

THE STATE

Versus

LEWARD NYAMADZAWO

HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 19 NOVEMBER 2024

REVIEW JUDGMENT

NDLOVU J: This matter was placed before me by way of review from the Regional Court Magistrate, Gokwe. The accused was convicted and sentenced to 15 years imprisonment for the contravention of *s 65 [1] of the Criminal Law [Codification and Reform] Act, [Chapter 9:23], [the Code] “RAPE.”*

It is the conduct of the proceedings in the Court a quo shortly before the trial commenced that has necessitated the writing of this review judgment. It is my view that the conduct in question seriously violated the accused’s Right to Legal Representation and a Fair trial. I hereunder reproduce in relevant parts the verbal exchanges that took place in the Court Room a quo.

“19/6/24

....

PP. It’s a matter for trial.

Court to Accused

You are entitled to legal representation. Do you want to engage a lawyer to represent you?

- A. Yes I have tasked my parents to look for a lawyer on 10/6/24. I don’t know if they managed to secure a lawyer. I have not conversed with them.*

Court to Accused

You may converse with them. Are they in court today.

Accused. Yes

.....

[Resummed after 15 minutes]

Court Q, Have you conversed with parents.

A. Yes

Q. What do they say

*A. They are indicating that they want to look for more money for 2 weeks.
I had not heard which one they had sought for.*

Q. Who will pay for the witnesses who came

A. We will see

Q. Why failed to raise the money to secure the money for lawyer [sic]

A. no response

*If I may be granted some days to look for a lawyer I will be able to raise
money and acquire a lawyer on 28/6/24*

Court to PP. What is your response to the application

*May the accused be notified that the witnesses have travelled from Gawa,
an area under Chief Nemangwe. The accused has been notified of his trial
date from 10/6/24. The accused had adequate time to look for a lawyer.
But today now wants the matter to be postponed. May the Court advise the
Accused that the matter to proceed to trial. May Accused also know that
the witnesses are not employed. If the matter is postponed, then it
prejudices and inconveniences witnesses.*

Accused- I have nothing to say.

Court

*The right to legal representation is not absolute. Where it inconveniences
witnesses and the administration of justice, the Court will refuse to grant*

it.

The accused was given adequate notice of the trial. He had 9 days within which to prepare for trial and ensure the lawyer was available for trial. He was even advised on 28 May 2024. He said he would self-act. He was aware witnesses would be called. He had 20 days to look for a lawyer but he acted lackadaisically.

PP. Charge put to accused.”

The rest is now history.

*“It is trite that every person who is charged with a criminal offence is permitted to defend himself at his own expense, by a legal practitioner of own choice.....The trial court, however, has a discretion, **in appropriate case**, to order that the trial should proceed **but this discretion must be exercised judicially.**” S Vs. Nyathi HB90/03 per Ndou J. [my emphasis].*

In *Wheeler and Others Vs Attorney General 1998 [2] ZLR305 [S] @ 311* Gubbay CJ [as he then was] had said,

“....it is only in exceptional circumstances that the court would be justified in refusing a postponement of the trial to an Accused who wanted to engage a legal practitioner at his own expense, or whose chosen representative was absent for good reason. But where the application for postponement is obviously vexatious or frivolous or where the Accused is guilty of gross negligence in failing timeously to engage the services of a legal representative of his choice or of a deliberate tactic to unreasonably delay the trial, he cannot complain that his Constitutional rights are infringed if the trial ordered to commence.....In this way Accused will enjoy the full protection of the Constitution”.

Trial Magistrates are expected to understand and internalize what is meant by a right to legal representation. It is a right provided for in the Bill of Rights in the Constitution. It is not a casual option made available to an accused person at trial. It

is a serious matter. A Judicial who before him appears an unsophisticated accused person must explain in the simplest language what this right entails. Of course, he should not turn the courtroom into a lecture room of some sort. The explanation must be simple, understandable and meaningful.

It is insufficient for a trial Magistrate to tell an accused person that he has a right to legal representation, ask him if he understands that statement and on affirmation ask him what his choice is. That kind of approach cannot be christened as “*an explanation to the accused of his right to legal representation and his choice to proceed with the trial unassisted.*” A judicial officer must tell the accused that he has a right to be represented by a lawyer of his choice and at his expense. Proceed to explain, briefly and in simple terms to him what a lawyer does in a criminal trial on behalf of the accused person. His choice must be a product of his consideration of the economics of engaging a lawyer and a full appreciation of the nature of the services of a lawyer. He must be told that lawyers ordinarily do not come cheap.

Put differently, the court must go about its task in such a manner that the accused person does not ONLY understand that [a] he has the right to legal representation, [b] that he has a choice to either secure a lawyer to represent him or proceed with the trial unassisted and [c] that if he chooses legal representation he must understand that he will be obliged to pay the lawyer, BUT in addition to the above and crucially so, it MUST be explained to him and he must indicate his understanding of [d] the explanation of the services a lawyer renders to a litigant during a trial.

It is only then that he can be said to have made an informed choice. Preferably the exchange between the magistrate must appear *ex facie* the record of proceedings.

The Judicial Training Centre is encouraged to consider drafting a standard Annexure containing a model explanation to an accused person of his right to legal representation that will be used by all magistrates.

Where an accused chooses to engage a legal practitioner to assist him during his trial, he must be asked the time within which he will secure the services of a lawyer and not when he will secure the lawyer's attendance at court. The latter is the business of the lawyer in engagement with the public prosecutor and where necessary with the blessing of the court. A judicial officer is expected to understand and appreciate that a lawyer is not cheap and that a lawyer ordinarily is pre-funded. He is expected to appreciate that money is a scarce commodity for the majority of our citizens and factor that in deciding the period of postponement. He must also consider whether or not the accused is in custody. Where the accused is over-ambitious with his timelines, the judicial officer must be practical and tell the accused that the time he is giving is too short.

An accused's right to legal representation is not subject to the convenience of State witnesses. It is not subject to the bus fare cost of the State witnesses. It is not subject to the fact of a set down of the matter by the prosecutor before the right has been exercised. It is an act of irresponsibility for a public prosecutor to set the matter down without ascertaining whether or not the accused chooses to be represented by a lawyer at trial, especially where the accused is facing serious charges like rape which upon being convicted, he is liable to be made to part ways with his freedom for a very It is not subject to the benevolence of the public prosecutor. It is not subject to the haste of the presiding officer. It is subject to the principles that underpin a fair trial. It is subject to the cause of justice.

In *casu*, in an act that arguably is wanting in logic, on 10 June the accused elected to engage a lawyer and the court went on to set 19 June as a trial date. The logic in doing this is difficult to locate. The accused was in custody, he subcontracted his right to choose a lawyer of his choice to his family. His family was asking for a mere nine days to cobble together money to secure the services of a legal practitioner for him. He had assigned them 9 days prior, [making it 18 days]. He was facing a serious charge of rape which made him liable to imprisonment for a long time. He

unwittingly half-offered to pay the State witnesses' expenses. One wonders what convinced the magistrate to consider even posing that question. Payment of witness expenses is the obligation and responsibility of the Central Government through the Judicial Service Commission. He was asked why he failed to raise the money to pay a lawyer. This is an accused person who is in custody. The economy is not yet blooming and is blowing in the opposite direction of the average citizen. He was not afforded a decent opportunity to secure legal representation as afforded him by the Constitution of Zimbabwe.

Given what I have stated above, it cannot be said that the accused received a fair trial. He did not. The order made by the magistrate that the trial commence was not done judiciously. It was made in direct contrast to the spirit in the Wheeler case [supra]. The trial that thereafter ensued was unfair and should not be allowed to stand. Accordingly, the proceedings that led to the conviction of the accused person are set aside.

The offender must be recalled and informed of this Review outcome, and be tried *de novo* before a different Regional Court Magistrate. If he is still desirous of being represented by counsel, he must be given adequate time to secure the legal practitioner before the matter is set down for trial. In the event of a conviction, the period he has spent in prison must be considered and deducted from the sentence that would otherwise be appropriate.

Ndlovu J

M. Dube J I agree