

VINCENT PAMIRE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHATUKUTA AND MUSAKWA JJ  
HARARE, 21 January, 20 February, 8 & 25 March 2019 & 2 October 2020 &  
5 October 2020

### **Criminal Appeal**

*E. Mubaiwa*, for appellant  
*S. Fero*, for respondent

MUSAKWA J: The appellant is seeking a referral of the matter to the Constitutional Court on the basis that his right to protection of the law has been compromised by the delay in the hearing of the appeal.

The background is that on 23 December 2008 the appellant was convicted of four counts of theft by conversion. He was sentenced to a total of 30 months' imprisonment of which 6 months were suspended for 5 years on the usual condition of good behaviour. Twelve months were suspended on condition of restitution and the remaining 12 months were suspended on condition of performing 420 hours of community service. Appeal against conviction and sentence was noted on 9 January 2009. On 11 April 2017 the appellant filed an amended notice of appeal. On the same date the appellant filed a chamber application for referral to the Constitutional Court.

There was a hiatus which was occasioned by the impasse between the appellant and the respondent regarding the procedure by which the referral was to be made. More particularly the parties would not agree on whether the facts on which the application was to be made were not in dispute. Ultimately the appellant filed a summary of evidence whilst the respondent filed its summary on 15 February 2019. The parties also agreed that they would lead evidence from one witness on either side.

On the date set for the hearing the appellant took to the witness stand. He stated that after he was sentenced he instructed his lawyers to note an appeal. Having failed to reconstitute he was committed to Chikurubi Prison. In between his wife managed to secure legal services

and he was released on bail. Since he could no longer afford to pay his legal practitioners he went to an office where he met a Mr Roderick Tokwe. From the appellant's explanation the office he went to is within the High Court complex. He was assured that his appeal was in order and would be notified once the matter was due for a hearing. He was also told that appeals were on a first come first heard basis. As to why he went to Mr Tokwe he explained that according to his wife this is the person she had dealt with concerning bail. As to why he was making these follow-ups in person he explained that his legal practitioners were reluctant to continue representing him as he owed them fees.

At some stage he fell ill. He again went to see Mr Tokwe and informed him that he was going to South Africa for treatment. He was told to give feedback when he returned. When he returned from South Africa he resumed communication with Mr Tokwe. They used to communicate by telephone. The indication from Mr Tokwe was that their office was short-staffed and that when the appeal was set down for hearing he would be informed. The appellant later learnt that Mr Tokwe had passed on. Not long after that his wife also passed on. He pursued the matter after engaging new legal practitioners.

Under cross-examination the appellant stated that he instructed that an appeal be noted. His wife is the one who had engaged Chinyama and Partners. He was not sure which legal practitioners noted the appeal. He stated that the meetings with Mr Tokwe did not involve his legal practitioners. He was asked about Mr Tokwe's position and in what way he was to assist him. His answer did not directly address the question as he stated that they only wanted to know when the appeal would be heard. Later he stated that he did not know Mr Tokwe's position. All he knew was that he was an officer of the court. He was also asked if he expected the appeal to be expedited and he replied that from his experience with a civil matter he did not expect so. Thus he had an idea that appeals took long to be heard. As to the steps he took to expedite the hearing, he stated that he tried to mobilise funding. Concerning why the enquiries did not involve his legal practitioners he explained that initially the company in which he was a director (Victoria Steel) paid his legal fees. When the matter dragged on they ceased to provide funding. Regarding whether there was formal communication, he stated that the communication was by telephone. On prejudice he stated that he did not think that he would be prejudiced, adding that he had waited for too long and had aged in the process. There was no re-examination.

The court sought clarification with the appellant on some aspects of his testimony. He stated that he engaged Nyangulu and Associates legal practitioners after Mr Tokwe's death.

He claimed to have been unaware that Chinyama and Associates renounced agency in 2018. Concerning the office he visited at the High Court, he stated that he did not know its location.

Raymond Matangaidze was called to testify on behalf of the respondent. He is the Deputy Registrar in the Criminal Division. He explained that from his perusal of the record of proceedings he noted that appeal was filed in 2009 and costs for preparation of the record were paid by the appellant in 2014. There is no correspondence from the appellant. It is the Registrar's responsibility to set down a matter for hearing. As for the delay in the hearing of the appeal, he stated that there was a backlog. Appeals are set down on a first come first served basis depending whether heads of argument have been filed. He was not aware what stalled the payment of fees for preparation of the record in the present matter. He did not ascertain with the clerk of court. He stated that communication with an appellant happens when they want heads of argument filed or when they notify of set down. There was no Roderick Tokwe who ever worked at the High Court. The costs for a record are only determined after the pages have been verified.

In his written submissions counsel for the appellant highlighted the following: For the first time, outside the evidence led by the appellant we now know that Roderick Tokwe was a Chief Law Officer who appeared for the State in the bail proceedings that involved the appellant. He is the one who is alleged to have communicated with the appellant concerning his appeal until he passed on. Thereafter the appellant engaged Nyangulu & Associates and it did not take long for the appeal to be set down. The appellant should be believed regarding his interaction with Mr Tokwe. The submission is that he was credible in his explanations and that he freely confessed his memory lapses. It is also submitted that Raymond Matangaidze did not offer any explanation for the delay in the processing of the appeal. It is submitted that notwithstanding the shortcomings in the Registrar's Office, Raymond Matangaidze was a credible witness.

The appellant's submissions on referral can be summed up as follows: No cogent explanation for the delay in the processing of the appeal has been advanced. No evidence was led on the lack of capacity to process appeals by the Criminal Registry was led. The duty of the appellant to explain himself arises after the State has explained its part. The appellant took action to assert his rights and he was not aware that Mr Tokwe did not work for Criminal Registry.

In its written submissions the respondent pointed out the issue of referral has to be considered against four factors: the length of delay, the cause of delay, whether the appellant

asserted his rights and the prejudice occasioned by the delay. It was submitted that the principles applicable to the determination of delays in bringing an accused to trial should equally apply to delays in finalising an appeal. In this respect authorities relating to delay in bringing an accused to trial cited are *Shumba v Attorney-General* 1997 (1) ZLR 589, *S v Mavharamu* 1998 (2) ZLR 341, *In re Mlambo* 1991 (2) ZLR 339 (SC) and *S v Fikilini* 1990 (1) ZLR 105 (SC).

The starting point to note is that the referral of a matter to the Constitutional Court is governed by s 175 (4) of the Constitution which provides that:

“If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.”

An application for referral is preceded by the leading of evidence by an applicant. In that application a basis for the referral must be laid out. The applicant must lay out the length of the delay, and to what extent he was responsible, whether he asserted his right and the prejudice occasioned by the delay. In this respect reference is made to *S v Banga* 1995 (2) ZLR 297 (SC).

What constitutes frivolous and vexatious has been laid out in a number of authorities. In *Martin v Attorney-General And Another* 1993 (1) ZLR 153 (SC) whilst considering the issue within the context of the former constitution, GUBBAY CJ had this to say at 157-

“In the context of s 24(2), the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised bona fide, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJKB 857 at 859; *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476D-G; *Fisheries Development Corporation of SA Ltd v E Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F.

To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court.”

Reliance is also placed on the decisions in *Traude Allison Rogers v Elliot Grenville Kern Rogers and Master of The High Court* SC 64-07 and *Tomana and Another v Judicial Service Commission* HH-281-16. In *Traude Allison Rogers v Elliot Grenville Kern Rogers and Master of The High Court supra* MALABA JA (as he then was) summed up frivolous and

vexatious as unsustainable, manifestly groundless or utterly hopeless and without foundation. In that judgment reference was made to several other authorities.

A court that is requested to refer a matter to the Constitutional Court is enjoined to consider the merits of the request. In other words the court must consider whether the referral enjoys prospects of success. In this respect see *Martin v Attorney-General And Another supra*.

There is no doubt that there was an inordinate delay in the processing of the appeal. There is no correspondence between the Registrar and the clerk of court regarding the preparation of the record and what delayed the appeal. However, equally if not more culpable is the appellant himself. The appellant appears to have adopted a supine attitude and never asserted his rights. There is no evidence of any correspondence that was written demanding the setting down of the appeal. The case of *S v Banga supra* serves to highlight that the appellant had an obligation to assert his rights. In that case GUBBAY CJ had this to say at p 301-

“This court has stressed frequently that if an accused is of the view that the State is dragging its feet in bringing him to trial, he must assert his constitutional right to be tried within a reasonable time and in default of compliance with such protest seek a stay of proceedings. See *S v Ruzario* 1990 (1) ZLR 359 (S) at 367F-G; *In re Mlambo supra* at 354B-C; *S v Musivitsi & Anor* S-229-93 at p 6; *S v Matarutse supra* at p 3.

A failure to object along the way until the stage is reached where the State is able to commence with the trial, will lead to the inevitable inferences that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that his eleventh hour protest was nothing more than a desperate tactic to avoid the outcome of the trial.”

The appellant placed reliance on telephone calls he made to Mr Tokwe as evidence of the follow-ups regarding the delay in the hearing of the appeal. There is no single officer from the Registrar’s office that he was able to name as persons he engaged in the process. Mr Tokwe whom he claimed to communicate with was a prosecutor from the Prosecutor-General’s Office. It is unconvincing that the appellant could place reliance on a prosecutor for purposes of processing his appeal. The appellant struggled to describe the office he visited at the High Court where he claimed to have met with Mr Tokwe. This lays hollow the suggestion that a serious assertion of rights was ever attempted. The appellant did not impress as a naive person who would not have known the setting down of criminal appeals is not processed by the Prosecutor General. It must be noted that the appellant was familiar with court processes. During his testimony he drew experience from a civil matter he had once

prosecuted. He made reference to this in the context that he was familiar with delays experienced in court processes.

Apart from the appellant's failure to assert his rights, during the course of his testimony he did not articulate the prejudice he stands to suffer as a result of the delay in the hearing of the appeal. In his testimony the appellant said he would not be prejudiced. But he also stated that he has aged and has waited for too long. As pointed out earlier, these aspects were not clarified. It must be appreciated that this is an appeal as opposed to a trial. All the evidence the court has to consider is on paper. There is no claim that the record of proceedings is defective.

It follows then that the application for referral is frivolous and vexatious. In the result the application is hereby dismissed.

CHATUKUTA J agrees.....

*V. S. Nyangulu & Associates*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners