ABRAHAM JAMES WIRIMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 4 and 18 November 2015

Application for leave to note fresh appeal

S. A. Tawona, for applicant
Ms *S. Fero*, for respondent

TAGU J: This is an application for leave to note fresh appeal in terms of r 22 (4) of the Supreme Court (Magistrate Court) Criminal Rules, 1979. In the year 2010 the applicant filed a Notice of Appeal against both conviction and sentence of the Magistrate Court Gweru under Case No HC CA 773/10. On 27 May 2015, some 5 years later, the Registrar of the High Court, acting in terms of r 22 (4) of the Supreme Court (Magistrate Court) (Criminal Appeals Rules, 1979 dismissed the applicant's appeal on the basis that it was deemed abandoned and invalidated in terms of the Rules aforementioned for failure to pay costs of preparation of the record after having been advised to do so.

Aggrieved by the dismissal of his appeal, the applicant filed this application. The application is opposed by the respondent.

The applicant was represented by a legal practitioner, one Mr T. *Chivasa* of Chivasa and Associates, at the time of his conviction and sentence who subsequently filed the Notice of Appeal on behalf of the applicant through their corresponding legal practitioners Donsa-Nkomo & Mtangi Legal Practice. Rule 22 of the aforesaid rules govern appeals against conviction and sentence by convicted persons who are legally represented. The relevant subrules say-

"**22. Noting of appeal**
(1) ……..
(2) The appellant shall, at the time of the noting of an appeal in terms of subrule (1) or within such period thereof, not exceeding five days, as the clerk of court may allow, deposit with the clerk of the court the cost as estimated by the clerk of the court of one certified copy of the

record in the case concerned:
Provided that the clerk of the court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative of such cost immediately after it has been determined.

(3) Any difference between any payment of the estimated cost referred to in subrule (2) and the actual cost of the copy of the record shall be paid to the clerk of the court by the appellant, as the case may be, once the cost has been determined and before the appeal is heard.

(4) Any failure to comply with the provisions of subrule (2) or (3) or any undertaking made in terms of the proviso to subrule (2) shall invalidate the noting of the appeal:
Provided that a judge of the Supreme Court may give leave for a fresh appeal to be noted."

This application has been filed by Tawona & Jaravani Attorneys. The founding affidavit to the applicant's application for leave to note fresh appeal was deposed to by his new legal practitioner of record Mr *Simbarashe Akem Tawona*. Order 32 r227 (4) states that:

"An affidavit filed

(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and

(b) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents."

In my view, to the extent that Mr Simbarashe Akem Tawona who was not seized with the matter at any stage before, deposed to what could only have been in the mind of the applicant, was giving hearsay testimony. He could not have been in the applicant's mind to know why the applicant did not pay costs for the preparation of the record after it was determined. The information Mr *Tawona* gave could only have been supplied to him by the applicant. It should have been properly deposed to by the applicant himself or at least by the legal practitioner who was handling the applicant's appeal. The depositions of those facts that were not personally known by the legal practitioner of record rendered them inadmissible. See *Clemence Nyoni* v *The State* HH142/11.

However, in an application of this nature the court is enjoined to consider three factors, namely, the prospects of success, the explanation for the failure to pay costs and the length of the delay. The factors are more or less the same as those considered in an application for condonation. See *Mashave & Ors* v *Zupco & Anor* 2000 (1) ZLR 478 (SC) at 486 C-D. In "*Criminal Procedure in Zimbabwe*" by JR Rowland the author dealing with the factors stated:

> "The first is the length of the delay. The second is the reason advanced for the delay. The third is the chance of the appeal succeeding. The greater the length of delay and the less satisfactory the reason for the delay, the greater must be the chance of success. Where the delay is short and the reason for it is convincing and satisfactory, the chance of success need not be so great; it may be enough to have an arguable case."

In his founding affidavit Mr *Simbarashe Akem Tawona* explained that after the filing of the notice of appeal the applicant engaged another legal practitioner to handle the matter and this unnamed new practitioner applied for and obtained bail pending appeal for the applicant. Sometime in 2015 the applicant was arrested and incarcerated at Mutare Remand Court pending trial but was subsequently found not guilty and acquitted. While he was in custody the Registrar of the High Court served him with a letter advising him that his appeal had been dismissed for failure to pay costs in terms of the rules. He further submitted that the failure of the applicant to pay costs was not deliberate because he was in custody and had no legal practitioner to represent him since his last legal practitioner had abandoned him. He therefore submitted that the applicant has good prospects of success on appeal. According to him the applicant had not been advised that the record was ready and that he was to pay the costs of the preparation of the record.

Ms *S Fero* submitted on behalf the respondent that the failure by the applicant to pay costs for the preparation of the record was wilful. The applicant was represented by Chivasa and Associates Legal Practitioners but did not pay the costs after being advised to do so. She further argued that the applicant's incarceration in 2015 on a different matter is divorced from his inaction as of 2010. The applicant waited for 5 years to prosecute his appeal and failed to state when he was abandoned by his former legal practitioners nor to state what action he took to prosecute his appeal. Finally she argued that the applicant has no prospects of success on appeal.

Prospects of success

The applicant was a Public Prosecutor based at Zvishavane Magistrates Court. The allegations were that on 19 February 2010 two accused persons Alphinos Masarira and Silakho Dambakure arrived late at court and were issued with warrants of arrest. They approached the applicant who demanded $100.00 for the cancellation of their warrants of arrest. They raised $80.00 which was later paid to the applicant. This came to the attention of the court officials and matter was reported to the Police leading to the arrest of the applicant. Evidence that was led at the trial of the applicant was very clear from Dzikamai Gambiza a barman at Dakarayi Bar that the two accused persons approached him and left $80.00 which was supposed to be handed over to one Consilda Chizondo for onward transmission to the applicant. Dzikamai Gambiza then generated exh 1, a note to the effect that he had received $80.00 from the two accused. When Mrs Moyo, also known as Consilda Chizondo came he

handed over the parcel to her. Consilda Chizondo another bar lady at Dakarayi Bar confirmed that she met the applicant a few days before who was her regular customer. The applicant told her that the two accused were to come and leave some money for him. On the day the money was brought she was at church. On her return she was given exh 1 as well as the money by Dzikamai Gambiza which she handed over to the applicant. There are therefore, no prospects of success on appeal against both conviction and sentence. The evidence was clear that applicant criminally abused his office as a public officer in terms of s 174 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*]. the sentence was proper in the circumstances.

Explanation for the failure to pay costs

The applicant, other than the hearsay evidence in Mr *Tawona*'s affidavit, did not proffer an explanation as to why he did not pay costs for the preparation of the record. Mr *Tawona* said it was because the applicant had been abandoned by his legal practitioner and was later incarcerated at Mutare. His incarceration had nothing to do with his failure to pay costs since 2010. Be that as it may the applicant who is a court official did not explain as to what action he took to prosecute his appeal. For the following reasons I find that the applicant's explanation that he was not aware that the record was ready and was not reminded to pay the costs is not true. A perusal of the record shows that the record was ready and Mr T. *Chivasa* inspected and signed the copy of the record on 6 December 2012. On 22 January 2013 the Registrar of the High Court sent the record back to Gweru Court with an instruction that the magistrate and the transcriber should endorse their signatures. On 31 May 2013 the record was again sent back to Gweru Court with an instruction from the Registrar of the High Court that the record must be re-inspected by the applicant or his legal practitioner. That having been done, and on 5 September the Registrar wrote another letter to the applicant's legal practitioners through their correspondence lawyers requesting the legal practitioners to forward the heads of argument within 15 days from the date of receipt of the letter. Instead of complying and on 11 October 2013 Mr Chivasa and Associates legal practitioners filed a notice of renunciation of agency. It is not clear when the new unnamed lawyers assumed agency and applied for bail pending appeal. But there is correspondence in the file dated 27th February 2014 written by the Registrar to the applicant through applicant's correspondence lawyers Donsa-Nkomo & Mtangi Legal Practice requesting among other things proof of payment for cost of preparing the record in terms of r 22 (2) of the Supreme Court

(Magistrate Court) (Criminal Appeals) Rules, 1979. No explanation was given as to what the new layers and or the applicant did since 27 February 2014 up to the year 2015 when the applicant was incarcerated in connection with a different matter.

In my view, the applicant failed to give a reasonable explanation for his failure to pay cost for the preparation of the record. The applicant wilfully neglected to comply with the Rules and it is trite that the appeal is dismissed on that basis.

The length of the delay

Section 22 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979 provides that an appellant shall, within such period thereof, not exceeding five days, as the clerk of court may allow, deposit with the clerk of court the cost as estimated by the clerk of court of one certified copy of the record in the case concerned. The applicant was therefore obliged to pay the cost within a period not exceeding five days after the notice to furnish the same was served on him. *In casu*, the applicant has waited for 5 years to prosecute his appeal. There is no just and plausible explanation for the delay and the applicant cannot be allowed to benefit from his own inaction. I find this to be an inordinate delay. The applicant thought that the matter would die a natural death since he was now enjoying his freedom while out on bail, not knowing that one day the long arm of the law would catch up with him.

The application has no merit and it is dismissed.

Tawona & Jaravani Attorneys, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners