

**REPORTABLE** (32)

**TENDAI KANDIMA**  
**v**  
**THE STATE**

**SUPREME COURT OF ZIMBABWE**  
**BHUNU JA, MUSAKWA JA & MWAYERA JA**  
**HARARE, 2 JUNE 2022 & 31 MARCH 2023**

*T. Gonese*, for the appellant

*S. Dhlomo*, for the respondent

**MWAYERA JA:** This is an appeal in terms of s 80 (1) (a) (i) of the Defence Act [*Chapter 11:02*] (the Act) against the judgment of the General Court Martial handed down on 13 February 2019. The appeal is against conviction and sentence for contravening para 39 (2) (a) of the First Schedule to the Act as read with s 31 (b) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], that is, publishing or communicating false statements prejudicial to the State.

**FACTUAL BACKGROUND**

The appellant was a regular member of the Zimbabwe Defence Forces ("ZDF") holding the rank of Lance Corporal and serving with the school of Military Intelligence. The

respondent is the State represented by the Commander of the Defence Forces (“CDF”) in his capacity as the confirming authority in terms of s 63 of the Act.

On 13 February 2020, the appellant was arraigned before the Court Martial facing a charge of contravening para 39 (2) (a) of the First Schedule to the Act as read with s 31 (b) (i) of the Criminal Law Codification and Reform Act, that is publishing or communicating statements prejudicial to the State.

It was alleged that the appellant, in December 2018 unlawfully and intentionally communicated subversive messages to one Kerina Mujati a Zimbabwean National residing in the United Kingdom knowing that such information was false and capable of undermining public confidence in the ZDF as well as being prejudicial to the Government of Zimbabwe. Sometime in December 2018, the appellant communicated with Kerina Mujati through a WhatsApp platform using a Netone line registered in his name with the username Saunyama. He communicated information to the effect that he as a member of the Military Intelligence together with his friends, were orchestrating a plan to eliminate some high-profile figures in Zimbabwe because they were fed up with them. The high-profile people were identified and these included His Excellency, the Head of State and Government and Commander in Chief of the Defence Forces of Zimbabwe Emmerson Dambudzo Mnangagwa, the Vice President of Zimbabwe Retired General Dominic Nyikadzino Guvheya Chiwenga and the late Foreign Affairs Minister retired Lieutenant General Dr Sibusiso Moyo.

It was further alleged that whilst using the same WhatsApp platform, the appellant communicated to Mujati that he was part of the assailants at Bulawayo White City

Sports Stadium where a bombing incident occurred in 2018. In addition to that, he stated that he poisoned the Head of State back in 2017 in Gwanda. He further asserted on the platform that he was responsible for poisoning the late Foreign Affairs Minister Retired Lieutenant General, Dr Sibusiso Moyo who fell ill sometime in 2018.

Furthermore, in his conversation with Mujati, the appellant acknowledged that he was responsible for the road traffic accident involving a Zanu PF member and Gutu South Legislator, one Pupurai Togarepi. He further pointed out that he had been assigned to assassinate Nelson Chamisa of the Movement for Democratic Change. It is alleged that when the appellant communicated the aforementioned subversive information, he knew that the information was false and capable of undermining public confidence in the Defence Forces of Zimbabwe as well as being prejudicial to the Government of Zimbabwe.

The WhatsApp messages were produced as evidence before the court *a quo* and the appellant pleaded guilty to the charge. He testified that the commission of the offence was motivated by greed because Mujati had informed him that she had been conned of US\$12 000 by one Tongai Mnangagwa who had promised her a farm. On that basis, he testified that Mujati had implored him to assist her so that the person who had defrauded her would be brought to book. He testified that Mujati had pledged to give him €1 000 pounds if he assisted her to recover the lost money. The appellant further testified that when he communicated and peddled the false information it was to entice Mujati to pay him as a man capable of bringing to book the man who had conned her.

After satisfying itself of the genuineness of the appellant's plea of guilt the court convicted and sentenced the appellant. The Court Martial in passing sentence, considered as mitigatory that the appellant had a heart problem and that he was remorseful. Further in mitigation it considered that he had cooperated with the investigations and had pleaded guilty to the charge. On the other hand, it also considered in aggravation, that the appellant was a ZDF member who failed to display a high level of discipline as expected of a member of the force. Further aggravation was the fact that his conduct, in committing the offence, injured the reputation of the defence forces. That the appellant was not a first offender was also taken as aggravation. Consequently the appellant was sentenced as follows:

1. Reduction in rank to private.
2. Discharged with ignominy from Zimbabwe Defence Forces with effect from 13 February 2019 and;
3. 12 years imprisonment with labour of which 2 years is suspended for a period of 5 years on condition that he does not within that period commit an offence involving communicating or publicising falsehoods prejudicial to the State for which if convicted he is sentenced to imprisonment without the option of a fine.

Irrked by the determination of the court *a quo* on conviction and sentence the appellant lodged the present appeal on the following grounds of appeal.

#### **GROUND OF APPEAL AD CONVICTION**

1. It is respectfully submitted that the offence of which the appellant was charged and convicted of namely s 31 (b) (i) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] is inconsistent with provisions of the Bill of Rights as enshrined in the

Constitution of Zimbabwe (Amendment No. 20) s 61 and the appellant will seek a declaration that to the extent of the inconsistency the provisions are void and consequent to such declaration constitutional invalidity the charges are incompetent (sic).

2. The General Court Martial misdirected itself at law in failing to provide the appellant with a legally qualified legal representative in violation of the provisions of s 70 (1) (e) of the Constitution of Zimbabwe (Amendment No. 20) which require the adjudicating authority to ensure that an accused person facing a serious charge is provided with legal representation at the state's expense if substantial injustice would otherwise result.
3. The General Court Martial misdirected itself at law in proceeding to try the appellant without informing him of his entitlement to legal representation by counsel of his own choice as provided by s 69 (4) of the Constitution of Zimbabwe (Amendment No. 20).
4. The General Court Martial did not afford the appellant a fair trial in compliance with the Criminal Procedure and Evidence Act [*Chapter 9:07*] in that the appellant's legal right to be furnished with the trial papers well in advance of the trial proceedings to enable him to prepare his defence was violated.
5. The General Court Martial erred and misdirected itself in proceeding with the trial in circumstances where the Defending Officer had not taken instructions from the appellant prior to the commencement of the trial and such failure constitutes a gross irregularity vitiating the whole proceedings.
6. The learned Judge Advocate erred at law in failing to properly direct on matters of procedures in recording a guilty plea and the confirmation of the guilty plea is bad at law as it did not comply with guidelines set out in case law in respect of unrepresented accused persons.

7. The General Court Martial erred and misdirected itself at law when it returned a verdict of guilty when the facts themselves did not show that the appellant had the intention to communicate the alleged WhatsApp messages to the general public.
8. The General Court Martial erroneously recorded a verdict of guilty when the alleged WhatsApp messages were not produced before it and became part of the court record.
9. In the event that s 31 (b) (i) is held to be valid the General Court Martial erred at law in returning a verdict of guilty as the nature of messages allegedly communicated by the appellant even if true do not constitute an offence as envisaged by the relevant section of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

#### **AD SENTENCE**

Notwithstanding the provisions of s 80 (4) of the Defence Act, it is respectfully submitted that the said provisions of the Defence Act are inconsistent with the Bill of rights enshrined in the Constitution of Zimbabwe (Amendment No. 20) s 69 (11), 69 (3), 56 (1) and 56 (3) as read with the duty to respect fundamental rights enshrined in s 44 and the application of the Bill of Rights [*Chapter 45*] and the appellant will seek a declaration that to the extent of the inconsistency, the provisions are void. And consequent to such declaration, the appellant will submit that a sentence of “reduction of rank coupled with discharge with ignominy from the Zimbabwe Defence Forces and a custodial sentence of 12 years imprisonment,” such a sentence on a proper consideration of facts *in casu* is so severe and grossly unreasonable so as to induce a sense of shock and outrage. (*sic*)

### **SUBMISSIONS BEFORE THIS COURT**

At the commencement of the hearing Ms *Dhlomo* for the respondent, raised a preliminary point to the effect that the grounds of appeal raised by the appellant were fatally defective for want of compliance with s 80 (1) of the Act because they did not relate to questions of law, or questions of fact or mixed law and fact. She submitted that the grounds which were based on extrinsic evidence ought to be struck out and that the matter be struck off the roll. Further, she submitted that the grounds were long and argumentative instead of being clear and concise as envisaged by the rules of this Court. The court decided to roll over the preliminary point and thus allowed both counsel to address it on merits.

On the merits, Mr *Gonese* for the appellant, submitted that the appellant was convicted on a charge that violated the Constitution of Zimbabwe as it was inconsistent with the provisions of the Bill of Rights particularly the right to equality before the law and the right to freedom of expression protected under s 56 and s 61 respectively. He further submitted that s 31 (1) (b) of the Criminal Law (Codification and Reform) Act was void for lack of conformity with the Constitution such that it ought to be declared invalid. He argued that the failure by the court *a quo* to recognise the invalidity resulted in the erroneous conviction and sentence of the appellant based on a nullity.

He further submitted that the appellant was not provided with a legal practitioner who could represent him effectively. He submitted that such failure to afford legal representation was in violation of s 70 (i) (e) of the Constitution. Further, that the appellant was denied the right to a fair trial as he was not informed of the charge against him promptly, and

neither was he furnished with trial papers prior to the trial. It was further contended that the appellant's conviction was improper because despite pleading guilty to the charge the relevant procedure of explaining the essential elements of the crime was not followed.

*Per contra*, on the merits, Ms *Dhlomo*, made the following submissions. She submitted that s 31 (1) (b) of the Criminal Law (Codification and Reform) Act is a valid statutory provision and remained so until it was legally declared to be unconstitutional. She contended that there was no basis to impugn a conviction based on a valid statutory provision. Further, she submitted that it was not correct that the appellant was denied the right to legal representation. She contended that the appellant was given a Defending Commissioned Officer whom he chose to represent him. She submitted that the Defending Officer of the appellant's choice in the Defence Forces was qualified in military law and procedures in military courts. She further submitted that the defending office is recognised by the Military Courts (s 85 (1) of the Defence Forces (Courts Martial Procedure Regulation, 1956) as an officer who provides legal representation to members on trial. She submitted that the appellant was represented by a Defending Officer of his choice.

Further, Ms *Dhlomo* submitted that the plea of guilty was entered at the appellant's own volition and that the Judge Advocate properly and procedurally canvassed the essential elements of the offence to ascertain the genuineness of the plea of guilty. She submitted that the claim that the appellant was not subjected to a fair trial did not appear *ex facie* the record. Counsel contended that it was clear on the record that the charge was put and

understood and that the essential elements of the offence were explained to him, understood and admitted before the conviction.

### **DETERMINATION ON PRELIMINARY POINTS**

The court's disposition on the preliminary points is that although the grounds of appeal were inelegantly crafted and thus essentially long and winding it could easily be discerned that the appellant sought to impugn the conviction and sentence. On that basis, the court dismissed the preliminary points.

### **ISSUES FOR DETERMINATION**

1. Whether or not the court *a quo* erred in convicting the appellant on the basis of an enactment alleged to be inconsistent with the Constitution of Zimbabwe.
2. Whether or not the court erred in subjecting the appellant to an unfair trial without affording him legal representation.
3. Whether or not the Court Martial properly convicted the appellant on his own plea of guilty.
4. Whether or not the sentence imposed was unreasonably harsh so as to induce a sense of shock.

### **THE LAW**

The present appeal was noted in terms of s 80 of the Act which provides as follows:

“80 Appeals

- (1) Subject to this section, an appellant may appeal against conviction to the Appeal Court-
  - (a) On any ground of appeal which involves-
    - (i) a question of law alone; or
    - (ii) a question of fact alone; or
    - (iii) a question of mixed law and fact.”

The appellant was charged with contravening para 39 (2) (a) of the First Schedule to the Defence Act, as read with s 31 (1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

The said para 39 provides as follows:

“Civil Offences

(1) .....

(2) Any member who commits –

- (a) A civil offence other than treason murder or rape; or
  - (b) A foreign offence;
- shall be guilty of an offence in terms of this paragraph”

Section 31 of the Criminal Code reads:

“31 Publishing or communicating false statements prejudicial to the State.

Any person who, whether inside or outside Zimbabwe-

- (a) publishes or communicates to any other person a statement which is wholly or materially false with the intention or realising that there is a real risk or possibility of-
- (b) with or without the intention or realisation referred to in paragraph (a), publishes or communicates to any other person a statement which is wholly or materially false and which-
  - (i) he or she knows to be false;
  - (ii) .....shall, if the publication or communication of the statement-
  - A. promotes public disorder or public violence or endangers public safety; or
  - B. adversely effects the defence or economic interests of Zimbabwe or;
  - C. undermines public confidence in a law enforcement agency, the Prison Service or Defence Forces or Zimbabwe; or
  - D. interferes with, disrupts or interrupts any essential service;

be guilty of publishing or communicating a false statement prejudicial to the State and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.”

The Constitution of Zimbabwe Amendment (No.20) Act 2013 provides in s 70 that:

“70 Right of accused persons.

(1) Any person accused of an offence has the following rights-

.....

(d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;

(e) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result.”

Section 69 provides for the right to a fair hearing in the following words:

(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.”

Section 85 (1) of the Defence Forces (Court Martial Procedure) Regulations is also relevant on legal representation. It provides as follows:

“If an accused person is not represented at his trial by counsel, he may be represented by an officer, who shall be called the defending officer, or assisted by any person whose services he may be able to procure and who shall be called the friend of the accused.”

Section 87 (1) of the same Regulations provides as follows:

“An accused person intending to be represented by counsel shall give his commanding officer or to the convening authority the earliest practicable notice of such intention and if no sufficient notice has been given a Court Martial may, if the court thinks fit, on the application of the prosecutor adjourn the matter.”

Part 5 of the Constitution of Zimbabwe provides as follows:

**“Limitation of rights and freedoms**

86. Limitation of rights and freedoms.

- (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including-
  - (a) the nature of right or freedom concerned;
  - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety order, public morality, public health, regional or town planning or general public interest;
  - (c) the nature and extent of limitation;
  - (d) the need to ensure that the enjoyment of the rights and freedoms by any person does not prejudice the rights and freedoms of others;
  - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
  - (f) whether there are any less restrictive means of achieving the purpose of the limitation.”

### **APPLICATION OF THE LAW TO THE FACTS AND ANALYSIS**

The appellant was found guilty on his own plea of guilty of communicating false statements to Mujati which statements were prejudicial to the State and which he knew to be wholly and materially false. The communication by the appellant had the effect of adversely affecting the defence interests of Zimbabwe as well as undermining public confidence in the Defence Forces of Zimbabwe.

The appellant, in his defence made reference to his constitutional rights, being violated. He sought to rely, *inter alia*, on s 61 which relates to freedom of expression and which provides as follows:

“Every person has the right to freedom of expression, which includes-

- (a) freedom to seek, receive and communicate ideas and other information.”

The argument that the appellant's right of freedom of expression was infringed by the conviction *a quo* cannot hold. First and foremost, it is clear from the Constitution that there are limitations to the fundamental rights falling under chapter 4 under which the right to freedom of expression falls. Section 86 of the Constitution as highlighted above is apposite. It is standard practice that there are limitations to the rights as the rights are not absolute but may be subservient to other rights. Limitations are acceptable to the extent that the restrictions are fair, reasonably necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom.

In the Bill of Rights Handbook, 6<sup>th</sup> Ed, 150 (Juta and Co. Ltd, Cape Town, 2014

Currie and de Waal agree that:

“(c) Constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic value.”

This essentially means that not all alleged infringements of rights are unconstitutional. Rights can be limited or justifiably infringed in the interest of public order and safety among other considerations. In this case the communication by the appellant to Mujati was not only injurious to the Defence Forces but also to State security and public order.

**Whether or not the court *a quo* erred in convicting the appellant for contravention of s 31 (1) (b) of the Criminal Law (Codification and Reform) Act.**

The appellant sought to challenge his conviction on the basis of alleged infringement of his right to freedom of expression. In essence the appellant is seeking a declaration of constitutional invalidity of s 31 (1) (b) of the Criminal Law (Codification and

Reform) Act. A reading of that section shows that it criminalises publication of information which endangers public safety and order. Section 86 of the Constitution spells out limitations to rights to serve important legitimate, legislative or governmental purposes. Section 86 (2) lists acceptable purposes of the limitation of rights including that the limitation should be necessary in the interests of defence, public safety, public order, public morality, public health, regional town planning or the general public interest.

As occurred in this case, the publication of false allegations to Mujati on the alleged plot to eliminate high profile figures in Zimbabwe not only placed at risk the public figures, but also undermined the public confidence of citizens in the Zimbabwe Defence Forces and further endangered public safety and order. The offending section is actually in conformity with the provisions of s 86 of the Constitution.

In any event, by seeking that this Court makes a declaration on the validity or otherwise of s 31 of the Criminal Code the appellant sought to have this appellate court sit as a court of first instance. The remarks by GARWE JA (as he then was) in *Mlilo v The President of the Republic of Zimbabwe* SC 179/20 at para 36 are apposite.

“In any event the submissions that an appeal against an order of constitutional validity should lie to the Supreme Court and not the Constitutional Court would result in a patent absurdity. The Supreme Court is an appellate court and does not itself deal with matters at first instance. It does not itself declare, at the first instance, an Act of Parliament to be valid or invalid. Its powers in terms, of s 22 of the Supreme Court Act, are to confirm, vary, amend, or substitute the order appealed against. If it amends the order of the lower court, that amended order becomes the order of the lower court. Similarly, where it substitutes an order, that order becomes the order of the lower court.” (Underlining emphasis)

In any case the Appellant cannot bring in an application for the declaration of invalidity of the Act of parliament without citing the relevant responsible Minister.”

The grounds of appeal relating to the invalidity or otherwise of the charge cannot therefore be sustained in the circumstances.

**Whether or not the court *a quo* erred by subjecting the appellant to an unfair trial, by failing to inform him of his entitlement to legal representation by legal practitioner of his own choice.**

It is trite that s 70 of the Constitution guarantees an accused person the right to choose a legal practitioner of his or her choice and also the right to be represented by a legal practitioner assigned by the State. See s 70 (1) (d) and (e). Section 69 of the Constitution which provides for the right to a fair hearing further emphasises the right to choose and be represented by a legal practitioner before any court or tribunal.

It is not in dispute that the appellant, when he appeared before the Court Martial, was entitled to legal representation. Section 85 (1) of the Defence Forces (Court Martial Procedure) Regulations, 1956, confirms the right to legal representation. It is restated hereunder for convenience:

“If an accused person is not represented at his trial by counsel, he may be represented by any officer, who shall be called the defending officer, or assisted by any person whose services he may be able to procure and who shall be called the friend of the accused.”

Furthermore, s 87 (1) of the Defence Forces (Court Martial Procedure) Regulations, 1956, regulates the procedure to be followed for one to procure legal representation. It provides as follows:

“An accused person intending to be represented by counsel shall give his commanding officer or to the convening authority the earliest practical notice of such intention and if no sufficient notice is given a Court Martial may, if it thinks fit, on the application of the prosecution adjourn the matter.”

Both the Defence Regulations and the Constitution recognize the need for legal representation. The appellant was afforded legal representation by a Defending Officer. The appellant, on appeal, avers that he was not represented because the Defending Officer was not qualified and did not act according to his instructions. However, a reading of the record *a quo* reveals that the Judge Advocate actually enquired from the appellant if there were any special pleas and objections and the Defence indicated that there were none. If at all the appellant was not satisfied with the Defending Officer representing him, it was open to him to inform the court so as to be given the chance to change the Defending Officer for another, or to secure legal representation of his own choice. Further, the argument that the Defending Officer was not qualified cannot be sustained because the Defending Officers appointed in terms of the law may be legal practitioners or if not, one should be an officer well versed in Martial law and operations of the Martial Court. The appellant was defended *a quo* by a defending officer by consent without any protestation.

**Whether or not the plea of guilty was properly adduced**

The appellant's argument that he was convicted without the court *a quo* satisfying itself that the plea of guilty tendered was unequivocal and genuine cannot stand considering that he was legally represented. In fact, the court *a quo* actually proceeded to record the plea in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The court *a quo* entered a plea of guilty in accordance with his plea. It went further to read the facts which were not disputed by the appellant. It explained the essential elements of the offence to him in order to ascertain if the appellant entered the plea of guilty

from an informed position. After satisfying itself of the fact that the appellant appreciated the essential ingredients of the offence, the court concluded that the guilty plea was genuine and unequivocal. It thus returned a verdict of guilty.

The record of proceedings *a quo* reveals that the appellant was afforded a fair hearing and was also afforded legal representation. All the grounds of appeal challenging the issues relating to the right to a fair trial and legal representation cannot be sustained in the circumstances.

### **Sentence**

The last issue relates to whether or not the sentence imposed by the court *a quo* was unduly harsh and or unreasonable. The reasons for sentence by the court *a quo* took into account all mitigatory and aggravating factors. The court *a quo* properly weighed these and considered the nature of the offence, the offender and societal interests. The Court properly weighed these and came up with an appropriate sentence. There is no basis for interfering with the sentencing discretion which was properly exercised.

In any event, as properly observed by the court and conceded by both counsel, a reading of s 80 (1) as read with s 80 (4) (i) essentially reveals that an appeal against the sentence of a Court Martial does not suspend the operation of the sentence. Section 80 (4) provides that “subsection (i) shall not affect the operation of any sentence of a Court Martial other than a sentence of death.” See also *S v Mugoni* 1994 (2) ZLR 184A at p. 193F.

The grounds of appeal against both conviction and sentence have no merit and cannot be sustained. The appeal must fail in its entirety.

Accordingly, it is ordered that:

“The appeal be and is hereby dismissed in its entirety.”

**BHUNU JA:** I agree

**MUSAKWA JA:** I agree

*Lawman Law Chambers*, appellant’s legal practitioners

*National Prosecuting Authority*, respondent’s legal practitioners