

CRISPEN CHARUMBIRA
versus
NGONI NDUNA N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND KWENDA JJ
HARARE, 22 & 1 March 2023

Court Application for Review of Untermiated Proceedings

L Uriri, for the applicant
F I Nyahunzvi, for the respondent

CHIKOWERO J:

[1] This is an appeal against the Magistrates court judgment dismissing an application for discharge at the close of the State's case disguised as a court application for review of that decision. It is an unmitigated and flagrant abuse of court process.

[2] A superior court interferes in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant. See *Ndhlovu v Regional Magistrate Eastern Division & Anor* 1989 (1) ZLR 264(H); *Dombodzvuku & Anor v Sithole N.O & Anor* 2004(2) ZLR 242(H), *Attorney-General v Makamba* 2005(2) ZLR 54(S); *Prosecutor-General of Zimbabwe v (1) Intratek Zimbabwe (Private) Limited* (2) *Wicknell Munodaani Chivayo* (3) *L Ncube* SC 67/20.

[3] The grounds for review read as follows:

- “1. The 1st respondent misdirected himself when he found that the State had proved a *prima facie* case on all counts when there was no evidence led and placed before the court linking the accused person to the offences.
2. The first respondent also misdirected himself when he found that the State had no need to produce critical evidence in the form of call records, notebooks and occurrence books on all counts to prove its case on a balance of probabilities when the evidence could be obtained and the State chose not to investigate on it.

3. The first respondent further misdirected himself when he found that the State had led sufficient evidence in proving its case in relation to the alternative charges in counts 3 and 4 when there was no evidence that was led as far as how the accused person criminally abused his duties as a public officer.
4. The first respondent further misdirected himself when he found that the accused person had a case to answer when no facts had been established to extent of requiring an answer by the accused person.”

[4] All the grounds impeach the correctness of the decision to refuse to discharge the applicant at the close of the case for the prosecution. The point is there made that there was inadequate evidence to justify the placement of the applicant on his defence. We think that the applicant, aware that a decision refusing to accede to an application for discharge at the close of the State’s case cannot be taken on appeal at this stage, devised the strategy of appealing all the same but under the cloak of what he filed as a court application for review of unterminated proceedings. What he cast as grounds for review are in substance grounds of appeal. He is complaining that the decision rendered by the Magistrates court is wrong. Exercising review powers, we cannot relate to that complaint.

[5] The applicant is a high-ranking member of the Zimbabwe Republic Police. He is on trial on two counts of attempting to defeat or obstruct the course of justice as defined in s 189 as read with s 184(1)(E) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. He is also being tried on two counts of defeating or obstructing the court of justice as defined in s 184(1)(E) of the Criminal Law Code with the alternative charges being criminal abuse of duty as a public officer in contravention of s 174(1)(a) of the Criminal Law Code.

[6] In respect of counts one and two the prosecution alleged that the applicant attempted to defeat or obstruct the course of justice by ordering named police detectives, over the phone, to release suspects arrested on charges of unlawful possession of dangerous drugs. The alleged orders were not obeyed.

[7] As for count three, the allegations were that the applicant actually defeated or obstructed the course of justice because his telephonic orders to junior members of the Zimbabwe Republic Police not to carry out a search at a suspect’s house were complied with. The allegations in count four were that the applicant unlawfully, again over the phone, ordered junior members of the Zimbabwe Republic Police to release a suspect arrested for possessing gold without a licence.

The allegations were that the suspect was indeed released, without any charges having been preferred against. The gold too was handed back to the suspect. The alternative charges were based on the same facts.

[8] The prosecution called serving and former members of the Zimbabwe Republic Police. These included the junior officers who allegedly received the applicant's telephonic orders to act in the manner that we have already spelt out.

[9] The applicant has not predicated the application on the ground that there was a gross irregularity in the proceedings or the decision refusing to discharge him at the close of the case for the prosecution. He failed to convince us that if we do not interfere with the trial at this stage grave injustice might otherwise result or justice might not by other means be attained. The trial has not been concluded. The decision now complained of may turn out to be of no consequence in the event that the applicant is eventually acquitted. Even if he is convicted, he can still appeal the verdict.

[10] The application be and is dismissed.

CHIKOWERO J.....

KWENDA J, agrees:

Bvekwa Legal Practice, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners