

ZENZO NDLOVU

and

MPILO MOYO

Versus

SAMUKELISIWE GUMBO N.O

THE STATE

HIGH COURT OF ZIMBABWE

MUTEVEDZI J

BULAWAYO, 13 JUNE 2025

C. Mabhena for the 2nd respondent

C. T. Matava for the applicants

Criminal review

MUTEVEDZI J: This is an application for review of completed proceedings from Inyathi Magistrates Court in terms of section 27(1)(c) of the High Court Act [*Chapter 7:06*] (“the Rules”). The applicants were arraigned before the Magistrate Court facing a charge of contravening section 368 of the Mines and Minerals Act [*Chapter 21:05.*] (“the Mines and Minerals Act”). The allegations were that on 4 January 2025 and along Bulawayo-Nkayi road near Ndwangwana shopping centre, Queens, Inyathi the applicants unlawfully prospected for gold without a permit or licence.

[1] When, at the commencement of trial, the charge was read to the applicants, the trial magistrate who is the first respondent in this case, explained to them that the crime with which they were charged carried a minimum mandatory sentence of two years imprisonment unless each of them demonstrated to the court that there existed special circumstances warranting it to depart from imposing such sentence. The magistrate went on to explain what constituted special circumstances. The applicants however argue that they never understood that explanation. That they didn’t is borne by the record of proceedings. When the question was put to the applicants whether they had understood the explanation, both of them remained reticent. Notwithstanding that the court proceeded to ask the two how they pleaded to the charge. They both pleaded guilty. After explaining the

essential elements of the offence, the court duly convicted both applicants. At the presentencing stage, the magistrate must have felt it cumbersome to repeat the same explanation regarding special circumstances which she had given earlier. Instead, she simply gave the applicants an example of what special circumstances could be. It was an analogy of sorts. She then asked each of the applicants if they had any special circumstances to proffer. Guided by the example of special circumstances that had been given by the court, the first applicant submitted that he had committed the offence because he had lost a maternal grandmother and he needed cash to travel to the village for the funeral. The second applicant told the court that he had lost his job and he needed money to cater for his pregnant wife. The prosecution wasn't afforded any opportunity to express its views regarding the question of special circumstances. Further, the court did not pronounce itself as to whether the representations by the applicants had or had not amounted special circumstances. What however is apparent is that the applicants were each sentenced to the minimum mandatory two years imprisonment.

[2] Aggrieved by the sentences, the two applicants sought legal assistance. The counsel later filed an application for the review of the proceedings be reviewed on the following grounds:

- “1. The court a quo grossly erred in failing to properly explain the meaning of “special circumstances” and failed to satisfy itself that the Applicants understood the meaning as explained by the court.
2. The court a quo grossly erred in not affording the State a chance to respond to the Applicants’ submissions on special circumstances.
3. The court a quo grossly misdirected itself in omitting to give a ruling on the existence or non-existence of special circumstances before proceeding to record the Applicant’s mitigation.

RELIEF SOUGHT

1. Application for review succeeds
2. The proceedings in the court a quo under case number Inyathi 88-89/25 are hereby quashed and set aside, matter referred back to the court a quo for a hearing de novo.
3. No order as to costs.”

[3] Put bluntly, the applicants contend that the trial magistrate failed to properly and clearly explain to them what is meant by special circumstances and that thereafter she did not rule on whether or not their submissions had qualified as special circumstances. The second respondent conceded the application. The concession could have only been well made.

Special circumstances

[4] This court has, on countless occasions emphasized that the question of special circumstances is critical in the sentencing of offenders convicted of offences which prescribe minimum mandatory sentences. In the case of *S v Happy Simba Manase* HH 110-15 MUREMBA J issued detailed guidelines on how to properly canvass special circumstances in matters involving unrepresented accused persons. She remarked that: -

“However, in cases where the accused is not legally represented, the court has a duty to explain, fully and clearly to the accused in a language that he understands that he or she is in jeopardy of having a heavy minimum sentence imposed upon him and that he or she can avoid this by showing special circumstances. See *S v Makawa and Another* S-46-91. The court has a further duty to explain what is meant by special circumstances. See *S v Chaerera* 1998 ZLR 226 (S), *S v Maharangwe* S-5-90; *S v Kaja* S-129-89. Thereafter the court should invite the accused to address it on special circumstances. The court should also record its explanation in the record. The accused’s response should also be recorded in full. It should be explained to the accused that in addressing the court on special circumstances it is his right to lead evidence from witnesses if he or she so wishes. In terms of s 70 (1) (h) of the Constitution of Zimbabwe Amendment (No.20) Act 2013, an accused has a right to adduce evidence. The right is even greater in circumstances where the accused is at the risk of being sentenced to a minimum mandatory sentence upon failure to satisfy the court that there are special circumstances justifying the non-imposition of the mandatory minimum sentence. According the accused such an opportunity is also in line with section 69 of the Constitution which states that an accused has a right to a fair hearing. If the accused leads evidence from witnesses, the State should be given a chance to cross-examine those witnesses. After the accused’s explanation the State should be invited to respond irrespective of whether or not the accused is legally represented. It also has the right to adduce evidence if it so wishes and if it does, the accused or his defence counsel should be given the opportunity to cross examine the State witnesses. It is the accused’s right to challenge evidence adduced against him: see s 70 (1) (h) of the Constitution. Thereafter the court should make a ruling on the existence or otherwise of special circumstances. After that the court should proceed to record mitigation and then sentence the accused.”

[5] In *Arnold Bvuto v The State* 2018 (1) ZLR 119 HUNGWE J (now JA) not only reiterated the same position in *Manase* but went further and stated that in his view every person facing a charge where there is a minimum mandatory sentence must be afforded legal representation at the state’s expense. He said: -

“In my respectful view, it is high time that our legal system gives effect to the constitutional right to a fair trial by enacting appropriate legislation that would entitle every suspect standing trial who faces a minimum mandatory sentence to legal representation at the expense of the State. Besides being a positive fulfilment of the right to a fair hearing, such a step would ensure that the wheels of justice turn more swiftly and efficaciously. The Law Development Commission should consider the suggestion seriously.”

[6] There is no gainsaying the above approaches especially if regard is had to what happened in this case. There are a number of missteps that the trial court took. First magistrates must always bear in mind that whilst it is ideal to do so, there is no legal requirement to explain

the question of special circumstances at the commencement of a trial. That initial explanation is done to keep the accused alert of any issues which he/she may, in the event of a conviction, turn to in proving the existence of special circumstances. It is usually critical in instances of a contested trial where most of the issues are ventilated through witnesses' testimonies and other evidence. Very little if anything is gained from it where an accused is pleading guilty to the offence charged. As such that preliminary explanation cannot and must not substitute the one that must be made after an accused has been convicted and before he/she is invited to make his/her presentation regarding special circumstances.

[7] What is worse in this case, is that after the desultory explanation before the applicants had pleaded to the charge, the magistrate did not bother to ensure that the applicants had indeed understood that explanation. As already said the applicants remained silent when asked whether or not they had understood the court's explanation. We were prepared to condone that omission had the court gone on to deal with the issue after convicting the applicants. But it did not. Instead it chose to give an unhelpful example of what special circumstances are. As can be seen the first applicant proceeded to mimic the same example that the court had given possibly betraying his lack of understanding of the explanation and the example given by the court. That failure by the magistrate was without a doubt, a gross misdirection on his/her part which caused serious prejudice to the applicants.

[8] The misapprehensions did not end there. Whilst the applicants were invited to make submissions and they did, the prosecutor was not afforded a similar opportunity. It is a requirement that the prosecutor must address the court soon after the submissions by the accused person(s). That requirement is not for cosmetic purposes but is intended to ensure that the accused receives a fair trial. The prosecutor in his/her address may seek to oppose or support the submissions made by the defence. In equal measure the prosecutor may in cases such as this one, where the accused is unrepresented be aware of other issues which may indeed amount to special circumstances. If he is, he is obligated to disclose those to the court. As such, depriving the prosecutor of an opportunity to address the court resulted in an unfair trial for the accused in more ways than one.

[9] Third, and worst of all, the trial court did not pronounce itself on whether or not the applicants' submissions amounted to special circumstances. It is elementary that for every disputation before it, a court must make a definitive ruling. Failure to do so, vitiates the decision it arrives at. The applicants and the prosecution were all entitled to know the decision the court had arrived at regarding their contestation about special circumstances. A court cannot proceed to sentence an accused to a minimum mandatory sentence before resolving the question of special circumstances where such is a requirement. In the instant case, the trial magistrate overlooked the importance of deciding on the issue and publicly pronouncing his decision to the litigants. When he/she proceeded to sentence the applicants, they both could not follow what was going on. They could not understand why the minimum mandatory sentence was being imposed in the face of what they thought were irrefutable special circumstances. They could have only known the futility of their presentations if a proper pronouncement had been made on them.

[10] As is clear, all the above indiscretions go to the root of a fair trial. That they caused sufficient strife to the applicants to warrant our interference in the proceedings is not debatable.

[11] In the result, the proceedings in the court *a quo* beginning from the attempted explanation of special circumstances after the conviction of the applicants, the pre-sentencing inquiry and the sentence itself are quashed and set aside in their entirety. The matter is remitted to the trial court for it to:

- a. Properly explain the question of special circumstances to the applicants
- b. Afford each of the applicants on one hand and the prosecution on the other opportunity to address it, and if they so wish to lead evidence on the existence or otherwise of special circumstances
- c. Decide on whether or not special circumstances existed in the case
- d. Thereafter accordingly sentence the applicants

MUTEVEDZI J

CHIVAYO J..... J agrees

Makiya and Partners applicant's legal practitioners
National Prosecuting Authority 2nd respondent's legal practitioners