EVERITSO KAMONE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,6,12,13,15,19, 22, 28 June & 24 September 2018

Bail application

L Mauwa, for the applicant
K Mufute, for the respondent

CHITAPI J: In this application the applicant applies for bail pending appeal based on changed circumstances following the dismissal of his previous application by MUREMBA J on 13 December, 2017 in a judgment recorded as HH 216/18. On 22 February, 2018, the applicant acting in person, filed an application which was however withdrawn by his legal practitioners after assuming agency. They then filed the present application on 2 March, 2018. The legal practitioners requested of MUREMBA J for reasons for her order dismissing the previous application. MUREMBA J duly supplied the said reasons as judgment HH 216/18 as already indicated. On 12 March, 2018, the applicant's legal practitioners filed of record, the copy of judgment HH 216/18. The application suffered an aborted set down on 10 May, 2018 and an endorsement was made that the applicant should provide the judgement of MUREMBA J.

I commenced my deployment to bail court on 4 June, 2018. This application was listed on the bail court roll on 6 June, 2018. On this date, the application was not argued with Mrs *Fero* for the respondent and Mr *L Mauwa* for the applicant agreeing to a postponement to 12 June, 2018 to enable the applicant to follow up on MUREMBA J's judgment. The applicant's legal practitioner submitted that he had been following up on MUREMBA J's judgment without joy since making a request for reasons for judgment. On 12 June, 2018, the application was again not argued. The State counsel had not filed a response. I took issue with the excuse that a judgment was still awaited from MUREMBA J. I pointed out to counsel that from my reading of the record, MUREMBA J had prepared a judgment long back and that the applicant's legal practitioners had filed a copy of the same under cover of notices of filing on 12 March, 2018

and on 7 May 2018. I showed counsel the filed notices and copies of the same judgment so that they would confirm whether or not the said judgment was not the one under reference. Mr *Mauwa* confirmed that it was the one. He apologized for misleading the court in asserting that MUREMBA J was still to provide her reasons for judgment. The notice of filing to which the judgment was attached was franked with both the Registrar's date stamp and that of the National Prosecuting Authority, showing that service on both had been made not once but twice respectively on 12 March, 2018 and 7 May, 2018. It became clear that there was confusion on the part of counsel who appeared not to be versed with the paper trail on record. Counsel were clearly sleeping on duty in this regard.

In the light of the confusion on the part of counsel as to the availability of the record, the determination of the application was unnecessarily delayed in violation of the High Court Bail Rules 1991 which provide that bail applications should be heard on an urgent basis. In the light of the delays which were of counsel's making. I directed Mr *Munyoro* who appeared for Mrs *Fero* on behalf of the State as the respondent, to convey my directive that a response should be filed immediately and in any event by no later than 9:00am on the following day or at the hearing. I postponed the application for argument to the following day, 13 June, 2018.

On 13 June, 2018, the State had not filed a response as directed. Mr *Mufute* instead applied for a postponement of the hearing for the reasons that Mrs *Fero* was not available. When I raised issue that the court directive of the previous day had not been complied with, Mr *Mufute* submitted that he was not aware of not only the directive but the whereabouts of both Mr *Munyoro* who had appeared on the previous day and Mrs *Fero* who was said to have initially been allocated the application to deal with on behalf of the respondent. Mr M*auwa* was justified to protest. I however acceded to the request by the State and ordered that the postponement would be the last one. I also directed that it was up to the Prosecutor-General to assign either Mr *Mufute* or any other available State counsel to take over and argue the matter. In the event that there was no state response filed, I indicated that I would determine the application on the merits with or without the benefit of the State's response. I postponed the hearing to 15 June 2018.

On 15 June, 2018, lo and behold, I was presented with another excuse by Mr *Mufute*. He submitted that he had established that Mrs *Fero* was out of the country in China on work business. He said that Mr *Mavuto* had been assigned to deal with the application in place of Mrs *Fero*. Mr *Mavuto* was however not available. After further justified protestations by Mr *Mauwa*, I reluctantly further postponed the hearing to 19 June, 2018. I was assured that the

State would be ready to argue the application and that a response would have been filed by 18 June, 2018.

Come 19 June, 2018, the circus or brouhaha by the State once more reared its head. In typical fashion, this time, it was Mr *Chimbari* who appeared for the State and indicated that he was standing in for Mr *Mavuto* who was attending a funeral. Mr *Chimbari* submitted that he did not have a brief to argue the application. There is a limit beyond which a court or judge should allow the indulgence of a postponement and continued postponements. In all the circumstances of the case and given the latitude which had been extended to the State counsel and the State's defiance of directives to assign the application to any other available prosecutor, I determined that allowing further postponements for flimsy reasons would amount to an affront and assault not only on the rules of court pertaining to disposal of bail applications but equally on the rights of the applicant to have his bail application determined promptly. Bail is a liberty issue which the constitution jealously protects. Had this application been a civil application, the court could easily have considered penalizing the State with costs. I should mention that the issue here was not that the court did not sympathize with Mr *Mavuto's* absence on account of his attending a funeral. The court does accept that death befalls all of us and ordinarily, the court will adopt an understanding attitude and exercise its discretion to postpone a hearing where a party, witness, legal practitioner or prosecutor is unavailable for the reasons of attending to a funeral. In the present case, given the history of the postponements and the court's directives which were ignored, it dawned on the court that the State was being inept and clumsy in the manner that the application was being handled. Simply put, there was nothing to prevent the Prosecutor General from assigning another prosecutor who could within an hour or two read the trial court record in which the matter was disposed of by way of a guilty plea, read the judgment of MUREMBA J, comprising 3 pages, read the current application for bail based on changed circumstances, comprising 9 pages and prepared a response. The attitude by the State and the incompetent manner that the matter was handled does not indear itself to the court and deserves sanction. The court deprecates, abhors and frowns upon such conduct. The Prosecutor General should whip his officers into line lest the administration of justice falls into disrepute. Bail applications are liberty issues and as such are treated as priority matters. A judge presiding in bail court invariably has to read through not less than 30-40 applications per day and prepares to deal with them in one hearing on the following day. It is not a walk in the path for a judge presiding in bail court. It is a sacrifice and it should be the same for the State. State counsel must therefore in bail applications pull up their socks and discharge their obligations

with reasonable promptitude. In this matter there was a failure to discharge counsel's functions with astuteness. State counsels are legally trained and appreciate what they are required to do. It should not be the duty of the court to act as prefect over them in how they must handle themselves and their duties. It may well be that the attention of the Prosecutor General or the National Director of Prosecutions is not drawn to such short comings on the part of their subordinates. This judgment hopefully should act as a wakeup call to the need to take action to arrest the situation before it gets totally out of control.

Going forward, I refused the application for postponement and allowed Mr *Mauwa* to motivate his application. He submitted that he stood by his filed application and emphasised that the changed circumstance which he relied upon was that the trial court should have explained that common purpose went beyond the presence of the accused being present with the culprits in the motor vehicle because it had to be proved that the applicant was acting in league with the co-accused. The thrust of the argument was that this issue was not considered by MUREMBA J when she dismissed the application. Mr *Chimbari* for the State made no submissions.

I considered the record and the judgment of MUREMBA J. The applicant was convicted of contravening s 45 (1) (b) as read with s 128 of the General Laws Amendment Act (GN 148/2011) which creates and penalizes the possession of a specially protected animal under the Parks & Welfare Act, [*Chapter 20:14*]. The brief facts were that the applicant in the company of 4 accomplices were in unlawful possession of 2 live pangolins which they tried to sell to a potential buyer who was in fact a policeman in disguise. The applicant carried one of the pangolins. The applicant and accomplices were arrested, brought before the court and the applicant pleaded guilty. In the absence of special circumstances the applicant was sentenced to the minimum mandatory sentence of 9 years. The applicant appealed against sentence. His appeal is pending before this court.

Without repeating the reasons for refusing the applicant bail pending appeal given by MUREMBA J, the learned judge determined that the trial magistrate properly dealt with the plea and explained the accused's rights as well as the essential elements to which the applicant admitted. MUREMBA J's findings in this regard are final and not only do I agree with her findings upon a reading of the record, but I would had I been of a different view still not have jurisdiction to set aside her findings. Only the Supreme Court on appeal can disturb the judgment and not another judge of this court.

The purported new issue that the concept of common purpose was not explained to the applicant is a red herring and smokescreen. The applicant's legal practitioner is just being

ingenious and inventive. Unfortunately for him, his ingenuity does not fool the court. The issue does not form part of the grounds of appeal as a stand-alone ground and even if it did, the finding by MUREMBA J that "The record of proceedings in the present matter shows that after the applicant had pleaded guilty, the trial magistrate canvassed all the essential elements of the offence in a proper manner … I was not convinced that the trial court did not do its duty properly towards the applicant who was unrepresented because the applicant was jointly charged with 4 other unrepresented accused of which 3 pleaded not guilty to the charge. If others could deny the charge, nothing barred the applicant from doing the same" puts paid to the veracity of the same. MUREMBA J in her judgment referred to the trial court record and stated as follows, "The applicant then went on to say he had committed the offence in order to get money for school fees. The fact that the applicant managed to come up with such an explanation means that he had understood the explanation by the trial magistrate. At that juncture nothing stopped the applicant from explaining that he had been carrying the pangolin for and on behalf of the 1st accused who was the owner." Quite clearly therefore the so called changed circumstances are just being made up.

MUREMBA J made a finding that the applicant's proposed appeal did not have prospects of success. How such a finding can be disturbed upon an allegation of changed circumstances without the record of proceedings upon which the finding of no prospects of success being altered in content is in my view an impossible proposition or stance. If the applicant had perhaps indicated that he intended to lead further evidence on appeal and briefly set out such evidence, then one could argue that such a development was not considered by MUREMBA J. In its present form and content, the application essentially calls upon this court to review its judgment which it made through MUREMBA J after considering the record of proceedings. This is incompetent.

The application can also not succeed because it does not meet the requirements of *proviso* (ii) to s 123 (1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which provides that an applicant whose bail application pending appeal has previously been denied whether by a judge or magistrate may only make a follow up application if the subsequent application is "… based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination."

In *casu,* the point raised by applicant's counsel as a changed circumstance arises from the same unaltered record of proceedings. Counsel is simply taking a second bite of the cherry

which was available in its current form and content when the previous application was made and dismissed. This is not the change of circumstance envisaged in the *proviso* aforesaid. Basically what the applicant is now saying is akin to stating that "I missed the point when I made my application although the point was apparent from the record. I have now engaged a clever lawyer who has picked up the point. I now wish to raise the point." The law does not support the applicant because upon an ordinary grammatical construction of the *proviso*, revisiting the same facts previously considered as they appear on record does not amount to a changed circumstance but a revision or correction because nothing has changed on the record content.

Thus, notwithstanding the State's negligent and deliberate failure to file a response to the application and the application having been considered on merits without the benefit of the State's input, the application must fail for reasons given in the judgment and it is accordingly dismissed.

Mauwa & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners