METRON CHONGANI MAKAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 14 September 2023

Application for condonation for late noting of an appeal

Applicant in person

MUTEVEDZI J: The applicant, Metron Chongani Makamba, an apparently brazen and incorrigible offender was convicted by the court of a regional magistrate at Masvingo in 2015 on numerous counts of robbery committed in aggravating circumstances as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charges against the applicant were on three separate criminal record book numbers. The first was MSVR 250/15 on which the applicant was the sole accused facing two counts of robbery. The second was MSVR 252-3 where the applicant was jointly charged with one Energy Knowledge Jonasi with six counts of robbery. The last was MSVR 1476-78/15 where he also jointly appeared with Energy Knowledge Jonasa charged with an additional two counts of robbery. The applicant was convicted of all the ten counts of armed robbery on his own plea of guilty. On the first CRB number the trial magistrate, for purposes of sentence, treated both counts as one and sentenced the applicant to 12 years imprisonment. On the second CRB the counts were grouped as follows:

Counts 1 and 2 – **9** years imprisonment

Counts 3 and 4- **8** years imprisonment

Counts 5 and 6- **6** years imprisonment

Of the total 23 years imprisonment, the magistrate suspended 2 years imprisonment for 5 years on condition of future good behaviour. The applicant was therefore left to serve an effective twenty-one years imprisonment.

As already said, on the third CRB number the applicant was charged with and convicted of two counts. In count 1 he was sentenced to 10 years imprisonment and in count 2 a term of 8 years imprisonment was imposed. It left him with an effective 18 years imprisonment. Added together it follows that the applicant is serving a total **51** years imprisonment.

In his detailed reasons for sentence, the trial magistrate pointed out that the accused and his accomplices had committed robbery in aggravating circumstances, an offence which by any standard is considered very serious. He added that during the commission of the offences, the accused would dress either as police officers or as soldiers. They carried firearms and other dangerous weapons in the course of the robberies. In fact in some of the robberies the complainants were lucky to survive as the accused persons shot at them. One suffered a penetrating gunshot wound when one bullet went through his thigh and another grazed his left ear. If the bullet had gone an inch to the right, that particular complainant would in all probability have died. The acts of disguising themselves as police officers or soldiers, so the trial court added, jeopardized national security. Judging by the accused persons' modus, a lot of preplanning went into the commission of the robberies. It was primarily for those amongst other reasons that the trial magistrate justified the sentences imposed on the applicant and his accomplices in the various counts.

The applicant was sentenced around September 2015. He did not appeal against any of the sentences. He only sought to do so in 2022 when he filed this application for condonation of late filing of an appeal. A rough calculation of the length of time between the imposition of the sentences and the application for condonation shows that the delay is in excess of six years.

In his application, the applicant stated the following as his reasons for the lengthy delay in filing his appeal:

> "I filed late my intention to appeal because, I was ignorant to appealing procedural technicalities. More so, my relatives had promised me to engage a legal practitioner on my behalf. Therefore time lapsed for the lawyer to show up. In pursuit of the record it took me some years adding to the delay since I am in custody. Wherefore late filing factors were beyond my control. Therefore I seek to be condoned for late filing of appeal against sentence only". (Sic)

The applicant attached to the application for condonation, what he described as grounds of appeal against sentence. They were couched as follows:

"Ad sentence

1. The court *a quo* erred to adopt aggravation on protest the armed robbery was prevalent, it is imperative to note that plea of guilty has its contribution in justice of which meaningful sentence reduction was called for- more so even a concurrent sentence since the stolen properties (or items) were recovered and the matter on plea sentence should have been equitable to the costs of the stolen property accounted on plea recordings. Guidance to be adopted from an appeal case;- *State* v *Richard Musurudziva* HH 369/19".

Thereafter the applicant, in the same grounds of appeal, proceeded to cite several precedents and to relate to more superfluous issues such as that his cooperation with the police should have been regarded as proof of his innocence. He added that the trial court had fallen into error by failing to explain to him the technical term special circumstances and to give him examples of such special circumstances as demanded by the law.

I heard the application on 24 March 2022 and dismissed it soon thereafter. True to his tardiness, the applicant only requested for my written reasons for the decision many months later. Nonetheless he is entitled to them. Below are the reasons.

The starting point in applications for condonation must be MAKONI JA's dictum in the case of *Prosecutor General* v *Job Sikhala* SC 116/20 at p 5 of the cyclostyled judgment where she remarked that:

> "It is settled law that condonation is an indulgence which may be granted at the discretion of the court and is not a right obtainable on demand. See *Friendship* v *Cargo Carriers Limited &* Anor SC 1/13. In exercising that discretion, the court is enjoined to look at several factors cumulatively. These include the extent of the delay and the reasonableness of the explanation for the delay or non-compliance, the prospects of success on appeal, the possible prejudice to the other party, the need for finality in litigation, the importance of the case and avoidance of unnecessary delays in the administration of justice. (See *Read* v *Gardiner & Anor* SC 70/19). However, there are several authorities to the effect that condonation may be granted in circumstances where, although the explanation tendered is unsatisfactory, the prospects of success on appeal are good".

As can be noted, there are several critical factors that stick out from the above pronouncement. For purposes of the present application, the crucial ones are the explanation for the delay and the prospects of success on appeal. I deem them crucial because their consideration is dispositive of the application. In addition they are intricately linked to each other in that, where an applicant's prospects of success on appeal are very strong, that consideration may override an unsatisfactory explanation which he/she may have given for the delay in noting the appeal. Put in another way, where an applicant advances a plausible and credible explanation for noting his/her appeal outside the prescribed timeframes such explanation may be taken as compensation for the applicant's weak prospects of success on

appeal and vice versa. Critically, it must go without saying that an applicant who on one hand proffers an unsatisfactory explanation for the delay and has on the other, poor prospects of success on appeal has a hopeless case and is simply flogging a dead horse.

In the instant case, the applicant is out of time to appeal against the sentences imposed on him by more than six years. He sought to justify his delay on the basis that he was ignorant of the law relating to appeals, that his relatives had promised to engage a legal practitioner for him and that it took him all these years to follow up on his records of proceedings from the court *a quo.* Whilst I admit that it may be difficult for a self-representing accused person to be acquainted with the procedure to appeal against an adverse decision visited upon him/her I also take judicial notice that the administrative arms of all courts in Zimbabwe have taken measures to mitigate such difficulties. In the first place, templates which can be used by such litigants are available for no payment at all prisons across the country. As shown by his papers the applicant is held at Chikurubi Maximum Prison. Many other inmates from that prison have previously taken advantage of those pre-designed forms to lodge their appeals. It is incredible that for more than six years the applicant had not come across such forms which clearly direct inmates on what to do if they wish to appeal against either sentence or conviction or both. Secondly, magistrates and judges periodically visit all prisons to check on the welfare and other needs of prisoners. During such visits, the judicial officers accommodate questions, complaints and any grievances by the inmates. Without being their legal advisers, the officers invariably assist the inmates and in instances where they cannot, direct any inmate with a grievance to particular offices or government departments mandated to resolve any such query. It is once more inconceivable, that the applicant for all these years was so unfortunate as not to be present when visiting justices went to Chikurubi Maximun Prison. On the argument that his relatives had promised to hire a legal practitioner for him the applicant ought to have realised long back, that the relatives had either failed or were unwilling to assist him in that regard. If the above arguments are lame, then the suggestion that the applicant was failing to access the records of proceedings in his cases for six years is an outright lie. He baldly made that assertion but failed to attach a shred of evidence to back it up. Prisoners are permitted to write letters to registrars and clerks of courts demanding to be given records of proceedings. It is their entitlement. The applicant must have attached any such correspondence to back his claim. That he did not do so only serves to reinforce the untruthfulness of the claim. It is

preposterous. All in all, I am completely dissatisfied with the applicant's purported explanation of this outrageously long delay in noting his appeal.

As already said, there are instances where an unsatisfactory explanation like the applicant's in this case may be overridden by his strong prospects of success on appeal. To gauge an applicant's prospects of success, the court is necessarily required to examine his grounds of appeal. Earlier I reproduced the applicant's purported grounds of appeal. I must add now that the grounds of appeal are hopeless if they are not a nullity. The noting of an appeal by an accused who is not legally represented against a sentence imposed by a magistrate is governed by R 103 of the High Court Rules, 2021. It states as follows:

> ***"103. Appeal against sentence by convicted person in person***
> (1) The provisions of this rule shall apply in respect of an appeal by a person convicted and sentenced by a court who intends to appeal in person and who appeals against sentence only (hereinafter in this rule called "the appellant").
> (2) The appellant shall, within five days of the passing of sentence, note his or her appeal by lodging with the clerk of the court a notice in septuplicate—
> (a) setting out clearly and specifically the grounds of appeal and giving for the purpose of service the address of the convicted person; and
> (b) stating that the appellant intends to prosecute the appeal in person".

From the above, sub rule (2) (a) is critical. The appellant must set out intelligibly, distinctly and precisely the basis of the appeal. In addition the appellant must indicate in the body of the notice of appeal and not separately that it is his intention to prosecute the appeal in person. In this application, the draft notice of appeal attached by the applicant contains two grounds of appeal which are circuitous and illogical. For instance the second ground makes the allegation that the trial magistrate did not explain special circumstances to the applicant. The offence of robbery in aggravating circumstances is created by s 126 (1). The sentences imposable for the offence are specified under subsection (2) thereof. Special circumstances apply in cases where the crime attracts a minimum mandatory penalty. The offence of robbery is not one such. It becomes obvious that the applicant without giving it any thought, must have found it fashionable to attack the trial court on the unhelpful basis that special circumstances were not explained. Such an ill-conceived ground of appeal cannot breed success. It is doomed to fail. The first ground is incomprehensible. It is vague as to be meaningless. It cites case authorities and incorporates mounts of irrelevant material. It flies in the face of the requirement in R 103 (2) (a) of the High Court Rules, 2021. It is fatally defective and renders the grounds of appeal a complete nullity. If they are not, to then say the court erred *'in adopting aggravation'* in circumstances where the applicant admitted that he and his accomplices used firearms in the robberies is to contradict oneself. There is no

argument from the papers that the robbery was committed in aggravating circumstances. Based on that, the ground of appeal, if it is not fatally defective will inescapably fail.

Disposition

The combination of an implausible explanation justifying a delay threatening to run into seven years and a hopeless appeal predicated on non– existent grounds is a toxic recipe for the applicant. He dismally failed to establish any of the requirements for the grant of condonation. There is no gainsaying that the application cannot succeed. It was for those reasons that I accordingly directed that the application be dismissed.