

IN RE: SIMBARASHE CHIVAURA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 20 JULY 2010 AND 7 OCTOBER 2010

Mr Mabhaudi for state
Mr Chivaura for accused

Misconduct

CHEDA J: This matter involves the above legal practitioner's conduct in court.

Mr Chivaura (hereinafter referred to as "the legal practitioner") is an admitted legal practitioner of this court. He enjoys all the rights and privileges of appearing before all the courts in the land except the traditional and small claims court.

In accordance with the custom and practice of the High Court, the Registrar of the High Court allocates criminal cases mostly murder to various legal practitioners from time to time on a pro deo basis.

In the present case the legal practitioner was allocated the case of *S v Bizeck Ndlovu* CRB 66/10. The matter was set down for trial and as is the procedure he drafted and submitted a defence outline stating accused's version of the events which were designed to excuse his wrongful and unlawful conduct which led to the deceased's demise. For clarity's sake I hereinunder capture the said defence outline:

"IN THE HIGH COURT OF ZIMBABWE HC 18/2010
HELD AT BULAWAYO

In the matter between:

**THE STATE
AND
BIZECK NDLOVU**

**APPLICANT

ACCUSED**

ACCUSED'S DEFENCE OUTLINE

1. The Accused person is facing a charge of contravention of Section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23 **MURDER**. It is alleged that on the 9th of August 2006 and at Big Ben Farm, Gwanda, the Accused killed Dumolwenkosi Nkiwane whom he found lying on a water tank whilst fetching water by holding up his legs and pushing him face down into the water thereby drowning him.
2. Accused person will plead **NOT GUILTY** and shall put the state to strict proof of its allegations. He shall confirm having made a warned and cautioned statement freely and voluntarily to the police and wishes to incorporate the contents of it as part of his defence outline.
3. The accused person shall state that it was not his intention to kill Dumolwenkosi Nkiwane and will aver the following:-
 - 3.1 That on the 9th August 2006 the Accused person had an altercation with Dumolwenkosi Nkiwane over fetching water hereinafter named the Deceased which resulted in the Deceased assaulting the Accused person with a stick three times.
 - 3.2 The Deceased then proceeded to the water tank to fetch water and whilst the Deceased was fetching water the Accused person followed him to find him lying on the water tank fetching some water.
 - 3.3 On arrival the Accused person held up the legs of the Deceased in order to submerge his heads in the water for a short period after which the Accused person let his legs go and fell into the water tank. Accused person then left the scene. The Accused had no intention of killing him but rather sought to get back at him for the assault that the Deceased had inflicted upon him which gravely provoked and incensed the Accused.
4. In the foregoing, the accused person will plead his innocence and pray for an acquittal on the charge of murder.

DATED AT BULAWAYO THIS 19TH DAY OF JULY 2010

.....(Signed)

Mashayamombe &Co, Attorneys

Accused's Legal Practitioners

Suite 301, 2nd Floor, Salamaat Mews

9th Ave/G. Silundika St.

BULAWAYO

(MR

CHIVAURA)

TO: THE REGISTRAR
High Court of Zimbabwe
BULAWAYO

AND TO: THE ATTORNEY GENERAL'S OFFICE
Tredgold Building
BULAWAYO

When the trial was about to commence I was approached by both the State counsel *Mr Mabhaudi* and the said Legal practitioner for accused who informed me that the trial could not commence as the accused could not be located. I made an enquiry from the Legal Practitioner, regarding the accused's whereabouts and he confessed that he had not seen the accused and infact had not personally taken instructions from him. Asked as to how he had drafted such a detailed defence outline without seeing the accused he stated that he had relied on accused's warned and cautioned statement.

At the time of writing this judgment, he had not seen his client. It is for that reason that I was prompted to write this judgment.

This profession requires honesty, integrity and professionalism. A legal practitioner should be truthful, candid and fair in all his dealings with both his client and the court. *Mr. Chivaura* was allocated a pro deo matter, which he accepted, he was, therefore, expected to represent the accused to his best ability. A charge of murder is one of the most serious charges one can face, as upon conviction, accused can receive capital punishment. That is, how grave the offence is. For that reason, any legal practitioner representing such a person should apply all his mind in the case before him and employ all his skills in order to assist his client. It is for

that reason that he is enjoined to personally take instructions from the accused who is his client.

A legal practitioner must perform his duty with diligence and competence failure to do so amounts to negligence. The type of failure referred to above may amount to misconduct if it has a sting of impropriety.

With regard to taking instructions, a legal practitioner must be reasonably satisfied of the clients' identity and capacity to instruct which is the main reason why he should see him personally.

In casu the legal practitioner drafted the defence outline without not only taking instructions from the accused, but, without seeing him at all. According to him the defence outline was based on the warned and cautioned statement accused made to the police. The accused's identity is extremely important as the legal practitioner may end up taking instructions from a different person. In addition, thereto and most importantly, a legal practitioner should ascertain the competence of the accused in giving instructions, as accused may be suffering from some legal disability, for example disability arising from some mental illness.

It is, therefore, the duty of every legal practitioner to advise his client on any aspects which call for advice. The advice must be given with complete frankness and honesty. The legal practitioner was assigned the accused (Bizeck Ndlovu) as his client, from that time he assumed duty to act in the best interest of his client. Surely, he cannot be said to have performed his duty of frankly and honestly advising his client when he had not seen him.

Despite the seriousness of the offence he did not seek audience with him, but, proceeded to mislead the court into believing that the defence outline filed of record was a true reflection of accused's version of events as per his instructions.

It is not necessary for me to delve into the consequences of such material misrepresentation. What comes to mind is the contradiction which may arise between his warned and cautioned statement and defence outline. No doubt, the trial court may adversely conclude that accused is not a credible witness.

Therefore, a legal practitioner, who misrepresents a client in this manner is in my view prima facie guilty of unbecoming and unprofessional conduct. He was indeed negligent see *Hayes v Bar Council* 1981 ZLR 183 and in re: *Tapera Sengweni* HB 45/08 (cyclostyled).

In light of the Legal Practitioner's conduct in handling this matter, it will not be in the interest of both the accused and justice for him to continue representing the accused.

The following order is therefore made:

1. *Mr Chivaura* be and is hereby excused from representing the accused (Bizeck Ndlovu) in this matter.
2. The Law Society of Zimbabwe be and is hereby directed to investigate *Mr Chivaura's* conduct in this matter.

Criminal Division, Attorney General's Office applicant's legal practitioners
Mashayamombe and Company, accused's legal practitioners