STATE
versus
ALLAN MUKODZANI

HIGH COURT OF ZIMBABWE
TSANGA & MUREMBA JJ
HARARE, 30 October 2017

Criminal Review

TSANGA J: The record in the matter between the *State* v *Allan Mukodzani* CRB MUTP 2504/17 was referred for review by the magistrate to whom the matter had been referred to internally for a trial *de novo* by the trial magistrate who heard the matter after she had recused herself. It is said in the correspondence accompanying the record by the referring magistrate that the trial magistrate no longer felt comfortable handling the matter as the defence counsel was undermining her authority and had already given a wrong impression of bias. During cross examination of the complainant it had been suggested by the defence counsel that the complainant had spoken to the court and that the accused was going to be found guilty. The purpose of the referral of the record for review was for the proceedings to be formally quashed and for a trial *de novo* to be ordered.

In matters of this nature for recusal where proceedings are sought to be formally quashed, it is the trial magistrate who heard the matter who has the duty to refer the record for review giving full reasons for her recusal and setting out why the proceedings should be quashed. This is because it will only be on the basis of a full appreciation of the totality of the surrounding circumstances as captured by the trial magistrate that the reviewing court can make an informed decision on recusal and quashing. Suffice it to say that as recusal is not sanctioned lightly by the court and it cannot be for the magistrate upon whom the matter has been subsequently dumped to enlighten the court as to the circumstances upon which an order for quashing is sought.

Turning to the issue at hand, in the interests of justice and progress on this matter I will however proceed with the review as the record of the actual proceedings was provided and included therein were the magistrate's reasons for recusal. The matter before the

magistrate was an assault case. At the end of cross examination, the defence counsel put the following questions to witness who was the complainant in the matter.

"Q Correct that among the people, you have told them that you have placed mechanisms that accused will be convicted no matter what?
A No
Q Correct that you have told them that you have spoken to the court for accused to be convicted?
A No
Q Correct that the whole neighbourhood knows the accused will be convicted?
A No."

In re-examination the witness was asked as follows by the State counsel:
"Q You were asked that you have placed mechanisms that the accused will be found guilty what your comment is.
A People asked about the assault. I never told them about any mechanism. It is rumours".

After the re-examination by the State, the court ordered an inspection *in loco* of where the assault had taken place. It was only thereafter that the magistrate recused herself noting the following reasons for doing so:

> "I am recusing myself from the matter mainly because I am no longer comfortable to preside over it. During cross examination the defence counsel have already suggested that the accused has already been convicted as the complainant had already spread such rumours. I also feel that the defence counsel has undermined my authority from the time his trial started till now which is making me uncomfortable. I think it is best for justice for another magistrate to deal with the matter. Defence counsel have already suggested the likelihood of bias by the court. Justice should be done as well as seen to be done. An impression of bias on the part of the court has been made. I am referring the matter to court B".

The case of *Zhou* v *Katiyo NO & Anor* HH-774-15 captures the following considerations as regards bias:

> "When faced with an application for recusal, a judicial officer must consider and weigh up two important obligations; namely the duty to hear every case that comes before him or her and the duty to apply the law impartially, without fear, favour or prejudice. Impartiality does not require the magistrate to be neutral; rather, it is a state of mind in which the magistrate is disinterested in the result and is open to persuasions by the evidence and submissions. It is that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the judge's own predictions, preconceptions and personal views – that is the keystone of a civilised system of adjudication. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to the issues. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or would not bring an impartial mind to bear upon the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel. The perception of bias must be reasonable in two respects: (a) the

> perception must be reasonable: it must be based on reasonable grounds and there must be a reasonable apprehension that the judicial officer will be biased; an apprehension that the judicial officer may be biased is not sufficient. (b) In addition, the person apprehending the bias must be a reasonable and objective person in the position of the litigant who is informed of the facts".

Also as stated in the case of *S* v *Nhire & Anor 2015 (2) ZLR 295,* the threshold for a finding of real or perceived bias is high. There must appear to be a real likelihood of bias and surmise or conjecture will not do. The circumstances must be such that an ordinary person will think it likely or probable that the judicial officer would favour one side at the expense of the other. Furthermore, as emphasised therein, the starting point is a presumption that judicial officers are impartial in adjudicating disputes and it is the person alleging the bias who bears the onus of rebutting the onus of judicial impartiality.

Applying the principles set out in the *Zhou* v *Katiyo* above, the perception of bias does not appear to me to have been based on any reasonable grounds as there were absolutely no facts that were then made to substantiate the claim by the defence counsel in terms of who had been spoken to, when and where. The magistrate in her reasons also does not explain whether the apprehension that she would be biased had any basis whatsoever in fact other than the fact that the defence counsel had alluded to it in cross examination. Moreover even after the statements had been made in cross examination, she had proceeded to do an inspection *in loco*.

It is vital that magistrates should not allow themselves to be bullied by defence counsel as they will then be no end to spurious allegations that may be designed to simply delay a matter or worse still to get an undesired magistrate off a case. If the defence counsel had actual facts to substantiate the claim that the matter before the magistrate was tainted by irregularities form the onset, then the matter should simply never have been heard by that magistrate. Recusal should have been sought from the onset. Approaching a magistrate before a matter has been heard is a serious offence. It is highly irregular to wait until all evidence has been given by a complaint to then suddenly introduce allegations of impropriety on the part of the judicial officer that preceded the trial. If this had indeed taken place there was no reason whatsoever for the matter to be heard by that magistrate.

Justice would grind to a halt if every time counsel makes an unsubstantiated claim of bias, a magistrate is quick to recuse themselves on the grounds of perception. In the circumstances, I am not satisfied that this is a case that calls for the recusal of the magistrate

and for this court to quash the proceedings for a hearing before a different magistrate. Accordingly, the case is referred back to the same magistrate for completion of the trial.

MUREMBA J agrees ……