TENDAI CHIHERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & CHINAMORA JJ
HARARE, 4 February 2020 & 6 February 2020

**Bail Application**

Applicant in person
*W Badalane,* for the respondent

CHITAPI J: This matter has remained unresolved since the applicant filed an application for bail on 26 June 2019. The applicant is a self-actor. The application did not show the premise on which bail was being sought. The applicant used the standard bail form which is completed by applicants who are in custody. On the portion on which the applicant must state the grounds for which he or she seeks release on bail, the applicant wrote as follows:

> "I make several applications to this honourable court for me to get my Record of Proceedings. But the record does not found. Then I was advised by this honourable court to go back to the trial court. The trial court may write a letter indicated that. The record of proceedings is not to be found. This honourable court will do something for me. Here is the letter which was written by the Chief Magistrate Office attached to this application. You may assist agent." (sic)

The letter from the Chief Magistrate's Office which the applicant attached to the application reads as follows:

> "23 January 2018
>
> Officer in Charge
> Chikurubi Maximum Security Prison
>
> Attention: Assistant Commissioner Mutiwaringa
>
> **RE: REQUEST FOR RECORD OF PROCEEDINGS: TENDAI CHIHERA**
>
> Reference is made to your minute dated 28 December 2017 regarding the above matter.

The record you requested for cannot be located.

We searched for it at the court and National Archives to no avail.

G. Mandaza
**For: CHIEF MAGISTRATE**"

The registrar set down the application in bail court on 23 June 2019. FOROMA J postponed the hearing to 2 July 2019 at the request of the State counsel who needed time to prepare and file a response. The hearing was further postponed to 4 July 2019 for the same reason. On 4 July 2019 the matter was postponed to 8 July 2019 and FOROMA J endorsed that the State should investigate whether the applicant's co-accused was granted bail and to file a response. On 8 July 2019 the matter was further postponed to 10 July 2019 with an endorsement made that the State was still tracking whether the co-accused had been admitted to bail. On 10 July 2019, a further postponement was granted to 12 July 2019 with the court endorsing that the State should follow up using prison numbers to ascertain if the co-accused was released from jail. On 12 July 2019 the matter was postponed to 16 July 2019 with FOROMA J endorsing that the applicant should write to the Registrar. It is not clear as to what the applicant was supposed to write to the Registrar. This notwithstanding, it is evident from the record that from 28 June 2019 to 16 July 2019, there was nothing concrete which the postponements which the court granted at the instance of the State yielded in advancing the determination of the applicant's application.

On 16 July 2019, the applicant appeared before NDEWERE J who had taken over presiding bail court from FOROMA J. NDEWERE J removed the matter from the roll. She endorsed on the record that the Registrar should enquire into the issue of the missing record. In addition, Justice Ndewere asked the Registrar to enquire whether the applicant's accomplice had been released and whether there was a valid appeal by the accomplice. The learned judge also made a note that the issue being raised by the applicant was not for bail court since the applicant wanted to appeal and the record could not be found. The removal of the application, from the roll meant that the applicant's application regardless of its propriety or merits, was not determined. Apart from directing the Registrar to investigate the whereabouts of the record and to check whether the accused had been granted bail no decision had been made. Whether there was a pending appeal or it had been determined already, no direction was given as to

what would become of the matter after the Registrar had complied with the court's directive. Not surprisingly, nothing happened in regard to the application and no one followed up on the Registrar to check if the directives given by the learned judge had been complied with up to follow up on the record.

The applicant waited until 2 October 2019, when he filed an application which he headed "application for reinstatement for bail application." In the application, he required that his matter be reinstated because he had managed to obtain information which FOROMA J directed that it be availed. The information which the applicant attached to the letter was copy of a letter dated 12 July 2019 from the Registrar of this Court to Chikurubi Maximum Prison. It is well to repeat the contents of the letter as I so do hereby

> "Our Ref: CA 926/03
> Your Ref:
>
> 12 July 2019
>
> Chikurubi Maximum Prison
> P Bag 7392
> Greendale
> **HARARE**
>
> **RE: REQUESTING FOR A DIRECTIVE TO RETRIEVE WARRANT OF LIBERY OF GLADMORE PARADZAI MPANGI prison no. 854/03 FROM CHIKURUBI MAXIMUM PRISON**
>
> The above matter refers.
>
> We kindly request that you allow Tendai Chihera 9C3251/18) to retrieve warrant of liberty to Gladmore Paradzai Mpangi Prison No. 854/03 from Chikurubi Maximum Prison. The above bearer's matter is to appear before the Judge.
>
> B. Gatawa
> **For: REGISTRAR OF THE HIGH COURT**
>
> /cm"

For reasons not apparent from the record, the matter was only enrolled in bail court on 22 October, 2019. I was then doing my stint in that court. The application was postponed to 24 October, 2019 for the State's response. On 24 October, 2019, the matter was again postponed to 31 October, 2019 for the same reason. On 31 October, 2019 I reluctantly postponed the matter to 4 November, 2019. I also summoned the Registrar to attend in chambers to explain

what the problem was with tracking the record. The Criminal Registrar undertook to continue with the searches. On 4 November, 2019, the Registrar endorsed on the record as follows:

"The proceedings cannot be found."

I was not satisfied that it was sufficient for the Registrar to make such a simple endorsement without explaining the details of the searches that had been made for the record.

I postponed the matter to 5 November, 2019. On that date l noted that there had been filed, a copy of a receipt of payment of the record in the sum of $15.00 made on 1 November, 2019. To the receipt was attached 3 pages of transcript of proceedings in case no CRB R926-7/03 which were done on 9 May, 2019. The proceedings were headed "Application for time to pay." The learned magistrate, H Mujaya Esquire, dismissed the applicant's extension of time to pay on the basis that the applicant had no prospects of raising money to pay the restitution and had, in any case, failed to pay for 16 – 17 years since he was convicted and sentenced. On enquiry whether this was the only record available, Ms Badalane for the State submitted that she had also checked with the Clerk of Court and Criminal Registrar on the availability of the record and been advised that only the time to pay application was all they could lay their hands on. I postponed the application to 11 November, 2019 and directed State Counsel to address the issue of the missing record in heads of argument.

On 11 November, 2019 Ms Badalane was not in attendance and Mr Chesa stood in for her. I decided to make a formal order on the way forward in regard to the missing trial record and how the matter would be dealt with. I issued an order which appears hereunder and, in this regard, it has been noted from the copies of the orders that it is indicated that the order was made by NDEWERE J which is an error. The order should be amended to reflect that it was made by myself. The Registrar is ordered to issue a corrected order to the extent only of deleting the words "Ms Justice Ndewere" and substituting with "Mr Justice Chitapi," the rest to remain unaltered. The contents of the order which I issued read as follows:

> "WHERE UPON, after reading documents filed of record and hearing counsel
> It is ordered that:
> 1. Matter be postponed to 15 November 2019 in D Court.
> 2. In view of the fact that the record of proceedings of the applicant cannot be found after all diligent searches:
> a) The Chief Magistrate or Clerk of Court is directed to file an affidavit confirming the searches made and the results thereof and the Registrar must obtain the affidavit by 13th November, 2019.
> b) State counsel is directed to file heads of argument by 15 November, 2019 to deal with the legal issue of what the state's position is in view of the missing records."

I postponed the matter to 15 November, 2019. Ms Badalane in the interim filed heads of argument on 11 November, 2019. For completeness of record, I reproduce the heads of argument verbatim below:

> "1. The applicant was arraigned before a Regional Court sitting at Harare charged with several armed robbery cases and convicted together with his 4 other co-accused person. Cumulatively he was sentenced to 30 years imprisonment in all the matters.
> 2. A few months later, one of his co-accused person. Gladmore Mupangi was granted bail and released. He died a month later after his release. The other co-accused Bob Dhiriza was released on medical grounds citing ill-health and latter passed on a few weeks after his release. Although it is his right to make an application for bail at any stage it remains unclear on the reason why the present applicant did not make his application for bail at the time when Mpangi made his application for bail than having to wait for 16 years to make the application. It remains a conjecture in addition, whether applicant once made an application(s) for bail in the past which were dismissed.
> 3. Applicant has served close to 16 years to date.
> 4. He now makes an application for bail pending appeal but there is no appeal pending and the sole reason is the absence of a missing record of proceedings. A search was conducted at the Harare Magistrate's Court and at the National Archives but all efforts were fruitless. I also took an initiative to go to the Registrar's office and we searched for records pertaining to Gladmore Mupangi's application for bail but none could be found. In fact, in the record book where details of accused person who would have made their applications for bail, a mysterious occurrence was noted; the name of Gladmore Mupangi is there but the page is torn where details are written. I also endeavoured to get information pertaining to the legal practitioner who dealt with Mupangi's bail application but applicant's relatives said the lawyer's record also went missing. Now, it is clear that virtually all the records pertaining to both Mupangi and applicant are missing. Although it cannot be proved to a highest degree of certainty, the mysterious disappearance of the record of proceedings and any information relating to the applicant's co-accused person Mupangi raises a lot of questions and a hint on underhand dealings by persons who have an interest in the matter.
> 5. The law is clear on the issue of bail pending appeal. An applicant has to submit a record of proceedings and the application itself. The question that has to be asked now is on whether it is possible that bail can be granted in light of these circumstances and if granted there should be clarity as to which bail is it. Would it be bail pending appeal where there is no appeal 'pending'? There cannot be just an application for bail, just bail. It should be clear as to assert that bail is being granted awaiting trial or appeal or a determination of leave. The next hurdle would be the issue of balancing competing interests of justice, which is an applicant's right to freedom, *vis-a-vis* the proper administration of justice, which is the question of whether one can be released on bail pending appeal in the absence of the appeal itself.
> 6. In a matter with almost similar circumstances where an applicant sought permanent stay of proceedings as a result of a record of proceedings which mysteriously disappeared, Jonathan Mutsinze CCZ13-2015, GARWE JCC held;
>
> > "the lengthy delay experienced in the completion of this case, occasioned almost by the suspicious disappearance of the record of the proceedings, cannot justify the grant of permanent stay of the proceedings, particularly in light of the fact that such record of proceedings can be reconstructed."
>
> 7. Reconstruction of a record is another remedy available but the difficulty that this remedy has is the availability of the trial magistrate(s) who dealt with the matters, the prosecutors) due to the passage of time. One of the magistrates who dealt with this matter is now late, others have since left service.

> 8. The next remedy would be to grant the application by operation of law. It is clear that all the remedies were exhausted and efforts were also made to recover the record of proceedings but to no avail. The question to be asked is on whether the court should ignore the applicant's quest for justice and freedom on a technicality? Applicant has served almost three quarters of his sentence, 16 years to be precise, and surely by operation of law it would be prejudicial to allow him to continue serving the sentence when he wants to appeal but cannot do that as a result of the disappearance of his record of proceedings."

On 15 November, 2019, I noted that the Registrar had not complied with my order of 11 November, 2019 to obtain affidavits from the court a quo detailing the searches made and confirming the lost status of the record. As I was not amused that the order had not been complied with I summoned the Registrar of the High Court, Mr Ndirowei, to express the court's concern at the unexplained failure by his staff to comply with the order of 11 November, 2019. The Registrar undertook to personally ensure that the order has been complied with. It was stressed to the Registrar that the procrastination in complying with the order had the effect of putting the administration of justice into disrepute regard being had to the fact that the matter had been ongoing since June, 2019. I postponed the matter to 20 November, 2019.

On 19 November, 2019, the Registrar advised that his office still needed further time to complete investigations on the missing record and to obtain relevant affidavits on searches made for the record. On 20 November 2019, l postponed the matter to 25 November, 2019. On 25 November, 2019 I postponed the matter to 4 December 2020, to allow the Registrar to file an affidavit since the Clerk of Court *a quo* had prepared an affidavit explaining searches done and findings made at the court *a quo* or trial court. Again for completeness of record, the affidavit by the Clerk of Court is reproduced verbatim hereunder:

> Affidavit
>
> "I, Christopher Muchineripi ID No. 43-056237G47, do hereby solemnly swear that the information given below is correct from what l know and established after a diligent search.
> I am the current Clerk of Court for the Regional Office, Harare, and therefore are the custodian of all criminal court records for that office.
> I have searched for the court record for the matter *State* v *Tendai Chihera and another* for the period 8 September 2017 until now, my checks involved physically checking each record from both our strong rooms where both completed and current records are filed and stored.
> Our records show that the matter was finalised on 23 December 2003 before Regional Magistrate whose name was not captured in our Court Record Book.
> On file we have correspondence from the then Clerk of Court, regional, Ms Tafirenyika, dated 14 October 2009 which indicates that they had failed to locate the said court record.
> The matter was referred to the High Court Harare for purposes of appeal on the 4th of March 2004.
> I contacted the Registrar of the High Court Harare and their Mr Dodzo confirmed that they received the record of proceedings but could only account for the empty record cover.

I paid two visits to the National Archives offices and they undertook to search for the record. They have since declared that they do not have A copy of the record of proceedings.
Our own transmittal list of 13 February 2015 confirms that the said record was "missing" from the pile of records we surrendered to them on the 13th of February 2015.
I verily believe the said court record should be regarded as lost and incapable of being retrieved from us.
I solemnly declare the above to be correct."

The Registry records custodian at the High Court's affidavit reads as follows:

Affidavit

"I, Msarurwa Ivy, ID No. 63-996542 H 42 swear that the information below is correct from my knowledge after a diligent search.

I am a Records and Information Assistant for the Criminal Registry in the High Court of Zimbabwe, Harare, and I am the custodian of all Criminal Records.

I have conducted a diligent search for the matter *State* v *Tendai Chihera* (CA42/04) from the 15th November 2019 up to now. According to our records, the record was transferred to Records Centre on the 21st August 2017. I requested the record on the 19th of November 2019 and the Records Centre staff noted that they could not trace the record. I personally visited the Records Centre on the 26th of November 2019 and still the record could not be availed after a thorough search.

That is all."

The first issue which I address is the procedure which the applicant adopted in dealing with the issue of the missing record. NDEWERE J struck the matter off the roll on the basis that the applicant could not use the bail forum to complain about a missing record. I am at ease in dealing with the matter because the learned judge did not, in fact, give judgment on the matter. Thus, the matter was not rendered res judicata. Had this been so, my hands would have been tied.

The applicant in his application where he filled in details explained the problems he was facing in even making a proper bail application in the absence of the record. NDEWERE J as observed by FOROMA J and myself made note that the record should be found. These orders needed to be complied with otherwise there would have been no need to make them. A court does not just make orders for the sake of it. It is for this reason that I followed up on the court directives made that the applicant's record be searched for. If the record had been found, the court would have a duty to advise or direct the applicant on his rights. It is trite that the court has a duty to assist the unrepresented accused not by interceding as his or her legal practitioner but by informing the unrepresented applicant or convict of his rights to seek further redress

where the law permits. For example, a convict has a constitutional right to appeal or seek a review of proceeding and decisions relating to him or her by a subordinate court to a superior court clothed with jurisdiction to determine such appeal or review as the case may be. The Constitution also places a duty an all persons including courts to, *inter-alia* protect, promote and fulfil rights given in it and this includes the right of the convict to seek a review or appeal of the decisions he or she is dissatisfied with.

The next point is whether in the light of the results of the court ordered investigation, the trial record pertaining to the applicant is forever lost and cannot be reconstructed or retrieved. I am concerned whether the court should leave he matter at that or it should give an appropriate order in relation to lost proceedings. In my view, the court as provided for in s 176 of the Constitution has inherent power to protect and regulate its own process and develop the common and customary law taking into account the interests of justice and the provisions of the constitution. The provisions of the Constitution at paly are that the applicant requires the record of his trial. It is evident that the record would be necessary for purposes of the court being able to holistically determine ancillary questions like bail pending appeal or leave to appeal as the case may be. In particular, s 70 (4) of the Constitution provides as follows:

> "4. Any person who has been tied for an offence has the right, on payment of a reasonable fee prescribed by law, to be given a copy of the record of the proceedings within a reasonable time after judgment is delivered."

There is, therefore, no doubt that the applicant has a right to be given a copy of record of proceedings. The court which tried him is a court of record, and therefore, it is competent for the applicant to request for the court record.

In *casu*, the record is not only missing or lost but cannot be retrieved. What remains of the proceedings is a prison warrant and court record book in which is recorded the usual details of dates of court appearances, the charge for which the applicant was tried, the verdict and the sentence. The only other part of the record is the transcript of the application for extension of time to pay. Regrettably, it has no impact on the review or appeal processes.

In the case of *John Bonuah* at *Eric Annor Blay* v *The Republic* J3/1/2015 Ghana Supreme Court decision of the Chief Justice Mrs WOOD CJ, the following is stated in regard to court records.

> "Generally, the responsibility for keeping court records in safe and proper custody and producing them on demand rests on the Registrar of the relevant court. The guaranteed constitutional right to a fair trial within a reasonable time under article 19 (1) of the 1992

> Constitution ought to be generously and purposively construed to include a fair appeal hearing within a reasonable time. The right, on demand subject to the fulfilment of all necessary legal and administration requirements include an untrammelled access to the full record of the trial proceedings. We state this as the standard rule, as clearly, this right may be lost or curtailed through an appellants own criminal actions, the clearest example being where an appellant conspires with others to have all his trial records destroyed. But an appellant,a… through no fault of this, to full access the trial records, for purposes of obtaining a merit-based determination of his appeal is a clear violation of his constitutional right to a fair hearing.

A lost or destroyed record of proceedings can be reconstructed. See *Jonathan Mutsinze* v *State* CCZ 13/2015. The procedure for reconstruction of a lost record after completion of the trial is that the clerk of court must after declaring on affidavit that the record has been lost proceed to reconstruct the record. The reconstruction process entails the clerk of court having to obtained affidavits from the magistrate, witnesses and other parties who were present like the prosecution and legal practitioner as to the contents of the record and the prosecutor and magistrate to give their versions on the reconstructed record. Thereafter it is certified as such after which it is then forwarded on appeal or review as the case may, See *S* v *Sawadye* 2016 (2) ZLR 319; *S* v *Sibanda* HH 80/91. In *casu*, the Clerk of Court in her affidavit states that she checked on all conceivable sources of where the record could be located in vain. Significantly she ended her deposition by stating:

> "I verily believe that the Court Record should be regarded as lost and incapable of being retrieved from us."

Further, to compound matters there was no endorsement on the record of the name of the magistrate who presided over the trial. The State counsel, in her response indicted that reconstruction of the record was not feasible because even the prosecutors, due to passage of time, had left service apart from one of the magistrates who dealt with the case having died. In short, therefore it had to be accepted that it is not humanly possible to reconstruct the lost record.

State counsel submitted that the court could not ignore the applicant's quest for justice and freedom on the basis of a technicality (lost record). Counsel submitted that with the applicant having served 16 years, which equated to almost three quarters of the sentence imposed, "it would be prejudicial to allow him to continue serving the sentence when he wants to appeal but cannot do that as a result of the disappearance of his record of proceedings." The concession by the State counsel is, in my view, well taken because it is the system which lost the record and no blame was attributed to the applicant in the loss of the record.

The question which presents itself is: what should the court do in such circumstances where the record is lost in whole and cannot be retrieved or reconstructed. In the Kenyan case of *Benjamin Onganya and Anor* v *Regina* [2013] eKLR cited in the *Bonuah* v *Republic* case (supra), it is stated:

> "where the appeal could not be heard because the court records had been officially destroyed; the court once again approved the standard principles governing lost records in these terms:
>
> 'In such a situation as this, the Court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality? In the final analysis the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant, has lost the benefit of the presumption of innocence given to him by s 77 (2) (a) of the Constitution, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but, it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interests of justice as a whole must be considered."

The applicant in *casu* is not before this court on bail but is fighting to obtain the record of proceedings so that he prosecutes his intended appeal. This notwithstanding, the principles enunciated as quoted in the *Benuah* judgment are relevant. In the final analysis, what really informs the action which the court will take dictated by what the interests of justice in any given case. There is therefore no one size fits all approach. Put differently, there simply is no template

Further decisions of the South African Courts are also cited with approval in the *Bonuah* judgment notably, *S* v *van Standen* 2008 (2) SACR 62, where it is stated:

> "When an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside……. The mere fact that the record of proceedings might be lost or incomplete would not, however, automatically entitle an accused to the setting aside of a conviction or sentence. Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or destroyed and cannot be reconstructed (See *SVK: supra*, at 1921 – 1946, *S* v *Ntantiso and Ors 1997* (2) SACR 302 (W) and *S* v *Leslie 2000* (1) SACR 347 (W) at 353 D – E)
>
> The court explained the philosophy underlying the grant of relief thus:
>
> "…. The state is burdened with the responsibility of keeping proper records of trial proceedings and that an accused's right to a fair trial (and therefore also to the right of appeal) should not be frustrated by the State's failure to do so (see *Zandi, supra* at 243 (1) – 244 (b) and *S* v *S* 1995 (2) SACR 420 T at 42 b"

The challenge which also confronts the court in regard to an appropriate order to make is that, in the absence of the record, there are no proceedings to review or to be appealed against. The affidavit by the Clerk of Court shows that the record was sent to this court on appeal in 2004 and duly received. The Registrar acknowledged that indeed there existed appeal number CA 42/04 in relation to the applicant. There is now no trace of the records. The applicant states that he has made several applications to this court to intercede so that he is furnished with the record to no avail. This was not denied. The inevitable conclusion is that the system has been unfair to the applicant. However, I question the reasonableness of the failure by the applicant to have applied for quashing of his conviction and sentence for non- availability of the record earlier. Be that as it may, the system too should have managed the record and appeal in a manner which guarded against loss of records.

In my determination, I must make it clear that the circumstances of each individual case where a record of proceedings has been lost or destroyed will determine how the court or judge will dispose of the matter. There cannot be a set precedent on the order which the court should give where a record is either lost or cannot be reconstructed. Circumstances may well be different. The record of the accused's conviction was for armed robbery for which he was sentenced to 30 years imprisonment leaving an effective sentence of 20 years. The 16 years he has served, as correctly pointed out by the State counsel, equates to about three quarters of the sentence in respect of which he seeks to appeal. There is no immediate indication that the record of appeal can be reconstructed. That option is therefore an impossibility or impracticability. At the same time, much as it is unfortunate to order an acquittal would not serve the ends of justice. The appropriate order will be to leave it to the Prosecutor in his discretion to institute a fresh trial if so minded.

The following order will therefore in my view meet or satisfy the interests of justice. I should record that my brother CHINAMORA J painstakingly considered the novel situation which this case presented and is in agreement with the order I have made:

(i) The proceedings against the applicant in the case *State* v *Tendai Chihera* concluded under case No. CRB R 926-7/03 are set aside.
(ii) A trial *de novo* be conducted, the decision to commence a prosecution afresh being left to the discretion of the Prosecutor General.
(iii) In the event that a trial *de novo* is instituted by the Prosecutor General, and the applicant is convicted, the trial court shall take into account the period which the

applicant has spent in prison as a serving prisoner as part of the sentence already served.

(iv) This judgment disposes of the case No. B 1058/19 and closes case Nos. R 926-7/03 and CA 42/04.

CHINAMORA J agrees……..

*National Prosecuting Authority*, respondent's legal practitioners