THE PROSECUTOR GENERAL
versus
LAWRENCE BEREJENA
and
(MAGISTRATE) T MASHAIRE N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE; 9 November 2023 & 24 May 2024

Chamber Application

F I Nyahunzvi, for the applicant
J Tuso, for the 1st respondent

FOROMA J: This is a chamber application in terms of s 198(4)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Prosecutor General dissatisfied with the grant of an application for discharge to respondent at the close of the state case sought leave of a judge of the High Court to appeal against the decision to discharge the accused (respondent). The application was opposed by the respondent with the assistance of his defence counsel who also defended him at the trial.

Respondent appeared before the court *a quo* facing a contempt of Court charge in contravention of s 182(1)(a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] it being alleged that he unlawfully interjected to court proceedings and uttered words to the effect that the court did not have authority to try Nancy Berejena (respondent's mother) and that by so doing impaired the dignity and authority of the headman's court. The gravamen of the allegations are that during the trial of respondents mother's case before Headman Mungoni respondent is alleged to have interrupted and disrupted the proceedings by asking for evidence of a letter which was said to be forged. The Headman as presiding officer told the respondent that the one who had a right and allowed to ask for the said letter was the defendant (respondent's mother) and not himself. This did not go down well with respondent who instructed his mother the defendant to leave the court room before the end of the court cession thereby abandoning the proceedings.

Respondent in the state outline is alleged also to have undermined the local court by saying that it (the Headman's court) had no jurisdiction to try his mother.

It is important to note that at the trial of respondent in the court a quo the state led evidence of the Headman and his clerk of court and closed its case. Respondent then applied for a discharge of the respondent at the close of the state case in terms of s 198(3) of the Criminal Procedure and Evidence Act which application was granted.

Before considering the merits of the applicant's case I shall briefly address the points *in limine* raised by the respondent in its opposition to the application. Respondent raised the following points *in limine* – (i) that the application was fatally defective for failure to comply with the rules requiring the use of Form Number 25 in its chamber application as prescribed by r 60(1) of the High Court 2021. The objection is worded as follows- "3 applicant used the wrong form. This is a chamber application so applicant should have used Form 25 which states that the summary of the basis of the application not Form 23 that they used. The application therefore does not comply with r 60(1) of the High Court rr 2021. (4) for that reason, the present application is improperly before the court and as such it must be struck off the roll." At the hearing applicant's counsel conceded the objection *in limine* albeit incorrectly. In terms of the *proviso* to r 60(1) applicant determined that the chamber application needed to be served on an interested party. For this reason, the chamber application had to be in Form 23 with appropriate modifications. I can not do better than reproduce the said *proviso* to r 60(1) ……..''Provided that where a chamber application is to be served on an interested party, it shall be in Form 23 with appropriate modifications."

(2) The next objection was headed <u>Application is misleading and defective</u>. In amplification the respondent's contention was that the application was misleading because the record of proceedings that was attached is incomplete in that it omitted information about what transpired before evidence was led namely an application for an exception filed in writing which applicant have not opposed but which the court dismissed all the same. The exception related to an objection to the court *a quo's* jurisdiction. While it is correct that the said exception was not captured in the record of the court *a quo* the reason for it is apparent and well within respondent's knowledge. It is because the exception was not determined by the second respondent who handled the trial from plea recording stage to close of the state case with a different prosecutor representing applicant. It is important to note that the respondent in its notice of opposition referred to the

exception raised and actually attached a copy with its notice of opposition. Although for the sake of completeness I directed that applicant file the said document exception before I could consider my ruling herein, I subsequently realized that nothing turned on the said exception as at any rate there was no counter chamber application which called upon a consideration of anything arising from how it was dealt with. In the circumstances and as nothing turned on the omitted portion of the record this objection did not positively affect the matter one way or the other. If it had been of any material effect and considering that the second respondent had not been called upon to pronounce on it, nothing prevented respondent repeating it before the second respondent in order to get the matter dealt with whichever way respondent desired it to be addressed. Although respondent objected to the manner of service of the application this was abandoned and it therefore need not detain me.

On the merits the respondent argued that the application had no prospects of success for the reasons that the relief sought in the draft notice of appeal was not specific in that the draft order did not contain the prayer that the applicant prayed that the appeal succeed. In this regard respondent cited the case of Edward Mudyavanhu SC 75/17. A reading of the judgment of GWAUNZA JA (as she then was) shows that in terms of r 29 of the Supreme Court Rules a failure to pray in the notice of appeal that "the appeal be allowed) is a fatal error which makes the notice of appeal null and void.

This objection with respect to counsel is misplaced. In *casu*, the court is not seized with the determination of the validity of a notice of appeal but with determination of whether or not the proposed appeal is arguable. For this reason, what should concern the court is not the prayer but the validity of the grounds of appeal. Besides the Supreme Court in the Edward Mudyavanhu (*supra)* was concerned with an interpretation of the Supreme Court Civil Rules whereas *in casu*, the court is concerned with the interpretation of rules pertaining to enforcement of criminal appeal rules.

The grounds of appeal in the draft notice of appeal filed with the application highlight that the court *a quo* granted respondent's application for a discharge on a version of evidence that reflected a misunderstanding of both the facts and the law. An analysis of the evidence adduced from the two state witnesses (Headman and his clerk of court) when compared to the state out line will expose the following.

(a) Whereas the conduct deemed contemptuous is said to have taken place during the trial of respondent's mother (according to the state outline), the state witnesses testified that it took place after the court had actually handed down its judgment that is to say after the conclusion of the trial of respondent's mother.

(b) According to the state outline complainant only raised the complaint of contempt of court as he related respondent's reaction to the alleged request for the forged letter. A quoting from the record will assist demonstrate the point.

(5) ………..the accused person who was not a party to the proceedings and without leave of the court interjected and asked for a letter which was said to be forged. The complainant then said the defendant is the one who is allowed to ask for those papers ……….(6) This did not go down well with the accused (Respondent) who then instructed his mother to move out of the court room and said "nxaa" before the end of the court cession thereby abandoning the proceedings." It is clear that this would be a disruption of court proceedings if the witness evidence had confirmed this to have happened which it did not.

(c) The court *a quo* correctly observed that the state closed its case before it reconciled the inconsistencies in the state outline and the oral evidence adduced from witnesses. While the state outline does not deal with any request for a written judgment the second state witness testified that respondent actually asked for the judgment after the court had already pronounced it. It is clear therefore that any allegedly contemptuous conduct on the part of respondent even on the state's own evidence took place after the proceedings had come to an end contrary to the state outline's suggestion that this took place during the course of proceedings and resulted in the abandonment of proceedings. The test for determining when to grant a discharge of an accused at the close of the state case is trite-see *S* v *Kachipare* 1998 (2) ZLR 271, See *S* v *Nyarungwe* HH 42/16. The court *a quo* was well within its rights to reason that the evidence adduced on behalf of state was so manifestly unreliable no reasonable court could safely act on it-*Attorney General* v *Tarwireyi* 1997(1) ZLR(s) 576.

In light of the above cited examples of a poor state case the second respondent cannot be blamed for granting respondent's application for a discharge at the close of the state case. I do not consider that the proposed appeal has any prospects of success and

accordingly dismiss the applicant's application for leave to appeal against the decision granting respondent a discharge at the close of the state case.

National Prosecuting Authority, applicant's legal practitioners
Tavenhave & Machingauta, first respondent's legal practitioners