

WILFORD EDWARD NYAMBO
versus
MAGISTRATE T.K. MAHWE, ESQ
and
PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 16 October & 17 October 2014 and 28 January 2015

Criminal Review

Ms B. Mtetwa, for the applicant
E. Mauta, for the respondent

BHUNU J: This is an application for review in terms of s 26 of the High Court Act [*Cap 7:06*] which confers general powers, jurisdiction and authority on the High Court to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities in Zimbabwe.

The application stems from the trial magistrate herein cited as the first respondent's refusal to discharge and acquit the applicant at the closure of the state case in terms of s 198 (3) of the Criminal procedure and Evidence Act [*Cap 9:07*]. The section provides that:

“(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

The background to the application is that the applicant was jointly charged of fraud as defined in s 136 of the Criminal Law Codification and reform Act [*Cap 9:23*] together with his erstwhile legal practitioner Norman Bvekwa. The first respondent presided over the trial in his capacity as the trial magistrate sitting at Harare.

The factual basis upon which the application is founded is to a large extent not in dispute. The undisputed facts are that the State alleged that both accused persons fraudulently wrote a letter containing falsehoods calculated to scuttle the intended sale of a certain piece of

land between the complainant company Christmas Gift (Pvt) Ltd and the National Social Security Authority (NSSA). Both accused admitted writing the letter as alleged by the State. The letter dated 16 October 2012 Annexure G at p 148 reads:

“Dear Sirs,

RE: OUR CLIENT – W. E . NYAMBO. SHARES IN DMC HOLDINGS (PRIVATE) LIMITED – NEW CHRISTMAS GIFT (PRIVATE) LIMITED

We refer to the above matter and address you at the instance of our client W.E Nyambo.

We understand that you want to purchase the above described property from one Mr. De sa, who claims to be the owner of the property.

This property does not belong to him as our client is the 100% shareholder in New Christmas gift investments (Private) Limited.

Attempts to reach compromises between Mr. De sa and our client have yielded nothing.

We demand that you stop immediately any attempts to buy this property through the said Mr. De sa.

Please communicate this position to us.”

At the close of the State case Mr. Bvekwa the applicant’s lawyer was properly found not guilty and discharged on the basis that he lacked the requisite *mens rea* to commit the offence in that he merely acted in his professional capacity as the applicant’s legal practitioner. In that capacity he only acted as the applicant’s mouth piece without attracting any civil or criminal liability to himself. That kind of reasoning is unassailable and cannot be faulted at all. .

The trial magistrate in a concise but well-reasoned and convincing interim judgment proceeded to determine that the applicant had a case to answer because he was the principal and prime mover for the writing of the offending letter. Evidence was led from various State witnesses tending to establish that the letter written at the applicant’s instance and promptitude contained falsehoods and deliberate misrepresentations calculated to prejudice the complainant in its bid to sell its property to the National Social Security.

It was Mr. Rogerio De sa's testimony that he holds 99% shares in Christmas Gift (Private) Limited and the remaining 1% share is held by his wife. He authenticated his evidence by producing the relevant documentation in the form of the company's CR14 showing the company's directorship and title deeds of the disputed land as proof of ownership. His evidence in this respect found ample corroboration in the evidence of one of the company's directors Mr. Kizito Gweshe in every material respect.

They both disputed that the applicant was the owner of 100% shares in the company in dispute. It is clear as day light that the evidence of all the state witnesses if left unrebutted can only lead to one inexorable conclusion that the applicant's letter to NSSA was written and communicated with fraudulent intent.

It is an established rule of procedure in a criminal trial consistent with the *audi alteram partem* rule, that once the state has established a *prima facie* case pointing to the likelihood of the accused being guilty of the offence charged, the onus shifts to the accused to rebut the operation of the evidence led against him. When placed on his defence the accused is not being called upon to prove his innocence but to rebut the operation of state evidence suggesting that he is guilty of the offence charged.

The trial magistrate was therefore correct in determining that the applicant has a case to answer. His determination in this respect was amply backed up by the available evidence at his disposal.

That being the case, the applicant cannot seek refuge in the Constitution or the High Court by way of a frivolous and vexatious application for review. It is accordingly ordered:

1. That the application be and is hereby dismissed.
2. That the trial magistrate's ruling be and is hereby sustained.

Mtetwa & Nyambirai, applicant's legal practitioners
The Prosecutor General, respondent's legal practitioners.