

THE STATE
versus
EUNICE CHIMHAU

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 12 January 2016

Assessors: Messrs Mr Shenje
Mr Chidyausiku

Criminal Trial

A. Muzivi, for the plaintiff
R. Ngwenya, for the respondent

CHITAPI J: The accused is charged with the crime of murder in contravention of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The accused was indicted for trial which was to commence on 21 May, 2015. The trial was set down before Zhou J but was struck off the roll because the State did not have its key witnesses in attendance. The accused was out of custody and remains so.

The accused was re-indicted and served with a summons to appear before this court for trial on 12 January, 2016. The service upon the accused of the indictment and summons has the effect that the case becomes classified as a pending case which the court must dispose of. In this matter, the trial was scheduled to be presided over by myself sitting with assessors.

Prior to commencement of the hearing, both counsel for the State and the accused appeared in chambers to make a courtesy call since accused's counsel was appearing before me for the first time. State counsel used the opportunity to advise me that the main State witnesses were not in attendance for the case to commence because the police had tried to locate them in vain with the principal witness believed to be in South Africa. I was already robbed for court then, and advised counsel that we would meet in court to hear what he had to say and rule on the way forward. State counsel intimated that he would apply that the matter be removed from the roll. I excused counsel.

Shortly after counsel had left, the Registrar (my clerk) advised that one of the assessors was not in court but was within the building. I directed that I be called as soon as the assessors were ready. The registrar subsequently led me to court where I met up with the assessors. To our utter dismay when the Registrar who had left parties in court including the case record on the bench checked to satisfy herself that everything was ready before ushering me and the assessors into the court, she realized that the court was deserted and there was no one in attendance.

I directed the Registrar to ensure that the court was reconstituted so that the matter could be dispensed with procedurally. Apparently as I was made to understand, counsel had dismissed court officials and themselves because they believed that the matter had been dealt with in chambers when State counsel indicated that he would apply for the matter to be removed from the roll.

Once the court was reconstituted, I admonished both counsel for dismissing the attendants and the accused and the proceedings proceeded as follows:

- “(a) The matter was called as in the normal course. Counsel introduced themselves and apologized for the earlier mishap when they had taken it upon themselves to dismiss the case, officials and witnesses.
- (b) Counsel for the State then explained to the court that he was not ready to proceed with matter because the police had been unable to locate the material witnesses.
- (c) Counsel applied that the matter be removed from the roll and undertook that the matter would not be enrolled again unless the witnesses’ attendance had been secured.

I have considered it necessary in the light of what transpired and in order to guide the parties and maintain the integrity of the court to pass the following comments relative to the case before me.

1. In terms of s 3 of the High Court Act, [*Chapter 7:06*] and in particular s 3 (b) the criminal court of the High Court for trial purposes is constituted by one judge and two assessors. Since the assessors are part and parcel of the court, it was ill advised of counsel for both the State and defence to assume that an indication made to me (the judge) in chambers that the matter would not proceed to trial for lack of witnesses was proper notification to the court that the case would not proceed to trial.

2. The accused was served with an indictment and a summons to appear for her trial today and she dutifully did so. Service of the indictment and summons is a process governed by the High Court (Criminal Procedure) Rule 1964 SRGN 452 of 1964. Whilst the indictment is prepared by the Prosecutor General, a summons is a process of this court issued by the Registrar of the court. The summons appears as form CP&E 3 as a schedule to the Criminal Procedure rules aforesaid. The summons clearly indicates in its body that the summoned accused should not depart the court where his/her case is pending until discharged in due course of the law. The summons can only therefore be dismissed and the accused discharged by the court and not by either state or defence counsel. It was therefore irregular for counsel to discharge the accused from court as they do not have authority to do so. Counsel clearly usurped the functions of the court. In their favour, I rule that counsel did not intend to impair the dignity of the court but did so through ignorance without malice.
3. Counsel must appreciate that in terms of s 137 as read with s 160 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]; once an indictment in a criminal matter has been lodged with the Registrar of this court as was done in this case, the case concerned in the indictment is deemed to be pending before the court for hearing or determination by this court. The accused once indicted for trial will be in the hands of the court awaiting trial. Neither the State nor defence counsel has authority to discharge or liberate the accused.
4. A pending case may in terms of ss 165 and 166 of the Criminal Procedure and Evidence Act be adjourned or postponed to such date, time and place as the court may determine from time to time. In the instant case the state counsel applied for the matter to be struck off the roll with the consent of the defence counsel. The court does not just strike out a matter from the roll without hearing an explanation as to why the matter should not proceed. In this case, the state counsel explained that the key witnesses could not be located and he could not say as to when they would be located. He advised the court that the docket would be returned to the station of origin with an instruction that the police first locate the witnesses before the matter is reset down and accused re-indicted for trial on summons.
5. A criminal court more so the High Court is not a walk in the path. It is a superior court of record with original jurisdiction over all criminal matters in Zimbabwe. It

exercises supervisory and review functions over other subordinate courts and acts as an appeal court as may be provided by an Act of Parliament. Being a superior court of record, its proceedings are recorded. Its judgments in appropriate cases provide guidance to the subordinate courts. The exercise of its functions is a matter of public interest and scrutiny. The conduct of its functions must be carried out in an exemplary manner. Counsel have a duty to safeguard the status and role of the court. This cannot be achieved by counsel being lax in their dealings with the court.

6. In the instant case, there were a lot of stakeholders or interested parties since the proceedings were open to the public. Court officials namely, the prison services, police court orderlies, interpreters, relatives of the accused and the deceased, the press and members of the public attended court to perform their official functions or witness the proceedings. The court, that is, the presiding officers, being the judge and assessors were ready to hear the matter. Only the court in such circumstances enjoys the power to deal with a listed matter and indeed the court has a duty to record the proceedings even if the trial does not commence and to give its ruling with regard the disposal of the matter.
7. In terms of s 162 of the Constitution; judicial authority derives from the people of Zimbabwe and is vested in the courts. Section 165 lists the guiding principles which the courts in the exercise of its judicial authority must have regard to. Amongst the principles set out in s 165 is the principle that justice must not be delayed. The fact that this matter has now failed to take off on two occasions speaks to delayed justice. The reasons and justification for the delay must be recorded and appropriate undertakings given by the actors who can remedy the cause of the delay. If a member of the public were to enquire as to what happened in this matter on the date of its hearing, he/she should not be met with uninformed explanations like the judge did not even come to court or such other reason.
8. Having made the above comments, the court granted the application by the State for the removal of the case from the roll. If this matter is to be proceeded with, a fresh indictment will have to be prepared and the accused summoned to court. It will be up to the accused to raise other issues which she wishes to at the resumed trial. Hopefully State counsel will have made sure that the witnesses have been

secured to avoid another postponement. The criminal court in the High Court is slowly becoming a circus for failure of cases to take off and the concerned parties must introspect and act positively so that the criminal justice system does not collapse. If it does, the consequences will be too ghastly to contemplate. Criminal justice must be dispensed with reasonable promptitude.

This matter is struck off or removed from the roll.

National Prosecuting Authority, plaintiff's legal practitioners
Chinawa Law Chambers, Respondent's legal practitioners