MUGOVE CHIPFURUTSE
versus
MAGISTRATE YEUKAI CHIGODORA N.O
(TRIAL MAGISTRATE)
and
THE STATE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 6 March 2019 & 29 May 2019

Review Application

MUSHORE J: This matter was placed before me on my unopposed roll for review purposes on the 6th March 2019. I removed it from my roll so that I could make a determination on it in my chambers.

The application was filed mid-proceedings which is to say that the applicant is enjoining this Court to revisit the decision which the court *a quo* made to dismiss the applicant's application for discharge at the end of the State's case.

Applicant was charged with four counts of extortion. Applicant is a registered nurse and is employed by the Ministry of Health and Child Care stationed at Chitungwiza General Hospital School of Nursing. He teaches nursing students. The allegations were that around the 20th and 21st July 2017 he acted together with an accomplice to extort money from nursing students in exchange for which he would furnish the examination papers ahead of the examinations. He also offered to provide those same students with answer sheets. The transactions were concluded and the students who wrote the examinations somehow still managed to fail the examinations. When applicant tried to extort more money from the students for a rewrite of the examinations, the offense came to light. Several students were involved in this extortion scheme and gave evidence for the State. The amounts which the applicant allegedly extorted form the students were: Count 1-US$1,800-00; Count 2 US$600-00; Count three US$800-00 and Count four US$600-00.

At the close of the State Case the applicant applied for a discharge of the case against him and the court dismissed his application. The applicant is seeking an acquittal from the court.

In applications such as the present one the superior courts are loathe to substitute their discretion for that of a lower court unless there are exceptional circumstances of a proven decisional irregularity having being proven by an applicant. The superior courts usually refrain from interfering in incomplete proceedings where there's no danger of irreparable harm or a miscarriage of justice occurring.

In the present matter, the grounds for review which have been presented to this court in this application have been drafted in a generalised manner; but in essence what the applicant is complaining about is that according to him, the court *a quo's* dismissal of his application for discharge at the close of the State case, is grossly unreasonable. Applicant is calling into question, the manner by which the court *a quo* received the State evidence, by implying that the facts and evidence should not have allowed for his application for a discharge to be dismissed. Applicant's grounds or review are as follows:-

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13 1st Respondent failed to consider carefully, or at all:-

13.1 The fact that there was no evidence upon which a reasonable court acting carefully could properly convict the applicant especially in respect of the third and fourth counts.

13.2. None of the seven witnesses managed on a balance of probabilities to prove any of the essential ingredients of the offence charged.

13.3 That the evidence of the witnesses in respect of the first and the second count was manifestly unreliable and that no court could safely act on it"

Thus in summary what the applicant is inviting this court to do is to revisit the evidence of the State witnesses and to re-determine its reliability; and to make findings on the alleged inconsistencies of State evidence. Applicant alleges that the witnesses' were motivated by malice toward him when they gave their testimony. In short the applicant is inviting this court to re-try the evidence and come at a different conclusion to that of the trial court.

The application is opposed. The State submitted that its witnesses had given very reliable evidence and that there were no inconsistencies in their evidence. The State balked at the applicant's suggestion that the State witnesses gave their evidence under duress.

My initial view is that the decision of a trial court in assessing the value of any (or all) of the submissions made by both sides; pertaining to the reliability of oral evidence is something that a trial court is better placed to have done, based upon its observations of the witnesses demeanour and nuance. A trial court has a distinct disadvantage in measuring the innuendo that mood of the witnesses. On the other hand a reviewing court is essentially peering

into a written record of the proceedings and not observing the evidence as it unfold and the reactions of witnesses. The court *a quo's* acceptance of the State witnesses' testimony is difficult to counter save by a spectacularly wrong conclusion having been shown to have been made *a quo*. The record of the proceedings before me contains both the submissions by the State and the applicant's legal practitioner, with both sides being equally convinced that their evaluation of the evidence was correct. The decision of the court *a quo* was made on a *prima facie* finding on those submissions.

In the present application for review, the applicant is looking forward to this court acquitting him *in toto*. By asking for an acquittal at this juncture; this court would have to go beyond a *prima facie* opinion and make findings of fact beyond reasonable doubt, which this court is unable to do; and which the court deems would clearly not serve the interests of justice without the benefit of the applicant's defence case being heard. The evidence on the record so far falls short of the bar required for a finding being made beyond a shadow of a doubt. It is my view that applicant will not be prejudiced if the trial were to proceed to the defence case because the applicant would still have a right to mount an appeal against the final decision of the court; should that decision not favour him at the end of the trial. In fact it should be to applicant's advantage to present his defence as a rebuttal to the State evidence.

The present application is in my view, frivolous. In weighing up the balance if convenience between the court *a quo* managing its own affairs and the efficient delivery of justice, I feel constrained to allow the wheels of justice to proceed and for the applicant to present his defence case. This Court will not lightly interfere with that process. In bringing this application, applicant is merely trying his luck to avoid being put on his defence.

See: *S* v *John* HH242/13.

The applicant has not made out a case for the relief asked for. Accordingly it is my view that the matter ought to proceed to the defence case,

I therefore order as follows:

"Application is dismissed"

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
National Prosecuting Authority, 2nd Respondent's legal practitioners