

JOHN MUCHENJE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 NOVEMBER 2012

L. Jamela with Mrs N. Chanayiwa for the applicant
T. Makoni for the respondent

Judgment

NDOU J: The applicant seeks an order in the following terms:

“It is ordered that:

1. The following questions be referred to the Supreme Court for determination:
 - 1.1 Whether the applicant’s right to a fair trial within a reasonable time has been violated or not.
 - 1.2 Whether the applicant’s right to personal liberty has been violated or not.
2. Pending the determination by the Supreme Court, the applicant be released from Khami Remand Prison forthwith and the respondent to proceed by way of summons in the event that the Supreme Court rules against the applicant.”

The background facts of the matter are the following. The applicant was arrested on 22 October 2001 and charged with murder. He first appeared in the magistrates’ Court on 25 October 2001 where he was put through the remand system. He was routinely remanded in custody. In September 2003 he was indicted for trial at this court. His trial commenced before my brother Judge. The applicant pleaded not guilty to the charge. A total of four state witnesses testified leaving one outstanding state witness who happened to be the investigating officer. Since then the matter has been postponed indefinitely, first because the said witness could not be secured. At a later stage the trial Judge left Bulawayo High Court and was therefore not available to continue with the trial for some time. The trial Judge came back in 2006 to continue with the trial but the said state witness was not available. The two assessors who constituted the court in this matter passed on one after the other. The court was therefore not properly constituted to proceed. The applicant has been in incarceration for around eleven (11) years waiting finalization of the matter. The applicant has now made this

application for referral to the Supreme Court in terms of section 24 (2) of the Constitution of Zimbabwe. Section 24 (2) *supra*, provides as follows:

“If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, refer the question to the Supreme Court unless, in his opinion the raising of the question is merely frivolous and vexatious.”

The respondent opposed the application. The deponent to the opposing affidavit (mistakenly referred to as answering affidavit) does not aver that the application is frivolous and vexatious. All the deponent does is to explain how the applicant ended up in custody for eleven (11) years. It is more of a justification for the delay in finalizing the trial. It is trite that faced with a request to refer the question to the Supreme Court in terms of section 24 (2) *supra*, this court has no option but to act in accordance therewith, unless it is of the opinion that the question was, as characterized in section 24 (2), *supra*, as merely frivolous and vexatious – *Martin v Attorney General & Anor* 1993 (1) ZLR 153 (SC).

Given the background of this case, it cannot, with respect, be said that seeking redress in terms of section 18 (2) and 13 (1) of the Constitution of Zimbabwe is frivolous and vexatious. The applicant has been in custody for about eleven years through no fault of his own. By all accounts this is an unusual delay in our criminal justice system. The applicant is justified in seeking to test the constitutionality of such conduct at the Supreme Court – *S v Watson* 2006 (1) ZLR 394 (S); *In Re- Mlambo* 1991 (2) ZLR 339 (S) and *S v Nhondo & Ors* 2001 (2) ZLR 84 (S).

As far as the prayer sought in paragraph 2 of the draft order is concerned, I hold that a proper application should be made for bail pending the determination of the matter by the Supreme Court.

Accordingly, I grant the order in terms of the amended draft.

Zimbabwe Lawyers for Human Rights, applicant’s legal practitioners
Criminal Division, Attorney General’s Office respondent’s legal practitioners