

ASHA MUKOTE

VERSUS

COMMISSIONER GENERAL OF POLICE N.O

AND

OFFICER COMMANDING POLICE BULAWAYO PROVINCE N.O

AND

SUPERINTENDENT ENERST HUNGWE N.O

AND

ASSISTANT INSPECTOR DAVID NHIRA N.O

AND

ASSISTANT INSPECTOR NDAVANYEMATEMA N.O

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 29 OCTOBER 2013 AND 6 FEBRUARY 2014

B Sengweni for the applicant

W. Marecha for the respondents

Opposed matter

MOYO J: This is an application for review. On the 16th of June 2009, the Applicant was convicted of contravening Section 29 of the Schedule to the Police Act [Chapter 11:10] as read with Section 34 of the said Act in that he improperly disposed of 85 litres of diesel for tillage. The Applicant filed this application upon dissatisfaction with the conviction and the penalties that followed.

The 3rd and 4th Respondents apparently are the ones that unearthed the theft of the diesel at ZRP Springs farm.

The trial before a single officer was presided over by the 3rd Respondent and the 4th Respondent was prosecuting. This in essence means that 3rd and 4th Respondents were

complainants/witnesses in the same case that one of them adjudicated upon and the other prosecuted. The Respondents in paragraph 3.3 of Respondents' heads of argument wherein Respondents' counsel states that:-

“3.3.1 It is trite that the trial did not adhere to the principles of natural justice, *viz*,

(a) *audi alteram partem rule*

(b) *memo judex in sua causa*.

3.3.2 third and fourth Respondents arrested the Applicant, prosecuted and tried him. It is not in dispute that this was a flagrant miscarriage of justice.”

This point was rightly conceded to by the Respondents.

Although the Respondents are opposed to this application, having said that they concede that the proceedings were a flagrant miscarriage of justice, one wonders what then makes Respondents' counsel be of the view that such can be overlooked by this court.

The proceedings breached the rules of natural justice and clearly can not stand. Section 27 of the High Court Act [Chapter 7:06], provides that the grounds for review are the following:-

- (a) absence of jurisdiction on the part of the court, tribunal or authority concerned.
- (b) interest in the cause, bias, malice, or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned,
- (c) gross irregularity in the proceedings or decision.

Clearly if 3rd and 4th Respondents were complainants/witnesses, judge and prosecutor in the same case, they could have had interest in the cause and proceeding in this manner amounted to a gross irregularity in the proceedings. The proceedings can therefore not stand.

I accordingly grant the application in the following terms:-

- (1) The decision of the trial by a single officer on 15th and 16th June 2009 be and is hereby set aside.
- (2) The matter be remitted back to the 1st Respondent for a trial to be conducted before a different officer.
- (3) Respondents to bear the costs of this application

Mcijo, Dube and partners, applicant's legal practitioners
Civil Division, Attorney General's office, respondents' legal practitioners