

REPORTABLE (30)

(1) JENNIFER WILLIAMS (2) MAGODONGA MAHLANGU (3)
CLARA MANJENGWA (4) CELINA MADUKANI

v

(1) CO-MINISTERS OF HOME AFFAIRS (2) COMMISSIONER
GENERAL OF POLICE (3) ATTORNEY GENERAL OF
ZIMBABWE

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, MAKARAU JA
GOWORA JA & OMERJEE AJA
HARARE, JUNE 14, 2012 & JUNE 5, 2014**

L Uriri, for the appellants

R Goba, for the respondents

ZIYAMBI JA: This application is brought in terms of s 24(1) of the Constitution of Zimbabwe which provides as follows:

“24 ENFORCEMENT OF PROTECTIVE PROVISIONS

(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress”.

The applicants, who are members of an organisation called Women of Zimbabwe Arise (WOZA), a non-profit organisation which seeks to advance the rights of women in Zimbabwe, allege that their various rights enshrined in the Declaration of Rights as set out below were violated by the respondents.

THE BACKGROUND

The applicants were arrested during the course of a demonstration, on 15 April 2010, against what they alleged to be the appalling service provision from the Zimbabwe Electricity Supply Authority (Zesa), and detained at the Harare Central Police Station. The first applicant is the Director of WOZA.

It was alleged by the first applicant that on arrival at the police station, she was ordered by police officers at the Law and Order Section to remove her shoes, jacket and brassiere causing her to remain with a single top and bottom. She felt violated by being forced to remove such an intimate piece of apparel and deposit it with the police. She was shocked to be handed a filthy bag in which to place such intimate wearing apparel as well as her outer clothing and personal belongings and this made the whole exercise 'all the more dehumanising'.

She was force marched, barefoot on a dirty floor, to the holding cells where her senses were assaulted by the choking smell of human excreta and flowing urine of varying colours. The holding cells were 'full to overflowing' with human excreta and the built-in beds were also covered with the same. The lights did not work and the entire atmosphere was damp and dark without any fresh air. She spent the night in one of the corridors huddled up together with second, third and fourth applicants even though urine flowed there as well.

During the night, she discovered that the toilet was within the cell. When she needed to relieve herself she had to wade through a pool of urine. The toilets had no running

water and were full of human excreta. She later discovered that this was because the toilets are flushed from outside and are thus flushed at the pleasure of the police officers who did not do so often judging by the fact that excreta from the toilet was flowing into the cells.

There was no toilet paper and she was refused permission to carry her own. The toilet bowl is not partitioned from the rest of the cell and it was not possible to relieve oneself in privacy. She had to use the toilet in full view of the other occupants of the cell.

No sanitary provisions were made for menstruating women, such as washing and disposal facilities and provision of sanitary towels.

During the night, she requested blankets for warmth and was given three blankets, which reeked of urine, for use by the sixteen detainees in the cell.

There was no shower, no bathing or ablution facilities and no drinking water was available. She had to depend on the kindness of those who visited her for that.

Although certain cleaners came to mop the floor, they confined themselves to cleaning the corridors and the cells were not cleaned. She was given no food by the police and had to rely on the food brought to her by friends and relatives. However, that was unpalatable as she had to eat it in the corridor of the same cell which was overflowing with excreta. She spent five nights in the cell under these conditions and her complaints to the police fell on deaf ears.

The other three applicants associated themselves with these averments. In addition, the second applicant alleged that her mobile phone, which she was made to surrender to the police at the time of her detention by them, had been tampered with.

The applicants claimed that in view of the above, their constitutional right to protection from torture or to inhuman and degrading treatment or punishment as enshrined in s 15(1) of the Constitution of Zimbabwe was violated by the respondents.

They alleged also that the failure to make provision for the peculiar needs of women, for example, sanitary facilities as set out above, amounted to discrimination against women in violation of s 23 of the Constitution.

In essence, the applicants aver that the circumstances in which they were detained, as narrated above, deprived them of protection of the law guaranteed in s 18 of the Constitution, constitute inhuman and degrading treatment prohibited under s 15 of the Constitution, and amounted to a violation of their right enshrined in s 23 of the Constitution to be protected from discrimination on the basis of sex. They sought *declaratur*s to the effect that their constitutional rights enshrined in those sections of the Constitution had been violated as well as certain consequential relief.

The respondents opposed the application and relied on the affidavit of the second respondent. They denied that the conditions in the cells were as deposed to by the applicants. They averred that it is procedural for detainees to be made to remove some of their apparel. This is standard procedure and is provided for by s 41 of the Criminal Procedure and Evidence Act [*Cap 9:01*] (“the Act”) as read with Police Standing Orders

Volume 1. Arrested persons, they averred, are searched by the arresting detail in strict compliance with the terms of the Act and particularly s 41(4) of the Act with reference to women, and all money and articles connected with an offence as well as all things which a prisoner could use to cause harm to himself or others or which could be used to effect his escape are collected from the arrested persons. They denied that the applicants were ordered to remove their ‘undergarments’ because ‘the law does not allow it’ but did not deny that they were made to remove their brassieres. Whatever was meant to be conveyed by the term ‘undergarments’, the respondents’ attitude, as expressed in their heads of argument as well as in oral argument before us, that brassieres are not necessary wearing material within the meaning of s 41 of the Act would appear to support the applicants’ averment that they were made to remove their brassieres. Indeed the respondents in their heads of argument submit:

“The Applicants contend that they were made to remove their undergarments and in their founding affidavit the undergarments are specified as brassiere. They argue that it is necessary wearing apparel. Although the brassieres are mentioned in their founding affidavits, in their heads of argument they simply use the word undergarments, which ordinarily would include panties. However since applicants’ case is founded on their founding affidavits, *Respondents submit that what Applicants were made to remove were their brassieres.*” (My emphasis)

We therefore resolve this apparent dispute of fact in favour of the applicants.

It was not denied that the applicants were made to remove their shoes as this was ‘standard procedure’.

In response to the allegation that the light in the cell was not functioning, they averred that the lighting system at the police station is fully functional.

While the location of the toilet within the holding cell was admitted, it was denied that the applicants had to wade through urine. The reason given for the denial was that, if that had happened, the applicants would have contracted a disease of some sort. They maintained that there is running water at the police station and denied that there was human excreta flowing into the holding cell from the toilet.

They averred, further, that it is standard procedure that a police detail is placed on guard duty at the cells to deal with detained persons' requests. Where no member is placed on guard duty all suspects are to be visited at least every half hour. Such visits are recorded in the charge office diary or report book maintained for this purpose. [However neither the diary nor the report book was attached to the opposing affidavit.]

They maintained that although no toilet paper is kept in the cells, it is issued upon request. While it was admitted that no sanitary provisions are made for menstruating women, the women are permitted to bring their sanitary requirements. They added that these concerns are being addressed by a committee set up by Cabinet to look into the conditions of police and prison cells, which committee is expected to make recommendations on how best to improve the detention conditions of suspects and convicted persons.

It was denied that the blankets given to the applicants were dirty although, by virtue of the number of detainees in the cells, they could have been inadequate.

According to police standards, so they averred, prisoners are to be supplied with good drinking water and sufficient wholesome food. The inadequacy of these provisions is also one of the matters being looked into by the committee.

It was denied that the cells were unclean as deposed to by the applicants because, so it was averred, general hands scrub the police cells daily with detergent and disinfectant during the daily prisoners' exercise period of thirty minutes and the Officer in charge arranges for daily inspection of the cells. The court was urged to inspect the cells in order to ascertain the actual conditions prevailing thereat.

An inspection of three cells was undertaken at the Harare Central Police Station, the applicants being unsure of the actual cell in which they were detained. It is common cause that all the cells are structurally standard.

It was apparent that great effort had been made to clean the floors of the corridors and stairs leading to the cells. There was a heavy smell of floor polish and the court had to step carefully to avoid falling by reason of the slippery floors.

Of the cells inspected, two were located on the second floor and one on the first floor. The structural details differ little from that deposed to in the applicants' papers. There were six built - in concrete beds in bunk form in each of the cells. In the cell on the first floor there were six folded blankets lying on one of the built - in concrete beds. The one shown to the court was torn and frayed but appeared to be clean. There was a toilet in one corner of each cell in the form of a raised platform in the centre of which was an open hole. There was a wall approximately one metre high separating the toilet from the rest of the cell but there was no door. There was a small window about one metre from the ceiling which let in some measure of light. There was a fluorescent light in the ceiling which, though dim, was functioning. Directly above each toilet was a tap of running water which emptied into the toilet hole. There was no toilet paper, no soap, no wash basin, no bathing

facilities and no drinking water. A detainee would have to drink from the tap right above the open toilet hole. The flushing mechanism for the toilet was located outside the cell and the toilets were flushed at the convenience of the police.

In addition to the Court's observations above, the established facts were that the applicants, women, were made to remove their brassieres and shoes and to place them in a bag with their other belongings. The court was shown a canvas bag of the type used by the applicants and noted that it, as well as the others observed to be hanging nearby, was dirty probably by reason of use by other detainees. Established also was the fact that the applicants were made to walk barefoot to and in the cell. There were sixteen detainees including the applicants in the cell which was meant to accommodate six people. Only three blankets were provided for use by the sixteen occupants of the cell. The applicants were provided with no food or drinking water, no toilet paper or soap. The occupants of the cell were unable to flush the toilet after use, having to depend on the pleasure of the police to flush it from outside.

THE COMPLAINT AGAINST DISCRIMINATION

Section 23(1) of the Constitution provides:

"23 PROTECTION FROM DISCRIMINATION ON THE GROUNDS OF RACE, ETC

(1) Subject to the provisions of this section—

- (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
- (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of

origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced—

- (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
- (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability of the persons concerned.”

The applicants allege that they were treated in a discriminatory manner in that firstly, they were subjected to sanitary conditions, restrictions or disabilities that peculiarly isolate them and amount to inhuman and degrading treatment. In that connection it was submitted that:-

‘treatment which results in some partiality or inequality of treatment is the popular meaning of the word ‘discrimination’ and is the meaning which should be adopted in this case for ‘It is the duty of the court to hold the scales evenly between different classes of the community and to declare invalid practice, which...results in partial and unequal treatment to a substantial degree between different sectors of the community.’”

Secondly, they were made to remove their brassieres which were not only inhuman and degrading but discriminatory. I will revert later in this judgment to the question of inhuman and degrading treatment.

THE FAILURE TO PROVIDE SANITARY PROVISIONS FOR MENSTRUATING WOMEN

The applicants were alive to the fact that on them rests the onus of establishing that they were treated in a discriminatory manner. Mr *Uriri* submitted that the discharge of the onus which lay on the applicants had been facilitated by the admission by the second

respondent that the Police do not provide sanitary provisions for menstruating women. That is not so.

While the idea would appear to be abhorrent that sanitary provisions are not afforded to women in custody, the applicants do not allege that they were menstruating and were refused sanitary provisions by the Police. They simply allege that no such provisions are made for women generally. But s 24 (1) of the Constitution does not allow the applicants to be torchbearers for women in general. The applicants have to show that there has been a violation of the declaration of rights in relation to themselves. This, they have failed to do and accordingly no violation of the applicants' rights under this head has been established.

THE ORDER TO REMOVE THEIR BRASSIERES

The applicants further contend that the order to remove their brassieres was discriminatory. The respondents submit that in requiring them to remove their brassieres, they were acting in terms of s 41 of the Criminal Procedure and Evidence Act [*Cap 9:07*] which states as follows:

- “41 (1) ...
- (2) A peace officer or other person arresting any person under this Part may search that person, and shall place in safe custody all articles, **other than necessary wearing apparel, found on him.**” (My emphasis)

They contend that a woman's brassiere is not 'necessary wearing apparel' as contemplated by the Act. They aver that in some places women go about bare breasted. The applicants, who are all women, aver, on the contrary, that a brassiere is, for them, a necessary piece of intimate wearing apparel.

I am unable to accept the contention by the respondents that brassieres do not fall within the class of necessary wearing apparel for women. It was submitted on behalf of the applicants that to oblige them to remove such undergarments was to subject them to discriminatory treatment. The submission is not without merit. It seems to me that the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignores the fact that the applicants being women, have, by reason of their sex, personal needs which differ from that of men and has resulted in discrimination against the applicants, who by virtue of their biological make-up, have need of two undergarments. The applicants have in our view established that their right enshrined in s 23 of the Constitution to protection against discrimination has been violated.

THE RIGHT TO BE PROTECTED AGAINST TORTURE OR CRUEL AND INHUMAN PUNISHMENT OR TREATMENT

Section 15(1) of the Constitution of Zimbabwe provides:

“15 PROTECTION FROM INHUMAN TREATMENT

- (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.
- (2) No treatment reasonably justifiable in the circumstances of the case to prevent the escape from custody of a person who has been lawfully detained shall be held to be in contravention of subsection (1) on the ground that it is degrading.”

Section 15, therefore, proscribes torture, inhuman punishment, degrading punishment, inhuman treatment, degrading treatment. See *S v Ncube & Ors* 1987 (2) ZLR 246 (SC) at 264 C-H.

Many decisions of this Court have dealt with the issue of what constitutes inhuman or degrading treatment. See for example Ncube’s case, *supra*, *Nancy Kachingwe &*

Ors v Minister of Home Affairs & Anor SC 145/04, Jestina Mukoko v The Attorney General
SC 11/12.

In the *Nancy Kachingwe* case, this Court declared that the applicants were subjected to inhuman and degrading treatment. It found that the holding cells in which the applicants had been detained overnight at Highlands Police Station and Matapi Police Station, respectively, fell short of the minimum standards of decency. It said at p 10 and 11 of the cyclostyled judgment:

“I have no doubt in my mind that the holding cell that the court inspected at Highlands Police Station, the same holding cell in which the Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure:

- (a) To screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private;
- (b) To provide a toilet flushing mechanism from within the cell;
- (c) To provide toilet paper;
- (d) To provide a wash – basin; and
- (e) To provide a sitting platform or bench;

constitute inhuman and degrading treatment prohibited in terms of s 15(1) of the Constitution. The evidence clearly establishes that Chibebe was subjected to similar treatment.”

The remarks quoted above apply equally to the cells at Harare Central Police Station which were seen by the Court. That there was a sitting platform surrounding the toilet hole and a one metre wall separating the toilet from the rest of the cell is of little significance because there was no door and the one metre wall is inadequate to provide privacy to the users of the toilet.

Thus the conditions experienced by the applicants in the *Kachingwe* case are little or no different from those experienced by the applicants in the instant case. In addition, the applicants shared the cell, which was made to accommodate six people, with thirteen

others. It was not denied that no drinking water was available to the applicants. However, even assuming that the tap in the cell was meant to be the source of drinking water for the occupants of the cell, the implications arising from the fact that the tap was positioned directly above, and emptied into, the toilet which could only be flushed from without, are too ghastly to contemplate.

The applicants in *Kachingwe's* case were detained for one night. The position in respect of the applicants is aggravating in that they were detained in such degrading conditions for four days and forced to rely on relatives for food and drinking water. Detention for four or five nights in the conditions described by the applicants in my view constitutes a gross violation of the applicants' right not to be subjected to inhuman and degrading treatment. Accordingly, I find that the applicants were detained in conditions that constitute inhuman and degrading treatment in violation of their right enshrined in s 15 of the Constitution.

REMOVAL OF BRASSIERES

The applicants averred that their brassieres are items of intimate underclothing and being forced to remove them was inhuman and degrading. The respondents could only submit in reply that in some cultures women go about bare breasted. However, it would seem to me that the applicants are in a better position to comment on this issue. They have said how humiliated they felt not only by being made to remove what were personal underclothing but also by being forced to place them in a dirty bag.

The question then is posed: Are these measures reasonably necessary to prevent the applicants' escape from custody? Surely not. Further, such treatment cannot be

justified by the reasoning that the applicants might use these items of clothing to harm themselves - for then any item of clothing can be turned into a weapon or an instrument for self-affliction or suicide.

Detention ought not to reduce the detainee to humiliation and indignity. Every detainee is entitled to be treated with some modicum of decency and respect. The order to the applicants to remove their brassieres caused them great humiliation. Such treatment meted out to the applicants cannot be said to be reasonably necessary to prevent their escape which is the only derogation allowed by s 15 of the right enshrined therein. Accordingly, the applicants have established, in this regard also, that their right enshrined in s 15 not to be subjected to cruel and inhuman and degrading treatment has been violated by the respondents.

REMOVAL OF SHOES

The applicants averred that they were made to walk barefoot on dirty floors. The respondents deny that the floors were dirty and based their denial on the fact that Standing Orders require the floors to be cleaned. However, the respondent admits that there were sixteen persons, including the applicants, detained in one cell which is meant for six people. It is admitted also that the toilet in the cell is only flushed at the pleasure of the police from outside. The cells are cleaned only once a day during the detained persons daily exercise period of 30 minutes. In these circumstances, the probabilities are that the floor of the cell did become wet with human waste as deposed to by the applicants. To require the applicants to walk barefoot in such unsanitary conditions is to subject them, in my view, to inhuman and degrading treatment.

THE ORDER SOUGHT

The applicants premised their argument on the fact that the conditions experienced in the Police cells amounted to a violation of their right to the protection of the law enshrined in s 18. Having found the treatment experienced by the applicants to amount to a violation of ss 15 and 23 we do not consider it appropriate or necessary to grant the *declaratur* sought in this regard.

SEIZURE OF CELLPHONES

The papers establish that personal possessions of detainees are taken on detention and stored pending their retrieval on the release of the detainee. No breach of an enshrined right has been shown in this regard. Suffice it to say that a claim for any damages suffered as a result of such seizure may be made in the appropriate forum.

CONCLUSION

The applicants have established that their rights enshrined in ss 15 and 23 of the former Constitution of Zimbabwe were violated by the respondents. We consider the following order to be appropriate.

ORDER

It is declared:

1. That the applicants' rights in terms of s 23 of the Constitution of Zimbabwe not to be discriminated against, have been violated.
2. The applicants' rights, in terms of s 15 of the Constitution, to protection from inhuman and degrading treatment have been violated.

Consequently it is ordered that:

3. The first and second respondents are directed to take all necessary steps and measures within their power to ensure that at Harare Central Police Station:

- (a) The holding cells shall have clean and salubrious flushing toilets with toilet paper and a washing bowl.
- (b) The flushing toilets shall be cordoned off from the main cell to ensure privacy.
- (c) A good standard of hygiene shall be maintained in the holding cells.
- (d) Every person detained in police custody overnight shall be furnished with a clean mattress and adequate blankets.
- (e) Adequate bathing facilities shall be provided for all persons detained in custody overnight.
- (f) Every person detained shall have access at all times to wholesome drinking water from a source other than the tap above the toilet.
- (g) Women detained in police custody shall be allowed to keep their undergarments including brassieres, and to wear suitable footwear.

4. There shall be no order as to costs.

GARWE JA: 1 agree

MAKARAU JA: I agree

GOWORA JA: 1 agree

OMERJEE AJA: I agree

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners

Attorney General's Office, respondents' legal practitioners