

THE STATE

Versus

ELIJAH NDEBELE

And

NKOSINATHI MASEKO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 27 APRIL 2017

Review Judgment

BERE J: The facts which have prompted this application for the recusal of the trial magistrate are most unusual and the conduct displayed by the trial magistrate and the defence lawyer is unhealthy and of course unprofessional.

The facts presented to me are scant but what I can decipher from the record sent to me is as follows:

The accused persons appeared at Filabusi Magistrates' Court charged with the crime of stock theft in contravention of section 114 (2) (c) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. At the close of the state case the accused through their legal practitioner made an unsuccessful application for their discharge or acquittal. Sometime after this abortive application had been made, the defence lawyer met the trial magistrate at Khumalo Hockey Stadium here in Bulawayo and an argument ensued over the magistrate's dismissal of the application for discharge of the accused persons. It would appear that during the argument that followed the legal practitioner raised arguments of bias on the part of the magistrate.

Having been placed in this embarrassing situation the magistrate has now initiated this application for recusal expressing the view that he no longer feels comfortable to continue

presiding over this matter hence the referral of this matter to a Judge of the High Court for review.

As I stated, the facts of this case are most unusual in the sense that a magistrate is not expected to engage in a discussion of a matter he is seized with outside the court itself except the usual professional discussion with fellow magistrates. It is even more puzzling that such kind of a discussion was given space outside the court room itself. Such conduct is deplorable and can easily be regarded as a breeding ground for improper conduct on the part of all those involved.

Professional ethics does not give room to either the presiding magistrate or the legal practitioner to initiate such conduct. Counsel's "ammunition" if any must be reserved for the court room environment where all the parties including the Prosecution are fully represented.

One of the hallmarks of both our criminal and civil litigation is that such cases must be presided over by an impartial magistrate or Judge. This is one of the fundamental pillars of a fair hearing, for justice must not only be done but must indeed be seen to be done. I could not agree more with my brother judge NDOU J when he puts it in the following terms:

"... An impartial judge is a fundamental prerequisite for the fair trial and as such a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigator for apprehending that the judicial officer for whatever reasons was not or will not be impartial."¹

See also the case of the *State vs Paradza Benjamin*,² per BHUNU J (now JA); *Sibongile Sibanda vs Nintsha Sibanda*³ and *Sager v Smith*⁴.

1. *Maydeep Investments (Pvt) Ltd another vs Cecil Madondo & 3 Others* HB-34-05
2. HH-182-2004
3. HB-32-08
4. 2001 (3) SA 1004 (SCA) at p 1009

In the instant case, by engaging the defence lawyer outside court over a case that was pending before him, the magistrate rendered himself incompetent to continue hearing the matter.

It is my sincere hope as I write this judgment that the defence lawyer did not deliberately provoke the discussion in order to deflate the smooth conclusion of this case.

Whatever the motive was, the circumstances of this case require that a trial *de novo* be ordered.

Consequently I make the following order:

It is ordered:-

- 1) That the proceedings in the court *a quo* be and are hereby quashed.
- 2) That a trial *de novo* be conducted at any other court other than Filabusi Magistrates' Court.

Makonese J I agree