

DANIEL MANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 11 September 2020 and 30 March 2023

Review application

Mr *B Mlauzi*, for the applicant
Mr *R Chikosha*, for the respondents

CHINAMORA J:

Background facts:

This matter appeared before me as a review application of criminal proceedings before the Honourable Magistrate Guwuro. The applicant had been convicted by the court *a quo* for contravening s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Applicant was sentenced to 3 years imprisonment, 1 year of which was suspended for 5 years, and 4 months were suspended on condition of restitution of \$40.00. Thus, the applicant was effectively to serve 20 months. He approached this court by way of a review to have the conviction quashed and sentence set aside. The basis for this application was gross irregularity in the way the trial was conducted. It was the applicant's contention that the evidence which was used during proceedings had been illegally obtained by trapping the applicant. He further argued that the learned magistrate proceeded to hear the mitigation when his legal practitioner of choice was not in attendance. His case was that he was denied the right to a fair trial and that the court was biased against him, as his request for postponement on account of his lawyer's illness was dismissed. On sentence, the applicant contended that the court ignored the community service guidelines and imposed an excessive sentence. Consequently, the applicant submitted that this constitutes a gross irregularity.

After hearing argument, I dismissed the application for lack of merit. The applicant then wrote to the registrar requesting reasons for my decision. The following are the reasons.

The applicable law

The law on review is set out in ss 27 to 29 of the High Court Act [*Chapter 7:06*], which provides what one must allege in order to sustain a review of civil or criminal proceedings of the lower court. Section 27 of the High Court Act states the grounds for bringing a review to the High Court as follows:

“27 Grounds for review

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
 - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
 - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
 - (c) gross irregularity in the proceedings or the decisions
- (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities”.

The applicant in this matter sought to rely on s 27 (1c) of the High Court Act and based on that sought to have the decision of the court *a quo* set aside. In *S v Maphosa* HH 323-13, the court pointed out that:

“... the essential difference between review and appeal procedure is that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal. An election to appeal confines the legal practitioner to matters reflected in the record of proceedings.”

See also *R v Stephens* 1969 (2) RLR 143 (AD)

In *Nyathi* HB-90-03, this court decided that, other than in exceptional cases, the accused is not allowed to use the review procedure to attack the conviction. Normally, the accused must lodge an appeal if he or she is arguing that the conviction was wrong. In the present case, the applicant had been convicted and sentenced to a term of imprisonment. The proceedings had been confirmed on review. His legal practitioner sought to bring the matter on review again. Let me repeat what

the applicant did *in casu*. He attacked the conviction and, in addition, submitted that the proceedings were defective. Additionally, he alleged that the magistrate had not allowed him to secure legal representation. It was suggested that the accused had wished to secure the services of a particular practitioner, but that lawyer died before the trial began. Also submitted was that the court *a quo* had not granted a postponement to enable a defence witness to be called. The court held that the matter should have been taken on appeal. I observe that *S v Nyathi supra* is on all fours with this case, and take the view that the applicant used the wrong procedure to approach this court the application cannot be sustained. The remedy that the applicant sought was best served through the appeal procedure. I am not satisfied that the applicant placed before me anything that demonstrates an irregularity that triggers my intervention by way of review.

Disposition

It is for the reasons given above that I dismissed the application.

Kossam Ncube & Partners, applicant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners