

JELOUS MADZIVA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 6 February 2024

### **Chamber Application – Condonation**

Applicant in person  
*C Muchemwa* with Mr *Mapfuwa*, for the respondent

**ZHOU J:** This is an application for condonation of late noting of an appeal and for leave to prosecute the appeal in person. The application is opposed by the respondent.

The applicant was convicted of rape as defined in s 65 of the Code. He was sentenced to 18 years imprisonment of which four years imprisonment was suspended on condition of good behaviour, leaving an effective prison term of 14 years. The conviction was in terms of the judgment dated 2 August 2018. The instant application was filed in 2023.

In considering an application for condonation the court takes into account the settled factors which include the degree of non-compliance with the rules of court, the explanation therefor, the prospects of success, and the need for finality in litigation, among others. These factors are not considered individually but in conjunction with one another and the application as a whole.

*In casu* the delay is of five years three months. That delay is inordinate.

The explanation tendered for the delay is that there was a delay in obtaining the record and also that the applicant was trying to mobilise resources to enable him to prosecute the appeal. These reasons cannot constitute a reasonable explanation. A failure to mobilise resources cannot explain instituting an appeal more than five years after the judgment that is being sought to be challenged was made. It is entirely the litigant's responsibility to ensure that he mobilises resources for him to prosecute the appeal within the period prescribed by the rules, otherwise every litigant would set out such a fact as an explanation for non-compliance with the rules. Equally,

the delay in obtaining the record is not attributed to the court or any officer thereof. Applicant states that he was relying on relatives to do that and those relatives let him down. They were his agents. In any event, a delay of five years cannot be explained away by simply expecting that the relatives were attaching to the issue of the record.

After a few weeks without progress applicant ought to have taken action to obtain the record of proceedings. The incompleteness of the record has not been proved but in any event five years cannot be accepted as a delay that could be explained by effort to ensure that the record is complete. For these reasons, the explanation tendered for the non-compliance with the rules is unreasonable and unacceptable.

On prospects, the appellant's case is a predictable failure. Sexual intercourse was established through the evidence of the complainant as corroborated by the medical report. The only issue was whether the applicant was the perpetrator of the rape. He has not put in issue his identification by the complainant. Indeed, he does not explain why he would be singled out as the perpetrator. All the evidence shows no bad blood between him and the complainant. On the other hand, the complainant was found by the learned magistrate to have been a credible witness. None of the grounds of appeal impeaches the findings of credibility which in any event is not lightly interfered with by an appellate court. The alleged contradictions are not contradictions at all. A mention of a kitchen and a wooden structure do not constitute a contradiction in the absence of evidence to show that these are different places.

Equally, nothing turns on the issue of the birth certificate, because this rape was not based primarily on the age of the complainant but on the absence of consent. After all, the record shows that the birth certificate was produced in court.

In all the circumstances, the need for finality dictates that this application fails.

**In the result, IT IS ORDERED THAT:-**

1. The application is dismissed in its entirety.