



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 325/2012

In the matter between:

REX

And

LUCKY MANANA

Neutral citation: *Rex v Lucky Manana (325/2012) [2021] SZHC 02 (28 January 2021)*

CORAM : **T.L. DLAMINI J**

Heard : 11 September 2020

Delivered : 28 January 2021

[1] *Criminal law and procedure – Bail – Failure to attend court when required to do so*

Summary

Accused person was admitted to bail but could not be located when court processes directing him to appear for his trial were to be served upon him – His eventual court appearance was secured through the issuance of a warrant for his arrest – A date was set on which he was called upon to show cause why his bail should not be revoked – During the hearing, he elected not to give any reasons which explain his non-appearance but only made technical submissions through his attorney.

Held - That the accused failed to give satisfactory reasons why he disappeared and could not be located when the court required his attendance for commencement of trial – Bail accordingly revoked.

JUDGMENT

- [1] Lucky Manana is an accused person charged with two offences. On the first count he is charged with the Attempted Murder of Thandi Hlatshwako. According to the indictment, he committed this offence at Bugeleni area in the Shiselweni district by hacking her with a bush knife all over her body on the 21 October 2012. On the second count he is charged with Assault with Intent to do Grievous Bodily Harm. The indictment reflects that he committed this offence at the same place and date with respect to count one, and did so by hacking one Mangwangwa Lukhele with a bush knife all over the body with the intention to injure him.
- [2] Following his arrest for these offences, he was admitted to bail and released from custody. I find it apposite to mention that I am not aware of the date of his admission to bail and the date of his actual release from custody. The court file for the bail application was reported by the attorneys for both parties to have disappeared from the criminal registry office, hence even the bail conditions were submittedly unknown.
- [3] The matter was allocated to me for trial during the first session of this court for the year 2020. On the 28 January 2020 I allocated the date of 10 March 2020 as the trial commencement date but the trial could not commence because a pre-trial conference had not been held and the accused was not

before court. This was the situation because pre-trial notices could not be served upon the accused as he could not be located and his whereabouts were unknown.

[4] The first pre-trial notice called upon the accused to appear before this court on the 31 January 2020 and is dated 24 January 2020. A second pre-trial notice called upon him to appear before this court on 14 February 2020 and is dated 03 February 2020. A third pre-trial notice called upon him to appear before this court on 06 March 2020 and is dated 18 February 2020. On the trial date of 10 March 2020 the accused did not appear before this court. Pursuant to the non-appearance, I postponed the trial to 15 April 2020. I ordered counsel for the crown to ensure that the notice of pre-trial together with a notice of trial for 15 April 2020 are served upon the accused.

[5] Another pre-trial conference notice was issued calling upon the accused to appear before this court on 03 April 2020 and is dated 11 March 2020. A notice of trial was also issued calling upon the accused to appear before this court on 15 April 2020 and is dated 11 March 2020. The return of service reflects that the notice of trial was served upon the wife of the accused Bongekile Sikhondze who reported the accused to be in the Republic of South Africa. Service was on the 25 March 2020 at 1440 hours.

[6] On the new trial date of 15 April 2020 the accused did not appear in court. Counsel for the crown informed the court that the accused is nowhere to be found and that he last reported to Kaphunga police station as per his bail conditions in 2014. He further informed the court that the accused person's wife reported him to have left and went to the Republic of South Africa. The

information that the accused cannot be located and that he is reported to have left for the Republic of South Africa was confirmed by officer 4542 D/Const. Dalton Ngwenya. Officer Ngwenya also informed the court that the accused is employed as a truck driver in South Africa. He however further informed the court that he once saw the accused at the Kaphunga police station in 2019 when the accused's wife was arrested for assault but was not aware about this matter at that time.

- [7] On application by the crown, a warrant for his arrest was issued by this court. He ultimately was arrested and brought before this court on 23 July 2020. On his appearance, he was remanded into custody and was called upon to show cause why his bail should not be revoked for non-appearance when required by the court to do so. He was also called upon to show cause why the bail should not be revoked for breach of his bail conditions by not reporting to Kaphunga police station as ordered by the court, and also for evading the court's jurisdiction by crossing to the republic of South Africa.
- [8] On account of unavoidable reasons and a natural cause occurrence, the hearing was held on the 11 September 2020. The accused offered no explanation for his non-appearance but elected to make a technical defence through his attorney.
- [9] In setting out a defence for the accused, the defence attorney first explained circumstances which led to their office's failure to locate the file that has the bail application processes. Without informing the court about who was seized with the matter, the accused's attorney explained that two colleagues who practiced with him in the law firm, left the office. In the year 2014, the

law office moved from Ilanga Centre Building in Manzini to Lomasontfo Park. This resulted in him being unable to now find the accused's bail application file. The file could also not be found at the court's registry office. This became a similar encounter even by the crown's attorney at the Directorate of Public Prosecution's Chambers. This state of affairs resulted in both attorneys standing before this court without knowledge of the bail conditions that were imposed when the accused was released on bail.

[10] On the basis of the above submitted facts, the defence attorney submitted that any alleged default by the accused is based on mere speculation because the conditions are not within the knowledge of either parties. He submitted that no one knows if the accused was indeed ordered by the court to report to the Kaphunga police station. No one knows if the accused was warned about the bail conditions. He also submitted that even officer Ngwenya does not know the facts and circumstances of this matter as he is not the investigating officer. According to the evidence which officer Ngwenya gave before this court, he was transferred to the Kaphunga police station in February 2019. The defence attorney therefore submitted that the warrant for the arrest of the accused was not issued on the basis of concrete grounds but mere speculation.

[11] To buttress his submissions, the defence attorney argued that officer Ngwenya informed the court that he once saw the accused at the Kaphunga police station in 2019 when his wife was arrested. This, he submitted, is evidence that the accused was not evading the police. He therefore applied that the court discharge the warrant and release the accused from custody.

He also applied that a trial date be set and that conditions to ensure that the accused attends trial be put in place.

[12] The crown's attorney submitted that it is common cause that when an accused person is released on bail, conditions meant to ensure that he appears in court when trial is ready to commence are attached to his release from custody. He also submitted that the fact that the accused reported to the Kaphunga police station until the 04 July 2014 is evidence and proof of the fact that he was ordered to report to the Kaphunga police station.

[13] The crown's attorney further submitted that a return of service shows that the notice of trial for 15 April 2020 was served upon the accused through his wife on the 25 March 2020. He argued that the accused's attorney submitted that the accused visited home on a monthly basis. On that premise, the crown's attorney submitted that the accused never showed up in court on the 15 April 2020 until he was arrested in July 2020. He therefore, in argument, submitted that the accused ought to have followed up on why he was required to appear in court on the date reflected in the notice of trial. He however never did so until his arrest in July.

[14] In reply, the defence attorney submitted that the crown's submissions are based on speculation. He submitted that the crown has not pointed out even one bail condition that was flouted by the accused. He also submitted that the alleged last reporting to the police station on the 04 July 2014 is not supported by any evidence. This is also true with respect to the service of the notice of trial process through the wife of the accused. No evidence has been given by any witness, he argued. He therefore applied that the accused be

given a last chance if found to have breached the bail conditions, and that he will make sure that the accused attend court when required to do so.

[15] I now turn to deal with the relevant issues. I first wish to point out that an admission to bail is meant to safeguard the accused person's liberty by allowing him to regain his freedom pending a determination of the allegations and charge preferred against him. In admitting an accused person to bail, the courts practically give effect to the principle enshrined in our Constitution and statutory law that an accused person is presumed innocent until found guilty by a competent court. Bail comes with conditions tailored to ensure that the accused avails himself in court for his trial on the date, time and place appointed by the court.

[16] The legal authors **Lansdown and Campbell** in their book **South African Criminal Law and Procedure, Volume V**, state what I quote below:

By the grant of bail is understood the entering into a contract for the setting at liberty of an accused person who is in custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned. (p.311)

[17] The authors cited above continue, citing the case of **Cassim v. Regional Magistrate, Pretoria, 1962 (2) SA 440 (T)** to state what I quote below:

There is an implied obligation on the part of the State, so long as the bail exists, to allow the accused to remain at liberty. If he is arrested in respect of the relevant offence, that cancels the whole basis of the transaction and the bail falls away.

[18] In terms of **s.100 (2)** of the **Criminal Procedure and Evidence Act, 67/1938** as amended (hereinafter called "the Act"), the recognizance which

is taken on the admission of an accused person to bail shall be, amongst others, that the accused will attend during the hearing of the case and to receive sentence, and that he will accept service of a notice of trial “*at some certain and convenient place within Eswatini by him chosen and therein expressed*”.

[19] I take judicial notice of the fact that one bail condition which has remained standard and has always been imposed by the courts as a bail condition, is that immediately upon release from custody, the accused must notify the investigating officer about his residential address, and that he must equally inform the investigating officer of his new residential address in the event he has to change his place of residence.

[20] In casu, it is unfortunate that when the accused was called upon to show cause why his bail should not be revoked for his non-appearance in court when required by the court to do so, he elected not to take the witness stand and tell the court about the challenges that he may have encountered. Instead, he elected to be technical and informed the court through his attorney that any allegation that he breached his bail conditions is based on speculation as neither the court nor the crown know the bail conditions that were imposed when he was admitted to bail. His argument is that the file that contains the bail application processes disappeared without any trace from the Registrar’s office. The same is true with the Director of Public Prosecution’s office file, and that of the accused’s attorneys who lost it when relocating from the old offices they occupied.

[21] The accused, in my view and finding, had an obligation to inform the court if he was admitted to bail without any condition attached to his release on bail, if that was the case. If conditions were attached, he still had the obligation to explain to the court why he did not attend court when he was required and directed to do so through the relevant court processes. As I reflect in paragraph 18 above, it is a requirement of the law that amongst the conditions to be imposed upon an accused person who is released on bail, is that he must accept service of a notice of trial and to attend court during the trial of the case preferred against him. The argument proffered on behalf of the accused that any alleged breach of bail conditions based on his failure to attend court is premised on speculation is not accepted by this court and is rejected. The accused had an obligation to inform the court if he was released on bail without any condition being attached for his release, if that was the case.

[22] **Section 101 of the Act** provides that if the accused fails to appear on the day appointed for trial, the accused and his sureties may be called upon their recognisance and the surety declared forfeited. The section provides as quoted below:

If upon the day appointed for the hearing of a case it appears by the return of the proper officer or by other sufficient proof that a copy of the indictment and notice of trial ... had been duly served or given and the accused does not appear after he has been three times ... called by name, the prosecutor may apply to the court for a warrant for the apprehension of such accused and his sureties (if any) be called upon their recognisance, and, in default of his appearance, that it may be then and there declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on such recognisance for the amounts therein named against such accused and his sureties respectively.

[23] It is my finding and conclusion that the accused failed to make use of the opportunity availed to him by the court to give satisfactory reasons why he should not be held to be in contempt for his failure to attend trial of the case preferred against him. He is accordingly held by this court to be in contempt for his non-appearance.

[24] I therefore order that the bail which the accused was admitted to be and is hereby revoked. The recognizance which was taken on his admission to bail is declared forfeited.



T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For the crown: Mr S. Phakathi

For the accused: Mr O. Nzima