

PRICCILAR VENGESAI  
versus  
HOSEA MUJAYA N.O  
and  
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE  
KWENDA J  
HARARE, 15 December 2020, 30 March 2021 and  
7 February 2022

### **Application for Criminal Review**

*T Musarurwa*, for the applicant  
*T Mapfuwa*, for the respondents

KWENDA J: The applicant is on trial before the Regional Court of the Eastern Division of two charges of bribery as defined in s 170 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. The allegations being that on or around 26 June 2014 she corruptly offered JUSTICE FELICIA CHATUKUTA, a High Court Judge some money as a reward for rendering judgment favourable a certain company known as Avondale Holdings (Pvt) Ltd in case No. HC 4018/14.

In the other count she is alleged to have corruptly offered Public Prosecutor Michael Reza, \$500 as an .....for him to decline prosecution in case No. CR Harare Central 55/09/14.

She is alleged to have sent text messages to the judge on two occasions requesting to see the charge. On the 26<sup>th</sup> of June 2014 she was allowed access to the judge in her chambers where she told the judge that she had been sent to present a token of appreciation on behalf of Avondale Holdings whereupon she pulled out an envelope, removed a ward of money which she offered to the judge. The judge declined the offer but had recorded the conversation.

With respect to the second count having been arrested for the failed attempt to compromise the justice, on the 24<sup>th</sup> and 27<sup>th</sup> April, 2018 she made contact with Prosecutor Michael Reza who had been allocated the docket to study and prosecute. Michael Reza set a trap and the applicant was observed by Detectives handing over \$500 to the prosecutor.

The accused pleaded guilty to all charges. She was represented by one *Admire Rubaya*, a legal practitioner. On the 9<sup>th</sup> August 2018 Mr *Rubaya* renounced agency for personal reason not disclosed.

One *Rumbidzayi Venge* a legal practitioner, assumed agency on the 14<sup>th</sup> August 2018. On the 15<sup>th</sup> August 2018 the applicant sought a postponement through counsel in order to prepare for the trial which the trial magistrate granted grudgingly giving the applicant one day to engage Advocate *Musarurwa* on the advise of Ms *Venge*. Upon perusing the papers, Mr *Musarurwa* was of the opinion that the applicant would not receive a fair trial since Michael Reza who was the informant in count 2, was a close associate of the Presiding Magistrate who is the first respondent in this application. The applicant's defence team led by Mr *Musarurwa* were accompanied to the respondent's office where efforts to convince him to step down as the Presiding Officer where unsuccessful. The applicant made an application for the first respondent recusal in an open which was refused.

The applicant then applied for time to prepare for trial which was dismissed. Advocate *Musarurwa* and Ms *Venge* hen decided to and did step down as applicant's legal representatives. They asked to be excused and the trial progressed with the applicant unrepresented by counsel.

The applicant was aggrieved by the and other decision made by the first respondent as the trial progressed. She formed the opinion that he was biased against her. She therefore filed this application for review on the 20<sup>th</sup> of August 2018.

She seek the reliefs paraphrased below:

- (1) That the first respondent's refusal to recuse himself be set aside.
- (2) The first respondent's refusal to postpone the trial to enable her counsel to take further instructions from her be set aside.
- (3) That the proceeding be quashed and recommenced before a different Magistrate.
- (4) That the second respondent (Prosecutor General) removed the Prosecutor Tinashe Makaya and replace her with another.
- (5) Costs

The applicant subsequently filed a chamber application to stop the trial pending the review. On the 5<sup>th</sup> September 2018 this Court granted the order staying the trial pending the review. Thereafter the applicant did not prosecute the application for review resulting in the

second respondent filing and application almost a year later on the 7<sup>th</sup> of May 2019 dismissal of the application for review.

The second respondent's application for dismissal was premised on the grounds that he had opposed the application for review on the 12<sup>th</sup> of September 2018 and thereafter, after filing an answering affidavit on the 5<sup>th</sup> October 2018, the applicant had not set down her application for review for hearing. The second respondent's application for dismissal was in terms of r 236(4) of the High Court Rules, 1971.

The Registrar refused to set the second respondent's application despite several requests. The reason advanced by the Registrar and correctly so, was that the second respondent had complied with r 238 of the High Court Rules 1971 in that he had failed or neglected to file heads of argument r 287 is worded as follows.

Meanwhile on the 13<sup>th</sup> of June 2019 the applicant had her application for hearing on the motion court as unopposed. Fortuitously the Presiding judge, JUSTICE CHAREWA, discovered there was another matter No. HC 3758/19 being the application for dismissal, which was still pending. JUSTICE CHAREWA therefore removed the review application from the roll.

The applicant once again was happy to let sleeping dogs lie and she did not do much to progress her application for review until sometime except to file a blank notice of set down from November 2020. When the anti-corruption became aware through routine audit that there were two matters which were lying the applicant's review application for review and the second respondent's application for dismissal.

The applicant was content that the trial before the second respondent had been indefinitely stayed in September 2018.

The audit led to an instruction than the matter be set down.

The essence of this application is that the first respondent made two wrong decisions and the second respondent should be ordered to replace the prosecutor handing the applicant's trial.

The applicant has not advanced any grounds for the removal of the prosecutor. She has not approached the Prosecutor General. There is therefore no decision to be impugned.

In regards to the first applicant there is nothing unprocedural about the manner in which the process undertaken by the first respondent which led to his decision to refuse to recuse himself as to postpone the trial.

He gave the parties to ample the trial opportunity to present their respective arguments before ruling the matter. The law gives him as the presiding judicial officer the competence to rule in the matter at his discretion. If his decision is wrong then that becomes subject of an appeal the distinction between a review and an appeal has been stated. It is stated as follows:

There is of course insistence by litigants on the review procedure in circumstances where they should be appealing taking advantage of the thin line between the definition or the phrases “a wrong decision”, a misdirection and a decision so wrong and irrational that no reasonable court acting careful could arrive at the decision.

That is a pointless debate. A review is concerned about the procedure adopted by a court which then leads to the decision. If it is the thought process adopted after the correct procedure has been followed or the decision itself which is under attack the correct way of challenging the outcome is an appeal.

However I need to emphasise that in incomplete proceedings the debate should not even arise. Review and appeal should normally take place after a matter has been determined with finality. A court may make decision which may turn out to be wrong when later scrutinised by a superior court at the conclusion of the trial. However that does not mean that a superior court should descent into the arena of a trial and tick boxes as the trial progresses far to do so would be to interfere with a judicial function.

Therefore with respect to uncompleted proceedings what must be pleaded is not only that the proceedings are reviewable but in addition to that the applicant must specifically show that the court below committed a procedural irregularity which vitiates the proceedings. Short of that all incorrect decisions stand to be corrected on appeal or review at the conclusion of the trial.

For the avoidance of it does not matter that the decision made may be wrong, the applicant must plead irreparable harm in order to succeed to have incomplete proceedings reviewed.

*F G Gijima and Associates*, applicant’s legal practitioners  
*National Prosecuting Authority.*, respondent’s legal practitioners