

REPORTABLE Z.L.R. (10)

Judgment No S.C. 14\03
Const. Application No 405\02

In Re Victor Gwekwerere

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA &
MALABA JA
HARARE MAY 22 & JUNE 11, 2003

B. Mufadza, for the applicant

SANDURA JA: This matter was referred to this Court in terms of s 24(2) of the Constitution of Zimbabwe (“the Constitution”).

The factual background is as follows. The applicant is a Messenger of Court stationed at Chitungwiza. He is presently charged with murder, the allegation being that at about 8.30 pm on 6 October 2002 he unlawfully shot and killed a man at a restaurant in the suburb of Mount Pleasant in Harare. It is not alleged that the murder was committed when the applicant was on duty. However, his trial has not yet commenced.

Believing that the applicant had conducted himself in a manner inconsistent with the discharge of his duties as a Messenger of Court, the Provincial Magistrate for Harare decided to act in terms of subsections (6) and (7) of s 10 of the Magistrates Court Act [Chapter 7:10] which, in relevant part, read as follows: -

- “(6) A messenger who -
- (a) – (c) ...; or
- (d) conducts himself in any manner ... inconsistent with the discharge of his duties as a messenger; or

- (e) for any other reason is, in the opinion of the provincial magistrate, unsuitable or unable to perform his duties;

may be suspended by the provincial magistrate ...

- (7) The provincial magistrate shall forthwith report to the Minister any action he has taken under subsection (6) and the Minister may, after consideration of the report, set aside the suspension or confirm it and dismiss the messenger from his office."

However, before suspending the applicant and reporting the matter to the Minister the Provincial Magistrate adopted a cautious approach by instituting an inquiry into the applicant's conduct. The inquiry was to be presided over by a junior provincial magistrate.

Subsequently, on 14 November 2002 and just before the inquiry commenced, the applicant's legal practitioner objected to the inquiry and raised constitutional issues which were not clearly articulated. However, what I can gather from the record of the proceedings is that the objection was based on the contention that if the inquiry preceded the murder trial, the applicant's right to a fair trial in respect of the murder charge, guaranteed by s 18(9) of the Constitution, would be prejudiced in that the applicant's evidence at the inquiry would enable the prosecution witnesses in the murder trial to make suitable adjustments to their evidence before the trial commenced.

In the circumstances, the applicant's legal practitioner suggested that the matter be referred to this Court for the determination of the constitutional issues he had raised. The matter was then referred in terms of s 24(2) of the Constitution.

Subsection (2) of s 24 of the Constitution, in terms of which the matter was referred, reads as follows: -

"If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

It is pertinent to note that the only question which may be referred to this Court in terms of s 24(2) of the Constitution is one which arises "in any proceedings in the High Court or in any court subordinate to the High Court" and concerns a contravention of the Declaration of Rights.

The question which now arises is whether the inquiry instituted by the Provincial Magistrate falls into the category of "proceedings in the High Court or in any court subordinate to the High Court". In my view, it does not.

The inquiry was an administrative one designed to determine whether the applicant had conducted himself in a manner inconsistent with the discharge of his duties as a Messenger of Court or was, for any other reason, unsuitable for that post. It was not a judicial proceeding conducted in any court. The fact that it was presided over by a provincial magistrate and that it was to be conducted in the magistrates court building made no difference to its nature. It could have been presided over by a person who was not a magistrate and could have been conducted in one of the offices of the Ministry of Justice, Legal and Parliamentary Affairs. It was purely administrative in nature and had nothing to do with the courts.

That being the case, the matter should not have been referred to this Court in terms of s 24(2) of the Constitution.

However, that does not mean that the applicant did not have any avenue through which he could have sought redress for his grievances from this

Court. He could have made a direct approach to this Court by filing an application in terms of s 24(1) of the Constitution which, in relevant part, reads as follows:-

“If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him ... that person ... may ... apply to the Supreme Court for redress.”

Whether such an application could have been successful is a matter on which I do not wish to express an opinion at this stage.

In the circumstances, as the matter should not have been referred to this Court, it was not properly before us and is, therefore, struck off the roll.

CHIDYAUSIKU CJ: I agree

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

Mufadza & Associates, applicant's legal practitioners