

**MPHELISI NGWENYA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 17 JANUARY & 9 FEBRUARY 2023

**Bail pending trial on changed circumstances**

Applicant in person  
*N. Katurura* for the respondent

**MAKONESE J:** The applicant is facing a charge of murder in contravention of section 47(1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Applicant denies the charge of murder but admits that he stabbed the complainant leading to his demise. Applicant avers that he shall tender a plea of not guilty to the charge of murder, but will plead guilty to the lesser charge of culpable homicide. Applicant has filed an application for bail pending his trial. He indicates that he is a suitable candidate for bail. The state is opposed to the application and avers that if granted bail applicant is likely to abscond.

**Factual background**

On 19<sup>th</sup> April 2021 at around 0240 hours the applicant in the company of his friend Vincent Mpofu were at a shebeen at house number 6173 Emganwini Township, Bulawayo. Applicant and other patrons were consuming alcohol with the deceased. A dispute arose between Vincent Mpofu and the deceased over a certain female who was at the shebeen. The deceased is alleged to have claimed that Vincent was after his girlfriend. A fight erupted. The applicant stabbed the deceased once in the chest with a sharp object. The deceased died on the spot from injuries sustained in the assault. The accused disappeared from the scene. Applicant vacated the premises he was residing in at the time. He was arrested on 20<sup>th</sup> May 2021. Applicant admits stabbing the deceased with a sharp object. He was positively identified by witnesses who were at the shebeen.

**Submissions by the applicant**

Applicant submits that he is entitled to bail on changed circumstances. Applicant has been previously denied bail by this court. This is applicant's second bid for his release on

bail pending trial. Applicant submits that there are changed circumstances in that his co-accused Vincent Mpofo has been released on bail. Applicant argues that he is entitled to bail as there has to be uniformity. Applicant's main contention is that since his co-accused has been released on bail, he should as of right be granted bail. In support of this argument applicant placed reference on the case of *Ruturi v The State* HH-31-03. I have had the occasion to look at that decision. The case involved an appeal against the refusal of bail by a magistrate. The decision does not provide the *dicta* suggested by the applicant. Applicants in bail applications must not to seek to mislead the court. Quite to the contrary, the decision referred to is authority for the position that where an accused is facing a serious offence, the greater the temptation on his part to flee and avoid standing trial. This is based on the common sense approach that since serious offences inevitably attract harsh sentences, the desire to avoid a custodial sentence may tempt the accused to flee.

### **Submissions by the respondent**

The respondent opposes the application for bail on the grounds that the applicant may abscond if granted bail. The papers filed with the applicant's bail statement reveal that after the commission of the offence on 19<sup>th</sup> April 2021 applicant fled the scene. He was only arrested on the 20<sup>th</sup> of May 2021 after going into hiding. The state argues that the applicant is facing a serious offence. On his own submission applicant intends to proffer a limited plea of guilty with respect to culpable homicide. The seriousness of the offence may tempt the applicant to flee.

### **The legal position**

It is trite that changed circumstances relate to any changes that have occurred since the initial application. Applications of this nature are governed by proviso (ii) to section 116 (a) of the Criminal Procedure and Evidence Act, which states;

“where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which had arisen or have been discovered after that determination.”

In *S v Barros & Ors* 2002 (2) ZLR 17 (H) HLATSHWAYO J (as he then was), commented as follows on the above provision:

*“The clear meaning of the above provision is quite clear. Where an application for bail has been refused, a further application for bail may only be made if such application is based on changed circumstances, that is, facts which were not placed before the judge or magistrate who determined the previous application which have arisen or discovered after that determination.”*

In *Daniel Range v The State* HB-127-04, CHEDA J remarked at page 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 application.”*

This court has been urged by the applicant to make a finding that the release of his co-accused Vincent Mpfu on bail constituted a changed circumstance which warrants his admission to bail. The applicant further implores this court to apply a uniform approach to the consideration of bail.

While this court does not dispute that applicant’s co-accused had since been granted bail the correct approach in my view, is to consider whether this factor alone amounts to a circumstance, which has since arisen and has the effect of altering the court’s attitude towards the granting of bail. The mere fact that a co-accused has been admitted to bail does not automatically lead to a changed circumstance warranting an applicant’s release on bail. The court must still look at the particular circumstances of each individual applicant. The court must still examine whether the interests of justice will not be compromised if applicant were released on bail. To this extent the fact still remains that applicant admits to stabbing the deceased once in the chest leading to his death. The fact still remains that the danger of abscondment still exists. The applicant went into hiding after the fatal stabbing and was only apprehended after one month. The applicant, if convicted is likely to be sentenced to a lengthy custodial sentence. This fact alone may tempt the applicant to flee. The possibility of fleeing is not remote as applicant has done so before.

In the circumstances, I am not persuaded that there are changed circumstances that would warrant the release of the applicant on bail.

Accordingly, the application for bail be and is hereby dismissed.

*National Prosecuting Authority, state's legal practitioners*