

REPORTABLE (12)

PAUL MADZORE
v
THE STATE

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, MAY 28, 2014**

M Majuru, for the applicant

E Nyazamba, for the respondent

MAVANGIRA AJCC: This is a matter that was referred to this court by a magistrate in terms of s 24(2) of the former Constitution of Zimbabwe, (“the former Constitution”).

The applicant was arraigned before a magistrate at Harare on a charge of assaulting or resisting a peace officer as defined in s 176 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The allegation was that on 14 December 2006, at Makomva Shopping Centre, Glen View 2, Harare, the applicant assaulted one Everisto Maponga, a Police Officer, who was performing his duty, by pushing him away with both hands.

Before this court, the applicant seeks the permanent stay of his prosecution on the ground that his right to a fair trial within a reasonable time before an impartial court has

been violated and that this was through no fault on his part. After hearing submissions by both parties, this court issued an order dismissing the application as being without merit, with no order as to costs. It was indicated that the reasons for this order would follow in due course. The following are the reasons.

BACKGROUND

The summary of the State case reflects that on 14 December 2006 a team of police detectives, one of whom is the complainant, was on patrol in the Glen View area in Harare. When the team arrived at Makomva Shopping Centre, Everisto Maponga (“the complainant”) observed a motor vehicle that was parked with its boot partially open. The complainant and a fellow detective approached the motor vehicle and observed a motor vehicle engine protruding from its boot.

The complainant requested one of the occupants of the vehicle to step out. The occupant, who later turned out to be one Onwell Kadembo, stepped out of the vehicle. The complainant and his colleague produced their police service identity cards and requested the occupant (Kadembo), who had stepped out, to identify himself. Kadembo went back to the vehicle and brought back the applicant’s particulars. Whilst the complainant was talking to Kadembo, the applicant who was seated in the driver’s seat of the parked vehicle got out and charged towards the complainant. He pushed the complainant causing him to stagger backwards. The applicant charged towards the complainant again but was restrained from further attacking him by other detectives who were nearby and who then arrested him. On 29 December 2006 the applicant was placed on remand.

The application for referral was made before the applicant had pleaded to the charges. The applicant’s legal practitioner applied for the matter to be referred to the

Supreme Court, then sitting as the Constitutional Court, for a determination as to whether the applicant's right, in terms of s 18(1) and (2) of the former Constitution, to a trial within a reasonable time had not been violated. This was in view of the time that had elapsed before the applicant's trial commenced. The application was to the further effect that if the Constitutional Court found that the applicant's right had been violated, the prayer before it would be for an order that his prosecution be permanently stayed.

APPLICANT'S EVIDENCE DURING THE APPLICATION BEFORE THE MAGISTRATE

The applicant gave evidence in support of the said application. He said that he was a Member of Parliament for Glen View South constituency. He also said that he had appeared in court several times on account of the allegations of assaulting a peace officer and that the matter was repeatedly remanded due to various reasons. On some occasions the reason given was that the docket was not ready and on others it was that the witnesses were not available. His evidence was generalised as he did not assign a specific reason for each postponement on the specific dates when he appeared in court.

The applicant also testified that besides nine police officers who witnessed the incident, there was one other person, a civilian, one Onwell Kadembo, whom he would have wished to call as a witness in the event the matter came to trial. However, he could no longer do so as the said Onwell Kadembo was out of the country and could not be traced. He averred that he had thus been prejudiced by the delay in bringing the matter to trial over the years and also by the fact that, due to the nature of his work, he was sometimes forced to cancel work-related trips. He further stated that he and his family also suffered anxiety and trauma owing to the fact that he had to go to court endlessly.

It was also the applicant's evidence that he has always been available to stand trial as he was always either at home or at work and that the police could have found him and served him with summons had they conscientiously made the effort to do so.

The prosecutor declined to cross examine the applicant. The record does not reflect any formal indication that the applicant did not wish to call any other witnesses but no further evidence was adduced on his behalf.

SUBMISSIONS BY THE APPLICANT BEFORE THE MAGISTRATE

In closing submissions before the magistrate, Mr *Muchadehama* contended that the evidence that had been placed before the court showed that the applicant had always been available within the jurisdiction. Furthermore, that it was known to the police that he was an active member of the MDC-T political party who would attend his party's political rallies; that he was a Member of Parliament who would attend Parliament at least 3 days a week and that he could be contacted telephonically. He submitted that if the Police had, in the circumstances, acted professionally they could have easily served him with summons. It was also his submission that no evidence had been placed before the court *a quo*, to show that the applicant had deliberately made efforts to ensure that he was not tried. It was for the State as *dominus litis*, he submitted, to take the necessary steps to ensure that the applicant was tried and not for the applicant to look for the Police.

RESPONDENT'S EVIDENCE BEFORE THE MAGISTRATE

After the applicant's evidence the State led evidence through the investigating officer, one Courage Chinyerere (hereafter referred to as "Chinyerere"). Chinyerere was not involved in the investigation of the matter before 2009. It was only in 2009 that he was

tasked to take over as the investigating officer. He thus did not give evidence on any of the events or matters that took place before he became involved in the matter. Such events or matters were only placed before the court *a quo* by way of the prosecutor's address which was made before the witness testified.

The witness' evidence was to the effect that sometime in 2009 when he was tasked to take over as the investigating officer of the matter, there was an instruction on the docket for him to serve the accused with summons for trial and to thereafter serve the witnesses with the relevant *subpoenae*. He visited the address that was recorded on the docket as being the applicant's residential address but found that he no longer resided there. On the Officer-in-Charge's instructions, which were guided by the fact that the applicant was a Member of Parliament, he approached the Clerk of Parliament with a view to ascertaining the applicant's current address. It was a fruitless visit as the Clerk of Parliament did not have it.

Chinyerere eventually obtained the applicant's mobile phone number. He contacted the applicant and on the latter's suggestion, they agreed to meet at his legal practitioner's offices. As Chinyerere was about to leave his office in order to go and meet with the applicant at the agreed venue, the latter then indicated that he (Chinyerere) should leave the summons with his secretary in Glen View. Chinyerere did not do so.

On 27 June 2010 Chinyerere was tasked, together with other details, to attend and cover a Movement for Democratic Change (MDC-T) political party rally in Epworth. At the rally he observed that the applicant was one of the guest speakers. At the end of the rally he approached the applicant and advised him that he wanted to serve him with summons but did not have the summons on him. The applicant's response was that he was at that time

unable to attend court due to his Constitutional Parliamentary Select Committee (COPAC) duties. After the COPAC process was over Chinyerere phoned the applicant who requested that they meet at Harvest House, the headquarters of his political party. The applicant thereafter told him to meet with a named vendor but Chinyerere refused to do so and advised the applicant that he needed to serve him personally with the summons. They then met at Harvest House where he finally served the summons on the applicant on a date that he said he could not remember except that it was in 2011.

SUBMISSIONS BY THE STATE (RESPONDENT) BEFORE THE MAGISTRATE

The only submissions made by the prosecutor were by way of an opening address to the court *a quo* which address was made immediately before the leading of Chinyerere in evidence. The prosecutor narrated the events that occurred during the period before Chinyerere's involvement as investigating officer of the case with particular reference to the State's efforts to bring the matter to trial and the applicant's frustration of the same.

He summarised the history of court hearings and postponements and stated the specific reasons why the trial did not commence on the various given set-down dates.

The first trial date that was set for this matter was 5 March 2007. On that date the trial could not commence as State papers had not been served on the applicant. 7 May 2007 was then set as the new date for trial. The applicant did not appear in court on that date and a warrant was issued for his arrest. The next trial date was 15 August 2007. Again, the trial did not commence on that day as the applicant's legal practitioner of choice, Mr *Muchadehama*, could not attend. Thereafter on 3 September 2007 and 23 October 2007 respectively, the trial did not commence and the matter was postponed apparently by agreement of both parties. On 3 December 2007 the State was ready to proceed to trial, all

the witnesses being present, but the matter was, for some unexplained reason, postponed to 31 January 2008. On 31 January 2008 the applicant was removed from remand by the magistrate.

The prosecutor highlighted the fact that after 31 January 2008, numerous attempts had been made to resuscitate the matter by way of summons. The applicant had been contacted by the police in order for arrangements to be made for him to be served with summons to appear for trial on 11 March 2008 but the applicant suggested that the trial date be set for 4 April 2008 instead. Thereafter the applicant could not be located for purposes of service of the summons for trial on the date that he had suggested. After he was finally located he kept giving excuses to the police relating to his Parliamentary and, subsequently, COPAC engagements and duties as reasons for not being able to avail himself for trial. Note may be taken at this stage that this is a trend that appears to have continued even after Chinyerere took over as investigating officer of the matter, as reflected by his evidence.

The prosecutor also submitted that the applicant's mobile phone number would frequently be unreachable when the police tried to contact him. Efforts made to locate him in Mbare where his music group performed were in vain. The police still failed to serve summons on him as they were only able to physically locate him at public gatherings or functions and they feared that any attempt to serve him thereat could ignite violence from members of his political party. For these reasons another trial date of 14 July 2010 failed to materialise. The police eventually decided to wait until the applicant's direct involvement in COPAC had lessened. He was, after some difficulties, eventually served with the summons, as testified to by Chinyerere, at the headquarters of his political party in January 2011 for trial on 11 January 2011.

The trial did not commence on 11 January 2011 as the applicant was not available. The matter was re-set down for 15 February 2011 but on that date the applicant was attending to his COPAC responsibilities. After 15 February 2011 the Police yet again faced difficulties in serving the applicant with summons for another date and only managed to serve him on 11 April 2011 for trial on 13 April 2011. On 13 April 2011 the applicant's legal practitioner, Mr *Muchadehama* was not in attendance, the defence claiming that they were not in possession of State papers. The applicant was remanded to 17 May 2011 on which date Mr *Muchadehama* gave notice that an application was going to be made for the matter to be referred to the Supreme Court sitting as the Constitutional Court.

MAGISTRATE'S REASONS FOR REFERRAL

The magistrate in the court *a quo* found that the raising of the question was not frivolous or vexatious and stated:

“This is a ruling to an application for referral of matter to the Supreme Court to determine whether or not accused person's right to a trial within a reasonable time in terms of s 18 (2) of the Constitution has not been violated. It is this court's finding that this application is not frivolous and vexatious considering that the offence was committed in 2006 and accused was initially placed on remand on 29 December 2006 and further remand was refused on 5 March 2007. Application is hereby granted and matter is hereby referred to the Supreme Court for determination.”

THE ISSUE FOR DETERMINATION

The issue for determination by this court is whether the applicant's right to a trial within a reasonable time was violated and if so, whether he is entitled to a permanent stay of prosecution.

APPLICANT'S SUBMISSIONS TO THIS COURT

In heads of argument filed with this Court on the applicant's behalf, it was submitted, in one breath, that the applicant's trial failed to commence for reasons wholly

attributable to the State. In the next breath the submission was that the delays in commencing the trial were almost wholly attributable to the State. It was also submitted that the reasons advanced by Chinyerere for the failure to serve summons on the applicant were not plausible as they were not truthful and had no sound legal basis. Furthermore, that when the State made further attempts to serve the summons on the applicant, he made it clear that he was going to resist being tried and was going to assert his rights to a fair trial. It was further submitted that the applicant's rights to personal liberty as guaranteed in terms of s 13(1) and to protection of the law and a fair hearing within a reasonable time by an independent and impartial court as guaranteed in terms of s 18(1) and (2) of the former Constitution were violated. Section 13 (1) was however, not invoked in the proceedings in the court *a quo* and the proceedings before that court did not relate to his rights thereunder.

In his oral submissions Mr *Majuru* for the applicant, relied on the heads of argument filed of record and also highlighted the following: the delay of 4 years and 7 months before the State made any serious attempts at trying the applicant; the delay in commencing trial is presumptively prejudicial to the applicant's rights to a fair trial within a reasonable time; the delays that occurred were almost wholly attributable to the State.

It was Mr *Majuru's* submission that the State had accepted that there was a *prima facie* inordinate delay in bringing the applicant to trial. He submitted that such acceptance obviated the need for the court to determine the first of the four factors that have been set out by case law as being relevant in matters of this nature. The focus would thus, he submitted, fall on the remaining three factors; the first being whether the Attorney-General had given a reasonable explanation for the delay. He contended that the prosecutor's decision in declining to cross examine the applicant meant that the State accepted or agreed

with everything that the applicant said under oath in the proceedings before the magistrate and that by implication therefore, the State had no plausible explanation for the delay.

As to the next factor, viz, whether the applicant asserted his right to a fair trial within a reasonable time, Mr *Majuru* made a bald unsubstantiated statement that the applicant had done so. Regarding the last factor, whether the applicant had been prejudiced by the delay, Mr *Majuru* referred the court to the case of *Re Hativagone (supra)* cited in the respondent's heads of argument, in which the following objectives of ensuring speedy trials are listed:

- (i) to prevent oppressive pre-trial incarceration
- (ii) to minimise anxiety and concern of the accused, and
- (iii) to limit the possibility that the defence will be impaired.

Mr *Majuru* submitted that in *casu*, the most serious consideration is that the applicant's defence will be impaired in that due to the delay, he is no longer able to locate and will therefore be unable to call his sole witness, Onwell Kadembo, whose current whereabouts are now unknown to him.

RESPONDENT'S SUBMISSIONS TO THIS COURT

Mr *Nyazamba* in his address to this Court, largely highlighted the submissions made in his written address. The submission was made that whilst the alleged delay in *casu* is *prima facie* inordinate, the explanation for it is, in the peculiar circumstances of the case, reasonable. It was also submitted that the delays in the commencement of the trial that occurred during the period between 14 December 2006 and 31 January 2008 when the applicant was removed from remand, were attributable to both the State and the applicant. It was further submitted that after the applicant counter proposed 4 April 2008 as a trial date in

place of 11 March 2008, the Police encountered problems in locating him for purposes of service of summons and the trend continued until he was finally served in 2011. During this whole period the State was incapacitated from complying with s 140 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which requires service of summons to be effected:

“by delivering it to the accused personally or if he cannot conveniently be found, by leaving it for him at his place of business or most usual or last known place of abode with an inmate thereof.”

Respondent’s counsel further highlighted that although police officers were on a number of occasions able to communicate with the applicant, his address for the purpose of service remained unknown to the State. The applicant thus made it impossible for the State to effect service of the summons on him.

The submission was also made that during the period from 31 July 2008 and 17 May 2010 the applicant never asserted his right to a speedy trial and that he waited until the time of reckoning to do so. Furthermore, that the State adduced evidence to the effect that, after the initial period referred to above, it had sought to resuscitate the matter but the applicant would shift goal posts whenever appointments were made with him by State officials. Consequently, it was contended, the applicant could not, in such circumstances, be heard to complain that he had been denied a speedy trial.

Respondent’s counsel also submitted that the applicant did not suffer any prejudice as he was never incarcerated but continued to enjoy his status and all the privileges accorded to an Honourable Parliamentarian throughout the period of the alleged delay.

FACTORS TO BE TAKEN INTO ACCOUNT

This application requires the court to assess whether the applicant has been deprived of his constitutional right to a speedy trial. The factors that this Court is enjoined to consider in applications of this nature are now settled. These are firstly, the length of the delay, this being to some extent, a triggering mechanism, for until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.¹ The second factor is the reason given by the prosecution for the delay. The third is whether the accused person asserted his rights and finally, the prejudice occasioned to the accused by the delay.²

THE LENGTH OF THE DELAY

It appears to me the following facts are not disputed; the fact of the applicant's arrest on 14 December 2006, his being placed on remand on 29 December 2006, remand being refused on 5 March 2007, the subsequent numerous abortive trial dates, and the proceedings of 20 July 2011 during which the application for referral to this court was successfully made. For the magistrate presiding over the matter in July 2011, some 4 years and 7 months after the arrest of the applicant and his being placed on remand, these facts would no doubt create an impression of a presumptively prejudicial delay. Delays of relatively similar lengths were found to be presumptively prejudicial in *In re Mlambo* 1991 (2) ZLR 339 (S); (four (4) years and six (6) months); *In re Masendeke* 1992 (2) ZLR 5 (S); (seven (7) years.); *Helen Matiashe v The Honourable Magistrate Mahwe N.O. & Anor* CCZ12/14; (more than five (5) years). To this extent the magistrate's finding can thus not be faulted.

¹ *Barker v Wingo* (1972) 407 US Sct, cited with approval in *In re Mlambo* 1991 (2) ZLR 339 (S) at 305G-H; *In re Hativagone* SC 67/04 at pp4-5.

² *Jonathan Mutsinze v The Attorney General* CCZ 13/2015; *Helen Matiashe v The Honourable Magistrate Mahwe N.O. & Anor* CCZ 12/14; *In re Hativagone* SC67/04; *In re Mlambo* 1991 (2) ZLR 339 (S), 350 A-G; *Fikilini v Attorney-General* 1990 (1) ZLR 105, 113A-H (SC).

It is settled that once it is accepted that the delay in the prosecution of the applicant is presumptively prejudicial, it then becomes necessary to consider the other pertinent factors in order to determine whether his rights under s 18 were breached.

THE EXPLANATION FOR THE DELAY

In the absence of specific reasons proffered by the applicant for the various aborted dates, the detailed and virtually unchallenged reasons proffered by the State for the failure of the trial to commence on the various given dates must be taken as the true explanation thereof. In my view the State has proffered a reasonable explanation for the delay.

WHETHER THE APPLICANT ASSERTED HIS RIGHTS

The history of the matter shows that during the period after the applicant's arrest but before he was removed from remand, his trial was postponed several times. The postponements were occasioned by the conduct of both the State and the defence on the various dates. The applicant did not dispute the evidence led by the State that after he had been removed from remand he was contacted by the police and that it was he who counter-proposed the trial date of 4 April 2008 in place of 11 March 2008, being the trial date for which the police had intended to serve him with summons. He nevertheless did not avail himself to the authorities.

The applicant was thus aware, certainly from March 2008, if not earlier, that the police were desirous of serving him with summons in order for his trial to commence. He kept giving excuses as to why he could not avail himself to stand trial, citing his Parliamentary engagements as well as his COPAC duties. He also vacated his known address without leaving a forwarding address and his address for service thus remained unknown.

More than 3 years later when he was eventually served with summons and appeared before a magistrate, the applicant then raised the issue of his right to a hearing within a reasonable time. What therefore emerges is that the applicant made it difficult for the summons to be served on him, despite being fully aware that the criminal charges that he was facing were not yet finalised and that the authorities were desirous of serving him with summons and having him tried.

In *S v Mavharamu* 1998 (2) ZLR 341 (H) it was stated that:

“What is emphasised in determining the cut-off point after which a delay becomes unreasonable is the balancing test, in which the conduct of both the prosecutor and the defendant are weighed.”

The conduct of the applicant *in casu* is not consistent with an assertion of his right to trial within a reasonable time. To the contrary, it points to a conscious or deliberate prolongation of the period of delay as he persistently made himself unavailable for service of summons. He seems to have adopted the attitude that perhaps the matter would simply fade into oblivion. I find that he was the cause of the greater part of the unreasonable delay in the prosecution of the charges that he was facing.

PREJUDICE TO THE APPLICANT

There is no grounded basis proffered by the applicant as to how the applicant's defence has been impaired. An indication was made by the applicant in his testimony before the magistrate, for purposes of the application for referral of this matter to this Court, that he would have wished to call Onwell Kadembo as a defence witness. He said that the said Kadembo had since left the country and he was unable to trace him. However, the said Kadembo was said by state counsel to be a state witness as reflected in the summary of the

state case at p 4 of the record of proceedings. In the event, the claim that his defence has been impaired cannot hold sway as the witness will be called by the state.

DISPOSITION

In casu it is common cause that there is no pre-trial incarceration to talk about as the applicant was never incarcerated. Regarding anxiety and concern on the part of the applicant, it is evident from his behaviour that the applicant was in no haste to undergo his trial. He continued to enjoy his status and the prestige that is accorded to an Honourable Parliamentarian throughout the period that he now complains of as being inordinately and unreasonably long. The following was stated in *S v Taenda* 2000 (2) ZLR 394 (H) at 396-7:-

“In general, an unreasonable delay to the finalisation of criminal proceedings causes prejudice to the accused. He suffers social prejudice arising from doubt as to his integrity or conduct. The presumption of innocence does not in the eyes of the public, family and friends, continue to operate as long as he is on remand. ...”

The applicant *in casu* did not suffer social prejudice. He enjoyed the latitude of counter-suggesting trial dates to state authorities. He would indicate that he would avail himself for service of summons but would thereafter not honour his word to the police, thereby prolonging the period of the delay while he went about his business as usual. The applicant could have taken, but did not, the advantage of grasping at the opportunity to have his day in court and clear his name. He did not at any stage assert his right to a speedy trial during the period extending from 31 July 2008 to 17 May 2010. He, on the other hand, would shift goal posts in terms of appointments with state officials for the purposes of being served with process for the commencement of his trial. What is evident is that the applicant waited until the day of reckoning to raise the issue of his constitutional right to a trial within a reasonable time.

The applicant has not established any basis for this court to grant him relief in the form of a permanent stay of prosecution.

It is for the above reasons that this Court dismissed his application on 28 May 2014, with no order as to costs.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

ZIYAMBI JCC: I agree.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

GUVAVA JCC: I agree.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners

The Attorney General's Office, respondent's legal practitioners.