JOB SIKHALA
versus
THE STATE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 20 & 21 December, 2022
& 4 January 2023

Appeal Against Refusal of Bail

Advocate T Mpofu, for the appellant
Mr *T Kangai*, for the respondent

DEME J: The appellant approached this court appealing against refusal of bail application by the Magistrates Court. The grounds of appeal are as follows:

"1. Having accepted that the release of the co-accused person as well as the 14 charged with identical offences constituted a change of circumstances, the court *a quo* seriously misdirected itself and erred in failing to come to the conclusion that such change was material and justified the reconsideration of the question of appellant's entitlement to release on bail.

2. Appellant having agreed that the approach taken in previous bail application on the question of his breach of a condition in an earlier bail order was wrong and inconsistent with the law, the court *a quo* erred in not coming to the conclusion that the illumination of a more correct legal position was a change in circumstances warranting the re-consideration of the question of his entitlement to bail.

3. The court *a quo* erred under the circumstances in not considering and ultimately coming to the conclusion that appellant had not violated the condition of the prior bail order, that such non violation had also been illuminated upon by the completion of investigations and that he ought therefore to have been released on bail.

4. The court *a quo* seriously misdirected itself, such misdirection amounting to an error in law in finding that the circumstances of the appellant were different from those of his co-accused person on the basis that his co-accused person had not violated his bail conditions yet at the same time, the court failed to consider the question of whether appellant had on the argument presented, violated any such condition.

5. It having contended that the prior matters had been resolved on a wrong premise, the court *a quo* erred in coming to the conclusion that its consideration of the question of –appellant's entitlement to bail would involve it impeding upon the misdirection of the superior courts.

6. The court *a quo* grossly misdirected itself in concluding that appellant has the propensity of committing criminal misconduct when the correct position is that he has never been convicted of any criminal misconduct.

7. The court *a quo* misdirected itself in not finding that the lapse of time had yielded the completion of investigations and that such completion had demonstrated beyond any doubt that the state had no evidence to lead against appellant and that its charge would not be improved upon.

8. The court *a quo* grossly misdirected itself in not finding that the criticism levelled against the charge did not constitute the raising of n exception and had to be related to in the course of inquiry as to the existence of changed circumstances.

9. The court *a quo* seriously misdirected itself in concluding that the submission made to the effect that the situation in Manyame area had calmed down was an admission by the appellant that he had been responsible for the violence in that area.

10. The court *a quo* erred in not adopting a holistic approach to the issues raised as constituting a change in circumstances. And in not weighing them against the need to reconsider and eventually grant the application for bail."

The appeal was opposed by the respondent. The main basis for the opposition was that there are no changes of circumstances which warrants the release of the appellant to bail. Further, the respondent also submitted that the appellant breached his previous bail conditions imposed by the court. The respondent also submitted that since the appellant breached his bail conditions, he should be treated differently from his co-accused persons.

The facts germane to the present matter are common cause save as may be highlighted. The appellant is facing the charge of inciting violence provided for in terms of s 187(1)(a) as read with s 36(1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The allegations of the State are that the appellant posted a video on social media inciting violence. It is further alleged that the appellant mobilised members of his political party to carry out acts of violence.

The appellant applied for bail at the court *a quo* for the third time. The appellant also appealed against the decision of court *a quo* on two occasions before the present appeal. On

two occasions, the Appeals noted by the appellant were dismissed on the basis that the appellant had breached the previous bail conditions enshrined in case number B1445/20. Reference is made to the case of *Sikhala* v *The State*[1], where this court held that:

> "In any event, in a judgment by my sister MUNGWARI J in *Job Sikhala & Another* v *The State* HC 874/22, it is stated that appellant, who was the first appellant therein, admitted the breach of the bail conditions."

Paragraphs (F) and (G) of bail conditions imposed by the court under case number B1445/20 which are relevant for this purpose are as follows:

> "(f) Pending finalisation of this matter, the appellant shall not post videos or audios on social media platform with content likely to incite others to commit acts of violence.
> (g) Pending finalisation of this matter, the appellant shall not address any gathering, whatsapp group or virtual meeting using words or gestures likely to incite others to commit acts of violence."

With this background, it is pertinent to revisit the law relating to the power of the appeal court in the present matter. It is apparent that the powers of the appeal court are severely restricted in bail proceedings. The appeal court may interfere with the decision of the court *a quo* only:

(a) Where the court *a quo* committed an act of irregularity.

(b) Where the court *a quo* misdirected itself.

(c) Where the court *a quo* improperly or unreasonably exercised its discretion.

Reference is made to the case of *Mwamuka* v *The State*[2], where the Supreme Court held that:

> "It is trite that this Court will interfere with a decision of a judge of the High Court in a bail application only if the judge a *quo* committed an irregularity or misdirection or exercised his or her discretion so unreasonably or so improperly as to vitiate his or her decision. See *Remember Moyo & Ors* v *The State* SC 106/2002, citing with approval *S* v *Chikumbirike* 1986 (2) ZLR 145 (S) at 146 E-F; *S* v *Barber* 1979 (4) SA 218 (D) at 220 E-G."

This position was reinforced by the Supreme Court in the case of *Attorney General* v *Siwela*, where the Supreme Court made the following pertinent remarks:

> "The power of this Court to interfere with the decision of the court *a quo* in an application for bail is limited to instances where the manner in which the court *a quo* exercised its discretion is so unreasonable as to vitiate the decision made. See *S* v *Ncube* 2001 (2) ZLR 556 (S). Another ground for interference with a decision of a court *a quo* is the existence of 'a

[1] HH572/22.

[2] SC 69/21.

misdirection occasioning a substantial miscarriage of justice' by the court *a quo – S* v *Makombe* SC 30/04."

It is clear that the two judgments made a finding to the effect that the appellant breached the conditions of the bail. The appellant sought to make an explanation that the actual words allegedly uttered cannot be construed to be inciting violence. The appellant also sought to make another explanation to the effect that the words were allegedly uttered were not posted by the appellant himself. The appellant argued that the audio was posted by ZimLive on its media platform.

These arguments do not take the appellant's case any further in light of the two judgments which held that the appellant breached his bail conditions. The most appropriate remedy for the appellant is to take necessary steps to have the two judgments set aside. These judgments are still extant and do have force or effect like any judgment.

After establishing that the appellant breached the bail conditions, the second, third and fifth grounds of appeal automatically fall by the way side. These grounds of appeal largely revolve around the issue of whether the appellant breached his bail conditions. The court *a quo,* is bound by the decision of the superior court. There is no sufficient justification why the court *a quo* should depart from the principle of stare decisis. The significance for the concept of *stare decisis* was well articulated in the case of *Denhere* v *Denhere and Anor*[3], where the Constitutional Court made the following remarks:

*"*The words "*stare decisis*" are Latin words which mean that things that have been decided should be left to stay undisturbed. The meaning of the doctrine of *stare decisis* is that when a point of law has been once solemnly and necessarily settled by a decision of a competent court it will no longer be considered open to examination or to a new ruling by the same tribunal or those which are bound to follow its adjudication.

The doctrine of *stare decisis* is therefore a rule of precedent or authority, addressed to lower courts and members of the public who are decision-makers, to the effect that decisions of the higher courts on particular points of law presented to and passed upon by those courts are law. Lower courts are bound to obey them in similar cases in future until they are overruled, even though a rigorous adherence to them might at times work individual hardship."

In the first and fourth grounds of appeal, the appellant is criticising the court *a quo* for failing to take into account the changed circumstances particularly the fact that the co-accused persons were admitted to bail. However, it is trite that co-accused persons may be

[3] CCZ9/19.

treated differently if their circumstances differ materially. Reference is made to the case of *Mwamuka* v *The State* (*supra*) where the Supreme Court made the following remarks:

> "The dismissal of the appellant's application before CHITAPI J was on the basis that he was a flight risk as demonstrated by the circumstances of his arrest. The issue of the wrong residential address was before CHITAPI J and he considered and dealt with it. It was not the reason for the denial of bail. The dismissal of the application was on the basis, primarily, that he had been arrested while in the process of fleeing. That is what swayed CHITAPI J to deny the appellant bail. This aspect was also found to justify the different treatment that was received by the appellant's co-accused who were admitted to bail. Their circumstances differ materially from the appellant's in this respect."

In casu, the appellant breached his pending bail conditions incorporated under case number B1445/20. There is no evidence that the other co-accused persons breached their bail conditions. Thus, the breaching of bail conditions by the appellant is a material difference which persuaded the court *a quo* to treat the fellow co-accused persons differently. Ordinarily, new circumstances invite the court to have a look at such circumstances with fresh lenses. However, where there is material difference, the change of circumstances may cease to function if the material difference would militate against the proper administration of justice.

In my view, the court *a quo* did not misdirect itself by holding that there is material difference in the circumstances of the co-accused persons. Accordingly, the first and fourth grounds of appeal stand dismissed.

The sixth ground of appeal focuses on whether or not the appellant has the propensity of committing crimes. The counsel for the respondent, Mr *Kangai*, submitted that the appellant was arrested sixty-three times which has not been disputed by the appellant's counsel, Advocate *Mpofu*. However, Advocate *Mpofu* argued that to date, the appellant has not been convicted although he has been arrested sixty-three times. Thus, the court *a quo* misdirected itself in this respect as proclivity to commit crimes can only be proved through conviction. However, this will not help the appellant's case in light of the fact that the appellant breached his bail conditions.

With respect to the seventh ground of appeal, where the appellant is attacking the strength of State case upon completion of investigations, this is rendered futile as the appellant had breached the bail conditions. As correctly submitted by the respondent, such

change of circumstance should not warrant the appellant's admission to bail. In the case of *Daniel Range* v *The State*[4], CHEDA J remarked at p 2 of the cyclostyled judgment that:

> "In determining changed circumstances, the court must go further and enquire as to whether the changed circumstances have changed to such an extent that they warrant the release of a suspect on bail without compromising the reasons for the initial refusal of the said bail application."

In casu, the appellant had not demonstrated a good reason why his release will not compromise the reasons for the initial refusal of the bail application. The appellant previously admitted having breached bail conditions imposed upon him by the court. In my view, the court *a quo* did not misdirect itself on this aspect. Accordingly, this ground of appeal fails on this basis.

In the eighth ground of appeal, the appellant is critiquing the court *a quo* for failure to consider his exception to the charge as change of circumstances. I am of the view that this ground must fail on the basis that the strength of the exception is yet to be determined as correctly submitted by the respondent. In the absence of a determination, it may be difficult for the court *a quo* to have accepted the exception to the charge as the change of circumstances. Thus, the court *a quo* did not misdirect itself in this respect.

In the ninth ground of appeal, the appellant criticised the court *a quo* for reaching a conclusion that the submission made on behalf of the appellant to the effect that the situation in Manyame area had calmed down was an admission by the appellant that he had been responsible for the violence in that area. Without adequate evidence, it is difficult to allege that the calmness of the Manyame area can be attributed to the incarceration of the appellant. In this respect, the court *a quo* erred as there was no evidence to substantiate these allegations. Arriving at this conclusion without sufficient facts would be a mere assumption or a conjecture. However, this will not help the appellant who has been found to be in breach of bail conditions imposed by the court.

The last ground of appeal invites this court to have a closer examination of whether the court *a quo* should have adopted a holistic approach in considering all issues raised by the appellant as constituting change of circumstances and weighing them against each other in order to determine whether the appellant is a suitable candidate to be admitted to bail. As highlighted before, most of the grounds of appeal fall by the way side in light of the fact that

---

[4] HB-127-04

the appellant breached bail conditions imposed by the court. Thus, the court *a quo* was persuaded that the change of circumstances may not automatically entitle him to liberty given that the appellant himself admitted that he breached bail conditions. Accordingly, the court *a quo* did not commit any irregularity in this respect. In the premises, the last ground of appeal fails.

After a conscientious examination of all surrounding facts and circumstances, I have come to the conclusion that there was no misdirection on the part of the court *a quo* in its dismissal of the application for bail based on changed circumstances. The present appeal lacks merits. The court in *S* v *Brian Makanya*[5], had this to say:

> "The applicant bears the onus to produce evidence which satisfies me that exceptional circumstances exist which in the interest of justice permit his release. Even if I accept that there are new circumstances or changed circumstances, I am still obliged to consider all the facts before me, new and old and on that basis decide whether the applicant is a good candidate for bail."

In my view, the appellant has failed to establish the basis for interference with the decision of the court *a quo*. By his own admission as highlighted before, the appellant breached bail conditions imposed by the court under case number B1445/20. As mentioned earlier, there are two judgments passed by this court which made a finding that the appellant breached the bail conditions. Such judgments are still extant. The appellant had not taken any single step to have such judgments set aside. The appellant should have no-one except himself to blame for failure to take appropriate steps to have the two judgments set aside. I find no reason to impugne the decision of the court *a quo*. On this basis, the appeal fails.

Accordingly, IT IS ORDERED THAT, the appeal be and is hereby dismissed.

Mbidzo, Muchadehama and Makoni Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[5] HH 15/15