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CRB NO. GT 1022-24/18
GT 624-20
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GT 533-20
GT 129-30/20
GT 16,20 & 24-20
GT 12-20
CHATS 8-20
GT 55-8/20
GT 388-20
GT 146-20

1. THE STATE
vs
BENJAMIN MUVADI
and
KUDAKWASHE MUMUNODAWAFA
And
LEONARD MUTERO
2. THE STATE
vs
TINEI CHITSA
3. THE STATE
vs
GEORGE MACHEKA
and
MURIMA KUDZAI
4. THE STATE
vs
JOSHUA CHIRELELE
5. THE STATE
vs
MATTHEW KUNEDZIMWE
6. THE STATE
vs
CEPHAS SIBANDA
and
BLESSED NYAMBIRA

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7. THE STATE
vs
KUDZAI MURIMA
8. THE STATE
vs
KUDZAI MURIMA
9. THE STATE
vs
SIMBARASHE PAKURA
10. THE STATE
vs
VIRGINIA NGWERE
and
BENSON MUTIMUDYO
and
SHELTON MUTIDYO
and
DECISION MUTIMODYO
11. THE STATE
vs
DEBORAH CHIGWENA
12. THE STATE
vs
MUPAWAENDA MAWERE

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HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J
MASVINGO 10 June, 2021

Criminal Review

MAWADZE J: The sole issue which fails for determination in all these twelve (12) cases is the correct procedure to be followed where a trial magistrate resigns and leaves uncompleted criminal proceedings or matters.

All these twelve records were referred to this court by the Gutu Resident Magistrate under cover of a minute dated 28 April 2021 which I received on 5 May 2021. The said minute reads as follows;

"Please place these records of proceedings before a High Court Judge with the following request.

The magistrate who dealt with the matters has since left service without having finalised the cases. We therefore request that the proceedings be reviewed with a request for a trial de novo.

Below is a table which shows the stages of the various cases."

It is apparent that the said minute was not copied to the Prosecutor General to solicit for the said Prosecutor General's comments. The state is *dominus litis* hence the need for an input from the Prosecutor General. It is for this reason that I referred the records to the Prosecutor

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General for his or her views. I am indebted to Mrs Muhwandavaka, the Chief Public Prosecutor for her *albeit* brief but informative views.

Before dealing with the material issue in this review judgement I wish to briefly make some few observations in respect of all the twelve cases,

I am deeply saddened by the fact that the then Gutu Resident Magistrate accumulated so many partly heard criminal matters. While I am not privy as the pressure of work Mr Mohamadi the then Gutu Resident Magistrate experienced it is clear that most of these cases were very mundane, simple and straight forward. They could have been disposed of without much ado. The delay to finalise most of them is clearly inordinate, inexplicable and not *ex facie* the records themselves. It is surprising that most these cases were being remanded ad infinitum. A brief examination of each case in their respective order or sequence reveal the following;

1. The correct position is that this matter was due for judgement and not at defence case stage as per the referral minute. The 3 accused persons are facing a charge of robbery. They had even called defence witnesses. They all ended up defaulting court on 22 January 2020. No judgement had been written.
2. This case is erroneously stated as at state case stage. It is in fact at defence case stage. The accused is being tried for having sexual intercourse with a young person.
3. In this matter of stock theft, the trial Prosecutor had written and filed closing submissions on 25 November 2020. The matter was simply due for judgement.
4. This is an assault case. Closing written submissions had been filed on 1 December 2020 and only reasons for judgement are unavailable.

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5. In this case the accused is being tried for contempt of court. All evidence was led. The trial magistrate amazingly wrote an incomplete judgement covering just one page and abandoned the task or process for unclear reasons.
6. The two accused person in this case were being charged for unlawful possession of dagga. The case is at state case stage. For unclear reasons the trial magistrate ordered that the state proceeds by way of summons.
7. and 8.
These two cases refer to the same accused persons who was being charged of stock theft in both cases. In the first matter it is incorrect that the case was at defence case stage as the trial Prosecutor had written and filed closing submissions. The matter awaits judgement.
In the second matter case the defence case was closed and surprisingly further remand was refused and the state was ordered to proceed by way of summons when in fact what is outstanding is the judgement.
9. The accused in this matter was charged with indecent assault. He defaulted court after close of the defence case. Police later re arrested him. The warrant of arrest was then confirmed. For unclear reason the State was then ordered to proceed by way of summons when the judgement was due.
10. This is an assault case. The accused apparently defaulted court. It is not clear as to why it is endorsed on the record that the State should proceed by way of summons when the accused should be on a warrant of arrest.
11. Again this was a simple assault case. After the defence case was closed the trial

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Magistrate in his predictable fashion wrote an incomplete one page judgement and abandoned the process midstream.

12. This matter relates to Domestic Violence. It is at defence case stage.

My respectful view is that the then Gutu resident magistrate Mr Mohamadi simply failed to manage these cases properly with due diligence in a professional manner to ensure expeditious delivery of justice. In most of the cases all the other players would have performed their expected roles. I would want to believe that there could also have been inadequate administrative supervision of the said then Gutu resident magistrate to ensure that he did not sleep on the wheel as it were but to perform his judicial responsibilities diligently.

It is now needless to mention that the consequences of such a lethargic approach to judicial responsibilities has come to haunt the justice delivery system. The wheels of justice simply stalled. The process may have to be started all over again much to the chagrin of all players involved. This would inconvenience all parties and it causes financial burden on the fiscus as the police will again have to resummon state witnesses and the state has to meet the witnesses expenses. Meanwhile the backlog of cases would continue to balloon. It is therefore critical that judicial officers properly and efficiently manage their partly heard matters to avoid such a scenario.

I now turn to the merits of the matter as it were.

In the case of *State v Robson Mutero HH 278-14* at page 2-3 of the cyclostyled judgement I dealt with different scenarios in which criminal proceedings are aborted or remain complete due to the unavailability or incapacitation of the presiding judicial officer (magistrate). I find no reason to regurgitate these various scenarios. See also *State v Catherine Murakata & Mavis Murakata HMA 39-18*.

A similar issue was dealt with by MUSAKWA J (as he then was) in the case of *State v Brian Mugodhi HH 104-17*. In that case the learned JUDGE made specific reference to the provisions of section 180 (6) and section 334 (7) of the Criminal Procedure and Evidence Act [Chapter 9:07] when he said;

"Except as provided for in section 180 (6) and section 334 (7) I know of no other provision that permits a magistrate to continue a matter that was commenced before another magistrate who had died. Therefore, when a judicial officer dies before proceedings are completed, those proceedings become a nullity except for those situations as provided for in section 180 (6) and section 334 (7)."

The only difference is that *in casu* the judicial officer has not died but has resigned. He is now incapable of completing these partly heard matters. Again this scenario, in my view, is a well beaten path.

It is my respectful view that where a magistrate retires or is incapacitated or becomes *funtus officio* the incomplete criminal proceedings before such a magistrate become a nullity. This means they would have to be started *de novo* before a different magistrate except in situations provided for in section 180 (6) and section 334 (7) of the Criminal Procedure and Evidence Act [Chapter 9:07]. See *State v Gwala & Others 1969 (2) SA 227*; *State v Makoni & Ors 1975 (2) RLR 75*; *Attorney General v Gavaza 1984 (2) ZLR 212 (S)*. *State v Tsanagaizi 1997 (2) ZLR 247 (H)*, *State v Likwenga & Ors 199 (1) ZLR 498 (H)*; *Chimuza v Dzepasi HH 487-15*.

John Reid Rowland in *Criminal Procedure in Zimbabwe* at 28-6 also drives this point home as follows;

"If evidence has been led and the presiding magistrate dies or is incapacitated (other than temporarily) the proceedings must be regarded as a nullity and the accused may be tried again. It would not be permissible for a new judicial officer to start from where the former

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left off. If the judicial officer retires or resigns, the proceedings are abortive (except to the extent that a JUDGE of the High Court or Supreme Court may complete proceedings begun by him and lapse without having to be set aside)."

As an aside, I have wondered why such an exception availed to Judges of the High Court and Supreme court should not be availed to magistrates. Administratively would there be any harm, if circumstances so permit, to recall a magistrate who would have resigned (or retired) to come and complete partly heard matters? This would not only save time and resources but would be less inconvenient to all the parties involved. The magistrate who would have resigned may simply be recalled and clothed with the necessary judicial power to enable him or her to specifically dispose of partly heard matters and nothing else. I am however mindful of the fact that this may only be possible if the resignation was less acrimonious and did not arise as a result of improper or unacceptable conduct. Would this harm the interests of justice? These are simply my thoughts and I have said this without the benefit of meaningful research and or argument.

Turning back to the matter at hand I agree entirely with the Prosecutor General's views.

In casu the then Gutu resident magistrate resigned. I am not privy as to the circumstances of his resignation (and they are immaterial in this case). The fact is that he left the criminal proceedings in all the twelve cases incomplete after the accused persons had pleaded to the various charges and evidence led. No verdict had been pronounced and he is incapacitated to pass such verdict.

The proper procedure or way to deal with all these 12 cases is to set aside the proceedings. A trial *de novo* in each matter should be held by a different magistrate or magistrates.

I also entirely agree with the sentiments expressed by Mrs Muhwandavaka for the Prosecutor General when she said;

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"On the strength of authorities cited above it would not have been necessary for the current Gutu Resident Magistrate to approach the High Court to sanction a trial de novo. Such a trial can take place without the High Court so ordering. In casu the trial magistrate became functus officio on the date he left the bench and the proceedings abortive and nullity."

Be that as it may, I am now seized with the matters and for clarity and avoidance of doubt I proceed to make the following order;

It is ordered that;

1. The incomplete proceedings in respect of all the twelve (12) cases cited herein be and are hereby quashed or set aside.
2. All the twelve (12) cases be and are hereby remitted for a trial *de novo* before a different magistrate or magistrates of competent jurisdiction.

ZISENGWE J: - I agree.....

CC: National Prosecuting Authority - Masvingo