



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 236/2022

In the matter between:

MANDLENKHOSI JABULANI MKHONTA

Applicant

And

THE KING

Respondent

Neutral Citation: *Mandlenkhosi Jabulani Mkhonta vs The King (236/2022)*

[2022] SZHC 152 (20/07/2022)

Coram: **K. MANZINI J**

Date Heard: 16 June, 2022.

Date Delivered: 20 July, 2022.

SUMMARY: *An application to be admitted to bail – Applicant was charged with one Count of Rape by Contravention of Section 3 (1), 3*

(2), 3 (c) as read with Section 9 (a) of the Sexual Offences and Domestic Violence Act, 15/2018.

Application to be admitted to Bail opposed by Respondent – Respondent contends that no exceptional circumstances exist which in the interests of justice permit Applicant’s release in terms of Sections 95 and 96 of the Criminal Procedure and Evidence Act, 67/1938 (as amended) – Onus upon the Applicant to prove the existence of exceptional circumstances.

Held: Bail Application is dismissed.

JUDGMENT

K. MANZINI J

INTRODUCTION

[1] The Applicant is Mandlenkhosi Jabulani Mkhonta, an adult Liswati male of Ka Jezzi area, Lubombo Region.

[2] The Respondent is the Crown, duly represented by the Director of Public Prosecutions, based at the Ministry of Justice Building, Mhlambanyatsi Road, Mbabane, District of Hhohho.

[3] The Applicant has applied for a reduction of bail after being arrested by the Siteki Royal Police Service on the charge of Rape by contravening Section 3 (1), 3 (2), 3 (c) as read together with Section 9 (a) of the Sexual Offences and Domestic Violence Act No. 15/2018. In his papers the Applicant does not make any effort to even dispute the charge preferred against him by the State.

[4] The Application for bail is being opposed by the Crown. After exchanging the necessary pleadings, and filing Heads of Arguments, the matter was argued on the 16th of June, 2022.

BRIEF FACTS

[5] The Applicant avers that he was arrested by the Siteki Police on the 25th day of January, 2022, and was charged for contravening the Sexual Offences and Domestic Violence Act (*supra*). According to the averments of the Applicant he is desirous of being admitted to bail for the following reasons:

5.1 He was, prior to his arrest, taking care of his four (4) minor children who are fully dependent upon him.

5.2 He is the breadwinner at his home, and is employed at Eswatini Water Services Corporation.

[6] The Crown is vigorously opposing this application for Bail on the following grounds:

6.1 The Applicant is accused of unlawfully and intentionally having sexual intercourse with one Mihlayonkhe, his biological female minor child of four (4) years of age.

6.2 The offence was accompanied by aggravating factors in that the accused did not use a condom, and thereby exposed the victim to the risk of contracting sexually transmitted diseases and/or infections.

6.3 That although the granting of bail is discretionary on the part of the Court, however, in the exercise of such discretion the Courts are to be guided by Sections 95 and 96 of the Criminal Procedure and Evidence Act, 67/1938 (as amended). Courts also have to consider the provisions of Section 96 (4) and Section 96 (12) (a), as well as the guidelines set out by the legislature in Section 96 (4), and other subsections of Section 96.

6.4 The offence with which the Applicant is charged is included in the Fifth Schedule of the Criminal Code. The onus of proving the existence of exceptional circumstances rests solely on the Applicant to prove why it is in the interests of justice that he be admitted to bail. In *casu*, the Applicant has failed on all accounts to comply with Section 96 (12) (a) to justify why he ought to be released on bail.

6.5 It will not be in the interests of justice to release the Applicant on bail on account of the following reasons:

6.5.1 It is not exceptional to take care of four (4) children, and further to sexually abuse one of them who is four (4) years old.

6.5.2 The legislature in Section 96 (12) (a) requires that the Applicant should adduce evidence to the satisfaction of the Court that exceptional circumstances warranting his release on bail. The Applicant has not adduced any such evidence on a balance of probabilities that it is in the interests of justice to admit him to bail.

6.5.3 Section 3 (9) (a) of the Sexual Offences and Domestic Violence Act 15/2018 enjoins the Court to mete out a custodial sentence of not less than thirty (30) years even for first offenders where they are found guilty of a similar offence as that with which the Applicant herein faces.

6.5.4 Section 23 (1) of the Children's Protection and Welfare Act, 2012 prohibits a parent from physically, psychologically or

emotionally injuring, or sexually abusing their child. The Applicant herein, who stood in *loco parentis* has dismally failed to exercise a duty of care towards the minor child, and yet he is the victim's biological father.

6.5.5 Section 96 (12) (a) prohibits the grant of bail where no exceptional circumstances exist.

6.5.6 The Applicant is likely to evade trial due to the seriousness of the offence he is charged with, as well as the sentencing trends of the Courts, such that if convicted he would be dealt with in terms of Sections 96 (6) (a), (b), (c), (d), (e), (f), (g) and (h) of the Act. It was submitted that in casu, the Applicant was very likely to evade trial, which could happen even within the Kingdom of Eswatini, without him necessarily leaving the country. The Respondent's Counsel cited the case of **Mkhulisi A. Khumalo v Rex (439/2014 (2015) SZHC (5)** to buttress her submissions.

6.5.7 It was alleged that the Applicant, if released in bail is likely to influence and/or intimidate State witnesses as he knows their identities, particularly the victim who has suffered trauma. It was the submission of the Counsel for the Respondent that the release of the Applicant could expose her to secondary trauma, and there is no way that the Police could prevent communication between the Applicant and the State witnesses as all of them reside in the same compound, and the witnesses all made statements to the Police and are known to the Applicant because they are members of his family.

6.6 The Counsel for Respondent vigorously argued that the strength of the Crown's case against the Applicant is quite impressive, and the evidence gathered against him is quite overwhelming such that the Crown is confident of obtaining a conviction against him. It was argued then by the Applicant's own admission in his answer to the Respondent's Answering Affidavit, he and the mother of the victim have often clashed to a point where their issues have actually involved the Social Welfare Department. It was submitted by the Respondent's Counsel that this buttresses the position already held by the

Respondent through their investigation that the Applicant is a violent person. Particularly to the mother of the alleged victim in *casu*, and will more than likely intimidate and interfere with the witnesses of the Crown. It was further the contention of the Counsel for the Respondent that the fact that the Applicant merely averred that he would not leave the country because he is a true Liswati, and would move to another location from where the State witnesses reside was not enough to convince the Court that he would not try to interfere with the witnesses of the State and/or evade trial. The Respondent submitted that it is not in the interest of justice for the Applicant to be released on Bail.

6.7 The Applicant herein is charged with an offence falling squarely within the **Fifth Schedule of the Criminal Procedure and Evidence Act of 1938 (as amended), namely Rape, and the Sexual Offences and Domestic Violence Act 15/2018**. In these premises, his application falls to be determined in terms of Section 96 (12) (a) of the Criminal Procedure and Evidence Act of 1938. The said provision reads thus:

“Notwithstanding any provision of this Act where the Accused is charged with an offence referred;

(a) In the Fifth Schedule the Court shall order that the Accused be detained in custody until he or she is dealt with in accordance with the law, unless the Accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his or her release.”

6.8 The Applicant herein did not adduce any such evidence and/or make any cogent averments that would lead to the finding that exceptional circumstances exist for him to be admitted to Bail. The Applicant bears the onus to prove on a balance of probabilities, the existence of these peculiar or exceptional circumstances which would permit his release on Bail. See **Rodney Masoka and Two Others v Rex (10/2014) Criminal Appeal Case No. 10/2014.** In essence no evidence was placed before Court to show what is exceptional about providing for four (4) minor children. It is further, quite perturbing

that the Applicant is currently faced with a charge of actually sexually violating one of his four (4) minor children.

6.9 The allegation that the Applicant is one with a history of being violent towards the mother of this minor victim further militates against the finding that it would be in the interests of justice that he be released on bail. The Applicant himself stated that he and the mother of his child often had altercations which resulted in their matter being the subject of the dispute resolution mechanism offered by the Social Welfare Department.

6.10 It is the Court's view that the Applicant in *casu* needed to do more to prove to the Court that exceptional circumstances exist that warrant his release on bail. The Application has therefore failed to adduce evidence which satisfies this Court on a balance of probabilities that exceptional circumstances exist which would convince this Court that it is in the interests of justice to permit his release in terms of Section **96 (12) (c) of the Criminal Procedure and Evidence Act of 1938 (as amended).**

6.11 In the prevailing circumstance, the Application for Bail is dismissed.

K. MANZINI
JUDGE OF THE HIGH COURT

For the Applicant: IN PERSON

For the Respondent: MS. B. FAKUDZE (DPP'S CHAMBERS)