

VIMBAI TANYANYIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 4 July 2018

In Chambers

WAMAMBO J: The applicant applied through a chamber application for the reinstatement of her appeal.

The background to the matter is that applicant was convicted and sentenced following a trial at Harare Magistrates Court. She faced a charge of assault as defined in s 89 of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*]. She was sentenced to 9 months imprisonment of which 6 months imprisonment were suspended on condition of good behavior while the remaining 3 months were suspended on condition of performing community service.

The sentence was handed down on 21 November 2017 while the notice of appeal was filed on 24 November 2017.

The Registrar in a letter dated 26 January 2018 wrote to applicant's legal practitioners Venturas & Samukange, the same legal firm that had filed the notice of appeal on behalf of the applicant requesting for heads of argument to be filed within 15 days of receipt of the letter. The letter was received by Venturas & Samukange Law Firm on 8 February 2018

The applicant's legal practitioners did not only not adhere to the timelines set but did not file heads of argument at all.

The Registrar in a letter dated 26 January 2018 wrote to the Clerk of Court, Harare Magistrate Court in the following words:

“VIMBAI TANYANYIWA VS THE STATE

RE: NOTICE OF APPEAL AGAINST CONVICTION / SENTENCE ONLY

This serves to advise that the records of appeal in the above mentioned case have been received. Could you please forward the heads of argument within 15 days from the date of receipt of this letter so that the matter can be set down for hearing.

The record reflects that the legal practitioners who are representing the applicant in the current application filed a notice of assumption of urgency which is dated 15 December 2016 but bears the Registrar's date stamp of 16 March 2018.

The applicant has filed an application for the reinstatement of appeal. In a rather short application the reasons being advanced are that the applicant put all her trust in her then legal practitioners. When the Registrar informed her then legal practitioners through the two letters referred to earlier they did not inform her neither did they act. She only discovered these developments when she enquired on the progress of her appeal.

In the circumstances the applicant asserts that she has proffered a reasonable explanation for the delay and that she has good prospects of success on appeal.

When the matter came before me, the National Prosecuting Authority's representative had filed a response to the application wherein she does not oppose the reinstatement of the appeal.

I duly considered the matter in totality including the concession by the National Prosecuting Authority I hasten to add that it is trite that I am not bound by the said concession.

I caused an order to be issued dismissing the reinstatement of the appeal.

The applicant's legal practitioners have requested for my reasons for so doing.

The chamber application on behalf of the applicant does not cite under what law they seek the reinstatement of the appeal. They are probably of the view that it is common knowledge. Be state as it may, it may be prudent in future for the legal practitioner to base their application on stated legal provisions in their application.

Reinstatement of appeals falls under the Supreme Court (Magistrate Court) (Criminal Appeals) Rules 1979 (hereinafter called the Rules). It should also be noted that although the title suggests otherwise the said Rules apply to, the High Court (See Magistrates Court Amendment Act (No. 9 of 1997). Section 60 of the Magistrates Court Act [*Chapter 7:10*] and s 44 (4) of the High Court Act [*Chapter 7:06*], Section 34 (3) of the Act no 28/1981. Section 60 (3) of Act no 29/81 and Section 11 (2) of Act No. 9 of 1997.

Part VII of the Rule are applicable to the instant case and they provide as follows:-

“34. Noting of appeal

(1) The appellant shall within five days of the passing of, sentence note his appeal by lodging with the clerk of court, a notice in duplicate setting out clearly and specifically, the grounds of the appeal and giving for the purpose of service the address of his legal representative, or if a legal representative has yet to be appointed, the address of the appellant.

(5) A copy of the notice of appeal noted in accordance with the provisions of this rule shall be sent to the Registrar.”

In the instant case it appears that the noting of appeal was done three days after the sentence was pronounced, and the notice of appeal provides the address of the appellant’s legal representative.

Effectively when the Registrar sent the letter referred to earlier she directed it to the legal practitioner named in the notice of appeal.

Section 37 is another relevant section it reads as follows:

“37 setting down of appeal and heads of argument.

(1) The Registrar shall send written notification of the appellant’s legal practitioner as soon as he has received the record and copies thereof referred to in subrule (6) of Rule 36 and shall call upon the legal practitioner to file heads of argument within fifteen days after the date of such notification.”

From a reading of the chamber application and with reference to Annexure ‘B’ the Registrar adhered to the requirements of r 37 (1) by requesting appellant’s legal practitioners to file heads of argument, within 15 days after, receiving the said notification.

When the Registrar received no heads of argument from the applicant’s legal practitioners he responded by filing annexure ‘C’ reads as follow:

“RE: STATE V VIMBAI TANYANYIWA

The above mentioned accused noted an appeal against conviction / sentence and was called upon to file heads of argument by 28/02/18. To date no heads of argument have been received and filed as requested. The appeal I hereby accordingly dismissed and you are hereby requested to issue out a warrant of arrest, against the said accused.”

Annexure ‘C’ above appear to be in the spirit of s 37 (5) if the Rules which reads as follows:

“(5) If the Registrar does not received heads of argument from the applicant’s legal practitioners within the period prescribed in Subrule (2) the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.”

The present applicant ostensibly follows from s 37 (2) of the Rules which reads as follows:

“(2) Within fifteen days after being called upon to file heads of arguments in terms of subrule (1) or within such longer period as a judge may for good cause allow the appellant’s legal practitioner shall file with the Registrar a document setting out the main heads of argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the Attorney General.” (underline is mine).

I am now asked to consider whether or not good cause prevails for me to extend the period for filing of heads of arguments by appellant from fifteen days after she was called upon by the Registrar to file heads of argument.

According to the appellant I have to consider length of delay and prospects of success.

The question is that, does this amount to all that I have to consider to conclude whether or not good cause prevails in this case? It appears that there is considerably more for my consideration, regard being had to the following cases. In *FBC Bank Limited v Robert Chidziva* judgment SC 31/17 GWAUNZA JA (as she then was) had occasion to deal with an application for the reinstatement of an appeal and she said:

“In considering an application for reinstatement MALABA JA (as he then was) held that the question for determination is whether the applicant has shown a cause for the reinstatement of the appeal. In considering application for condonation of non-compliance with its rules, the court has a discretion which it has to exercise judicially in the sense that it has to reconsider all the facts and apply established principles bearing in mind that it had to do justice. Some of the relevant factors that may considered and weighed one against the other are the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent’s interest in the finality of the judgement, the convenience to the court and the avoidance of the unnecessary delays in the administration of justice.”

Also see *S v Kanongora* HH 123/17, *Solojee and Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A), *Viking Woodwork (Pvt) Ltd v Blue Balls Enterprises (Pvt) Ltd* 1998 (2) ZLR 351, *Zimslate Quartzite (Private) Limited and 3 Ors v Central African Building Society* Judgment SC 34/17.

It is against the above principles that I considered this application.

The notice of appeal was filed three days after the sentence was handed down on 24 November 2018. The applicant’s legal practitioners were invited to file heads of argument on 26 January 2018. Only on 9 March 2018 did the Registrar write to the clerk of court announcing that the appeal was dismissed due to the applicant’s failure to file heads of argument as per the rules.

The applicant blames the failure to file heads of argument on her then legal practitioners. No effort was made by the applicant to check on the progress of her appeal from November 2017

up to the time she discovered the developments. It appears from the application that the applicant only made the discovery after 9 March 2018 which mean she had not enquired of the progress of her case for a period in excess of three months. That her then legal practitioners paid no heed to the Registrar's letters requesting them to adhere to the rules in dereliction of duty. The point however is that applicant herself did not exert at all until the appeal was deemed dismissed.

Thus I find that the reasons for not adhering to the rules and the period of 3 months wherein no action was made by the applicant, in a bid to have their appeal prosecuted is inexcusable.

This case involves infraction of s 89 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The applicant in the notice of appeal filed raised grounds of appeal only against sentence. The grounds basically attack the sentence of community service on the basis that the applicant should not have been ordered to perform community service as she is gainfully employed on a full time basis, that there was provocation by the complainant and that the complainant did not suffer serious injuries. It is further stated in the notice of appeal that the applicant's personal circumstances were not adequately considered and that the sentence is harsh and excessive in the circumstances.

I have considered the grounds of appeals against the record of proceedings.

I am cognisant that in considering the said grounds it is in order to determine the issue of prospects of success.

The ground of appeal on sentence presupposes that only unemployed convicted persons can be sentenced to perform community service, which is clearly a fallacy. In this case the court enquired from the applicant's legal practitioners which police station was closest to applicant's home in case of sentence of community service were to be passed. The legal practitioner consulted applicant and came up with Courtney Primary School. The court further asked if the applicant was prepared to go and perform community service at Courtney Primary School and the applicant's legal practitioner's answer was, "If the Court finds that to be appropriate that would be acceptable although that may jeopardise her business."

A sentence meted out by the Court in one or more ways will jeopardise the work business family and other interest of an accused. However, a court has to mete out an appropriate sentence where an accused is found guilty.

The provocation advances in the grounds of appeal was adequately dealt with in the judgment of the court *a quo*. The assault was perpetrated upon a 57 old defenceless woman who suffered five or more blows and sustained moderate injuries.

The sentence is in the vicinity of other like sentences and thus the prospects of success on appeal are dim. See *Howard Phiri v The State HB 310/17*, *The State v Bekezele Mguni HB 21/17*, *State v Tapiwa Madyambudzi HH 333/17*.

It should be noted that it is not necessary where there are no prospects of success on appeal to burden the already overloaded roll by reinstating this matter on the roll.

In consideration of the above factors, the fragrant disdain of the Rules of Court and the need for finality in the interest of justice, I find no good cause to elongate the period for the filing of heads of arguments by applicant above the period set by the rules.

It is ordered as follows:

Application for reinstatement of the appeal is dismissed.

Obedience Muchuvairi Attorneys at Law, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioner