LENIN MUTATARIKI
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 December 2015 & 13 January 2016

Condonation and Leave to Appeal

T. Zhuwarara, for the applicant
E. Makoto, for the respondent

TAGU J: The applicant filed a conjoined application for extension of time within which to make an application for leave to appeal as well as the substantive application for leave to appeal to the Supreme Court. Applicant was convicted of rape after a contested trial in the Regional Magistrates Court and was sentenced to 17 years imprisonment of which 3 years were suspended for 4 years on the usual condition of future good conduct. He duly noted an appeal to this honourable court which appeal was dismissed by the appellate court in judgment number HH 129/14 on 4 February 2014. Aggrieved by the dismissal of his appeal, the applicant did not appeal to the Supreme Court for a period of over one year and two months. He now seeks to do so now hence this conjoined application. His explanation for the failure to apply for leave to appeal and delay in filing his notice of appeal is twofold. Firstly, his erstwhile lawyer Ms R. Maposa who was present when the appeal was argued and dismissed had hoped that the appellate court was going to reserve judgment. Ms R Maposa was taken by surprise when the appellant court delivered its ruling soon after hearing submissions hence she failed to make an oral application for leave to appeal or let alone within the time stipulated in the rules because she lost faith in his cause. Secondly, the applicant was incarcerated and failed to raise financial muscle to assert his legal rights by engaging another lawyer timeously.

The applications were challenged by the state. The contention by Mr *Makoto* who appeared on behalf of the state was that the appeal to the Supreme Court was devoid of any reasonable prospects of success and on that basis it should fail since the court a quo as well as

the appellant court had properly analysed the evidence of the complainant and found her to have been a credible witness. He stated that credibility being the domain of the trial court, the appellate court cannot readily interfere unless it was shown that the decision was not judicially made.

On the other hand Mr *Zhuwarara* argued that the court *a quo* and the appellant court made a fundamental error in that they used the wrong test in assessing the evidence of the applicant. He submitted among other things that the side of the applicant's story was not given any weight. He attacked the appellate court's decision in dismissing the applicant's appeal where the judges said-

> "I am satisfied that the learned trial magistrate treated the evidence before him carefully and rejected accused's version as false"

According to Mr *Zhuwarara* the appellate court made an error of law. He said if the applicant's explanation was fails, it had to be false beyond a reasonable doubt. To him the applicant's story was probable but was not given the consideration it deserved. On the contrary the complaint was not a credible witness.

This is a conjoined application for condonation for late noting of appeal as well as an application for leave to appeal. In my view, the court in determining an application of this nature, the court is enjoined to consider three factors, that is, the length of the delay, the explanation for the delay and the prospects of success. See *Albert Costa Chatira v The State* HB 88/09 where it was said-

> "The factors to be considered in an application for extension of time within which to note an appeal are aptly captured in "Criminal Procedure in Zimbabwe" by JR Rowland. At 27-19 the author stated:
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> "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".

-*R v Humanikwa* 1968 (2) RLR 42 (A), *R v Viringanayi* 1969 (2) RLR 509 (A) ,; *Kombayi v Berkhout* 1988 (1) ZLR (S0; *S v Franco and Others* 1974 (2) RLR 39 (A) and *S v Moyo* (1) 1978 RLR 316 (G).

THE LENGTH OF THE DELAY

In the present case the delay is over one year and two months considering that the chamber application was filed on 15 April 2015. Mr *Zhuwarara* submitted that the application for leave to note the appeal should have been done within 12 days. On the face of it this is an inordinate delay. One can only conclude that the inordinate delay was wilful. Order 34 rules 262 and rule 263 of the High Court Rules, 1971 say-

> **"APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT**
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> **262. Criminal trial: oral application after sentence passed**
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> Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.
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> **263. Criminal trial: application in writing filed with registrar**
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> Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted."(the emphasis is mine)

Clearly if the applicant's lawyer was shocked by the dismissal of the appeal, she still had 12 days to recover from the shock and to file her application for leave to appeal through the registrar. In my view the delay was deliberate.

THE REASON FOR THE DELAY

The explanation that the applicant's erstwhile legal practitioner lost faith in the applicant's cause is not reasonable. It is equally not convincing that the erstwhile legal practitioner was surprised by the immediate delivery of the judgment to the extent that she failed to make an oral application for leave to appeal. Even if she was shocked by the timeous delivery of judgement she still had, as Mr *Zhuwarara* submitted 12 days to do so. She did not do so. When approached by applicant with a request to file an application for leave and or file notice of appeal she did not do so. In my view, the erstwhile legal practitioner may have

noticed that chances of success on appeal where remote. As regards the fact that applicant was in jail and had no money, this too is not reasonable. The applicant did not explain why he did not seek to appeal in person? He did not require funds to do so. He could have noted what was referred to by KUDYA J in *Clemence Nyoni v The State* HH 142/11 as "a bush appeal". The explanation for the delay is not satisfactory.

THE CHANCE OF THE APPEAL SUCCEEDING

I read the record of proceedings carefully. I also read the reasons for the judgment by the court *a quo*. Finally I read the appellate court's judgement. I read the grounds of appeal against the judgment of the court *a quo* and satisfied that though the appellate court dealt with the appeal on the merits, there was no appeal to talk about. The two notices and grounds of appeal filed by two different legal practitioners fall far short of the requirements of Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979 in that they were not precise but confusing. However, in their judgment the appellate court properly analysed the evidence and explained the basis upon which the applicant's explanation was dismissed as false. The complainant who was 6 years old at the time of the rape and 8 years old at the time of testifying could not have been expected to recall all minute details after two years. It would have been unfair to treat such a tender witness like an adult. The appellate court cannot be faulted for also treating the complainant as a credible witness given the circumstances surrounding the commission of the offence and the fact that these people were related and the relatives prevailed upon complainant's mother who had received the report of rape not to report the applicant to the police. Complainant herself at that tender age had been threatened and believed the applicant would carry out the threats. In the premises I am of the firm view that the intended appeal does not enjoy reasonable prospects of success.

In the result both applications for condonation and for leave to appeal are dismissed.

Nyamayaro, Makanza & Bakasa, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.