



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 142/2018

In the matter between:

THE KING

Applicant

And

JABULANI SIBHERA GAMEDZE

Respondent

Neutral citation: *The King v Jabulani Sibhera Gamedze (142/2018) [2024] SZHC 225 (30 September 2024)*

CORAM : **T. DLAMINI J**

Heard : 16 September 2024

Delivered : 30 September 2024

[1] *Criminal law and procedure – Admission to bail – Failure to attend trial – Revocation of bail*

Summary: *The respondent was arrested and charged with two offences of attempted murder, and two other offences of contravening the Arms and Ammunitions Act – He was, thereafter, released from custody on bail – Two days were set for his trial, on a Monday and the following Wednesday – He failed to appear in court on the Monday for commencement of trial – It turned out that it was because of the late service upon him of the notice of trial – The defence attorney informed the court that she*

has been able to speak to the respondent on the phone and is far away given that he was not aware of the trial date – The defence attorney also informed the court that the respondent has given assurance that he will appear in court on Wednesday as that day was the second allocated day for the trial – Wednesday came and the respondent did not appear notwithstanding that another notice of trial was prepared and served upon him – A warrant for his arrest was issued upon application by the prosecutor – The respondent was re-arrested and brought before court on 04 September 2024 – He was called upon to show cause on 16 September 2024 why his bail should not be revoked for failure to attend trial.

Held: *That no satisfactory reason(s) has been given why the respondent did not appear in court for his trial, and that his admission to bail is accordingly revoked.*

JUDGMENT ON BAIL

T. Dlamini J

[1] The respondent, Jabulani Sibhera Gamedze, was arrested and charged with two offences of attempted murder. He was also charged with two other offences of contravening the Arms and Ammunitions Act, No.12 of 1964 (as amended), in that he possessed a fire arm and also possessed two live rounds of ammunitions without a licence or permit. Following his arrest, he was admitted to bail. One of the bail conditions was that he should appear in court for his trial whenever required to do so.

[2] The trial of the respondent was set to commence on Monday, 18 March 2024, and also proceed on Wednesday, 20 March 2024. He did not appear in court on the Monday of 18 March, 2024. His attorney, Ms. N. Ndlangamandla, informed the court that the respondent was not aware of this trial date as the notice of trial was not personally served on him, and that the service was on short notice. She, however, informed the court that she has been able to get in contact with

him through a cell phone call. She also informed the court that the respondent said that he was not aware of the trial date and was far away. She further informed the court that she has been assured by the respondent that he will be in court on the next trial date of Wednesday, 20 March, 2024.

- [3] A second service of the notice of trial was effected upon the respondent at his parental homestead at *Makhulisihlengi* area. It was served through his father Mahlalangenhlanye Gamedze, in the presence of the girlfriend of the respondent, one Nomphumelelo Mamba.
- [4] March 20 came and again the respondent was not there for trial commencement. His attorney informed the court that she called the respondent this morning and his phone was on the busy mode. When she called again thereafter, the phone had been switched off. The prosecutor then applied for a warrant of the arrest of the respondent. The warrant was issued and successfully executed by the police in the month of September 2024. The respondent was produced before court on 04 September, 2024. The court called upon him to show cause why the bail should not be revoked for his failure to attend trial.
- [5] Through his attorney, Ms. S. Mhlanga on this day, the respondent submitted that on the Wednesday of 20 March, 2024, he attended an emergency that made him unable to make it to court. His father fell ill from a traditional ailment, and he had to take him to a traditional healer in the Republic of South Africa. He also submitted that his phone changed to the off mode because he had crossed this country's border boundary, and that the investigating officer is aware of his father's state of health. He further submitted that he stayed with his sick

father at the traditional healer's home for two months. Lastly, he submitted that when the police re-arrested him, they saw the condition of his father.

[6] The crown's attorney, Mr. S. Mdluli, submitted that the warrant was issued on 20 March 2024. The respondent and his attorney were in constant contact, and the respondent informed his attorney that he was on his way coming to court. It therefore, is surprising now, submitted Mr. Mdluli, that the respondent claims to have been on his way to the Republic of South Africa on this day. I wish to mention, however, that this is incorrect. When the attorney called the respondent on this day, the feedback given to court by the attorney is that the respondent's cell phone was on the busy mode when she first called. When she called again, thinking that the respondent was done with the call, she found the phone switched off.

[7] The crown's attorney implored the court to reject the respondent's submission as untruthful. He argued that the respondent would have informed his attorney about the father's predicament if it was true. He conceded that the investigating officer, Sgt. Xaba, is aware that the respondent's father is ill. He submitted, however, that Sgt. Xaba informed him that on the day of the re-arrest, he got a tip that the respondent was at a place where people enjoy alcoholic drinks around Siphofaneni area. The attorney implored the court to revoke the bail and remand the respondent into custody until his trial is finalized. He argued that the respondent failed to even communicate, through his attorney, about his failure to attend court despite knowing that he ought to have been in court for trial.

- [8] I am not persuaded by the respondent's submissions concerning his failure to attend court on 20 March, 2024. The version he gave is strikingly inconsistent with what his attorney informed the court on the 20 March, 2024. The attorney informed court that the respondent's cell phone was on the busy mode when she called him. Immediately thereafter, the phone was switched off. It is my considered view that crossing the boundary of Eswatini into the Republic of South Africa does not cause the gadget to switch off. It can only be switched off by the owner or possessor.
- [9] In addition, the two cellular services providers (MTN and Swazi Mobile) enabled roaming for their customers who cross the border into the Republic of South Africa.
- [10] The version that the respondent's attorney gave to the court on 20 March, 2024, is more credible than the version given during the submissions in court. I therefore do not accept, but reject the version that the respondent travelled to the Republic of South Africa due to his father's serious ailment. What also makes the version to be unreliable is that no evidence was tendered to prove that, indeed, he travelled to the Republic of South Africa. This could be in the form of a stamped passport.
- 11] Having carefully considered the submissions made, I attach more evidential weight to the version given to this court by the respondent's attorney on the trial date of 20 March, 2024, *viz.*, that the cell phone of the applicant was on the busy mode when she called him, but was immediately switched off after the respondent finished talking on that cell phone call.

- [12] The respondent, without doubt, saw the missed call made by his attorney, but did not bother to contact her back, notwithstanding his knowledge that he was required to appear in court on that day.
- [13] The grant of bail is a contract for setting at liberty an accused person who is in custody, upon the payment of a sum of money determined for his bail, for his appearance at a place, date and time, appointed for his trial. *See: Lansdown and Campbell, South African Criminal Law and Procedure, Volume V, Juta & Co. Ltd, 1982, p.311.*
- [14] On the failure of an accused person to appear in court for trial when he is out on bail, legal authors Peet M. Bekker *et al*, state that the accused may be re-arrested, his bail cancelled, and the money paid as bail forfeited to the state. *See: Peet M. Bekker et al, Criminal Procedure Handbook, 4th ed., Juta & Co. Ltd, 1999, p.137.*
- [15] I have not found any satisfactory reason or justification, why the respondent absconded trial on 20 March, 2024, while he was fully aware that he was required to appear in court for his trial. He even deceived his attorney and assured her that he will be in court on the 20th, but when the day came, he avoided her and switched off his cell phone upon realizing that the attorney was calling him.
- [16] For the reasons stated in this judgment, I come to the conclusion that the respondent failed to honour his bail conditions, as he failed to appear in court for trial notwithstanding being notified of the trial date. Accordingly, the bail he was admitted to ought to be revoked.

[17] Having come to the decision to revoke the respondent's bail, I invoke *s.101* of the *Criminal Procedure and Evidence Act, No. 66 of 1938 (as amended)*. The respondents bail amount is accordingly forfeited to the state.

[18] For the foregoing, I make the following orders:

[18.1] The bail that the respondent was admitted to is hereby revoked.

[18.2] The bail amount paid is forfeited to the state in accordance with *s.101* of the *Criminal Procedure and Evidence Act, No. 66 of 1938 (as amended)*.

[18.3] The respondent is to remain in custody until his trial is finalized.



T. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant: Mr. S. Mdluli
Director of Public Prosecution's Chambers

For Respondent: Ms. S. Mhlanga
Mabila Attorneys in Association with N. Ndlangamandla