



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 773/24

In Matter between:

THE KING

And

MARIO SITHOLE

Neutral citation: *The King v Mario Sithole (773/24) SZHC 352*
[2025] (06.02.2025)

CORUM: Z.Magagula

Date heard: 12.12.24

Date delivered: 06.02.25

Summary: *Criminal Procedure – Bail application, Applicant a Mozambican National charged with Murder –*

- *The two main criteria in deciding bail application are (i) the likelihood of the accused standing trial and (ii) the likelihood of the accused interfering with the Crown witnesses*
- *Court should also consider the strength of the case against the accused.*

Held: *Applicant is likely to abscond trial. Application dismissed.*

JUDGMENT

[1] The Applicant, Mario Sithole, an adult Mozambican male

has applied to this court to be admitted to bail.

[2] In his founding affidavit the Applicant has averred that he was arrested by members of the Royal ESwatini Police Service, on the 30th November 2023 stationed at the Malkerns Police Station. He and two co-accused were charged with murder, it being alleged that the three acting jointly in furtherance of a common purpose did wrongfully and intentionally kill one Albeto Afiado Mate.

[3] The applicant argued that he was innocent of the charge and at trial he will accordingly plead not guilty.

- [4] Applicant arrived in the country in 2001 and has lived in ESwatini ever since. He is married and has 3 minor children that he lives with in Malkerns. He is self employed, running a small shop commonly referred to as a spaza shop in the Malkerns area. Applicant argues further that he is a bread winner and his continued incarceration will impact negatively on his family and business.
- [5] The Applicant asserts that he has a clean criminal record. Should he be admitted to bail, he undertakes to comply with all and any conditions, in particular not to abscond trial. It is his final argument that it is in the interests of justice that he be admitted to bail and that there are exceptional circumstances which when considered favour his application.
- [6] The application is opposed by the Crown and for this purpose the opposing affidavit of 6349 Detective Constable Samketi Dlamini was filed.
- [7] Detective Dlamini stated that the Applicant was a tenant, renting a spaza shop from the deceased, who was also of Mozambican origin. The Applicant fell into arrears with rentals and when the deceased demanded payment, the Applicant became upset and hired the two co-accused to kill him. After the deceased was killed the Applicant reported to the Malkerns Police Station that the deceased was missing.

- [8] A search party, mostly of Mozambican nationals within the country, was organised and a search ensued. One of the co-accused called a member of the search party and directed him to where the body of the deceased was found. The Applicant later recorded a confession before a judicial officer admitting to having hired the co-accused to kill the deceased.
- [9] Detective Dlamini stated that the accused was likely to evade trial more so because he came into the country illegally. Further, murder being an offence mentioned in the 5th schedule of the Criminal Procedure and Evidence Act 67/1938 the accused was required to demonstrate the existence of exceptional circumstances permitting his release from custody.
- [10] The two main criteria in deciding bail applications are indeed the likelihood of the Applicant not standing trial and the likelihood of his interfering with Crown witness and the proper presentation of the case. The two criteria tend to coalesce if the Applicant is a person who would attempt to influence Crown witnesses it may readily be inferred that he might be tempted to abscond and not stand trial. There is the subsidiary factor also to be considered, namely the prospect of success at trial¹.

¹ Nathan CJ in Ndlovu vs Rex 1982-86 SLR 51 at 52

[11] But in **Jeremiah Dube v Rex**² Cohen J had summed up the legal position on bail as follows;

“ Summing up therefore, it seems to me that in a case of this kind, there is an initial onus which the Applicant has to discharge on a balance of probability that he will neither abscond or interfere with Crown witnesses. If bail is opposed by the director of public prosecutions and the indications are that the Crown case is of sufficient strength on its merits or the other surrounding circumstances are such as to indicate that it is in the interest of justice that he should remain in custody, the Applicant must further establish special facts before bail will be granted. The views of the director of Public Prosecutions on the application are generally speaking not readily discarded by the court”

[12] The *locus classicus* on the question of bail was laid down by Mahomed J (as he then was) in **S v Achenson**³ where he lucidly explained the consideration to be taken into account;

1. *Is it more likely that the accused will stand his trial or is it likely that he will abscond and forfeit his bail? The*

² Jeremiah Dube v Rex 1979 – 1981 SLR 187 at 190

³ S v Achenson 1991 (2) 805 at 822-823

determination of that issue involves a consideration of other sub-issues such as;

- (a) How deep are his emotional, occupational and family roots with the country where he is to stand trial.*
- (b) What are his assets in the country?*
- (c) What are the means that he has to flee from that country.*
- (d) How much can he afford the forfeiture of the bail money.*
- (e) What travel documents he has to enable him to leave the country*
- (f) What arrangement exist or may be later exist to extradite him if he flees to another country.*
- (g) How inherently serious is the offence in respect of which he is charged*
- (h) How strong is the case against him*
- (i) How severe is the punishment likely to be if he is found guilty;*

(j) *How stringent are the conditions of his bail and how difficult would it be for him to evade effective policing movements.*

2. *The second question which needs to be considered is whether there is a reasonable likelihood that, if accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors.*

[13] In this particular matter, there is no need to examine the second leg of the consideration.

[14] The Applicant is a Mozambican, he only arrived in the country in 2021. Despite his averment to the contrary, he does not have deep emotional, professional or occupational roots within the country. He is not possessed of such assets as would encourage him to stand trial. The accused is in the country unlawfully; most likely he did not enter the country through the lawfully recognised points of entry, this then extends to travel documents. The Applicant does not need a passport to cross through informal crossings.

[15] Coupled with all this is the fact that there currently is no extradition treaty between ESwatini and Mozambique. If Applicant crosses into Mozambique that would be the end of the matter. The accused is charged with a very serious offence and the penalty, should he be found guilty is very severe. The Applicant recorded a confession before a judicial officer and this strengthens the prosecution's case against him.

[16] In the premises, I find that the Applicant has failed to discharge the onus on a balance of probabilities that it would be in the interests of justice to admit him to bail. The application is dismissed.

[17] The Application is accordingly dismissed.



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Z. Magagula
Judge of the High Court

Appearances:

For the Crown – Mr C. Sibandze

For the Applicant – Mr C. Ndzimandze