

**IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT KABWE  
(Criminal jurisdiction)**

**HRBA/02/2024**

**BETWEEN:**

**NICKSON CHILANGWA  
DAVIS KANIKI  
KALUMBA CHIFUMBE  
KUNDA CHITOTELA  
CHABU CHITOTELA**



**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT  
3<sup>RD</sup> APPLICANT  
4<sup>TH</sup> APPLICANT  
5<sup>TH</sup> APPLICANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

Before Hon. Mr. Justice K. Limbani, at Kabwe on the <sup>20<sup>th</sup></sup>..... September,  
2024

For the Applicants: Mr. K. Kombe – Messrs. Andrew & Partners

Mr. J. Zimba – Messrs. Makebi Zulu Advocates

Mr. B. Mwelwa – Messrs. Mwelwa-Phiri & Partners

For the Respondent: Mrs. M. P. Lungu, Deputy Chief State Advocate –  
National Prosecution Authority

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**R U L I N G**

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**Cases Referred to:**

1. *Anuj Kumar Rathi Krishnan vs The People* (2011) 3 ZR 1
2. *The People vs Yusuf Pando* (2010) 2 ZR 206
3. *Stoddart vs The Queen* (No. 1) NRLR (1949 - 1951) 288

4. *Titus Zulu & Mike Musanya Sambundu vs The People* (2010) 1 ZR 450
5. *Collin Robert vs The People* CAZ Appeal No. 902 of 2024
6. *Adofasy Mubanga vs The People* HPEF/80/2022
7. *Ticky vs The People* (1968) ZR 21
8. *Faustin Kabwe and Aaron Chungu vs The People* (2011) 2 ZR
9. *Kayumba vs The People* SCZ/9/77/2011
10. *R vs Hall* (2019) 3 WLR 503
11. *The People vs Mwila* 2018 /HP/1278
12. *R vs Lee* (2017) 1 Cr App R 20

**Legislation Referred to:**

1. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
2. *The High Court Rules Chapter 27 of the Laws of Zambia*

## **INTRODUCTION**

- 1.0 This is the applicants' application for bail pending appeal pursuant to section 332(1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia. The application is supported by two affidavits dated 23<sup>rd</sup> July, 2024.

## **AFFIDAVIT IN SUPPORT**

- 2.0 Mr. Nickson Chilangwa, the 1<sup>st</sup> applicant herein, filed an affidavit in support of the application for bail pending appeal on behalf of the applicants.
- 2.1 The deponent states that on 22<sup>nd</sup> July, 2024, they were convicted by the Kawambwa Magistrates Court of the offences of malicious damage to property, assault occasioning actual bodily harm and threatening violence. Upon their conviction, they filed their notice of appeal on the 23<sup>rd</sup> July, 2024 which is exhibited and marked "NC 2" advancing twelve grounds of appeal.
- 2.2 The applicants further state that their application for bail pending appeal was rejected by the court below as per the ruling marked "NC 3". They believe that they have raised strong points of law in the grounds of appeal and that there are high chances of succeeding on appeal. They also have sufficient sureties to adhere to the bail conditions that the court may impose.

- 2.3 In the alternative, the applicant states that should the court be of the view that the grounds upon which bail pending appeal is being sought are not sufficient, then it should suspend the sentences imposed by the lower court pending the hearing of the appeal.

### **AFFIDAVIT IN OPPOSITION**

- 3.0 Mrs. Mercy Pondamali-Lungu, the Deputy Chief State Advocate, filed an affidavit in opposition to the application.
- 3.1 She averred that the reasons advanced by the applicants in their affidavit in support of the summons for bail pending appeal are not cogent enough for this court to grant the application. This is because no exceptional circumstances have been shown to exist to warrant the grant of bail pending appeal. She further states that a perusal of the grounds of appeal advanced for the intended appeal and judgment shows no likelihood of success of the appeal.
- 3.2 The Learned Deputy Chief State Advocate concluded by stating that if the application sought is granted, the likelihood of the state being prejudiced in the effective prosecution of the appeal is greater than that of the convicts.

## ARGUMENTS IN SUPPORT OF THE APPLICATION

- 4.0 Counsel J. Zimba made oral submissions on behalf of the applicants in support of the application.
- 4.1 He submitted that the proposed grounds of appeal in exhibit “NC 2” disclose an important point of law or serious question of law that ought to be investigated, that is, the basis for grant of bail.
- 4.2 Learned Counsel further submitted that one of the issues to be noted is the length of the sentence imposed in that there is a huge possibility that by the time the appeal is heard, the applicants would have served a substantial part of their sentence. In support of the above position, reliance was placed on the case of **Anuj Kumar Rathi Krishnan vs The People**<sup>1</sup>. Mr. Zimba argued that this is an exceptional circumstance.
- 4.3 He further submitted that one of the applicants is a sitting Member of Parliament and that the representation of the people of his constituency supersedes and outweighs the desire to have him incarcerated.
- 4.4 In augmenting the application, Counsel B. Mwelwa submitted that besides the Member of Parliament, there is also a Chairperson for Kawambwa Town Council who also needs to represent the people of Kawambwa.

- 4.5 He cited the case of **The People vs Yusuf Pando<sup>2</sup>** and argued that the grounds of appeal reveal the chances of succeeding on appeal based on the affidavit of Mr. Nickson Chilangwa. A perusal of the record shows that none of his witnesses were considered by the trial court and that no reason was given for not doing so. This is a very serious point of law as it is settled law that a trial court is duty bound to consider and evaluate the evidence of the defence.
- 4.6 Learned Counsel Mwelwa also referred to the **Anuj Kumar Krishnan case** in arguing the principle that upon perusal of the grounds of appeal and without delving into the merits of each ground, the court can conclude that an appeal has high prospects of success.
- 4.7 He submitted that a quick perusal of the grounds of appeal shows that there are serious points of law raised and that the prospects of success are high on appeal. He further argued that the grant of bail pending appeal to the applicants will in no way prejudice the State as the 2<sup>nd</sup> and 3<sup>rd</sup> applicants are Member of Parliament and Council Chairperson respectively. He prayed that bail pending appeal be granted to all the applicants.

#### **ARGUMENTS IN OPPOSITION**

- 5.0 Mrs. Lungu opposed the application and relied on the skeleton arguments filed into court.

5.1 She submitted that in terms of section 332(1) of the Criminal Procedure Code, the granting of bail pending appeal is in the discretion of the court and exercised judiciously. In the case in *casu*, the court is dealing with convicts hence different considerations apply as per the case of **Stoddart vs The Queen**<sup>3</sup> that;

“A convicted person should not be released on bail pending appeal unless exceptional circumstances are disclosed.”

Counsel also made reference to the case of **Anuj Kumar Rathi Krishnan vs The People**<sup>1</sup>.

5.2 On the fact that the applicants are convicts, the court was referred to the case of **Titus Zulu & Mike Musanya Sambundu vs The People**<sup>4</sup> where it was stated that;

“Unlike bail pending trial, bail pending appeal is granted with reserve because the applicant is a convicted person and the conviction is good unless and until an appellate court quashes the conviction. It is for this reason that different considerations apply in applications for bail pending appeal.”

5.3 The State argued that the prospects of the appeal succeeding are dim. At this stage, the court is not being invited to canvass the merits or demerits of the appeal in detail as this may be prejudicial. Having perused the judgment and the grounds of appeal advanced by the

applicants, the State took the view that the conviction is good and the prospects of the appeal succeeding are dim.

- 5.4 In respect of the suspension of the sentence pending the determination of the appeal, she contended that the Supreme Court guided in the **Anuj Kumar Rathi Krishnan** case that;

“Section 332(1) of the Criminal Procedure Code states that upon refusal of the application for bail, then the request for suspension of sentence should be made by the appellant.”

- 5.5 Therefore, at this stage, the court having not yet pronounced itself on the application for bail pending appeal, the request to suspend the sentence of the applicants is prematurely before the court.

- 5.6 Lastly, she submitted that while the applicant's affidavit refers to four other convicts, the jurat shows that only Mr. Nickson Chilangwa swore the affidavit contrary to the provisions of Order 5 rule 20(h) of the High Court Rules Chapter 27 of the Laws of Zambia.

- 5.7 In her oral arguments, the Deputy Chief State Advocate submitted that the applicants in this matter are convicts and that as convicts different considerations apply when determining their application for bail. This is because, for

convicts to be granted bail pending appeal, exceptional circumstances have to be revealed. In this case, no such exceptional circumstances have been revealed by the applicants.

- 5.8 Mrs. Lungu also argued that the fact that one of the applicants is a Member of Parliament and the other a Council Chairperson does not amount to exceptional circumstances.
- 5.9 It was also her position that the chances of the appeal succeeding are dim and that at this stage it is not for the court to delve into the merits of each ground of appeal but that it suffices that each ground should be examined with a prima facie conclusion made as to the prospects of success.
- 5.10 In response to the alternative relief for the court to suspend the sentence, Mrs. Lungu contended that the case of Anuj Kumar Rathi Krishnan guides that such an application ought to be made after a refusal by the court for the application for bail pending appeal. As such, the application is prematurely before the court.
- 5.11 Regarding the sentence imposed by the lower court, she submitted that it is highly unlikely that the applicants would have served a substantial part of the sentence or even the entire sentence by the time the appeal was heard. Reference

was made to the Court of Appeal decision of **Collin Robert vs The People<sup>5</sup>** wherein it was held that;

“When considering whether there are exceptional circumstances warranting the grant of bail pending appeal, the most important factor is the likelihood of the appeal succeeding. Even where there is a likelihood of the entire or substantial portion of the sentence being served by the time the appeal is heard, bail will not be granted if there is no likelihood of the appeal succeeding.”

- 5.12 Mrs. Lungu prayed that the application for bail pending appeal be dismissed and that the sentences imposed should not be suspended pending the hearing of the appeal as the application is premature before court.

#### **REPLY BY THE APPLICANTS**

- 6.0 In reply, Mr. Zimba submitted that it is not for the State to agree or disagree that the applicants would have served a substantial portion of their sentences by the time the appeal is heard but that it is the nature of the cases that must be looked at.

- 6.1 He made reference to the case of **Adofasy Mubanga vs The People<sup>6</sup>** decided in late 2022, where a sentence of two years was imposed but that to date, the appeal has not been heard. It was further argued that the State has not provided any law to support their view that being a Member of

Parliament or Council Chairperson, is not an exceptional case. Counsel maintained that being a Member of Parliament and Council Chairperson is an exceptional circumstance and that the State will not suffer any prejudice should the application be granted.

6.2 Mr. Mwelwa referred the court to the case of **Ticky vs The People**<sup>7</sup> which speaks to the evidence of the defence to be considered at the time of sentencing the convict. He stated that this is a serious point of law being raised.

6.3 For his part, Mr. Kombe submitted that the likelihood of the appeal succeeding is very high and that the court should peruse the grounds of appeal advanced to make a prima facie determination as to the prospects of success.

## **FINDINGS AND THE DECISION**

7.0 The applicants in this matter seek to be admitted to bail pending appeal. Their application is made pursuant to section 332(1) of the Criminal Procedure Code which provides as follows;

“After the entering of an appeal by a person entitled to appeal, the appellate court, or the subordinate court which convicted or sentenced such person, may, for reasons to be recorded by it in writing, order that he be released on bail with or without sureties, or if such

person is not released on bail shall, at the request of such person, order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

7.1 It is not in dispute that prior to filing this application, the applicants filed their notice of appeal and as such are entitled to the application.

7.2 In deciding whether or not to admit a convicted person to bail pending appeal, the Supreme Court guided, as per the case of **Anuj Kumar Rathi Krishnan vs The People**<sup>1</sup> which was cited by both parties that;

“3.For bail pending appeal to be granted, the Court must be satisfied that there are exceptional circumstances that are disclosed in the application.

4.The fact that the appellant due to delay in determining his appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may, be presented as exceptional circumstances.

5.It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.

6.The decision in *Stoddart v The Queen* is still good law and is quite instructive as to the principles applicable in applications for bail pending appeal.

7.It is not for the Court to delve into the merits of each ground. But it suffices that all the grounds are

examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.”

7.3 Further, in the case of **Faustin Kabwe and Aaron Chungu vs The People<sup>8</sup>**, the High Court (Matabini SC, Banda-Bobo and Salasini JJJ) held that;

“5. Unlike bail pending trial, bail pending appeal is granted with reserve because the applicant is a convicted person and the conviction is good unless and until an appellate Court quashes the conviction.

6. A convicted person should not be released on bail pending appeal, unless exceptional circumstances are disclosed.”

7.4 It can be distilled from the above that the considerations that a court must make in granting bail pending appeal are;

- (1) Whether the application discloses exceptional circumstances;
- (2) Whether sufficient reasons exist for the convict to be released on bail pending appeal; and
- (3) The court must prima facie make a determination whether the intended appeal has prospects of success.

## EXCEPTIONAL CIRCUMSTANCES

- 8.0 The applicants have contended that their application discloses an important point of law and that there are exceptional circumstances. They contend that the sentence of two years imposed on the applicants means that they would have served their term of imprisonment by the time their appeal is heard.
- 8.1 It should be noted that exceptional circumstances include, *inter alia*, serious health issues<sup>10</sup> such as a severe medical condition that requires immediate attention, age<sup>11</sup> (the convict being elderly or frail), lengthy or unreasonable trial delays<sup>12</sup> and family ties such as the convict having exceptional family responsibility or sole custody of dependants. The above have to be established on the merits with strong legal grounds and compelling evidence.
- 8.2 In the unreported case of **Kayumba vs The People**<sup>9</sup>, the appellant was sentenced to two years imprisonment which the court considered a short period such that by the time his appeal was heard he would have served his sentence. He was thus admitted to bail pending appeal. However, the Supreme Court went on to guide as follows;

“We must point out that each case is considered on its merits, depending on what may be presented as exceptional circumstance. For example, if the Record

of Appeal is voluminous and could take months to prepare, this can be considered an exceptional circumstance having regard to the length of the sentence.”

8.3 However, it is noted that of late, criminal appeals are heard and determined in record time by the High Court. Furthermore, although there were more than 100 witnesses called to testify in the case *in casu*, the voluminous nature of the record is not an issue or an exceptional circumstance as it has already been prepared and was used in this application including the other application for review of the judgment before sentence. The fact that there is already a typed record of proceedings in the case *in casu* distinguishes it from the cited case of **Adofasy Mubanga vs The People**<sup>6</sup>. Therefore, the applicants will not have served a substantial portion of their sentence by the time that the appeal is heard.

8.4 It was also argued that two of the applicants are a Member of Parliament and Council Chairperson. As such, their constituents are being deprived of their representation while they remain incarcerated. The office that one holds, be it public or private, is not an exceptional circumstance in the eyes of the law and justice for consideration for an application for bail pending appeal.

## **SUFFICIENT REASONS**

- 9.0 The applicants herein are convicts whose convictions remain good until overturned. A perusal of their affidavit does not disclose sufficient reasons as to why they should be admitted to bail pending appeal.

## **PROSPECTS OF SUCCESS**

- 10.0 The applicants have advanced 12 grounds of appeal challenging the decision of the lower court. A perusal of the grounds of appeal shows that they mainly impugn the manner in which the trial court considered and evaluated the evidence on record. A prima facie consideration of the advanced grounds does not disclose prospects of success.

## **SUSPENSION OF THE SENTENCE**

- 11.0 It is the position of the law, as per the Anuj Kumar Rathi Krishnan case and Section 332 (1) of the Criminal Procedure Code, that an application for the suspension of a sentence ought to be made after the refusal of the application for bail pending appeal. The application before court is thus premature.

## ORDER

- 12.0 Having considered the above, it is clear that the applicants have not succeeded in persuading the court to grant the application. The application is accordingly declined.

DELIVERED AT KABWE THIS <sup>20<sup>th</sup></sup>..... DAY OF SEPTEMBER, 2024



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**K. LIMBANI**  
**HIGH COURT JUDGE**