

BRIAN CHIWARA
versus
M. M. NDLOVU N.O
and
THE PROSECUTOR GENERAL N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE; 17 January & 1 February 2023

Opposed Application

D Matimba, for the applicant
Ms K H Kunaka, for the 2nd respondent

TAGU J: This is a court application for review of criminal proceedings in terms of section 26 and 27 of the High Court Act [*Chapter 7.06*].

Background facts

On 19 May 2019 at the 65 km peg along Roy-Chiredzi Road, Zaka, the applicant was involved in a traffic accident with another vehicle namely a Honda Fit resulting in the death of three (3) people who were passengers in the Honda Fit. Investigations were immediately carried out but applicant was summoned to appear at Zaka Magistrates Court on 13 July 2021 to answer a charge of culpable homicide. Witnesses were not present and by consent was remanded out of custody to 12 August 2021. Due to Covid -19. He was remanded out of custody to 7 October 2021. On that date witnesses were not present again. On 26 November 2021 he was removed from remand only to be summoned again on 22 March 2022 where only one witness Robert Chinono testified. The matter was postponed to 14 April to enable the State to call two more witnesses Constable Mukoko and Assistant Inspector Pfuwai. On 14 April 2022 the State secured the attendance of Officer Mukoko and sought a further postponement to secure attendant of Constable Pfuwai. Applicant's legal practitioner opposed a further postponement and made an application for a verdict in terms of s 180 (6) of the Criminal Procedure and Evidence Act [*Chapter 9.07*]. On 26 May 2022 the first respondent dismissed the application for a verdict on the basis that-

- a) “the failure of the State to secure the attendance of the Investigating Officer was not dilatory and did not warrant the present application for a verdict.
- b) the accused has been on remand “only” since the 22nd of March 2022 hence the application for a verdict was premature, and
- c) granting of the application will not be in the public interest considering that three (3) people lost their lives hence Court could not give a verdict considering the nature of the charge.”

Having dismissed the application for a verdict the court enquired if the last witness was available to which the State responded in the affirmative. The court asked the State to call in the witness to testify. This could not take place because the applicant’s legal practitioner indicated that he was filing an application for review at the High Court, hence the present application.

The application is opposed by the second respondent who filed a notice of opposition timeously. However, having been served with the applicant’s Heads of argument, the second respondent failed to file and serve its Heads of argument in terms of the Rule. It only served the applicant on the morning of the hearing. The applicant’s counsel applied for the removal of second respondent’s Heads of argument on the basis that the second respondent was automatically barred since the Heads of argument were not filed in terms of r 59 (21) of the High Court Rules, 2021. In terms of r 59 (22) a respondent who has not filed heads within 10 days shall be barred.

Counsel for the second respondent conceded that the heads were not filed and served in terms of the Rules. She however, maintained that the application is opposed. She attempted to apply orally for upliftment of the bar, but made an error of making that application in terms of r39 (4) (a) (b) of the Rules of this Honourable Court. This was opposed by counsel for the applicant who submitted that r 39 (4) (a) (b) is a bar where one fails to file a plea, and not heads of argument.

The court ruled that the second respondent was automatically barred for failure to file and serve its Heads of argument in terms of the Rules. Consequently, counsel for respondent did not make oral submissions and its heads of argument were not taken into account.

Let me hasten to mention that despite the second respondent having been barred for failure to file heads of argument, this did not mean that the application was unopposed in the face of the Notice of Opposition filed by the second respondent. Its submissions contained in its Notice of Opposition were taken into account.

This is an application for review of unterminated criminal proceedings in terms of s 26 and 27 of the High Court Act [*Chapter 7.06*]. Section 29 provides powers of review of criminal proceedings. The law is very clear on this matter.

BHUNU J (as he then was) in the case of *Munyaradzi Chikusvu v Magistrate T. Mahwe* HH 100/15 had this to say;

“It is trite that judges are always hesitant and unwilling to interfere prematurely with proceedings in the inferior courts and tribunals. In the ordinary run of things inferior courts and tribunals should be left to complete their proceedings with the superior courts only coming in when everything is said and done at that level. In *Masedza & Ors v Magistrate Rusape and Anor* 1998 (1) ZLR 36 this court held that:

“The power of the High Court to review the proceedings in the Magistrates Court is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the Court will review a decision in an interlocutory decision before the termination of the proceedings. it will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant, or the irregularity is such that justice might not by other means be attained.(My emphasis)

The same sentiments were earlier expressed by BERE J in the case of *Tafadzwa Mutumwa and Molly Maka v The state* HH 104/08 when he said;

“Whilst the review jurisdiction of the High Court in un-terminated criminal proceedings from the Magistrate Court is unquestionable, it should be borne in mind that, that avenue must only be pursued in extremely rare situations. The preferred or ideal situation seems to be that superior courts should only intervene at the conclusion of the criminal proceedings in the lower court. One finds instructive guidance from STEYN CJ in the case of *Ismail and Others v Additional Magistrate, WYN BERG and Another* 1963 (1) SA 5-6 where the learned judge stated:

“I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Anor* 1959 (3) SA 113 (AD) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the Magistrate’s decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or error which are to be dealt on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in a court below, and should, generally speaking, confine the exercise of its powers to “rare cases where grave injustice might otherwise result or where justice might not by other means be attained” (my emphasis)

The applicant referred the court among other authorities, to the cases of *Dombodzvuku & Another v Sithole N.O and Another* 2004 (2) ZLR 242 p. 246, *Attorney –General v Makamba* 2005 (2) ZLR 54 (S) in respect of the High Court and Supreme Court’s position vis a vis applications of this nature. In the *Attorney General v Makamba supra*, MALABA JA (as he then was) held at p 64 C that;

“The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularities 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.”

What emerged from the above authorities is that the following ingredients must be present before court intervenes in uncompleted proceedings-

- i) that there are exceptional circumstances,
- ii) arising from a proven irregularity,
- iii) the irregularity has the effect of vitiating the proceedings ;
- iv) resulting in miscarriage of justice;
- v) there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong and
- vi) that there is proven serious prejudice to the rights of the litigant and that the prejudice cannot be addressed by any other means.

According to the case of Attorney-General, *supra*, all the above ingredients must be present before Court intervenes in uncompleted proceedings.

In casu the applicant alleges that in dismissing the application the first respondent acted ultra vires the enabling Act as fully captured in s 180 (6). He said nowhere does the aforesaid section create a third alternative for a Judicial Officer or to take into considerations the alleged gravity or policy considerations of the public losing confidence in the justice system [it is ironic that the First Respondent did not consider the loss of confidence in the justice system caused by the manner the State was handling its case, the very conduct s 180 (6) seeks to provide an antidote for]. According to him this gross and grave irregularity and the resultant injustice done to him, it is unconscionable to wait for the finalization of the proceedings before approaching this Honourable Court for review in the normal way.

The undisputed facts are that the State intended to lead evidence from three witnesses. Two witnesses testified on two different dates. After the second witness testified the State applied for postponement to enable it to secure the third witness. At that stage the applicant made an application for a verdict in terms of s 180 (6) of the Criminal Procedure and Evidence Act [Chapter9.07]. The Section reads:

“(6) Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:

Provided that:-

- (i) where a plea of not guilty has been recorded whether in terms of section two hundred and seventy two or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced,
- (ii) where a plea of not guilty has been recorded, the trial may be continued before another judge or magistrate if no evidence has been adduced or no explanation has been given or inquiry made in terms of paragraph (b) of subsection (2) of section two hundred seventy –one.”

The prerequisite to making an application for a verdict in terms of s 180 (6) are-

- i) the person/applicant must have been called to plead to any indictment, summons or charge;
- ii) a plea of not guilty must have been recorded and evidence adduced, explanation given or inquiry made in terms of paragraph (b) of subsection (2) of Section Two Hundred and Seventy one and
- iii) the demand for a verdict is made to the Judge or Magistrate before whom the accused /appellant pleaded.

The argument by the counsel for the applicant was that by dismissing the application, the first respondent committed a grave irregularity. According to him the first respondent did not have any other option. Once an application for a verdict has been made, the court had to grant a verdict acquitting the applicant or finding him guilty. He therefore submitted that the applicant should have been acquitted because the evidence led did not support a conviction. I tend to have a different interpretation. My understanding is that once a person makes an application, one of the two things will ordinarily happen. Either the application is granted or it is dismissed. Where an application has been granted, the court would decide the nature of the verdict. Either the court would acquit the applicant or find him guilty.

In this case the first respondent dismissed the application and ordered the trial to proceed. The last witness was available. In my view the application was misplaced or premature. The irregularity complained of is not so gross as to vitiate the proceedings. The general rule is that a superior court should intervene 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. *In casu* I found no exceptional circumstances. Even if one were to say there was an irregularity in dismissing the application, which I doubt because the first respondent gave reasons for the dismissal. Such irregularity was capable of being cured by other means. In this case the applicant blocked the leading of evidence from the third and last witness. If the witness had testified, and applicant was of the view that there was no evidence against him, he could have applied for discharge at the close of the State Case. If the application was not going to find favour with the court at that stage, there was a possibility of applicant being acquitted at the close of the defence case. If not acquitted but convicted the applicant, the accused the option of applying for a Review or Appeal. So there were several options available to the applicant.

In the premises I find that the application lacks merit and I will dismiss it.

IT IS ORDERED THAT

1. The application is dismissed.
2. Applicant to pay costs on the ordinary scale.

Matipano and Matimba, applicant's legal practitioners
National Prosecuting Authority, first and second respondents' legal practitioners.