

EX CONSTABLE DUBE ADVICE 078655T
versus
THE OFFICER IN CHARGE, SUPERINTENDENT MUTASHU T
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 18 September, 2017 and 28 December, 2017

Opposed matter

N Mugiya, for the applicant
C Siquza, for the 1st & 2nd respondents

MANGOTA J: The applicant, a former constable in the Zimbabwe Republic Police, was charged with and convicted of contravening paragraph 11 of the Schedule to the Police Act as read with sections 29 and 34 of the same. He was sentenced to 14 days imprisonment and was subsequently discharged from the police service.

The applicant was not satisfied with the manner which led to his conviction and sentence. He applied for review of the same. His main ground for review was that the proceedings which the first respondent conducted were so grossly irregular that they should not be allowed to stand.

The second respondent opposed the application for review. The first respondent did not. The allegation was that a non-existent party had been cited and, as such, he could not be before the court.

The second respondent raised three *in limine* matters after which he addressed the merits of the application. His preliminary matters were that:

- i. the application had been filed outside the time which the rules of court permit,
- ii. the applicant cited a non-existent party as the first respondent - and
- iii. the applicant did not attach to his application the High Court order, HC 9836/14, which he referred to in paragraph 12 of his Founding Affidavit.

He stated, on the merits, that the applicant operated a transport business in defiance of an order which he issued prohibiting police officers from carrying out business which conflicted with their duties. He admitted that he discharged the applicant from the police force. He said he did so on the strength of the trial officer's decision as well as on the recommendations of the applicant's immediate supervisors. He insisted that the applicant was properly tried, convicted and sentenced. He moved the court to dismiss the application with costs.

The applicant was tried, convicted and sentenced on 25 June, 2014. He filed this application on 28 February, 2017. He stated, as a reason for not timeously filing the application, that the respondents were refusing to furnish him with the record of proceedings.

The applicant's assertions appear to carry some grain of truth. The extract of the record of proceedings which the trial officer – one Tererai Mutashu, a Superintendent in the Zimbabwe Republic Police force – certified on 4 May 2017 was filed with the court on 8 May, 2017. That record was, therefore, not available to the applicant before May, 2017.

The respondent's first preliminary matter cannot hold under the observed set of circumstances. He cannot be allowed to approbate and reprobate. He is the cause of the delay of the filing of the application. He should have known, as the most senior officer in the police force, that a review cannot be dealt with without the record of proceedings of the court *a quo*. He cannot, therefore, take advantage of his misdemeanours and proceed to lay the blame for late filing of the application for review on the applicant.

The applicant did not allow the matter which related to his application for review to remain lying idle. He applied for condonation of late application for review. The application which he filed under case number HC 9836/14 is relevant in the mentioned regard. He attached the court order which related to HC 9836/14 to his answering affidavit. The order which NDEWERE J granted under HC 9836/14 reads, in part, as follows:

“Whereupon, after reading documents filed of record, and hearing counsel:-
It is ordered that:

- a) Application for condonation for late filing of application for review be and is hereby granted.
- b) The applicant be and is hereby ordered to file his application for review within 10 days from the date of this order.
- c) Costs shall be in the cause.” [emphasis added].

The above mentioned order was granted on 14 February, 2017. This application was filed on 28 February, 2017. This was exactly ten days from the date of the order.

It is disquieting to observe that, even as the applicant filed the review application in compliance with NDEWERE J's order, the record of proceedings was still not available to him. The respondents continued to hold onto it for reasons best known to themselves. They held onto it notwithstanding the fact that they had been served with the application for review. Such wanton disregard of the law cannot be allowed to remain with those whose duty is not only to observe, but also to enforce, the law.

The above described set of circumstances dispose of the first and the last *in limine* matters of the respondent. The order, HC 9836/14, which the respondent complained of was attached to the applicant's answering affidavit. That order condoned the applicant's late application for review of the proceedings of the court *a quo*.

The second respondent's second preliminary matter was raised merely for academic purposes more than for any other. He knows as much as anyone who had something to do with this application does that some officer who is under his command tried the applicant. His assertion which was to the effect that there was no officer in charge with the rank of superintendent in the police force, though correct, rested on a technicality which the applicant was ready to make a concession upon.

The bottom line is that both respondents were served with the application for review. The second respondent, as the officer who is in charge of the entire police force, made up his mind to ride on the mistake which the applicant made in the citation of the first respondent. He must, therefore, have advised the latter not to respond to the application. He thought he would simply state, as he did, that the first respondent, as cited, was non-existent. If the first respondent was non-existent as the second respondent would have the court to believe, one wonders how the extract of the record of proceedings which Superintendent Mutashu filed on 8 May, 2017 found its way to this court. The existence of the record shows, in a clear and unambiguous manner, the plan of the respondents. They were, in my view, in communication with each other at all material times. They planned to tell a lie which, unfortunately for them, did not hold. The correct position of the matter is that the first respondent was properly served with the application for review as was the second respondent. He made up his mind not to appear at court. He remained out of court. He was in wilful default.

I have disposed of the preliminary matters which the second respondent raised. I now proceed to examine the substance of the application. This falls under part V of the High Court Act [*Chapter 7:06*]. Sections 26, 27 and 28 of the same are relevant.

Section 26 confers upon me the power, jurisdiction and authority to review all proceedings and decisions of inferior courts of justice, tribunals and administrative authorities which are in Zimbabwe. Section 27 spells out the grounds on which proceedings or decisions of inferior courts may be brought to this court on review. One such ground relates to gross irregularity in the proceedings or decision.

The present application rested on the above mentioned ground. The applicant's position was that the court *a quo*'s proceedings suffered gross irregularity which did not allow them to stand. He moved that they be set aside in terms of section 28 of the High Court Act.

The trial of the applicant was conducted in terms of the Police Act [*Chapter 11:10*] ["the Act"]. Section 35 of the Act provides a useful guide to officers who try other officers under it. Subsection (1) of the section is relevant. It reads:

"(1) the proceedings before or at any trial by a board of officers or an officer in terms of the Act shall, as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe." [emphasis added].

The cited part of the section admits of no discretion on the part of the trial officer. It is mandatory. He should simply remain guided by such statutes as the Criminal Procedure and Evidence Act [*Chapter 9:07*] and established precedent. Because his is, to all intents and purposes, a criminal trial court where the prosecutor is *dominus litis*, proof must be based on the accepted standard. It should be proof beyond reasonable doubt and not proof on a balance of probabilities. He must adhere to all the aspects as well as to all the stages of a criminal trial.

This court made a clear and unambiguous statement on the abovementioned matters in *Chilufiya v Commissioner General of Police and others*, HH 89/10. It said:

"The intention of the legislature is clear. The tribunal or officer must as near as possible comply with the rules of procedure and evidence as done in the courts of Zimbabwe. Where the tribunal or trial officer significantly departs from the procedure set out in criminal proceedings in the courts of Zimbabwe the proceedings may be set aside on review. The test applied on reviewing proceedings is whether or not the proceedings are in accordance with real and substantial justice." [emphasis added]

Whether or not the proceedings which are the subject of this application were/are in consonant with the above stated test does, in a large measure, depend on an analysis of the court *a quo*'s proceedings as measured against the same.

Preliminary observations which I gleaned from the record of proceedings shows a conspicuous absence of:

- i. the name of the trial officer and / or his rank in the police force;
- ii. an outline of the state case;

- iii. the date on which the trial commenced;
- iv. the charge which the state preferred against the applicant;
- v. the name of the prosecutor – and, above all
- vi. the reasons for the prison sentence which the trial officer imposed upon the applicant.

The proceedings which the court *a quo* conducted were a one witness trial. The witness could not state in clear and categorical terms that the applicant owned the motor vehicle which was the vessel through which the offence was allegedly committed. She, in fact, could not tell with any degree of certainty if the applicant owned the motor vehicle which was carrying passengers for a fee. She was, if anything, a very evasive and assumptive witness. She was, for instance, asked the following question under cross examination and she answered as follows:

“Q - Do you know the owner of the vehicle

A - It's the defaulter's vehicle because when he regained consciousness he was crying saying “my car, my car”

The same question was repeated when she was still under cross-examination, and she answered as follows:

“Q Would you know the real owner of the vehicle

A – I think it's the defaulter

Q – Why are you saying so

A – Because the person who collected the money reported the person who was drinking bear to him.”[emphasis added]

The above was the nearest which the state could go to prove its case against the applicant. It was, therefore, within the applicant's right to apply for discharge at the close of the case for the state. He did and his application was dismissed without any reasons being given for the dismissal.

The trial officer made an attempt to justify the dismissal of the application at the close of the state case. He did so in his judgment on the matter. He, however, based the dismissal on an assumption as opposed to any evidence. He said:

“The application for discharge at the close of the state case was dismissed due to the fact that the conduct of the accused person under the circumstances indicated that he was benefiting.” [emphasis added].

He did not explain the conduct which he referred to. He did not say how the conduct, if any, pointed to the benefit which allegedly was accruing to the applicant. No evidence was led to show the conduct which pointed to the applicant's benefit. The statement was just introduced into the matter without any basis upon which it rested.

The trial officer's statement which was to the effect that the applicant sat in-between the driver's seat and the front passenger seat with a view to maximising profits was not supported by any evidence. The witness's evidence on that aspect of the case was that the applicant sat on the front passenger seat. Equally, his statement which was to the effect that the applicant failed to challenge the passenger who was drinking beer in the car because he wanted him to pay his fare was not supported by any evidence.

The most damaging aspect of the trial officer's judgment centres on where he placed a duty on the applicant to produce the registration book of the car as proof of the fact that he was not the owner of the car. He said:

"In your defence, you failed to produce the registration book to indicate that the vehicle does not belong to you or to bring Emmanuel Magirazi [the alleged owner]"

In stating as he did, the trial officer committed one of the cardinal sins which should not occur in a criminal trial. It is not the duty of the accused to prove his innocence. It is always the duty of the state to prove his guilt beyond reasonable doubt.

There was no iota of evidence which allowed the trial officer to put the applicant on his defence. The evidence of the only witness for the state had a lot of gaps which did not establish a *prima facie* case against the applicant. The trial officer should simply have acquitted the applicant at the close of the state case. His non-acquittal of him at that stage was a serious misdirection.

The judgment which the trial officer wrote at the conclusion of the case did not support any conviction at all. He based it on assumptions more than on any evidence. The witness whom the state called was most unreliable. She would, as has already been demonstrated, make two or more conflicting statements on one and the same matter. She, for instance, stated that when the car in which the applicant, others and herself were travelling was involved in an accident she lost consciousness. She did not tell of the time she regained her consciousness. She, in the same breath, stated that the applicant uttered the words *my car, my car* soon after the accident. How she was able to hear those words in her unconsciousness state remains a matter for anyone's guess.

The state had in its power the ability to establish the owner of the motor vehicle. It could easily have checked on that matter with the Central Vehicle Registry. That route would have made its case unassailable especially where the details obtained from the Registry pointed at the applicant as the owner of the motor vehicle.

The applicant was, in my considered view, improperly convicted and sentenced. The evidence which the state led did not support the conviction. The sentence which the trial officer imposed on the applicant came upon him just as a bombshell. No reasons were given for the same. He was simply sentenced to a term of imprisonment.

It is injudicious for a judicial officer not to give reasons for his decision. That fact alone constitutes a gross irregularity. DUMBUTSHENA CJ stated in *S v Muteketa*, 1985 (2) ZLR 248 (5) that:

“The omission to give reasons is an irregularity which gives this court the opportunity to interfere with the trial court’s findings.” EBRAHIM JA reiterated the same point in *S v Makawa & another*, 1991 (1) ZLR 146 D – E wherein he said failure to give reasons for a judgment is a gross irregularity.

Everything about the court *a quo*’s proceedings was upside down. I could not sanction the trial as having been in accordance with real and substantial justice. The opposite of that principle was the case. The state did not establish a *prima facie* case against the applicant. It did not prove his guilt beyond reasonable doubt. The conviction could not, therefore, stand. The sentence which rested on an unsustainable conviction also fell by the way side.

The applicant proved his case on a balance of probabilities. The application is, therefore, granted as prayed.

Mugiya & Macharaga Law Chambers, applicant’s legal practitioners
The Civil Division of the Attorney General’s Office, 1st & 2nd respondents’ legal practitioners