

HONORABLE HIGH COURT OF ZAMBIA
AT Tabora.

MISC. CRIMINAL APPLICATION NO.37/95
(IN THE MATTER OF AN APPLICATION FOR BAIL PENDING
APPEAL u/s 368 (1) (a) (i) OF C.P.A. NO.9/89
AND
IN THE MATTER OF HIGH COURT CR. APPEAL NO.92/95
AND SHINYANGA CR. CASE NO.335/92

FESTO CHRISTOPHER MAKWILA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

R U L I N G

SUBJECT: Application for Bail pending appeal.
CHARGE: Store breaking andstealing c/s 296 of the Penal Code Cap.16.

KATITI, J.

Before this Court, lay an application for bail, pending the appeal, by FESTO CHRISTOPHER MAKWILA, the lither-to third accused, in the trial Court facing the above cited offence, but hence, and hereinafter, to be called the Applicant.

The Applicant currently aged 64 years, the third accused in the joint trial of six accused persons, going through the weft and warp of the adversarial system, found himself abandoned by fortune, and cold-bloodedly on the wrong side of the law, convicted as charged, and sentenced to five years imprisonment.

Obviously, the applicant was aggrieved, and he has appealed against conviction before this court, though in the meanwhile he is applying to be released on bail, pending the determination of his appeal. The Applicant has basically only one ground, and that he has severe dia-betes disease, because of which, he is currently admitted in Shinyanga Government

Hospital, which has no drugs and relevant Medical chits, were demonstrably attached to the application. This application, was resisted by Mr. Mwampoma, the learned Counsel representing the Republic. Mr. Mwampoma, submitingly maintained, that the appeal having, neither, over-whelming chances of success, nor, showing exceptional circumstances, fell outside the brackets for consideration as prayed.

This application, was obviously brought under section 368 of the Criminal Procedure Act 1985, that provided as follows:-

Section 368(1)

"After the entering of an appeal; by a person entitled to

applied the above cases, in complete oblivion the section, is difficult to explain.

After all, is said and done, I think, with respect, there is need for Judicial re-~~climant~~ on the matter, apply section 368 the Criminal Procedure act 1985, and be actually seen, to be applying it, that, for "reasonable cause," to be recorded in writing, bail pending appeal, may be granted. In the consideration of this not unimportant matter, I think with respect, that bail, at the post conviction stage, belongs to the blurred area of the Criminal Justice system, and hinges on the Judicial discretion, where reasonable cause is shown. Second, the issue is one intertwined with liberty, Justice, public safety, and even burden of the public treasury, and all should balancingly be considered, judicially in my view.

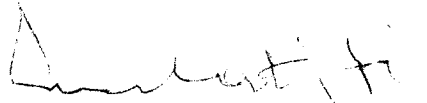
In my view, in deciding whether or not to grant bail pending appeal, the true question, should be whether there is reasonable cause for so doing. "Reasonable cause" is not defined by the section, but in ordinary language it should not mean less than any appreciably good sound, which any reasonably minded man, upon hearing it would positively accept. The examples are abounding. Since the purpose of it all, is justice, the enhancement of justice, cannot be less reasonable cause. If justice can be done by granting bail, then, that would amount to reasonable cause. Thus where circumstances exist, and it appears prima facie, that the appeal is likely to succeed, that would in the interest of Justice be reasonable cause, for granting bail pending appeal that, as that would pre-empt serving sentence without legal cause, where there is a risk, that the sentence will have been served by the time the appeal is heard, thereby defeating the purpose of appeal, could amount to reasonable cause. I make a confession here, that I am not making any pretensions at trying being exhaustive, as to what could amount to reasonable cause, for human circumstances being diverse, the list could be endless.

In this case, the applicant staged his state of health, and lack of drugs in the Government Hospital, as ground for applying for bail pending appeal, to help himself. Mr. Mwapoma marginalized and trivialised it. With respect, I cannot think, we could be right to trivialise this ground. Reflecting a little, we will realise that, we are all currently going through a difficult time as far as health services are concerned, when Government Hospitals, Health Centres, and Dispensaries, have few, or no drugs, and each person has to depend on his pocket, or pockets of his relatives. And if lack of drugs is, threat to life, as the applicants medical charts show, whether the Court should in the circumstances, still leave the applicant's life, in the mouth of death, is not an irrelevant question. In the case of HASS.NALI WALJI VS. R (1968) H.C.D. No.174, in

stolen, (2) it is common ground they found in the store of the applicant, (3) PW7 D/G Richard visited the scene of crime, only to see a hole in the wall of a godown, through which bicycles could not pass, (4) if so, bicycles must have left through the normal exit, (5) if so, where is store breaking?, (6) if there was no store breaking, how could the applicant be convicted of one, (7) the applicant's defence was that the same were brought there by the 4th accused, who denied it all, -the question is whether the applicant, was not adequately corroborated by PW.4 JOACHIM MALY, who saw the 4th accused asking about the very luggage. These was not unimportant areas need revisiting in the interest of justice.

Finally, I am satisfied that there generally exists reasonable cause, for granting bail pending appeal, which I hereby do. The applicant shall be released on bail, in the sum of shs.1,5 million with two sureties, each in the same amount. - Sureties to be approved by Resident Magistrate Incharge of Region.

Delivered this 27th day of October, 1995.



E.W. KATITI,

JUDGE.