JACOB MAFUME
versus
THE PROSECUTOR GENERAL OF ZIMBABWE
and
VONGAI GUWURIRO ESQ (N.O)

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 14 February 2023

Court Application for review

Adv T Zhuwarara, for applicant
F.I Nyahunzvi, for first respondent

KATIYO J: The superior courts, generally are not keen on interfering with lower courts proceedings as a matter of practice. Only in exceptional circumstances that such interventions are necessary.

The applicant the then Mayor of Harare Metropolitan approached this court seeking the following relief.

Relief sought

1. The second respondent's decision of the 18th of May 2022 in Criminal cause ACC 286/20 is hereby and set aside.
2. The Charges facing the Applicant in Criminal Cause ACC 286/20 are hereby quashed.
3. The costs of this application be borne by the first respondent if opposed

The charges facing the applicant

In this matter held at rotten row magistrates court the accused was charged with the crime of criminal abuse of duty of public office as defined in section 174 of the CRIMINAL LAW [CODIFICATION AND REFORM] Act [*Chapter 9:23*].

In that on the date to the Prosecutor unknown but during the month of March

2020, Jacob Mafume, being a Councilor for Mount Pleasant, Harare City Council therefore a public officer whose duties included to head development in his ward, exercising executive duties of City Council employees and making policies for the smooth running of the City of Harare unlawfully and contrary to his duties as a councilor which duties do not mandate him to allocate land, ordered Admore Nhekairo, the Director of Housing and Community Services to allocate stands to Rotina Mafume his sister and Rutendo Muvuti his workmate both not on the council waiting list, without following due process thereby showing favour to Rotina Mafume and Rutendo Muvuti and showing disfavour to the prospective house seekers on the Harare City Council waiting list.

Brief Background

The applicant was a councilor for Mt Pleasant and also a mayor of Harare City council. The allegations where that the applicant in the period between 1 March 2020 and 31 March 2020 asked one Addmore Nhekairo who was the Director of Housing, to allocate residential stands to Rotina Mafume his sister and Rutendo Muvuti a work colleague at Mafume Law Chambers. It was further alleged that at the time this request came, the interviews for Westlea stands had already closed and the two beneficiaries were not on the waiting list therefore did not have waiting list numbers. The applicant was informed of the deficiencies above but insisted that they be allocated stands. Rotina Mafume was allocated a stand under waiting list number 1317/3/10 which did not exist in the City Council waiting list database. Rutendo Muvuti was allocated stand number 11565 in Westlea under Harare City Council housing waiting list number 903/11/16 which belonged to Winnie Mandishona.

It was therefore alleged that by so doing he showed favour to his sister and work colleague thereby abusing his office as a councilor. He also showed disfavor to Winnie Mandishona who was duly on the waiting list.

The applicant initially objected to the charges as being vague and embarrassing had it amended but still excepted to the charges as not disclosing any offence. The applicant made an application before the magistrate in terms of section 178(1) of

Criminal Procedure and Evidence Act which entitles an accused to apply to quash a charge on the ground that it is calculated to prejudice him in his defense. The applicant argues that the charge does not disclose the exact executive duties of the council which he is subservient to. Also, the allegation by the state to say that it was never his duty to allocate land is equally embarrassing.

Specifically, that "*Jacob Mafume, being a counselor for Mt Pleasant, Harare City Council therefore a public employee and making policies for the smooth running of the City of Harare unlawfully and contrary to his duties as a councilor which duty do not mandate him to allocate land, ordered Admore Nhekairo"*

Averments by parties/submissions

According to the applicant he asserts that the charge does not specifically particularize the exact duty of the Applicant that he allegedly breached. The charge confesses that it was never the Applicant's duty to allocate land. Section 174 (1) of the Criminal Law Code criminalizes the commission or omission of a duty by a public officer in the exercise of his or her duties.

What is apparent from the charge is that it is not the function of the Applicant to allocate land. It therefore follows that the Applicant cannot be accused of having shown favor or disfavor in the exercise of functions. Such favor or disfavor ought to have been shown by a person whose duty was to allocate land.

The first respondent in its opposing affidavit admits that it was not applicant's duty to allocate land. Clearly a charge in terms of 174 of the Code cannot arise where it is being admitted that it was not the Applicant's duty to allocate land. There is no derogation from a duty that does not exist.

The first respondent averred that the charge showed that the applicant had certain duties he was supposed to carry out and that he derogated from those duties, applicant then went on to carry out duties he was not supposed to do. In the case of *S* v *Taranhike & 5 Ors* HH 222-18, the court clarified what needed to be alleged for one to be guilty of abuse of public office had this to say:

> "The trial magistrate in dismissing the application ruled that section 178(1) of The CP and E Act gives the court three available options and that section is not a getaway section to circumvent the ends of justice. She held that the charge as it stands contains sufficient particularities which are reasonable enough to inform the applicant of the offence charged. It therefore follows that the magistrate ordered the applicant to plead to the amend charges in that form. The applicant would not have any of that and decided to approach this court."

The applicant who initially had not attached the relief sought a point which the first respondent had objected to as invalidating this application gave a notice of amendment and did so arguing that the review is in terms of the Act and rules as contemplated by the first respondent. Let it be pointed out that what is critical in this matter is whether the charge is crafted as to embarrass the applicant or has sufficient details to disclose an offence. The first respondent by amending his initial charge was an admission that there was something wrong with it.

The applicant in his heads of arguments argues as follows:

In *limine*

The application is not fatally defective.

The objection suggesting that the application that did not on the face of it indicate the relief sought has no merit. The objection would have been merited if the Applicant had approached the Court in terms of High Court Rules. He did not. Section 26 of the High Court Act gives High Court the power to review proceedings and decisions of all inferior courts, tribunals and administrative authorities. Section 27 sets out the grounds for review. The sections provide as follows:

> 26 "Power to review proceedings and decisions subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
>
> 27 Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be
> (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned.
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the

case may be;

(c) Gross irregularity in the proceedings or the decision."

The above provisions allow a party to bring proceedings or to approach the High Court seeking a review of any proceedings or decision and raise a jurisdictional point. The Act does not set out the format of such an application that ought to be made by such an applicant. In line with the right that is given to an Applicant to have the High Court review proceedings or decisions of the inferior courts, the Applicant instituted the present application for the review of the second respondent's decision.

The present application is not being brought in terms of Rule 62 of the High Court Rules as suggested by the first respondent. In line with the right that is given to an Applicant to have the High Court review proceedings or decisions of the inferior courts, the Applicant instituted the present application for the review of the second respondent's decision.

The present application is not being brought in terms of Rule 62 of the High Court Rules as suggested by the 1st Respondent. The court in the case of *Gwaradzimba N.O* v *Gurta* A.G. SC 10/15 held as follows:

> "s4 (1) of the Administrative Court Act ("the Act") provides that the statutory relief referred to by the judge a quo may be sought by a way of application to the High Court. While a review in terms of the High Court Rules is a special form of an application and there is nothing in the Act to suggest that any other form of application for judicial review would in any way offend against the subsection as long as it meets the requirements of an ordinary court application."

The applicant alleged that the second respondent's decision to dismiss his petition to quash the charges was grossly irregular. Irregularity is one of the grounds upon which the present application has been brought under review. The Applicant seeks a statutory redress in terms of section 26 and 27 of the Act. The Court in the Gwaradzimba case above was further of the view that Order 33 r257 now Rule 62 of the High Court Rules is not the only form for bringing proceedings under review.

The objection on that basis stands to be dismissed. However, out of abundance of caution, in the event that the Court is not persuaded by applicant's submissions, an

amendment was sought and is hereby persisted with in the alternative. Such amendment would not prejudice the first respondent in any way at it was aware in any event about the relief as captured in the draft order. This important matter ought to be decided on the merits. That was the spirit of that Applicant took when he consented to have the bar operating against Respondents to be lifted.

On The Law and The Merits

The grounds upon which the proceedings in the Magistrates Court can be reviewed are contained in section 27 of the High Court of Zimbabwe Act [*Chapter 7:06*] ZIMBABWE

First Ground of Review: Gross Irregularity

The decision by the second respondent dismissing the applicant's application to quash the charges was grossly irregular and constituted a manifest procedural irregularity. This is so due to the fact that the second respondent applied the wrong statutory test and departed from the enquiry and procedure as envisaged under section 178 (1) of the Criminal Procedure and Evidence Act. The law on interference with uncompleted criminal proceedings by superior courts was discussed in the case of *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S), the wherein the court held that:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the right of the litigant."

See also *Mutasa & Anor* v *Mapfumo N.O & Ors*, *Mangoma* v *Mapfumo N.O & Ors* HH 84-21, section 178 of the Criminal Procedure and Evidence Act provides as follows:

> "The accused may, before pleading, apply to the court to quash indictment, summons or charge on the ground that it is calculated prejudice or embarrass him in his defense."

It is apparent from the wording of the above provision that the motion quash an indictment, summons or charge is premised on the ground that the same is "calculated to prejudice or embarrass" the accused in his defense. A court faced with an

application of this nature must make an investigation as to whether the charge as framed will prejudice or embarrass the accused.

The applicant made an application to quash the charge on the premise that the charge is embarrassing and yet the second respondent did not carry out an investigation to assess whether or not the charge will cause any embarrassment to the applicant. The second respondent rather in her ruling carried out an enquiry of her own and held that the charge was straight forward and informed accused on how to proceed, page 14 of the record. The second respondent did not deal with the issue that was before her; that is whether or not the applicant will be embarrassed by the charge as it stands.

It is settled law that failure to determine a material issue that is before the court is a gross irregularity that vitiates the decision made. in the case of *Mazarire* v *The Retrenchment Board & Anor* SC 105/2020 it was held that:

> "Thus, the general and trite position at the law that requires no further debate is that a court cannot go on a frolic if its own and determine by raising its own issues or facts and resolving the dispute on such."

See also *Nara & Ors* v *Kashumba & Ors* SC 18/18.

Secondly, the decision by the second respondent ought to be set aside for the reason that the second respondent failed to apply her mind to the issues at hand leading her to make a decision that is grossly irregular under the circumstances. Section 174 (1) of the Criminal Law Code which creates the offence of criminal abuse of duty as a public officer provides as follows:

> "If a public officer, in the exercise of his or her functions as such, intentionally-
>
> (a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or
> (b) omits to do anything which it is his or her duty as a public officer to do:
>
> for the purposes of showing favor or disfavor to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both." (Underlining for emphasis)

In the case of *Kasukuwere* v *Mujaya & 2 Ors* HH 562/19, the court stated the essentials of a charge or indictment predicated on section 174 of the Criminal Code. It held that:

> "What is clear from a reading of s174 is that, the public officer must have omitted to do anything which it is the public officer's duty to do... A charge can only properly arise where it is alleged that the public officer was supposed to act in a certain disclosed manner and that in abrogation of the duty to act in that manner, the public officer acted contrary thereto by commission or omission, the details of which must be captured in the charge."

Further the court in the case of *Kasukuwere* v *Mujaya* above, the court warned against simply regurgitating words in section 174 without specifying the exact nature of the duty and rule that an accused in alleged to have contravened. The court had this to say:

> "For example, s174 of the Code creates an offence called, "criminal abuse of duty as a public officer." It will therefore be sufficient to describe the offence using the word as quoted. The charge must still contain sufficient particulars to inform the accused of how it is alleged that he committed the statutory offence so described as "criminal abuse of duty as a public officer... it is only proper that where it is alleged that the public officer abused his duty, the precise duty which was abused should be included in the charge. The provisions of s174 are too broad and generalized. It is for this reason that the duty abused be disclosed by reference to how it should have been carried out and how the accused' conduct as described derogated from the discharge of the duty."

The amended charge is embarrassing and vague for lack of particularity. The charge states as follows:

> "… Jacob Mafume, being a councilor for Mt Pleasant, Harare City Council therefore a public officer whose duties included to head development is his ward, exercise executive duties of City Council employees and making policies for the smooth running of the City of Harare unlawfully and contrary to his duties as a councilor which duties do not mandate him to allocate land, ordered Admore Nhekairo…"

The charge falls short of the rules set out in the *Kasukuwere* v *Mujaya* case above for the following reasons:

The charge does not specifically particularize the exact duty of the Applicant that he allegedly breached.

The charge confesses that it was never the applicant's duty to allocate land.

Section 174 (1) of the Criminal Law Code criminalizes the commission or omission of a duty by a public officer in the exercise of his or her duties. What is apparent from the charge is that it is not the function of the applicant to allocate land, it therefore follows that the applicant cannot be accused of having shown favor or disfavor in the exercise of his functions. Such favor or disfavor ought to have been shown by a person whose duty was to allocate land.

The first respondent in its opposing affidavit admits that it was not applicant's duty to allocate land. Clearly a charge in terms of section 174 of the Code cannot arise where it is being admitted that it was not the applicant's duty to allocate land. There is no derogation from a duty that does not exist, on paragraph 5 the first respondent states as follows:

> "The charge shows that the applicant had certain duties he was supposed to carry out and that he derogated from those duties. The applicant then went on to carry out duties he was not mandated to do."

In the case of *S* v *Taranhike & 5 Ors HH 222 - 18*, the court clarified what needs to be alleged for one to be guilty of abuse of public office. The court had this to say:

> "…one must examine what if any powers have been entrusted to the defendant in his official position for the public benefit, asking how if at all the, misconduct involves abuse of those powers."

The second respondent faced with the scenario above, adopted an incorrect enquiry leading her to fail to appreciate that the amended charge is embarrassing and prejudicial for the reasons set out above.

The second respondent was called upon to determine whether or not the charge as it will embarrass the applicant or not. In her ruling, the second respondent instead of answering the question that she was called upon to determine, she alleged that the charge was straight forward and informed the applicant how to proceed.

Had the second respondent focused on the enquiry that was before her, she ought to have realized that section 174 (1) of the Criminal Law Code read properly criminalizes misconduct that arises during the functions of the public officer. Where

the misconduct does not arise in the function of the public official's duties, as is confessed by the amended charge, resort to a charge under section 174 is improper and embarrassing.

The failure by the second respondent to quash the charges under the circumstances amounts to a gross irregularity.

The purpose of a charge sheet is to inform the accused person in clear and unmistakable language what the charge is or what the charges are.

Proceeding with amended charge as it will infringe on the applicant's rights. Section 70 (1)(b) of the Constitution guarantees an accused person the right to be promptly informed of the charge, in sufficient detail to enable him to answer it.

A determination of the challenge to a charge can make a difference as to whether or not the accused is able to exercise the right to a fair trial and adequately prepare a defense as provided for in section 70 (1)(c) and to adduce and challenge evidence in terms of section 70 (1)(h) of the Constitution. The right to a fair trial is absolute in terms of section 86 (3) of the Constitution. Under the circumstances, the decision by the second respondent should be set aside. In response the first respondent argued as follows:

The court dismissed the application holding the applicant had been informed with particular specificity of the allegations against him.

The decision by the court a *quo* gave birth to the present application for review.

Submissions By the First Respondent

There can be no doubt that while it is a necessary feature of every adversarial system of justice that there should be a higher court in the hierarchy of the courts to correct judicial errors, that procedure should not be abused. It does not detract from the time-honored principle of our law that this court will only exercise its discretion to interfere with unterminated criminal proceedings where there were gross irregularities in the proceedings. Or where it is apparent that an injustice may occur if this court does not intervene because of prejudices to the accused. Otherwise, this termination of a criminal case. Otherwise, this court is generally loathe of exercising its powers of

review before the termination of a criminal case.

The power to review interlocutor decisions must be exercised sparingly and notable cases on this subject include, *Ndlovu* v *Regional Magistrate Eastern Division & Another* 1989 (1) ZLR 264(H) wherein the court held *inter alia*, that: -

> "The High Court's statutory powers of review under section 29 of the High Court Act, can be exercised at any stage of criminal proceedings before an inferior court. The court in any case, has inherent power of review. However, in uncompleted cases this power should be sparingly exercised only in those rare cases, where otherwise grave injustice might result or justice might not be obtained. Where a magistrate performs his functions in a proper manner the High Court will not interfere. It is desirable that the actual merits of cases be speedily disposed of and that any decisions which are wrong in law be corrected in the ordinary way of appeal."

At 276 D-E the learned judge aptly noted that:

> "on the authorities, it is clear that a superior court will not ordinarily interfere by way of review before the conclusion of the proceedings in the inferior court, but this court in the exercise of its inherent jurisdiction will, in rare cases in un-terminated proceedings before an inferior court, interfere where a grave injustice might otherwise result or where justice might not by other means be obtained."

CHIDYAUSIKU J (as he then was) in *S* v *Sibanda* 1994 (2) ZLR 19 (H) reiterated the position as follows:

> "… an accused who wishes to have his case reviewed before trial is completed has to proceed by way of a court application in terms of Order 33 of the High Court Rules. That relief is not readily available. It is only in exceptional cases that this court will review criminal Proceedings before they are completed. See *Ndlovu* v *Regional Magistrate & Anor*. 1989 (1) ZLR 264…"

In *S* v *Rose* 2012 (1) ZLR 238 HUNGWE J (as he then was) after considering a number of case authorities on when this court would intervene in uncompleted criminal proceedings in the inferior court had the following to say: -

> "The test as to when a superior court could intervene in un-terminated criminal proceedings has already been discussed above. A superior court having jurisdiction on review or appeal will be slow to exercise such power, whether by mandamus or otherwise, and will only do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained."

In terms of section 178 (1) of the Criminal Procedure and Evidence Act the court

has 3 options open to it once faced with an application of this nature. It may quash the charge, order the charge to be amended or refuse to make an order on the application. In the present case the court was satisfied that the charge was clear and straight forward, informing the applicant of the allegations against him and was not embarrassing. The charge shows that the applicant had certain duties he was supposed to carry out and that he derogated from those duties. The applicant then went on to carry out duties he was not mandated to do. The applicant has been informed in sufficient clarity of the allegations against him and should proceed to proffer a defence. See *Kasukuwere* v *Mujaya & Ors* HH 562/19. The learned author John Reid Rowland in Criminal Procedure in Zimbabwe has this to say:

> "The practical effect of taking exception to a charge is of little advantage to the accused. If the objection is well taken, the court may, if the accused is not thereby going to be prejudiced in his defence, allow the charge to be amended. In most cases the victory will be Pyrrhic. About the only situation where an exception or motion to quash a charge will have a permanent result satisfactory to the accused is where the charge was ultra- virus or the conduct constituted no offence."

See also S v Sikhala HMA 04 / 20

There is nothing irregular, gross or otherwise in the conduct of the court a quo and in the circumstances, it will be submitted that the present application is clear abuse of court processes designed to stall the criminal proceedings from reaching their logical conclusion.

Conclusion

On the point *in limine* as had raised by the first respondent regarding the non-inclusion of the relief sought on the initial application it will not go in any way resolving the matter before this court as all will be occasioned is an inordinate delay on the conclusion of the pending criminal proceedings. This court whilst not condoning the omission by the applicant it is however prepared to accept his argument as submitted. The best interest of justice demands that this matter be heard on merit as it was the case. The parties saw realized this thus argued and submitted their heads of arguments as above. It is against this background that this matter was

heard on merit. Let me at this stage point out that this matter while considered as unterminated proceedings it is distinguishable in that the applicant had not pleaded to the charges perse. The question as argued was whether the court aquo was correct in coming to the conclusion that the charges was not calculated to embarrass the applicant in his defence.

As argued in the cases cited by both parties supra a charge must be crafted in such a way as to leave no doubt as to what is it that the accused is alleged to have done. In numerous cases the phrase "Criminal Abuse" of office has been left wide open to the extent that it might leave an individual in an embarrassing position to the extent that they fail to grasp as how exactly they should craft their defence. In this case the charges were amended but the applicant still needed further amendment as he felt nothing meaningful had been done. Going by the response above the first respondent seems to rely on the principle that an applicant has a remedy at the end of the proceedings. That reasoning is not commensurate with the principle of fair trial as argued in this case. An individual should be subjected to trial proceedings when it is really necessary. By nature, criminal proceedings create anxiety, uncertainty and trauma on the victim and may lead to dire consequences. It is therefore the duty of the first respondent that only when it is necessary someone is subjected to such proceedings rather just leave everything to court. It was argued that the second respondent did not answer the question before her but rather simply concluded the charge is straight forward and sufficient as to inform the applicant of the charge he faces.

Ab initio the applicant has been requesting for particulars as regard to "contrary *to what duties"* he is alleged to have acted. He argues that it was never his duty to allocate stands or houses. From the charge sheet he is alleged to have ordered one Nhekairo to allocate land. This charge does not state how he ordered this Nhekairo and contrary to what duties. This question was not dealt with by the magistrate in the court *a quo*. This omission by the second respondent is not the category that should be cured by the evidence during trial. I say so because it forms the very basis why this

charge exists.

Once that is done and it us proved that he was directly responsible for allocating the land in that manner then certainly he will have a case to answer. What I am stating is that the charge in its present form is not sufficient enough to inform the applicant as to the exact nature of his conduct.

The applicant has conceded that they are prepared to accept the alternative relief. Looking at state outline attached there is nothing disclosing how he directed both one Edgar Dzehonye and Addmore Nhekairo to allocate the stands. The Kasukuwere case *supra* is very clear as to what should constitute a charge. It is not about regurgitating the statute as it is without putting the necessary elements in it. The High Court will no doubt interfere whenever it is necessary to do so though rarely so. In this case I am not convinced by the first respondent argument. I feel the court aquo erred when it held the charge is straight forward. I feel there was need for an amendment as to provide sufficient particulars to the applicant before he pleaded. The first respondent still has a chance to do so should he wish to proceed.

Disposition

From the arguments and analysis *supra,* I am persuaded by the applicant that indeed an interference is warranted. I will however grant the relief with an amendment to the draft order as follows:

After perusing papers filed and hearing counsels

IT IS ORDERED THAT;

1. The second respondent's decision of the 18th of May 2022 in criminal case 286/20 is hereby set aside.
2. First respondent is hereby ordered to amend the charges should they wish to pursue the charges.
3. Each party to bear own costs.

KATIYO J:……

Bhatasara Attorneys, applicant's legal practitioners
National Prosecuting Authority, first respondent's legal practitioners