

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING: APPLICATION FOR REINSTATEMENT TO BAIL

Case no: CC 06/2014

In the matter between:

STOCKLEY KAUEJAO

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Kauejao v S* (CC 06/2014) [2024] NAHCMD 186 (23 April 2024)

Coram: SIBOLEKA, AJ

Heard: 29 February 2024, 1, 12 and 19 March 2024

Delivered: 23 April 2024

Flynote: Bid for reinstatement to bail on new facts – applicant, a Windhoek prison trial awaiting inmate in terms of section 68(3) of Act 51 of 1977 as amended – said new facts found to be merely ordinary circumstances every prison inmate and family members expected to endure during such incarceration. Bid to be re admitted to bail declined.

Summary: The applicant was arrested in January 2013 and is accused 1 on the main matter charged with murder, stock theft and defeating the course of justice. He

was originally granted bail to enable him to sell some of his animals to pay counsel fees, a promise he grossly ignored and instead embarked on a fierce counsel firing spree, opting for private instruction. Numerous counsel were instructed and long postponements followed to enable them to read the voluminous record. On the set down court dates they all withdrew as his counsel of record due to none payment of their fees and all the agreed dates were put to waste. It was this continuous stalling of the trial proceedings on this matter that prompted this court to cancel his bail and remand him in custody in terms of s 68(3) of the Criminal Procedure Act 51 of 1977 as amended. The applicant is now applying to be re admitted to bail on new facts.

Held: The application for readmission to bail is declined.

ORDER

1. The bid of the applicant who is also the first accused in the main matter to have his bail reinstated/restored is declined.
2. The matter is removed from the roll and regarded finalised.

JUDGMENT

SIBOLEKA, AJ

Background

[1] From the beginning of the trial on this matter all four accused were legally represented, it was only accused 1 and 4 that were on bail. The trial was progressing very well without hiccups. However, all hell broke loose at the close of the prosecution's case on 19 July 2018. The trial dates for the start of the defense case, in particular that of accused 1 were agreed on by all four counsel. It was a long postponement. On the morning of the agreed date shortly before the start of the trial proceedings all four counsel came to my chambers at the request of the applicant's then counsel of record, Adv. Makando. The applicant's counsel told me he had

consulted with his client (applicant) thoroughly preparing, for the beginning of his case. However, he called him at the eleventh hour during the night saying he was no longer interested to start giving his evidence on the matter, he has instead decided to start a recusal application proceedings in order for me to step down, Makando would remain his counsel on the main matter and Adv. Diedericks would prosecute the recusal proceedings, both were privately instructed.

[2] A long postponement was agreed on to enable the recusal counsel to go through the voluminous record. On the agreed date for the beginning of the recusal application, the applicant was still on bail. He came to court without his counsel. On being asked where he was, the applicant said he did not know as they had not met yet. Makando was in attendance, he rose to tell the court that both are withdrawing as the applicant's counsel of record for none payment of their fees. The applicant still on bail then instructed Adv. Brokerhoff, another long postponement was agreed and on the court date, he also withdrew for none payment. It was on the strength of all the above court date wastages that the court became persuaded to finally cancel the applicant's bail and remand him in custody in terms of s 68(3) of the Criminal Procedure Act 51 of 1977 as amended ('the CPA') on 22 October 2021. Since the applicants remand in custody, the trial is progressing very well to date.

[3] I will now look at each of the applicant's new facts for requesting the restoration of his bail.

[4] The applicant has developed a medical condition while being incarcerated and now has special dietary requirements that the correctional facility in which he is currently being detained cannot provide: In his letter addressed to the Head, Health Care Services, Windhoek Correctional Facility dated 22 February 2022, the applicant stated that years ago, he was diagnosed with a chronic bowel disorder called Irritable Bowel Syndrome (IBS) or Spastic colon and has been living with it ever since. The chronic development referred to above was diagnosed long before his arrest and incarceration on this matter. This means he already had this bowel disorder from outside into the prison facility.

[5] Stockley Kauejao is the applicant in this bail hearing. He testified under oath that he was arrested on 14 January 2013. He was granted bail on 15 July 2016 even after a prima facie case was pronounced by court at the refusal of his discharge at the closure of the prosecution case in terms of s 174 of the CPA, he did not abscond. The prosecution case has already ended on 18 July 2018 and is now in custody for three years. He did not violate any of his bail conditions. He has completed his evidence under oath and so have all the witnesses he desired to call in support of his case. He denies to have delayed the trial proceedings. His brothers are all aged and also depend on him for help. His children have left school while his 92 years old mother also needs his assistance. He was diagnosed with a colon disorder way back in 2009. This has now gotten worse in custody, and there is only a clinic on the prison facility that caters for both trial awaiting and sentence serving inmates. He, however, admitted being usually taken to a doctor or hospital whenever such a need arose. He can afford N\$5000 as bail and he is now six and a half years in custody. He is not married but only lives with a partner Frieda Malu. According to him the completion of his three co-accused's case will take long thereby impact badly on his medical wellbeing.

[6] The applicant called the Senior Superintendent Teevi Kambalala Head of Health Care Services, at Windhoek Correctional Facility to come and testify in support of his bid to get bail. He stated that the applicant did not bring a prescribed diet from the doctor or dietician regarding what he should eat. According to this witness, the applicant is allowed to bring the list of food that he wants to the Commissary Shop in so that the same can be ordered for him at his cost. However prison rules do not allow cooked food from outside irrespective of whether it is for a trial awaiting suspect or for a sentence serving inmate, not at all.

[7] New facts numbers 1.2; 1.3 and 1.4 will be taken together for purposes of this discussion:

1.2 The applicant's older son dropped out of University in 2022 due to none payment of tuition fees resultant of applicant's incarceration.

1.3 The applicant's 13 year-old son stopped attending remedial classes and his academic performance has dropped drastically.

1.4 The applicant's 92 year old frail sickly mother cannot take care of herself. The applicant is unable to pay someone to take care of her resultant of applicant's incarceration.

All the above factors 1.2; 1.3; and 1.4 are merely normal, ordinary concerns that all family members including the inmate (trial awaiting or sentence serving) inmate himself are expected by law to endure. This situation ordinarily unfolds by operation of law as it comes into effect after a suspect has been arrested, handed over to the justice system and the allegations against him have been formally decided on by the Prosecutor-General. If the above factors were to be regarded as new facts and valid reasons for releasing a trial awaiting inmate from prison, the work of the police and the courts would be seriously dis functionalized.

1.5 The defense case of the applicant's three and his co accused will take long to finalise their case, as they have a lot of witnesses to call which will further prolong the trial: This situation has been freely and voluntarily elected by applicant himself, and accused 2 and 3, when immediately after the closure of the prosecution's case on 18 July 2018 the three accused embarked on a fierce counsel firing spree. It was this conduct that stalled the trial proceedings that the applicant is now complaining about.

1.6 The applicant had his bail cancelled and has since October 2021 been incarcerated, but that fact has had no effect on the speedy finalisation of the trial. The case will still take long even if he was still on bail.

Since the cancellation of the applicants bail and his remand in custody, this court has experienced a lot of progress as regards the trial itself, no hiccups or excuses, nothing. All agreed scheduled dates are continuously being honored and everything is in order and under control.

[8] The applicant (who is accused 1) in the main trial, the witnesses he desired to call in his defense in this matter have all testified and cross examined to completion.

It is only the evidence of his three co accused and that of the witnesses they may desire to call, if any, that is still outstanding.

[9] The respondent called D/Insp Trinity Mokatu, the current investigating officer, who took over from D/C/Insp Iyambo who resigned. He testified that he only knows the applicant as Mbaruu. He is opposed to the granting of bail to the applicant for fear that he may again repeat his delaying tactics to stall the continuation of the trial proceedings on this matter. The basis for the above is the strong case he is facing, very serious allegations and if convicted he may likely get a custodial sentence. According to this officer, in Gobabis, people demonstrated at the time of the applicant's arrest, showing that the matter has public interest. He stated that the deceased was a well-known person who also helped the police in stock theft investigations. He knows that the applicant was at some stage on bail and does not have information whether he tried to abscond or not.

[10] In his address before the ruling, Mr Kanyemba, the applicant's counsel argued that the applicant has made out a case proving that he is indeed a candidate for bail. He stressed the point that already at the close of the prosecution's case on 18 July 2018, he was on bail and he did not abscond. He further stated that there is no case against him seeing that the only evidence against him was the confession which was denied by the author under oath during this trial. This counsel stated that it will be very painful to continue keeping the applicant in custody only to discharge him at the end of the trial. According to him, there is absolutely no way this court or any other for that matter, acting carefully, can convict the applicant on the evidence before it, nothing at all. He further stated that this court can only convict if it ignores the provisions of s 219 of the CPA. This assertion in my considered view, was very unfortunate as it totally ignored the procedure requiring that in law the evidence can only be evaluated when the versions of all the accused and the witnesses of their choice have been fully accounted for and both sides have closed their cases. It was dangerously premature for the applicant's counsel to submit and address court on those lines while the trial proceedings are still progressing.

[11] Mr lipinge, respondent's counsel, submitted that the applicant's unhappiness as an inmate of Windhoek Correctional Service allows him to challenge the facility for not providing what he thinks they should, instead of bringing that grievance to this

court in the form of a bail application. This counsel forcefully asserted that whether the applicant was receiving sufficient medical care or not, is not a ground for him to be readmitted to bail, He cited various authorities¹ where it was held that bail is not a remedy against actions and omissions of Prison authorities. This counsel argued that the new facts raised and relied on by the applicant to be re admitted to bail are misplaced because as an inmate, all personal and medical unwellness he has raised at the Prison Health Care Service Center have been thoroughly dealt with. According to this counsel, incarceration should be a generally accepted phenomenon. It should be viewed as a natural consequence by all family members and the inmate whose liberty has been taken away in terms of the law should be accepted as a reasonable and foreseeable consequence. This counsel concluded by stating the fact that the applicant has kept his counsel since the withdrawal of his bail is testimony to the findings of this court that if his bail is reinstated, he will again stall the trial proceedings. He prayed that the application be dismissed.

[12] If the applicant's concerns, trivial as they are, were to be accepted as new factors and allowed to stand amid serious allegations, our justice system would easily be disfunctionalised. In view of all the above and in particular the point to which the defense case has thus far progressed, the expose of the applicant's conduct in the introductory paragraph as being the reasons why the applicant's bail was cancelled in terms of s 68(3) of the CPA will, in my considered view be an extremely hostile step against the smooth turning of the wheel, of justice to re-instate the applicant's bail in this matter.

[13] In the result I make the following order.

1. The bid of the applicant who is also the first accused in the main matter to have his bail reinstated/restored is declined.
2. The matter is removed from the roll and regarded finalized.

A M SIBOLEKA

¹ *Matheus v The State* (CA 35/2016) [2016] NAHCMD 167 at.8.

Acting Judge

APPEARANCES:

APPLICANT:

S Kanyemba
Of Salomon Kanyemaba Inc,
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RESPONDENT:

H K A lipinge
Of Office of the Prosecutor General,
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