DETECTIVE CONSTABLE CHIVENGWA
versus
THE TRIAL OFFICER (CHIEF SUPERINTENDENT MUNJERI)
and
COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 26 July 2018, 9, 12 & 23 July 2018, 14 September 2018 & 20 September 2018

Opposed Application

N Mugiya for the applicant
D Jaricha for the respondents

CHIKOWERO J: After hearing argument on September 14 2018 I dismissed this application with costs.

I stated that the reasons would be furnished in writing.

On the same day, around 16:35 hrs, the Registrar placed a letter before me.

It was authored by the applicant's legal practitioners. They were requesting the reasons for my decision for purposes of appeal.

These are those reasons.

This is a court application for review of the disciplinary proceedings wherein first respondent convicted applicant of contravening para 35 (1) of the schedule to the Police Act [*Chapter* 11:10] ("the Act") as read with section 29 and 34 of the said Act.

The charge preferred against the applicant reads:

> "contravening para 35 (1) of the schedule to the Police Act [*Chapter* 11:10] as read with sections 29 and 34 of the said Act . Acting in an unbecoming or disorderly manner or in a manner prejudicial to good order or discipline or reasonably likely to bring discredit to the police service. That is to say the accused person caused disorder by manhandling and challenging the presidential motorcade riders who were on duty in the presence of members of the public."

After a contested disciplinary hearing the applicant was, on November 2 2016, convicted and sentenced to 14 days in detention at Chikurubi Detention Barracks.

The application for review was timeously filed. The grounds for review read as follows:

> "1. The conviction and sentence of the applicant on 11 October 2016 and subsequent appeal was as a result of gross miscarriage of justice a denial of due process of the law.
> 2. The conviction was irregular as I was not furnished with cogent reasons for conviction.
> 3. The conviction and sentence will definitely prejudice Applicant irreparably and ought to be set aside."

The first ground was vague and in my view, would not have qualified as a ground of review. It did not identify the cause of complaint.

The second ground questioned the correctness of the conviction. It is not a ground of review at all. However, even as a ground of appeal it would still have been invalid for want of a specific averment of the alleged error by the second respondent. That there were "no cogent reasons" for the conviction cannot be a ground of appeal. I say this only in passing.

The third ground is unknown at law either as a ground of appeal or as a ground for review. It is a humanitarian ground.

Strictly speaking, therefore, this court application for review suffered a still birth. It was fatally defective. It failed to raise a single valid ground for review and could not , on that basis, be amended. A nullity cannot be amended. One would need to withdraw the defective application, seek condonation and extension of time and, if granted the same, file a proper application for review.

The defective nature of the application notwithstanding, I allowed Mr *Mugiya* to amend his application. I accept that I was generous in that regard. The next set of grounds for review mirrored the grounds of appeal. Applicant had also noted an appeal.

At the initial hearing, Mr *Mugiya* sought to argue the matter on the basis of grounds neither raised in the amended grounds for review nor traversed in his heads of argument.

With the consent of Mr *Jaricha*, I postponed the matter to September 14 2018 to enable applicant's counsel to amend the grounds for review for the second time and for all the parties to file the necessary papers to ensure the matter was ready for argument.

The necessary affidavits were filed, but neither party had filed heads of argument in respect of the amended grounds for review. Seeing the agony that the matter had endured, however, I

resorted to Rule 4c of this court's rules and allowed the parties to make oral argument in the interest of finality to litigation.

I now turn to the specific grounds raised on July 19 2018. It is on those grounds that the matter was eventually argued.

Did applicant plead to the charge?

This is a factual issue. The answer is in the transcript of the record. Applicant was then represented by Mr *Mugiya*. The first respondent (as trial officer) directed that the charge be put to the applicant.

The Prosecutor did that. After putting the charge to applicant, the prosecutor then stated:

"charge has been put to the defaulter your worship."

The following then ensued:

"By Court: have you understood the charge?
Defaulter: yes your worship
By Court: How do you plead?
Defaulter: Not guilty your worship.

Defence counsel: the plea is in accordance with the instructions your worship. There is no need to read the synopsis."

This plea was taken on 2 August 2016. This appears on p 9 of the transcript of the proceedings.

In fact, before the charge was put to the applicant Mr *Mugiya* and the State's representative agreed that the charge would be put to the applicant, he would plead thereto, the applicant would then file a written exception to the charge, the State would also file its response and then the first respondent would advise the date of handing down of the ruling on that exception.

The following exchanges were made in this regard:

"…. In terms of the above may the State be advised on time, it may want to respond. This exception will be taken in terms of s 180 (4) of the CP and E Act [Chapter 9:07]. I have communicated this to my colleague for the State and has agreed that the accused may be called to plead today and will then file a written application on or before Friday [5/8/2026] (*sic*). The State will respond before the 12 of August 2016. The court will then advise when the Ruling will be thereafter. [underlining is mine for emphasis]

Prosecutor : Since the defence counsel has indicated that he would submit his request in writing we suggest we read the charge to the defaulter.
BY COURT: Is the defense in consensus with what had (*sic*) been said by the Prosecutor?

Defense: Yes Your worship."

The charge was then put to the applicant

All this appears on the face of p 8 of the record *a quo.*

The ruling to the exception was handed down on 25 August 2016.

In the course of delivering that ruling, the first respondent made the following underlined error:

"Through his legal practitioner the applicant pleaded not guilty to the charge."

It is this error that Mr *Mugiya* fastened on to submit that the applicant did not plead to the charge, but that his legal practitioner did so on his behalf.

Legal practitioners are officers of the court. They have nothing to lose by being truthful to the courts before which they appear. I have put it mildly.

Consequently, the first ground for review, it being completely devoid of merit, is dismissed.

I did not find anything irregular in that the charge raised the sceptre of a conviction being secured either on the basis of "acting in an unbecoming manner" or "(acting) in a disorderly manner", or "(acting) in a manner prejudicial to good order or discipline" or "(acting) in a manner reasonably likely to bring discredit to the Police Service".

The reason why all those options are included in the charge is that the evidence may ultimately prove the most suitable option on which the conviction is grounded.

For purposes of preferring the charge there is in my view, nothing at all irregular in including all the options.

There is no doubt in my mind that the applicant was found guilty of contravening the statute in question in that he "acted in a manner reasonably likely to bring discredit to the Police Service."

This is clear from the first respondent's judgment *a quo*. On p 52 para 4 of the disciplinary proceedings record the first respondent put it this way:

> "The Defaulter's conduct tarnishes the image of the organisation. According to the Police Standing Orders Volume 1 Police Officers from different departments are supposed to cooperate in order to achieve one objective."

There was therefore nothing grossly irregular in the conviction of the applicant. I therefore dismiss the second ground for review on this basis.

Was the charge non-existent at law?

The argument was premised on the following. Paragraph 35 (1) of the Schedule to the Act refers to the Police Force. The Police Force ceased to exist on the coming into force of the current Constitution in 2013. The charge refers to the Police Service when the Act still refers to the Police Force. Absent an amendment of the Act so that it refers to the Police Service there is no longer any offence known to law such as under which the applicant was charged.

The provisions of s 2 (1) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 are set out below:

> "2. Supremacy of Constitution
>
> 1. This constitution is the Supreme Law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

Chapter 11 Part 3 s 219 of the new Constitution provides for the Police Service and its functions.

There is inconsistency between s 219 of the Constitution and the Act in so far as the former refers to the Police Service while the latter still refers to the Police Force.

But that is not the end of the matter.

Clause 10 Part 4 of the Sixth Schedule of the Constitution reads as follows:

> "PART 4
> SAVINGS AND TRANSITIONAL PROVISIONS
> 9 …….
> continuation of existing laws
> '10.subject to this schedule, all existing laws continue in force but must be construed in conformity with this constitution."

Now, the Police Act [*Chapter 11:10*] is one of those laws which was in existence at the coming into force of the new constitution.

That Act, being a law, continues in force.

But it must be construed in conformity with the constitution.

Such reading in conformity means this in my view. The Police organisation itself has not ceased to exist. What has changed is its name. It used to be called the Police Force. It is now called the Police Service. Because the Constitution is the Supreme law one must switch to the word "Service" where the Act refers to the Police "Force" so that the offence created by para 35 (1) of the Schedule to the Act remains in the Statute book. This is so because the Constitution says the Act remains in force.

I have looked at the following superior court judgments: *City of Harare* v *Tawanda Mukungurutse and Ors* SC 46/18. *Loveness Mudzuru and Anor* v *Minister of Justice, Legal and Parliamentary Affairs N.O and 2 Ors* CCZ 12/15. My understanding of the reasoning there employed when one is construing an existing law in conformity with the Constitution fortified me in finding, as I did, that there was nothing wrong in framing the charge itself, based on the Act, in the way that I have done. Simply put, the drafter of the charge was correct in employing the words "Police Service" and not "Police Force."

These are the reasons why l dismissed the contention that there was gross irregularity in first respondent convicting applicant on a charge "foreign to the law."

Are the proceedings liable to be set aside on account of applicant's ignorance of his procedural rights?

I have slightly rephrased applicant's last complaint to capture the nub thereof.

Applicant was initially represented by the same counsel who appeared before me.

The application for recusal and the exception were launched through counsel.

When his plea was taken he was still legally represented.

In the circumstances it is safe to proceed on the basis that he was not as disadvantaged as Mr *Mugiya* wanted me to believe.

Page 18 of the record *a quo* discloses that the outline of the facts on which the charge was based was read to the applicant. The deficiencies in the charge relating to the time and place of occurrence of the offence were ameliorated by the synopsis of facts. He was asked whether he understood them. His answer was positive.

The first respondent asked him to state his response. He gave his defence outline very well. It answered the factual allegations set out against him.

In the circumstances, l do not place unwarranted weight on the fact that there is want on the record of an explanation such as is given to an unrepresented accused in criminal proceedings before a defence outline is given.

What was important to me was that applicant, from the record, was able to present an outline of his defence responding to the substance of the allegations.

I did not find that the absence of an explanation to the applicant, before the witnesses testified, that he must prepare for cross-examination and what cross-examination entailed, was a gross irregularity.

The record is testimony that applicant was able to cross-examine both witnesses with the consummate skill and ability of a seasoned legal practitioner which he was not.

The applicant even applied for discharge at the close of the state's case.

Before he opened his defence case, the following explanation of his procedural rights were explained to him by the first respondent. It appears on p 36 para 3 of the record *a quo*:

Evidence of the defence

> "Court – defaulter. It is now your turn to give evidence by stating all what you know about this case. You are at liberty to produce exhibits and to call witnesses. You may give your testimony under oath bearing in mind that the testimony given under oath has more weight."

His evidence and that of his witness traversed the essence of the case the applicant had to meet.

After the defence witness gave evidence in chief, uninterrupted, the first respondent sought some clarification.

Thereafter, the first respondent handed over to the applicant to lead his own witness.

I do not read anything into the inconsequential error appearing on p 43 of the record *a quo* where first respondent recorded:

> "Cross examination of the defence witness by the defaulter."

In truth, it marked the starting point of applicant leading his own defence witness. That was after the same witness had been given a free hand to give an uninterrupted narration, and after the first respondent had sought and obtained some clarification as l have already stated.

The actual cross-examination of the defence witness commenced on page 44 of the record. It is headed:

> "Cross-examination by the state."

The applicant himself was satisfied with the way that first respondent handled the disciplinary trial.

This is so because, after being advised by first respondent of his right to address the trial officer before judgment he stated:

"Defaulter – l would like to thank the court on the way it has handled this case."

This appears on p 47 of the record *a quo.*

Thereafter, he proceeded to give a lucid and stirring closing address.

I mention in passing that even though he was eventually convicted, first respondent was not oblivious to applicant's valiant efforts. He made certain findings against the State.

I am cognisant of the fact that no appeal was before me. I remain alive to the fact that l was called upon to decide whether there were gross procedural irregularities in the proceedings below.

I found none. I was not able to agree with applicant.

In the event, I dismissed the application with costs.

Mugiya and Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners