

NYASHA NGWERUME  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
KWENDA J  
HARARE, 20 February 2019

### **Chamber Application**

KWENDA J: Applicant was convicted by the regional court sitting at Chitungwiza on a charge of aggravated indecent assault as defined in s 66 (1) ii of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

He was sentenced on 23 March 2018 to twenty years of which three were suspended.

He intends to appeal. He has applied for an order condoning late filing of appeal and leave to appeal because he is out of time.

He has attached a draft notice of appeal against both conviction and sentence. I presume that the application filed on 1 October 2018, is in terms of the Supreme Court (Magistrates Court) Criminal Appeals/Rules 1979. See Rule 48 as read with 47 (Rules now repealed).

Rule 48 provides for applications for leave to note appeal out of time. This application is characterised as an application for condonation of late filing of a notice of appeal. Such wording does not appear in the rules.

The State has consented to the application in an unhelpful response which covers only half a page. The State has supported the application on the grounds that the “applicant did not have money to engage the services of a legal practitioner.”

The response by the State does not deal with the merits of the appeal.

The notice of appeal contains what applicant described as a point *in limine*. It has been submitted on behalf of applicant that the court *a quo* ought to have found that the applicant was not criminally responsible due to mental disorder or default as contemplated in the Mental Health Act [*Chapter 15:06*]. The founding affidavit does not direct me to anything submitted with the application or in the record which supports this averment.

The rest of the grounds of appeal against conviction consist of a detailed analysis of evidence led by the State. The same can be said of the grounds of appeal against sentence which read like submissions in mitigation.

The rules require the grounds of appeal to be set out clearly and specifically. Such grounds must be concise and to the point clearly stating in brief how the court *a quo* erred.

The notice of appeal is therefore a nullity. Leave may not be granted so that the applicant can file a nullity.

Sub rule 2 (a) of r 48 is unambiguous. An application for leave to note an appeal out of time shall be accompanied by a draft notice of appeal complying with the appropriate provisions of the rules.

Accordingly, the draft notice of appeal is central in considering applications of this nature. The judge will, in considering whether to grant or refuse the application, take into account the contents of the draft notice of appeal and where the notice of appeal is either a nullity or lacks merit, the application cannot succeed.

Accordingly the application is dismissed.

*Rubaya & Chatambudza*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners