STANLEY NYASHA KAZHANJE
versus
HOSEA MUJAYA N.O.
and
THE PROSECUTOR GENERAL N.O.

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 17 & 19 June 2019, 16 August 2019

Chamber application

S. Hashiti & G Mhishi, for the applicant
T Mapfuwa and *B Vito*, for the respondents

KWENDA J: On the 14th June 2019 I dismissed applicant's urgent application for stay of criminal pending an application for review. I prepared a detailed judgment. The applicant intends to appeal against that judgment and hereby seeks leave to appeal.

After I had handed down judgment applicant's Counsels submitted a written request to appear before me to make oral application for leave to appeal. I granted applicant audience to enable him to enlighten me on the procedure he intended to adopt. When counsels appeared (the second respondent was represented) I asked lead counsel to address me on the legality of the procedure followed by him particularly the request to make an oral application for leave to appeal against dismissal of an urgent application.

He took me to order 34 of the High Court rules 1971. We noted that order 34 is concerned with leave to appeal against conviction and sentence (including further criminal appeals from the High Court to the Supreme Court against conviction and sentence either imposed or confirmed on appeal). Accordingly Order 34 does not apply to the present situation. Lead counsel presented to me a typed chamber application bearing the case number quoted above. The application was not presented with the file. I had to request for the file.

The grounds of the application are that it is intended to appeal against my judgment in case number HC 4817/19 on the following grounds:

1. The judge erred at law in making definitive and conclusive findings of law beyond pronouncing on prospects of success without the benefit of the record or observing witnesses testify.
2. The judge erred and misdirected himself in traversing the issues beyond what a *prima facie* is.
3. The judge misdirected himself in effectively rendering judgment in a matter for review which matter was not before him.
4. The judge erred and misdirected himself in failing to consider that once the issue for review was before the court in another case there was no basis for making conclusive findings on the matter absent the record of proceedings.
5. The Judge erred in conclusively dealing with the review and pre-empting the trial case.
6. The judge shifted and reversed onus onto the applicant to establish his innocence more so in the face of exculpating evidence.

The sixth ground is further broken down into further ten sub grounds. As can be seen, there is a lot of repetition but the essence of the whole application is that the judge pronounced opinions on the merits of the matter which are conclusive and detrimental to the applicant both at his trial before the Regional Magistrate or the pending High Court review.

It appears to me that counsel was very disturbed by the outcome contained in my judgment as will more fully be demonstrated hereunder. The chamber application must have been prepared hurriedly and with strong emotions. In the end the chamber application is deficient in that it fails dismally to comply with the rules of this court and the same ground was repeated and presented as seventeen grounds of application.

It appears that applicant took the view that my judgment is interlocutory because he sought an interim relief pending review. The application was therefore informed by s 43 (2) of the High Court Act *Chapter 7:06.* The Act does not provide for an oral application to the judge. Order 32 of the High Court rules therefore applies. Practice and procedure is that ordinarily where the court has pronounced itself in a judgment and a party intends to approach the same court on a procedural issue, he/she must do so by way of chamber application.[1]

[1] See rule 226(2) of the High Court rules

Form 29 B of the High Court Rules 1971[2] requires an applicant to set out in summary the basis of a chamber application. The provision contemplates clear, concise and specific grounds which need not be argumentative. The grounds which I have quoted above are not concise. They are argumentative

Further, according to the template in the rules, a chamber application must necessarily conclude by

(i) stating or identifying documents submitted in support of the application

(ii) stating the date on which it was prepared

(iii) identifying the legal practitioner who prepared it who should sign on the face of the chamber application.

(iv) state the address for service of the legal practitioner

(v) identify the other parties to be served and their respective addresses for service

All that information is not on the chamber application before me. This chamber application was not indexed. The judgment is not attached.

The application is opposed by the State on the merits. The State submitted that the I was justified in delving into the merits of the pending criminal trial in order to correctly determine whether or not to grant stay of a criminal trial pending the review. I agree with the submission.[3]

The *Gumbura* case[4] is now one a must read for guidance in cases of rape of vulnerable women through manipulation, brain washing or enslavement of the mind. For the purposes of this judgment it should be noted that while the Supreme Court was only dealing with a bail appeal, it made telling and conclusive findings on the merits of the conviction and sentence. More recently the Supreme Court expressed similarly telling views when dealing with the matter of Prosecutor General v *Intratrek Zimbabewe, Wicknell Chivhayo & Anor*[5] who had been acquitted by this court on review after this court upheld his exception to the charge. In the *Intratrek* case[6] the respondents submitted that the facts as captured in the charge and state outline did not disclose the offence charged. In disagreeing with the respondents the Supreme court gave a detailed analysis of the facts and expressed the opinion that the allegations as

[2] See rule 241
[3] See the matter of *S* v *Gumbura* 2014 ZLR (2) 539 (S)
[4] See note 3 above
[5] SC 59/2019
[6] See note 5 above

explained by the Honourable Judge of Appeal if proved would constitute fraud. I conclude that it would be lame for the respondents in the *Intratrek* matter to allege that in so doing the Supreme court gave pointers to the trial court because they invited those comments. I wish to reiterate that a party cannot cry foul when he/she has invited the court to express an opinion on the merits by attacking the findings of the court *a quo* on the merits. In any event, the *Intratrek* matter is authority for the position that where the accused on trial is aggrieved by the decision of a magistrate which he/she considers wrong, the remedy available ordinarily is to appeal after conviction.

Actually in this matter the record of proceedings was placed before me by the applicant with the consent of the State. It is therefore not correct that I did not have the record of proceedings. A higher court is not disqualified from exercising jurisdiction over lower court's proceedings simply because it (the higher court) did not hear the witnesses testifying.

I overlooked the deficiencies in the chamber application and heard argument on the merits. I only discovered the omissions, which are gross, in preparing judgment. I would have struck the matter off for want of compliance with the rules. However, due to the oversight stated above, I did not invite submissions on the procedural inadequacies. I will therefore invoke r 4 (c) of the High Court Rules and decided the matter on the merits.

The submission I ought not to have made findings on the merits of the pending trial lacks merit. The applicant attacked the trial court's decision to deny him discharge at the close of the State case. The applicant submitted that the trial court's decision is wrong in light of the evidence adduced before it. Applicant relied on the record of proceedings up to the close of the state case which was placed before me and addressed me extensively on the evidence adduced at the trial in an effort to convince me that the applicant had no case to answer. I analysed the evidence on record and differed with the applicant's assessment of the evidence whereupon I prepared judgment giving reasons. The applicant, in my view, may not be entitled to express views on the evidence adduced at his trial and at the same time muzzle this court from which he expects concurrence and a relief.

For the reasons stated above I find that the intended appeal has no merit and leave to appeal should be refused. The second respondent did not pray for costs. It is ordered as follows:

The application for leave to appeal from the judgment of this court in case No. HC 4817/19 be and is hereby dismissed with no order as to costs.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners