

ELVIS MUCHERI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHIKOWERO J  
HARARE, 19 September and 8 October 2019

### **Chamber Application**

#### **CHIKOWERO J:**

1. The applicant, following a full trial, was convicted of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
2. The judgment was rendered on 30 November 2017 by the Regional Court sitting at Harare.
3. On the same date, the applicant was sentenced to 16 years imprisonment of which 2 years imprisonment was suspended for 5 years on the usual conditions of good behavior.
4. On 15 August 2019 the applicant, under CON 231/19, filed an application for leave to appeal (against both conviction and sentence) out of time.
5. On 6 September 2019 the respondent filed a response to the application. It conceded to the application on the two bases that the intended appeal against conviction had prospect of success and that the applicant had tendered a reasonable explanation for not having appealed in time.
6. Satisfied that the concession was properly made, I disposed of the application in chambers on 19 September 2019 by granting an order in the following terms:
  - “1. the application for condonation and extension of time within which to note an appeal be and is granted.
  2. applicant shall note an appeal against the conviction and sentence in CRB R 819/17 within ten(10) days of service of this order upon him.
  3. the Registrar of the High Court shall serve the order on the applicant who shall sign to acknowledge such service.

4. the Registrar shall file proof of such service”
7. On 8 October 2019 the Registrar again placed the record before me together with a memorandum pointing out that the clerk of court refused to accept the applicant’s notice of appeal on the basis that the applicant did not obtain leave to prosecute the appeal in person. Consequently, the Registrar was seeking directions.
8. Exercising the High Court’s powers to regulate its own processes, and in light of the applicant’s status as a self-actor, I proceeded to grant leave to the applicant to prosecute the appeal against conviction and sentence in person. I granted the order on 8 October 2019.
9. On 19 August 2022 (this was during vacation), I found the record on my desk for the third time. It was accompanied by letter dated 11 June 2022 wherein the applicant was requesting written reasons for the orders that I granted on 19 September 2019 and 8 October 2019.
10. On perusing the record, I observed that it now contained a judgment handed down by CHITAPI J on 31 December 2019 in an application for bail pending appeal. The judgment is under the name *Elvis Mucheri v The State* HH 120/20 B 1845/19, Ref CA 651/19, Ref CON 94/19, Ref CON 231/19.
11. In addition to striking the application for bail pending appeal off the roll CHITAPI J also observed that my orders of 19 September 2019 and 8 October 2019 had been granted in error. He set them aside.
12. The reasons for taking this course appears on pp 5-6 in HH 120/20 where CHITAPI J said:

“In this matter, it was not brought to the attention of CHIKOWERO J when he decided the application for condonotaion that MANZUNZU J in the exercise of the same powers and jurisdiction as exercised by CHIKOWERO J had dismissed the application in an earlier order. Had CHIKOWERO J been made aware of the prior application and its determination on the merits , the learned judge would have struck off the roll the condonation application on the basis that it had already been determined, see *Triangel Ltd v Mukanya and Others* HH 105 /17; *Unitrack (Pvt) Ltd v Telone* SC 10/18. The judgment of CHIKOWERO J was therefore granted in error. It must be set aside. The purported appeal No CA 651/19 was filed in consequence of an order of condonation which was granted in error. The setting aside of the order of CHIKOWERO J has the effect that the order of MANZUNZU J, is the one which remains extant. In short there is no valid appeal or pending appeal before this court on which the application for bail pending appeal may be founded or anchored.”

13. In dealing with the application for bail pending appeal on 31 December 2019, CHITAPI J had observed that MANZUNZU J had dismissed the applicant's application for condonation for late noting of appeal, under CON 94/19, on 27 May 2019. He also observed that my orders, of 19 September 2019 and 8 October 2019, under a subsequently filed application for condonation (CON 231/19) were erroneous in that the High Court's jurisdiction to determine the application for condonation had been fully exercised and exhausted, on the merits, by MANZUNZU J.
14. At the time that I entertained and determined the application for condonation I had not been made aware that a similar application had already been dealt with and disposed of by MANZUNZU J, otherwise I would have struck off the application from the roll of chamber applications.
15. Now that I am aware that I granted the application for condonation in error, it would be sanctioning an abuse of court process to delve into the merits of the chamber application for the purpose of availing detailed reasons why I granted that application. Furnishing such detailed reasons in the circumstances would also be academic.
16. I take this view because the order should not have been granted in the first place. It was granted in error.

*The National Prosecuting Authority, respondent's legal practitioners.*