

THE STATE
versus
FANNUEL MPOFU

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE , 10 APRIL 2013

CRIMINAL REVIEW

HUNGWE J: The record of uncompleted criminal proceedings in State v Fannuel Mpfu CRB 19/07 was placed before me with the following comments from the presiding trial magistrate:-

“ THE STATE v FANNUEL MPOFU: ATTEMPTED MURDER: GOKWE REGIONAL CRB 19/2007

It has come to my notice that the trial Prosecutor is closely related to both the complainant and the accused. The complainant and the accused are brothers in that their respective fathers are also brothers. It has merged that the trial Prosecutor's late sister was married to another brother of the complainant and the accused's father. That relationship was brought to the attention of the court by the accused in a complaint he lodged against the trial Prosecutor.

The gist of the accused's complaint was that the trial Prosecutor is partisan to the complainant. According to his complaint, the trial Prosecutor who dealt with the case even in the pre-trial stages, had discussed the matter with the complainant after which he (the trial Prosecutor) had instructed the police to record statements from persons who did not witness the alleged assault on the complainant. According to the accused those witnesses are closely related to the complainant and were couched on what to say by the trial Prosecutor before they were approached by the police. These are the witnesses who testified on behalf of the State. In cross examining them, the accused's stance was that they were not present when he fought with the complainant and that contrary to their testimonies, he acted in self-defence after being assaulted by the complainant.

In the circumstances, it is the accused's view that his right to a fair trial was violated. He explained that as a lay person and a stranger to the courts he found it difficult to raise the complaint at the commencement of the trial because the persons he had a complaint against was the trial Prosecutor and his uncle as well.

My investigation has revealed that indeed the trial Prosecutor is related to the parties as alleged by the accused. But was there a reasonable apprehension that the accused' fair trial rights may have been violated? As was stated in *Smyth versus Ushewokunze & anor* 1997 (2) ZLR 544 (S) at 549: "A Prosecutor must dedicate himself to the achievement of justice see R V Banks (1916) 2 KB 621 at 623. He must pursue that aim impartially. He must conduct the case against the accused with due regard to the traditional precepts of candour and fairness. Like Ceasas's wife the Prosecutor must be above any trace of suspicion. As a Minister of truth he has the special duty to see that the truth emerges in court....." (my emphasis).

In case, the trial Prosecutor chose not to inform the court that he is closely related to the complainant and the accused at the commencement of the proceedings. It was only after the issue had been raised by the accused, albeit at an advanced stage of the proceedings, that he acknowledged the relationship. In my view that relationship placed the Prosecutor in a position whereby he could easily favour either party as being alleged by the accused. It is also reasonable, under the circumstances, for the accused to be under the apprehension that the trial Prosecutor handled the matter so as to secure a favourable outcome for the complainant whom he relates better with. In my view the trial Prosecutor's handling of this case before trial and during trial was ill-advised under the circumstances. It would have helped had he brought it to the court's attention from the onset that he is closely related to the parties before the trial commenced. Then the court would have elicited the attitude of the parties on whether they had any objections to his involvement. Given the undeclared relationship, it was very difficult if not impossible for the Prosecutor to be impartial and fair as expected of him.

In the premises it is my considered view that these uncompleted criminal proceedings should be quashed and an order for trial *de novo* be made.

G. BUTAU-MOCHO
REGIONAL MAGISTRATE – GOKWE

The learned trial magistrate is correct. The appropriate course of action is to quash the proceedings in CRB 19/07 and order a trial *de novo* before a different magistrate.

It is so ordered.