

LEFAN MWANZA
and
KOMBORERAI MHEMBERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 20 March 2018

Bail Pending Appeal

M. Nyatsoma, for the applicants
K. Kunaka, for the respondent

NDEWERE J: The applicants pleaded guilty to fraud. They were convicted and sentenced to 26 months imprisonment of which six months were suspended on conditions of good behaviour. They were to serve an effective 14 months in jail. They appealed against sentence only and applied for bail pending appeal.

No misdirection was established by the applicants in this case. The trial magistrate considered all the factors. He said the plea of guilty was mitigatory and that is why he sentenced the applicants to 26 months instead of the 32 months he had initially thought about. He found that the pre-planning by these Harare based accused persons to go to the unsuspecting complainants of Chinhoyi was aggravatory. He also said community service would trivialise the offence. As regards restitution, it was noted that none had been made at the time of sentence.

It must be noted that after conviction and sentence, bail is no longer a right as in bail pending trial. Bail pending appeal is therefore granted as the exception rather than the norm. See *Munyaradzi Kereke v Francis Maramwidze* HH 632/16. See also *S v Tengende*, 1981 ZLR 445 at 448 where the court said;

“The appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant asks the court to exercise its discretion in his favour.....”

For bail pending appeal to be granted, the applicant must establish that his appeal has prospects of success. For an appeal to have prospects of success, the trial court must have misdirected itself when it arrived at the decision it did. Without a misdirection, the appeal court cannot interfere.

In addition to considering prospects of success, the bail court is supposed to consider the likely delay before the appeal is heard, the likelihood of the applicant absconding if granted bail and balance the interests of the applicant with the interests of the administration of justice.

“The court must balance the liberty of the individual and the proper administration of justice.” *S v Dzvairo* 2006 (1) ZLR page 60 to 61.

The sentence of 26 months is beyond the 24 months which has been held to be the benchmark of considering giving community service. So there was no misdirection in relation to the principles governing community service.

The record of proceedings has already been transcribed so a lengthy delay in hearing the appeal is unlikely.

It is therefore better for the applicants to prosecute their appeal while serving their sentence. Granting them bail when there is no prospect of a non-custodial sentence being substituted on appeal will just induce them to abscond and avoid serving their sentence. Consequently, bail pending appeal is denied.