

THE PROSECUTOR GENERAL OF ZIMBABWE**Versus****TENDAI CHINEMBIRI**IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAAYO 17 & 19 MAY 2016**Opposed application***T. Hove* for applicant*R. Mahachi* for respondent

MAKONESE J: This is an application for leave to appeal, pursuant to the provisions of section 61 (b) of the Magistrates' Court Act (Chapter 7:10). The application is opposed on the grounds, *inter alia*, that the application for leave to appeal is well out of time. The judgment which is the subject of this application was delivered on 11 October 2013. This application is being brought more than two years later. The application is hopelessly out of time. There has been no attempt by the applicant to seek condonation for the late filing of the application for leave to appeal. There is no explanation why the application was not made timeously.

Background

The respondent appeared before a Regional Magistrate at Bulawayo on a charge of rape. The respondent was found not guilty and acquitted. It would appear that the applicant was not satisfied with the outcome of the criminal proceedings hence the intention to appeal. The grounds of appeal as set out in the draft notice of appeal are as follows:

“Grounds of appeal

1. The court erred in believing that the complainant's evidence was not credible.
 - 1.1 The learned magistrate erred in relying on the delay in making the report as a reason why the complainant's evidence should not be believed.

- 1.2 The learned magistrate erred in attaching too much weight to the fact that threats were not made to the complainant by the respondent as a ground for casting doubt on his guilt.
- 1.3 The learned magistrate erred in attaching too much weight on the fact that the complainant went back to the respondent's home after the first offence and continued playing there after the second offence.
2. the learned magistrate misdirected herself by taking judicial notice of the alleged feud that existed between the two families as a ground for casting doubt on the guilt of the accused when the evidence before the court proved that such feud did not exist."

It is clear that the applicant does not intend to appeal against the decision of the trial court on a point of law. Section 61 (b) of the Magistrates Court Act (Chapter 7:10) provides as follows:

"If the Prosecutor General is dissatisfied with the judgment of the court in a criminal matter –

- (a) upon a point of law; or
- (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not be reasonably entertained;

he may, with the leave of a judge of the High Court, appeal to the High Court against that judgment."

The respondent contends that there has been an inordinate delay in the bringing of this application. Further, and more importantly, there has been no explanation for the delay in instituting this application. It is trite that there is no set time limit for the filing of an application for leave to appeal. Such an application, in my view should be brought within a reasonable time. See *Attorney General v Lafleur & Another* 1998 (1) ZLR 520 (H), and *Prosecutor General v Beatrice Mtetwa & Anor* HH-82-16.

The overriding principle to be applied in such cases is that there is need for finality in litigation. The respondent is entitled to a fair hearing as enshrined in section 69 of the Constitution of Zimbabwe (No. 20 of 2013), which provides as follows:

"69. Right to a fair hearing

- (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
- (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law ...”

As clearly stated by MAWADZE J in *Prosecutor General v Beatrice Mtetwa and Another (supra)* at page 9 of the cyclostyled judgment:

“... it should be made abundantly clear to the Prosecutor General that the Prosecutor General is not at liberty to come to this court any time the Prosecutor General so wishes and seek leave to appeal. Such conduct should be frowned upon by this court and ought to be admonished without any hesitation by dismissing such an application for leave to appeal.”

The remarks by MAWADZE J, apply with equal force in this matter. I cannot comprehend why it has taken the applicant more than two years to realize that there is need to appeal against a judgment delivered in October 2013.

I make a specific finding that this application is not properly before the court for the reason that there is no application for the late filing of the application for leave to appeal. In any event, a cursory look at the grounds of appeal in the draft grounds of appeal reveals that this attempt to appeal is nothing more than a fishing expedition.

The proposed grounds of appeal reflect a general criticism of the findings of the trial court on issues of credibility. The grounds of appeal do not disclose a fundamental misdirection in the manner in which the trial magistrate examined the evidence or handled the case. Findings of fact are traditionally the domain of the trial court.

In the circumstances, I would uphold the point *in limine* taken by the respondent in that there has been an inordinate and unexplained delay in bringing this application. There is therefore no need for me to go into the merits of this application.

Accordingly, it is ordered that:

The application for leave to appeal be and is hereby dismissed with costs.

National Prosecuting Authority, applicant's legal practitioners
Messrs T. Hara & Partners respondent's legal practitioners