In re: MARGRET CHIKOMBINGO
and
ENIA SITHOLE
and
JASPER HUTU
and
PANASHE GIREYA JOHN
and
EDWIN DUBE
and
TRINITY DUBE
and
LETWIN DUBE
and
MIKE KANZIMBE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 3 June 2014

Civil Review

MAWADZE J: I should mention from the onset that these civil review proceedings, are now purely for academic purposes due to the lapse of time between the period the relevant orders were granted and the time the records were forwarded to me. The only reason I have decided to write this review judgement is to give guidance to magistrates who deal with these matters and seem not to appreciate how these matters should be properly handled. In some cases it would appear that magistrates are not aware of the need to send such matters for review and to do so timeously.

I have decided to deal with all the mattes at the same time because they were dealt with by the same magistrate at Bindura and the queries raised in each of those matters are also the same.

It is important at this point to highlight the inordinate delay in how these matters were dealt with. In the case of in re Enia Sithole my brother MUSAKWA J raised the query on 21 November 2005. In the cases of in re Jasper Hutu, Edwin Dube, Trinity Dube, Letwin Dube, Mike Dube and Panashe Giriye John my sister MAKARAU J (as she then was) raised queries on 15 May 2006. In re Margret Chikombingo it is not clear who raised the query on 19 December 2005. The learned Magistrate responded to all the queries under cover of one minute dated 16 August 2006. It is not clear as to when the records were received by the Registrar after the learned magistrate's response. All I can state confidently is that all these records, tied together were referred to me in December 2013. I am unable therefore to explain the inordinate delay from 2006 to 2013, a period of 7 years. I have also decided to deal with the matter of Enia Sithole despite that that initial query was raised by my brother MUSAKWA J. (I have brought this to his attention and he believes this is in order). As for my sister MAKARAU JA she left the High Court bench in 2010 after her deserved elevation to the highest court of the land.

The common thread which runs through all these cases is that they involve juveniles and the learned magistrate who dealt with these matters did not compile or constitute a record of proceedings in each matter. This is a misdirection as will be shown later.

All these matters were dealt with in terms of the Children's Act [*Cap 5:06*] although the learned magistrate who dealt with the matters mistakenly believed that he did so in terms of the then Children's Protection and Adoption Act of 1972. This is the same Act which was renamed the Children's Act in 2001 with amendments being done to the provisions of the old Act.

The query raised by my brother MUSAKWA J was as follows in respect of In re Enia Sithole:

> "This is another delayed review having been occasioned by the late submissions of the record of proceedings.
> Section 19 (1) (a) of the Children's Act enjoins a Children's Court to hold an inquiry in respect of a child brought before it. Apart from a letter from *SOS Children's Village Zimbabwe* and on order in terms of the Children's Act, there is nothing to show what inquiry was conducted by the magistrate. The matter is remitted to the relevant magistrate to conduct an inquiry as required by the Act."
> In respect of Margret Chikombingo the same query that there was no record of the inquiry held before the Magistrate was raised.

Lastly in respect of all the other matters MAKARAU J (as she then was) raised the following issues;

> "1. These matters were handled by the same magistrate.
> 2. There is no record of inquiry held by the magistrate.
> 3. Please ask him to explain."

The trial magistrate who handled these matters responded to the queries raised in all these matters in one minute dated 16 August 2006 as follows;

> "In this matter, the probation officer presented the court with reports which the court went through. Having satisfied myself with the contents of the report, I did not feel it necessary to call him or other persons.
>
> I based my decisions on the provisions of s 5(1) and (2) of the Children's Protection and Adoption Act. In subs 2 it is stated that –
>
> > '(2) The officer presiding over a juvenile court may in his discretion permit evidence to be given to the court by way of affidavit or report.'
>
> The report of the probation officer form part of the records. From the contents of the reports I did not feel that it was necessary for any other person to appear before the court. I thus made the order that I made."

It is clear that the learned magistrate who handled these matters misdirected himself and that even after the omissions he made were raised by all three judges he seemed unwilling to accept that he erred. Before demonstrating this fact let me briefly summarise the facts of each case and the contents of each record.

1. In re Panashe Gireya John

The juvenile was born on 3 October 2004. Both parents of the juvenile died when the juvenile was just 6 months old. The juvenile was left in the custody of a 64 year old uncle who was unable to take care of the child and decided to send the child to Howard Mission Hospital. The officials at the hospital decided to put the juvenile at Montgomery Heights as no relative was willing to take care of the juvenile. All this is outlined in the Probation Officer's report filed of record. The Probation Officer on that basis made an application to the children's court to have the juvenile placed at Montgomery Heights Christian Centre on 5 April 2006. Attached to that application was a letter of proof of vacancy from the institution confirming the institution's willingness to accept the juvenile. The order was granted on 6 April 2006 placing the juvenile at Montgomery Heights Christian Centre.

The record of proceedings in this matter consists of the Probation Officer's report, the confirmation letter and the order granted by the magistrate only.

2. In re Mike Kanzimbe

At the time the order was made the juvenile was 11 years old. The facts of the matter are that the mother of the child was unknown and the father died in 2004. The juvenile had nowhere to go and decided to board a bus in Matepatepa area. The conductor of the bus took him to Bindura Police Station who brought the plight of the juvenile to the social welfare department who in turn took the juvenile to Ponesai Vanhu Junior School being a place of safety. An application was then made in terms of the Children's Act to have the juvenile declared a child in need of care and placed at Ponesai Vanhu Junior School. The order was granted on 5 January 2006.

In this record there are no notes from the presiding magistrate except the Probation Officer's report and the order granted.

3. In re Letwin Dube (aged 9 years); Trinity Dube (aged 15 years); Edwin Dube (aged 5 years)

Although there are three separate records for these three juveniles their circumstances are the same as they are siblings hence I have decided to deal with them at the same time. The Probation Officer's report in respect of each of the juvenile reflects the following;

The parents for the juvenile are either deceased or unknown as they could not be traced. All what is known is that the mother died in 2004 at Maizelands Farm and that she had no relatives as she was just a migrant worker. An employee at the farm took care of the siblings, Trinity a girl aged 15 years, Philip a boy deaf and dumb aged 6 years, Edwin a boy aged 5 years and Letwin a girl aged 9 years. The owner of the farm a Mr Nel on a voluntary basis provided food and clothing from 2004 but was later unable to help in 2006. The social welfare department was alerted of the need to institutionalise the juveniles hence the application to the children's court. The order placing the three juveniles at SOS Village was made on 27 April 2006. However, the record shows that besides the Probation Officer's report and a copy of the order as per Form 8 no other notes were recorded by the court which means no inquiry was held.

4. In re Jasper Hutu aged 6 months (Born on 19 July 2005)

The mother of the juvenile died when the juvenile was 4 months old and was left in the custody of the father. The father is alive. He had no experience to look after the child and approached Social Welfare Department who decided to remove the juvenile from the father's custody and place it in the children home where the needs of the child's social needs would be met as the child would be in a family environment with other children and receiving motherly care and love. On the basis of the report the Probation Officer made an

application to have the child declared to be a child in need of care and to be placed in an institution. The order to that effect was granted on 20 January 2006.

This record of proceedings contains the Probation Officer's report and the court order on Form 8. There is no affidavit from the father and neither was the father heard during the inquiry.

5. <u>In re Margaret Chikombingo (born 7 October 1995 – 10 years)</u>

The background facts are that the juvenile was staying with a step brother and his wife at a farm in Concession. The brother is called Jeremiah. He was employed at this farm. This brother raped the complainant and was subsequently convicted and incarcerated. The juvenile had to leave the farm and a step sister one Mary in Glendale who is a commercial sex worker took care of the juvenile. The juvenile was exposed to immoral behaviour by the step sister who brought many boyfriends home to spend the nights in a single room with the juvenile also present. Members of the Glendale Child Welfare Forum notified the Probation Officer of the juvenile's plight and authorities at SOS Children's Village in Bindura agreed to take the juvenile into their custody. An application to that effect was made and granted. This order however, expired on 18 March 2003 and the current application is for the renewal of the order as the juvenile is still in need of care because no relative was willing or capable of looking after the juvenile. The order reviewing the previous order was granted on 25 February 2005.

In this record of proceedings there is only the Probation Officer's report and the court order. There is no confirmation letter from SOS Children's Village in Bindura. A copy of the expired order is not attached.

6. In re Enia Sithole

The facts of this matter are not explained as there is no Probation Officer's Report. The record only contains Form 8 which is this court order placing the juvenile at Shearly Cripps Children's Home dated 23 February 2005 and a letter from Shearly Cripps Children's Home to the Department of Social Welfare Glendale dated 10 April 2001 confirming that the juvenile was placed at that institution in 2000 and that there was need for the Department of Social Welfare to regularise this position urgently by obtaining a court order to that effect. This probably triggered the order granted by the court on 23 February 2005. The circumstances of the juvenile however remain unknown.

It is common cause that applications of this nature are brought to the Children's Court in terms of s 18 of the Children's Act [*Cap* 5:06]. (hereinafter the Act). In terms of s 19 (1) (a) of the Act the Children's Court in dealing with such an application is enjoined to hold an inquiry in respect of the child or juvenile brought before it. This inquiry is important to verify the facts upon which the application is premised. It is also to assist the Children's Court to establish whether the child is in need of care as is defined in the Act. The inquiry also assists the court to exercise any of the powers vested in the Children's Court in terms of s 20 of the Act. It is therefore as a result of such an inquiry that the Children's Court may decide on the proper option to take in terms of s 20 of the Act.

It is common cause that the Children's Court is a court of record. This means that all proceedings in this court should be recorded. The inquiry held should be recorded. The inquiry may entail the hearing of *viva voce* evidence or may be based on affidavits and reports admitted in court as exhibits during the inquiry. The record of proceedings should reflect all this. It is therefore disingenuous for the trial magistrate in this case to argue that since there was no *viva voce* evidence led there was no need to keep a record of proceedings showing the nature of the inquiry held. The Children's Court has a duty to keep a full legible record of proceedings in all matters dealt with. In addition to that there should be brief

reasons explaining the decision made by the Children's Court. The Children's Court should explain the brief circumstances of the child, the nature of the evidence relied upon, findings made on why the child is in need of care and the basis of the particular order granted in terms of s 20. This entails the confirmation of the requisite vacancy at the relevant institution.

In terms of s 27 of the Children's Act after the holding of the inquiry and the granting of the order the Children's Court is enjoined within 7 days to submit the record of proceedings to the High Court for review. Such a review can only be meaningful where a proper record of proceedings has been kept.

In the case on In re *Gonyora* 2001 (2) ZLR 573 (H) it was pointed out that the record of proceedings of a Children's Court which is submitted for review (whether in terms of the Guardianship of Minors Act [*Cap* 5:08] or the Act [*Cap* 5:06]) must include reasons for the court's decision. The reason for this is clear. This court cannot carry out its review powers to determine whether the proceedings were in accordance with real and substantial justice where there is no record of proceedings and no written reasons for the decision made. In the absence of a proper inquiry, the record of proceedings and reasons for the order made this court is hamstrung in deciding whether the children's court has taken into consideration the principles that bear on the child's best interests.

It is clear that in all these 8 matters dealt with by the magistrate there are no records of proceedings. There is no evidence on record that an inquiry as envisaged in terms of s 19 (1) of the Act was held before the relevant orders were granted in terms of s 20 of the Act. This constitutes a misdirection; see In re *Gonyora (Supra)* at 578 G-H.

It is not helpful for the magistrate to allege that an inquiry was held without such evidence in the form of a record of proceedings. Such a purported inquiry which remains stored in the mind of the magistrate falls far short of what is required in terms of s 19 (1) of the Act. In the absence of the reasons for decisions made in all 8 matters it is difficult to assess on review if the proceedings were in accordance with justice.

Due to the lapse of time it is now not possible, through the process of review, to rectify the anomalies. No useful purpose would be served by remitting the matters to the magistrate for a proper inquiry to be held. Due to lapse of time some of the juveniles are now majors. Further, the circumstances of the juveniles have changed since 2005 and 2006. All I can do now is to withhold my certificate and decline to certify the proceedings in all matters as in accordance with real and substantial justice.