

CONSTABLE NCUBE M. T 075098C
and
CONSTABLE NCUBE M. D 083092R
and
CONSTABLE SIZIBA B. 084014T
versus
THE TRIAL OFFICER SUPERINTENDENT NDUHLE
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 11 OCTOBER 2017 AND 8 MARCH 2018

R Ndou for the applicants
L Musika for the respondents

MOYO J: This is an application for the review of the decision of a single trial officer.

The three applicants were constables within the Zimbabwe Republic Police. They were charged for misconduct. They appeared before a single officer. The main ground for review was that the applicants were tried hastily, denied their rights to legal representation with some proceedings going on into the night.

The respondent's counsel conceded that there was a gross violation of the rights of the applicant's rights to legal representation and to a fair trial. The first complaint by the applicants is that they were whisked into a trial without notice as they had gone to the police station for some other business, not aware that there was a trial set down. Respondents denied this and this court cannot resolve that fact on paper. However, there are other glaring problems with the proceedings before the single officer. At the commencement of the proceedings, the accused persons were asked if they had been served with the state papers and accused one and two said No. Accused three and four confirmed receiving the state papers. On further enquiry accused one said he was served only with the charge sheet, accused two said he was served with the charge sheet and the synopsis. The accused persons were then asked the question:

“Would you like legal representation or you want to conduct your own case?”

They all responded by saying that they wanted legal representation. The trial officer then said:

“The charge sheet in possession of this court indicates that you want to conduct your own case why did you not seek legal representation since 16 January 2017?”

Accused one said he had a lawyer for 16 January 2017. Accused two said he did not get the state papers, accused three said his lawyer required transport to court, accused four said he gave his lawyer the information and the lawyer was not aware of that day’s sitting.

The court then ruled that from 16 January 2017, to 31 January 2017, the accused persons had ample time to engage legal representatives. The trial officer then further says in his ruling: “it will not be in the best interests of the organization to delay the matter. (My emphasis). I wonder whether in a trial, it is the interests of an organization or it is the interests of justice that are pivotal to any decision taken by the adjudicator. A trial officer does not, as an adjudicator in the police Tribunal, seek to protect or pursue the interests of the organization. That is a biased attitude and it paints the trial in a bad picture as from the very outset you have a trial officer who specifically mentions that he is sitting there with the interests of the organization at heart. That mars the trial and his independence and impartiality is seriously questionable. If he can protect the interests of the organization in saving its time, why would he not protect the interests of the organisation by ensuring that the accused are guilty at all costs?

On the first day of trial the court adjourned at 16:15 hours and resumed at 16:25 hours, it adjourned again at 18:00 hours and resumed at 18:40 hours. It adjourned again at 22:16 hours and resumed at 23:05 hours. It later adjourned at 01:00 hours for resumption later that morning and it did resume at 07:05 hours.

Pages 73-74 of the court record show that accused one told the court that he intended bringing witnesses at a later date as they were not in attendance at the material time. The ruling of the court on that part was that:

“The court has taken note of the fact that the accused has witnesses who are not at the court. ---. It is the duty of the accused to bring his witnesses to court at his own expense. This court will not be held at ransom by the accused who failed to secure his interests and accordingly this matter will proceed.” (Emphasis is mine)

From the record of proceedings it is clear that there was no other opportunity that the accused had been given to bring his witnesses, the trial officer wanted the accused's witnesses to be available throughout as he knew that he needed them in his defence case.

This is a gross violation of the accused's right to be heard and to conduct his defence to the best of his ability as well as to produce before the court, through witnesses, all the facts relevant to his defence. There are serious irregularities in this matter as follows:

- (1) The refusal by the court to accord the accused person an opportunity to exercise their rights to legal representation by seeking lawyers of their choice.
- (2) The marathon trial that went through the whole day into the night, adjourning the following day at 01:00 hours. It cannot be said that this is a fair trial. Trying an accused person at night when he may even be exhausted and will not be attentive enough to follow the proceedings and be able to fully challenge them in his defence.
- (3) The attitude of the trial officer to protect the interests of an organization as opposed to the interests of justice.
- (4) The ruling denying the accused persons a right to fully conduct their defence by calling witnesses.

The irregularities in this matter are so gross that they vitiate the whole proceedings. Nothing can be salvaged, the trial officer was biased against the accused persons, in favour of the organization, and the accused persons were neither given a chance to fully prepare their defences nor to bring legal representatives. They were also denied a fair trial in that fatigue must have taken its toll on them as they were tried through day and night. They were also denied an opportunity to call witnesses. I believe from the glaring irregularities in this matter, perhaps the Zimbabwe republic Police should endeavour to train these trial officers adequately before they proceed to handle matters as clearly in this particular case, the trial officer lacked the appropriate knowledge on the handling of these matters.

These proceedings must be quashed. The respondents' counsel responsibly conceded to that part. What the parties were not in agreement with was whether the matter should be remitted for a trial *de novo* or whether prosecution should be permanently stayed. Applicants' contention is that they have already served their 14 days imprisonment sentences at Fairbridge and that remitting the matter for a trial *de novo* in the circumstances will cause them double

jeopardy. I agree with this contention especially that they have already been punished. This court can only grant an order as sought by the applicants in the draft order. Accordingly, it is ordered that the application succeeds in terms of the draft order annexed thereto.

I thus make the following order:

- 1) The conviction and sentence of the applicants by 1st and 2nd respondents be and is hereby set aside.
- 2) The prosecution of the applicants on the same allegations be and is hereby stayed.
- 3) The respondents pay the costs of suit.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Civil Division, Attorney General's Office, respondent's legal practitioners