THE STATE
versus
ROBSON MUTERO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 19 May 2014

Criminal review

      MAWADZE J: The record of proceedings in this matter has been placed before me by the provincial Magistrate Masvingo under cover of a minute with the following comments;

> "Please place this record of proceedings before a High Court Judge with the following request.
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> The accused was arraigned before Mr P Mapiye at Masvingo Magistrates Court. The trial progressed till judgment stage and the accused defaulted before it was handed down. He was arrested through a warrant of arrest. However, the trial magistrate left service before handing down judgement. We therefore request that the proceedings be reviewed with a request for trial *de novo*."

      While this court has inherent jurisdiction to review and regulate the proceedings of lower tribunals, it is always important, in my view, for proper facts to be stated when submitting records to the court for purposes of review. I make this point because it is clear to me that the Learned Provincial Magistrate who wrote the referral minute seemed not to have appraised himself with the status of the proceedings he was referring to this court. It is incorrect that this matter had progressed till judgement stage. While it may be true that the accused defaulted court as alleged (this is not apparent in this record of proceedings). It is not true that this matter had reached the stage where judgement could be passed. The correct position is that the State had led evidence from three witnesses. The state case had not been closed and the accused was yet to give evidence. I am surprised why this Learned Provincial Magistrate did not at least appraise himself of the record of proceedings. This misrepresentation could also have been avoided if the Learned Provincial Magistrate has first referred this matter to the other interested party, the Prosecutor General (the Attorney General) for their input on the status of the matter. The correct facts of the matter are that the accused and an accomplice (who still appear to be at large, one Rangarirai Pakachena) were arraigned before Mr Mapiye at Masvingo Magistrate Court on 5 November 2008 facing a

charge of contravening s 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] – stock theft. It is alleged that on 1 October 2008 at Mavhorondiya Village Chief Zimuto Masvingo the accused and his accomplice or one of them stole two cows belonging to Shumirai Mudakureva valued then at Zimbabwean $600 million.

The facts alleged are that both the accused and complainant reside in the same Mavhorondiya Village Chioef Zimuto Masvingo. It is alleged that on 29 August 2008 the accused approached one Maramba who owns a butchery in Mucheke, Masvingo and offered to supply him with beef. It is alleged that Maramba alerted the police who proceeded to set up a trap. It is further alleged that on 1 October 2008 the accused and his accomplice stole complainant's two cows after which the accused approached the police for stock card clearance and permit to drive the two cows whilst his accomplice drove the cows to Gonyohori abattoir. Accused's accomplice was arrested at the abattoir with one cow as the other had escaped. Accused was arrested at Maramba's butchery awaiting payment for the two cows. Both cows were recovered.

When the trial commenced accused one was represented by Mr *Bhunu* and his accomplice appeared in person. They both pleaded not guilty. Accused one admitted offering to sell two beasts to Maramba but insisted that the beasts were his and that he was arrested before he had completed the transaction. The accomplice admits driving two beasts to Gonyohori abattoir where he was arrested and said this was on Accused one's instructions.

The record of proceedings shows that three witnesses, the complainant Shumirai, Godwin Maramba and the Investigating officer Chidhakwa gave evidence and the proceedings were adjourned. The reason is not clear, neither is the date. The accused is alleged to have defaulted the court thereafter and was rearrested sometime in 2012. Meanwhile the trial magistrate Mr Mapiye left service. The date is not given in the referral minute. It is on this basis that I am being requested to quash these proceedings and order trial *de novo*.

In the case of *S* v *Tsangazi* 1997 (2) ZLR 247 (H) GILLESPIE J. examined the various scenarios where incomplete criminal proceedings may be set aside and trial *de novo* ordered either due to the incapacity or unavailability of the judicial officer dealing with the matter. I believe it is important for guidance purposes to summarise the various scenarios and the appropriate action to be taken.

a) Where a judicial officer dies or is incapacitated the incomplete proceedings are a nullity and the matter may be commenced afresh. The reason is that the judicial

officer is incapable of bestowing a verdict and neither can the accused successfully demand for one. I may venture to add that in my view in such a scenario it may not be necessary for the High Court to set aside such incomplete proceedings although for procedural expedience and completeness such an order may be sought.

b) Where a judicial officer recuses himself or herself or he or she becomes *functus officio*: In such circumstances it is then necessary for the State through the Prosecutor if it wishes to continue with the matter to have a new hearing.

c) Where the judicial officer or magistrate is transferred from the station before completing the criminal proceedings he or she is not disqualified from continuing with that case. All what is required is for the necessary administrative steps to be taken like mobilising financial resources and necessary authority to vest him or her with the jurisdiction to exercise his/her powers in that District or Province. Such a judicial officer may also continue with the matter on the basis of implied jurisdiction.

d) The power to set aside incomplete proceedings on account of transfer of the judicial officer and to order trial *de novo* may only be properly exercised by this court on application by one of the interested parties on notice to the other. This is so because such a matter is not available for automatic review.

The circumstances of the matter *in casu* are that the trial magistrate left the service before the criminal proceedings had been completed. In the case of *S* v *Tsangazi* (*supra*) at 251/13 GILLESPIE J referred to the case of *S* v *Gwala* 1996 (2) SA 227 (N) in what I believe the question of what proper course of action this court can take was answered. It was stated that;

> "Clearly, such an officer becomes *functus officio* upon recusal, and, the prosecutor desiring to proceed with the case, it becomes necessary to have a completely new hearing. <u>Equally, so the death of a magistrate, his resignation or dismissal would give rise to the opening of a case *de novo* against an accused person."</u> (my emphasis)

It is clear from the facts of this case that the trial magistrate left the service. It matters not whether it was by dismissal or resignation. The criminal proceedings are incomplete. It is therefore appropriate in such circumstances to have the proceedings set aside and commenced *de novo* before another magistrate. This is a very serious matter of stock theft which invites a mandatory term of 9 years imprisonment in the absence of special circumstances if the accused is convicted. I am cognisant of the fact that the offence was committed in 2008 and that it has been outstanding for 5 years. The accused is clearly to blame for this delay. I also

believe there would be considerable delay incurred, if the trial magistrate (assuming he is available) is to be recalled and clothed with the necessary jurisdiction to finalise the matter and this is prejudicial to the accused.

I am therefore satisfied that I can properly set aside these incomplete proceedings.

Accordingly I make the following order.

1. The proceedings in CRB MS 2520-21/08 be and are hereby set aside.

2. A trial *de novo* be and is hereby ordered before a different magistrate.

MATHONSI J agrees _____