



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No.248/2013

In the matter between:

LWAZI KUBHEKA

Applicant

vs

REX

Respondent

Neutral citation: *Lwazi Kubheka vs Rex (248/13) [SZHC 216] [2013] (26 September 2013)*

Coram: **MAPHALALA PJ**

Heard: **9th August 2013**

Delivered: **26th September 2013**

For Applicant: Mr. N. Dlamini

For Respondent: Mr. M. Nxumalo

Summary: (i) Application to be released on bail.
(ii) The Applicant fails to disclose material facts and thus interfering with his *bona fide* in launching this application.

- (iii) As a result, the Application is refused as Applicant has failed to disclose a material fact thus interfering with his good faith in law.

JUDGMENT

The Application

- [1] The Applicant Lwazi Kubheka an adult Swazi male of Mahlanya in the Manzini District has filed before this court an Application under a Certificate of Urgency to be released on bail as averred in prayers (a), (b), (c) & (d) of the Notice of Motion.
- [2] In his Founding Affidavit he avers that he was arrested on the 8th June, 2013 by the Malkerns Police who charged him with murder. That it is alleged that he stabbed the deceased with a broken bottle. That after the stabbing of the deceased he was attacked by people in the community who assaulted him severely.

The opposition

- [3] The Crown opposes the Application and in this regard has filed an Opposing Affidavit of 2359 Richard Mamba a Police Officer based at Malkerns Police Station who is the investigating officer in this case. In the said affidavit a number of grounds are canvassed. Firstly, that the Applicant is a flight risk.

That Applicant has committed murder. This is because he was out on bail when he committed the present offence that he is facing a murder charge. He committed the offences in 2009 and it is still pending before this court under case no.390/2009 and is charged with two other persons. That all Applicants in this case were given bail on certain conditions. On their bail conditions the Applicant was to report at Matsapha Police Station after his release from custody.

- [4] The second ground of opposition is that the Applicant has contravened section 96(8) (c) of the *Criminal Procedure and Evidence Act (as amended)* in that he failed to report at the Matsapha Police Station after his release from custody. The said section provides the following:

“In considering whether the ground in subsection 4(d) has been established the court may, where applicable, take into account the following factors, namely:

- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions.”

- [5] The Crown contends in this regard, that the refusal to grant bail and detention of Applicant shall be in the interests of justice as he has previously failed to comply with bail conditions.

[6] Various other grounds are advanced by the Crown on the basis of section 96(14) 96(4) (c) of the *Criminal Procedure and Evidence Act (as amended)*.

The arguments of the parties

(i) For the Applicant

[7] I have heard submissions from both the attorneys of the Applicant and that of the Crown who have both filed very comprehensive Heads of Arguments for which I am grateful for their professionalism.

[8] The arguments of the Applicant are premised on the provisions of the Swaziland Constitution that in the interests of justice that he be released on bail because he is innocent of the alleged offences and the only one-all-embracing issue of the presumption of innocence operates in favour of the Applicant. In this regard the court was referred to section 21(2) of the Constitution of Swaziland Act No.1/2005 and the cases of *Jeremia Dube vs R 1979(- 181)*, *SLR 187* and that of *R vs Essack 1965 (2) 161 D*.

[9] The attorney for the Applicant further cited the case of *S v Acheson 1991 (2) SA 802* where *Mohammed J* stated the following legal formulation:

“An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he

is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice”.

[10] Various arguments are addressed at paragraphs 1, 2.1, 2.2, 3.1, 3.2, 4.1, 4.2 and 5 of the Heads of Arguments of the Applicant’s attorney and I shall revert to some pertinent arguments later on in my analysis of the arguments.

(ii) The arguments of the Crown

[11] The Crown as represented by Crown Counsel Mr. Nxumalo who also advanced useful arguments and also cited relevant decided cases on the question for decision.

[12] As stated earlier on in paragraph [3] to [5] of this judgment the opposition by the Crown is based on various infringements by the Applicant of the provisions of the *Criminal Procedure and Evidence Act (as amended)*. These being section 96(14) (a) (ii), 96(a) (a-e), 96(4) (c) of the *Criminal Procedure and Evidence Act (as amended)*.

[13] The Crown further cited pertinent cases in support of its arguments. These being the cases *Sikhumbuzo Makhanya vs Rex Case No.124/2002* and that of *Ntando Bhekumusa Dlamini Case No.261/2012* and further cited the South African case of *S vs Jonas 1998(2) SA SALR 662*.

[14] The final argument by the Crown is that the Applicant has failed to adduce evidence to convince the court that on a balance of probabilities that he did not commit the offence and is merely saying that he has any *bona fides* without addressing the evidence on a balance of probability as what the defence is.

The courts analysis and conclusion thereon

[15] Having considered all the arguments of the parties in this Application it is my view that the first point of call is a determination on the non-disclosure by the Applicant of certain facts thus interfering with his *bona fides*. I must say that this inquiry is akin to “the doctrine of clean hands” of the civil law.

[16] The Crown’s contention in this regard is founded on the *dicta* in the High Court case of *Sikhumbuzo Makhanya (supra)* citing with approval the legal authority of *du Toit et al, Commentary of the Criminal Procedure Act, Juta* at page 9-23 where the following was stated:

“In considering this question the court may take into account the fact that the accused knowingly supplied false information at the time of his arrest or during bail proceedings.”

[17] The Crown therefore, contends that the failure by the Applicant to disclose about the pending charges he was facing was an act of dishonesty.

[18] The Applicant on the other hand replied to this allegation of the Crown in his Replying Affidavit at paragraph 5.3 to the following:

“5.3 I wish to extend my sincere apology and request this Honourable Court to pardon me for not disclosing this issue. I was not aware that I was required to disclose that I am out of bail on another offence. Had I known, I would have stated it in my Founding Affidavit. That as it may, I wish to submit that I am not hiding anything from this Honourable Court.”

[19] Having considered the arguments to and fro I am not persuaded by the Applicant reply as stated above in paragraph [18] of this judgment because this was a material disclosure and not a minor detail where Applicant would have been forgiven from not disclosing. It is a matter that goes to the *bona fides* of the Applicant in his Application. In other words this was a material detail to the Application. For these reasons I have come to conclusion that the arguments for the Crown ought to succeed and therefore the whole Application ought to be dismissed without any further ado.

[20] All in all, in the interests of justice as provided in section 96(a) (a-e) of the *Criminal Procedure and Evidence Act No.68/1938* to protect the life of the Applicant from people in the community who are baying for Applicant's blood after the incidents accordingly invoked.

[21] Further I agree *in toto* with the submissions of the Crown regarding the other grounds being section 96(4) (b) of the Act. I must say though that this ruling is merely *obiter dictum* in view of my finding in respect of section 96(a) (a-e) of the Criminal Code.

[22] In the result, for the foregoing reasons the Application is dismissed forthwith.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE