JAISON ZHUWAKI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 22 July 2019

Chamber Application

Applicant in person
E Makoto, for the respondent

MUNANGATI-MANONGWA J: The wheels of justice must start turning once a litigant has approached court. The manner in which court officials handle received process contributes to the whole process of justice delivery. In that regard, it is imperative that these officials especially in registry follow the procedure laid down in the rules or procedures set by practice directions issued by the Chief Justice of Zimbabwe. The manner in which the applicant's application *in casu* was handled impacted upon his right to a speedy resolution of his application and ultimately access to justice.

The facts of this matter are as follows; on 19 November 2013 the applicant was convicted of contravening s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Rape). On 29 May 2018 the applicant filed a chamber application for condonation for late noting of an appeal against both conviction and sentence. The application was served on the National Prosecution Authority on the very day. The National Prosecuting Authority (hereinafter referred to as 'NPA' or "the State" used interchangeably) did not file its response. On 6 August 2018 the applicant wrote to the Registrar of High Court requesting to be appraised of the status of his application. This letter was not responded to. Rather the registrar wrote to the NPA on 16 August 2018 asking the State to file its response so that the matter could be placed before a judge. No response was forthcoming from the State.

On 8 October 2018 the applicant wrote to the registrar again making a follow up on his matter. This time the Registrar responded on 23 October 2018 advising that the record was

awaiting the State's response before it could be placed before a judge. On 26 November 2018 one and half months after his last enquiry, the applicant once again wrote to the registrar enquiring on progress of his application. Rather than responding to this letter the registrar simply attached the response of 16 August 2018. On 25 February 2019, the applicant wrote to the NPA requesting them to respond to his application. The letter was copied to the Criminal Court Registrar and was duly received on 1 March 2019. No response is on record instead the letter of 16 August 2018 was again attached presumably for record purposes.

Frustrated by lack of progress, the applicant filed an application under the heading "Court applications requesting for Judgment under Con No. 142/18." I then received the application on 2 July 2019.

Upon perusing the record, I got to know of how the record has been in criminal registry from 29 May 2018 until 2 July 2019, a period of more than 12 months. I also realized that a response was filed by the NPA on 20 March 2019 wherein the State is opposing the application. Despite receiving the response from the State the record was not placed before a judge.

The above related events reflect gross inefficiency, lack of diligence and total disregard of constitutionally guaranteed rights of an accused person.

The Registrar Criminal Division, is to blame. It is inexcusable to keep a chamber application for a full year on the pretext that there is no response from the other party. Failure to seek directions from the Registrar of the High Court or a judge was equally a blatant mistake.

The High Court Rules 1971 are clear on how a chamber application should be handled. Rule 245 is the rule that governs non-urgent chamber applications and provides:

Rule 245

> "Where a chamber application is not accompanied by a certificate referred to in r 244, the registrar shall in the normal cause of events but without undue delay, submit it to a judge who shall consider the papers without undue delay."

This rule in no uncertain terms calls for both the registrar and the judge to respectively handle and deal with the chamber application without undue delay. This means dealing with the application as soon as possible, at the earliest opportunity available.

The facts of this matter show that the registrar did not comply with this rule. The registrar failed to submit the application to a judge <u>without undue delay</u>. It took more than twelve (12) months for the application to be submitted to a judge. There is no requirement in the rules that

prevents a chamber application to be placed before a judge for the reason that there is no response from the other party. The NPA had been served thus the registrar did not have to wait for a response. In any case, r 246 provides how a chamber application is to be handled by a judge.

246. Consideration of applications

"(1) A judge to whom papers are submitted in terms of r 244 or 245 may –

(a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;

(b) require either party's legal practitioner to appear before him to present further argument as the judge may require."

Thus the lack of a response by a party does not prevent the placement of a chamber application before a judge. A judge is thus clothed with the powers to order a party or its representative to appear and furnish the judge with further information or present argument as the judge may require. In the result, the applicant's application should simply have been placed before a judge and not wait for a year for that to be done.

Section 68 of the Constitution of Zimbabwe Amendment (No. 20) of 2013 give persons the right to administrative conduct which is among other things "prompt" and efficient. Equally s 69 subsection (2) thereof states:

> "In the determination of civil rights and obligations every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law."

In essence s 69, is about the right to be heard by an impartial body within a reasonable period of time, and access to courts, or to a tribunal or forum established by law for the resolution of any dispute. Such access cannot be impeded by conduct of any official as it is access to justice. When an application is not placed before a judge as required for a year that impacts upon the right of a litigant to justice.

Equally s 165 (b) of the Constitution states that:

> "justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness."

The applicant's application suffered a great set-back as same was not considered for a year. The failure to receive prompt attention results in the delay to justice.

It is imperative that an application be heard and a determination made in good time irrespective of the outcome. Thus the justice delivery system must be seen to be working as demanded and dictated by the constitution to safeguard human rights and freedoms and the rule of law as per s 165 (1) (c) of the Constitution..

Whilst the State's conduct should not have impacted upon the placement of the application before a judge, the inaction leaves a lot to be desired. The state took 10 (ten) months to respond to a simple application for condonation. This is despite several reminders from the criminal registrar and a letter addressed to NPA by the applicant. The NPA is a major player in the justice delivery system in criminal matters. It should play its part in the administration of justice. This matter should have been determined long back had all parties taken their roles seriously.

On the merits, the applicant has put forward a reasonable explanation for the delay in noting his appeal. He is unrepresented, he did not have the funds to pay for the record of proceedings and relatives did not assist. He has no access to free legal services. When he ultimately paid for the record, it took time for same to be availed to him. The applicant has presented a reasonable explanation for the delay.

The prospects of success on appeal are present. The allegations against the accused were that between the period extending from May to November 2013 the accused had sexual intercourse with plaintiff. Complainant's evidence was that she was raped several times and on the last occasion accused raped her three times. The medical report produced raises more questions than answers. It appears on p 48 of the record. No examination was carried out on the complainant's genitalia. No reasons are given for the omission. The report indicates that examination on external genitalia was omitted so was the examination on the hymen, yet on the section where evidence on penetration is supposed to be filled in, the examining doctor wrote that penetration was "very likely". No evidence was led to justify this finding given the omitted practical examination referred to above. The medical doctor should have been called to justify his findings. The report of rape was also elicited through a threat of a beating which shows that it was not spontaneous. Further the applicant raised allegations of bad blood between the complainant's parents and him which could be a reason for false implication. The facts are such that the case is a borderline case where a different court may arrive at a different decision. Accordingly, it is in the interests of justice that the applicant be given an opportunity to have his appeal heard.

In the result the following order is granted:

1. The applicant's late noting of an appeal be and is hereby condoned.

2. The applicant is granted leave to prosecute the appeal in person.

3. The applicant shall file his notice of appeal within 10 days of being served with this order.

4. The Registrar shall ensure that personal service of the order is effected upon the applicant.

National Prosecuting Authority, respondent's legal practitioners