

THE STATE  
versus  
LAWRENCE KANYERA  
and  
CHARLES MHAKO

HIGH COURT OF ZIMBABWE  
CHITAPI & CHINAMORA JJ  
HARARE, 13 January, 2020

### **Criminal Review**

CHITAPI J: The learned presiding magistrate stayed continuation of the trial and referred the record of proceedings to the Registrar for “review”. The learned magistrate generated a letter to accompany the record. The letter dated 31 October, 2018, reads as follows:

“APPLICATION FOR REVIEW IN TERMS OF SECTION 26 AND 27 OF THE HIGH COURT ACT CHAPTER 7:0: STATE V LAWRENCE KANJERA + CHARLES MHAKO  
SHM 861-2/18

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The above matter refers.

Kindly place the record before the Hon Judge for review. I am applying for recusal in this matter for two reasons captured in s 27 (b) of the High Court Act namely bias and malice emanating from the proceedings.

The reasons are as follows;

There is likelihood of bias that will be inferred I am to convict the accused person number two in these proceedings. The background facts are that I commenced two trials including the 2<sup>nd</sup> accused person in this matter on 02.10.18 and the other record in SHM851/18. I convicted the 2<sup>nd</sup> accused on CRB SHM 851/18 on 18.10.18 where the complainant was Paul Chimbi and in that record elements of clashes and grudges were observed. On this case SHM 861-2/18 some witnesses who came to testify later in the course of trial disclosed that they were being assaulted

with machetes for failure to disclose where Paul Chibini the complainant under CRB SHM851/18. Therefore, having knowledge of the 2<sup>nd</sup> accused and the involvement of Paul Chimboni in this record any decision against the 2<sup>nd</sup> accused person would appear biased. Therefore, I would need to be seen as being impartial as I believed that on SHM 851/18 of malicious damage to property I acted on merit without any external influence alleged in the administrative complaint.

Another reason is that I am no longer comfortable handling the matter considering the falsehood which are rebutted by the record of proceedings on the events of initial remand of this case which were cited in the formal letter of complaint made to my superiors. I find the glaring falsehood malicious against my reputations I am not the one who entertained the initial appearance of the to accused person. It was my brother magistrate Mr Mangoti who for reasons best known to him remanded them in custody yet accused two blames me for the that conduct I am only a woman distinct from the man and such conduct has shown me that accused 2 has no respect for the presiding court and determined to tarnish my image.

I state that the subsequent bail ruling I gave on 03.10.18 were on the merits and no external influence was exerted upon me by any person as described in my response to the administrative complaint.

It is on these two grounds that I pray that I be recused from handling the above mentioned matter.

Thank you.

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M. Makati

Trial Magistrate

Bindura Magistrates Court”

In the above letter, the learned magistrate purports to make an application for her recusal for reasons of what she termed “bias and malice” emanating from the proceedings.” The learned magistrate is misdirected on procedure. She states in her request that her application for recusal is based on the provisions of s 27 (b) of the High court. Section 27 of the High Court Act, [*Chapter 7:06*] lists the grounds on which any proceedings or decisions may be brought on review by the High Court.

The background to the matter is that the a different magistrate commenced the trial of the two accused on seven (7) counts of assault as defined in s 89 (1) (a) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] on 27 September, 2018. The accused's person upon being appraised of their right to seek legal representation elected to have the trial proceed without them being legally represented. The different magistrate recorded the accused person's NOT GUILTY pleas to the charges and postponed the case to 2 October, 2018.

On 2 October, 2019, the two accused persons appeared before the current magistrate who has brought the proceedings on review. The learned magistrate again ascertained whether the accused persons wished to be legally represented. They elected to proceed without legal representation. The magistrate then repeated the motions of plea recording as had been done by the first magistrate. The accused persons restated their pleas of NOT GUILTY to each of the (7) seven counts. The motion of recommencing plea recordings as was done was irregular because once an accused has entered a not guilty plea, he is entitled to a verdict. The not guilty pleas entered on 27 September, 2018 remain unresolved. In order that the record is not distorted the NOT GUILTY pleas entered on 27 September, 2018 are set aside by way of correction of the proceedings such power to correct the proceedings being exercisable in terms of proviso (iii) to s 29(2). No prejudice to either the accused persons or the State arises from the correction made since the same motions were redone in accordance with trial procedure as obtains in the magistrates court. For the avoidance of doubt, the second magistrate should have proceeded from where the first magistrate had ended. The attention of the learned magistrate is drawn to proviso (1) to s 180 (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] which reads that:

- “(i) where a plea of not guilty has been recorded whether in terms of section two hundred and seventy two or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced.”

The trial was supposed to be continued in terms of the above proviso. The failure to do so as already pointed out did not vitiate the proceedings as there was no prejudice to the accused to their rights to a fair trial.

After the trial had commenced, defence outlines of the accused persons recorded and a number of state witnesses having testified, there was a development which torpedoed the trial. The 2<sup>nd</sup> accused on 22 October, 2018 generated a written complaint against the presiding magistrate to the Judicial Service Commission in which he made allegations against the magistrate of *inter alia*, having a personal interest in the case arising out of what he termed

family and social connections. The learned magistrate responded to the complaint denying allegations of impropriety in her conduct of the case. I do not wish to and neither is it material to this judgment to go into the intricate details of the complaint made and the response thereto.

On 24 October, 2018, the accused persons appeared for continuation of the trial represented by a legal practitioner, Mr *Musariri*. The legal practitioner formally applied for the recusal of the learned magistrate. The gravamen of the application was that, since the learned magistrate had convicted the 2<sup>nd</sup> accused on a separate but related charge of malicious injury to property, she was likely to be biased against the 2<sup>nd</sup> accused as she had already commented adversely on his character. The prosecutor whilst accepting that the malicious injury to property trial and the current trial were running concurrently argued that the 2<sup>nd</sup> accused had a remedy of appeal and had been precipitate in applying for recusal and not waiting for the trial to be completed.

The learned magistrate postponed the trial for her ruling on the recusal application. She delivered the ruling on 30 October, 2018. In her ruling the learned magistrate noted on the authority of the case of *Nhire and Anor v S* 2015 (2) ZLR 295 that the threshold for a finding of real or perceived bias should be based on a factual foundation as opposed to conjecture. She accepted that the second accused had been on trial before her in a concurrent trial in which the complainant in the malicious damages to property charge was different from the complainants involved in the instant trial. The learned magistrate then commented on the inaccuracy of the second accused's complaint against her to the Provincial Magistrate and the Judicial Services Commission. She also accused the legal practitioner of not being candid by making submission on behalf of the second accused without checking the veracity of facts. She accused the second accused of being intent to tarnish her image and reputation. The learned magistrate then stated that she maintained the position that the proceedings were conducted in accordance with "substantial justice subject to the review and scrutiny."

In the last paragraph of the ruling the learned magistrate stated:

"It is on this basis that the court will recuse itself and forward the application for recusal for the judge for determination on the proceedings would (sic) if recusal granted, be quashed for the matter to be heard de no,"

My reading of the proceedings relating to the application for the learned magistrate's recusal shows implicit and explicit signs of emotion on the part of the learned magistrate. I say so because she dealt with issues of the second accused having written letters of complaint to the Provincial Magistrate and the Judicial Service Commission which contained falsehoods

meant to tarnish her reputation. With due respect to the learned magistrate she was misdirected and fell below expected standards expected of a judicial officer to avoid being clouded by emotions. The job of a judicial officer is emotionally draining and requires that the judicial officer remains dispassionate in the discharge of judicial duties. Despite what litigants and the public will say it is expected that the judicial officer will remain rationale, impartial and not swayed by extraneous considerations. Allegations of impropriety, bias, corruption and all the bad things will be said of the judicial officer. This is to be expected because litigants will be safeguarding their rights and in the process a judicial officer becomes the centre of focus and mistrust by the litigants. The magistrate is reminded of the judicial oath as given in the Third Schedule to the Constitution. Judicial officers swear to be faithful to Zimbabwe, to uphold and protect the Constitution and to administer justice to all persons alike without fear, favour or prejudice in accordance with the constitution and the law. The letter which accompanied the record as quoted at the beginning of this judgment supports my view that the learned magistrate allowed emotion to get the better of her. The learned magistrate stated that she was “only a woman distinct from a man....” This statement is loaded and suggestive. I do not propose to unpack it save to disabuse the learned magistrate of this wrong notion of distinguishing herself on grounds of gender. In the judicial office and as far as distinctions may come into play the office is gender blind in regard to the exercise of jurisdiction conferred by the office. The learned magistrate must find solace in my reminding her that she is a magistrate with the same powers as her male colleagues of similar rank. She should never feel inferior by virtue of gender.

Reverting to the crux of the reference of the record to be placed before a judge on review, a judicial officer does not apply to recuse himself or herself. The judicial officer is the presiding officer in proceedings. Parties may apply for the recusal of the judicial officer. If grounds for recusal present themselves, the magistrate is free to recuse himself without parties prompting him or her. Where such an application is made, there is nothing special about it. It should be dealt with like any other application without emotion and determined upon a proper application of the law and principles which guide courts in determining recusal applications to facts alleged as grounding the basis for the recusal. *In casu*, the main contention advanced in support of the application for the learned magistrate’s recusal was that she was likely to be biased because she had concurrently dealt with a related case involving the 2<sup>nd</sup> accused and made findings on the accused’s character and credibility in convicting him on the other matter. In my view the ground raised was not frivolous nor vexatious. The learned magistrate should

have confined herself as much as possible to answering of the issue, raised. She unfortunately just glossed over it. I will not bother to interrogate the veracity of this ground of recusal because the learned magistrate made a decision to recuse herself.

I have already repeated the contents of the last paragraph of the ruling in which the learned magistrate indicated that she had recused herself and awaited a determination on whether a judge would grant the recusal and quash the conviction. As I have pointed out, the judicial officer is empowered to recuse himself or herself. The judicial officer does not apply to this court for recusal. At best, after making a decision to recuse himself or herself, the judicial officer will forward the record to a judge of this court on review with a request that the proceedings be set aside and further direction given as to the future conduct of the case. A judge of this court may on review order that the magistrate should continue with the proceedings or quash them and allow a fresh trial subject to the decision to prosecute afresh being left to the discretion of the Prosecutor General.

In my assessment of the proceedings, it is clear that the learned magistrate succumbed to the human frailty of negatively reacting to criticism on the basis that the attack on her integrity and reputation was unwarranted and baseless. I do not consider that it would be in the interests of justice and fair trial dictates that the learned magistrate be ordered to continue with the trial not least wise because she has already recused himself but moreso because she has already adjudged the 2<sup>nd</sup> accused to be a liar who made false allegations against the learned magistrate to her superior. The learned magistrate therefore has a negative mindset towards not only the 2<sup>nd</sup> accused but his legal practitioner whom she accused of lacking professionalism by failing to check facts before making submissions in support of the recusal application. It is therefore important that I grant an order that will ensure that this poisoned trial should be disposed of in conformity with fair trial dictates as provided for in section 69 of the Constitution. The following order will therefore ensue. I also record that my brother CHINAMORA J to whom I referred this judgment for his opinion agrees with it and the order made.

1. The proceedings against the accused persons in case no SHM 861-2/18 are hereby set aside in consequence of the recusal by the presiding magistrate.
2. In the event that the Prosecutor General decides to prosecute the accused persons afresh, such prosecution shall be done before a different magistrate *de novo*.

CHINAMORA J *agrees*:.....