



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**REPORTABLE**

Case No. 421/13

In the matter between

**NQOBILE DLAMINI**

**Applicant**

and

**DIRECTOR OF PUBLIC PROSECUTIONS  
MAGISTRATE PHATHAPHATHA MDLULI N.O.  
THE ATTORNEY GENERAL**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent**

**Neutral citation:** *Nqobile Dlamini v Director of Public Prosecutions & 2 Others* (421/13) [2014] SZSC 11 (17<sup>th</sup> February 2014)

**Coram:** **MAMBA J**

**Heard:** **11 December, 2013**

**Delivered:** **17 February, 2014**

[1] Criminal Law – Applicant assailed by Magistrate via text message on mobile telephone and applicant attempting to see and talk to Magistrate in his chambers following such attack. Applicant on failure to speak to Magistrate reports matter to the police but is arrested three days thereafter on the instruction of the Magistrate and charged with contempt of court.

- [2] Criminal Law and Procedure – Magistrate getting report from his clerk that accused came to see him in an angry mood. Accused summarily charged by magistrate three days thereafter and brought to court to face a charge of contempt of court. Magistrate concern acting as judge, prosecutor, witness and complainant. Accused pleads not guilty and denies factual allegations. Clerk to whom report made not called as a witness – improper for magistrate to adopt this procedure as the conduct of the accused did not occur in *facie curiae*.
- [3] Law of Evidence – admissibility of evidence – magistrate giving evidence of what was reported to him by his clerk, this hearsay and inadmissible. Irregular for magistrate to try case under such circumstances. Irregularity resulting in a failure of justice, conviction quashed.
- [1] ‘Power tends to corrupt and absolute Power corrupts absolutely.’
- [2] This is a review application. When the matter appeared before me, the respondents’ attorneys indicated that they could not support the conviction of the applicant by the second respondent; thus the application was not opposed. I suppose it was because of this stand or stance by the respondents’ Counsel that neither side filed any heads of argument in this case.
- [3] On being advised by both Counsel that the application was not being opposed and the court having gone through the papers herein, the court enquired from Counsel for the respondents why they could not support the said conviction and the court was informed that the procedure adopted by the second respondent in trying the case was fundamentally flawed and not

in accordance with real and substantial justice. Having gone through the papers myself, I agreed and issued an order in terms of prayers 5 and 6 of the notice of Motion dated 12 November 2013, namely; reviewing and setting aside the conviction of the applicant for contempt of court under Magistrate's court case 621/2013 and the sentence of 12 months imprisonment imposed upon her consequent upon that conviction.

- [4] I should add that I specifically indicated to both Counsel that I viewed this case as important in view of the fact that the second respondent, as a judicial officer, would certainly want to know and hopefully learn from his error – where he went wrong or erred. Besides, this court had to have a reason or reasons for quashing the conviction and sentence imposed on the applicant. The fact that the crown could not support the conviction was not sufficient reason for the court to undo that which the lower court had done. I mention this issue simply to allay any fears or suspicions that may have been created that this court may have been reluctant or averse to the quashing of the decision of the court a quo. No such aversion existed at all.
- [5] Only one set of papers has been filed herein, namely, the founding affidavit by the applicant. There averments contained therein have thus not been

disputed or challenged and thus, they are for purposes of this application deemed to be correct and truthful. In this regard, I should also mention that although the second respondent is, in law, at liberty in filing the record of the proceedings in the court a quo, to file whatever information he may consider appropriate together with such record, he has not filed anything beyond or outside such record of proceedings.

[6] The applicant is a Swazi female adult of Mbabane and is employed by the Swaziland Government as an assistant Immigration Officer and is stationed in Mbabane at the head office in that department. She and the second respondent who is a Magistrate stationed at the Mbabane Magistrate's Court, know each other very well. They referred to each other by their first names. They knew each others' mobile telephone numbers as well. The two once had 'some personal private issues between them but these had been settled or resolved'.

[7] On 8 November 2013, the applicant received a short texted message through her mobile telephone from the second respondent which said, "so u think u ar smart wait and c lll show u whos smarter." This was at 15.31 hours. A minute later, the second respondent sent her another message saying.

“Sawubona Nqobile Dlamini mineke im not childish I don’t send anonymous sms’s I hope u will not regret this becoz I want 2show u kutsi kusho kutsini kubanguMantji.” Translated, the second message means: ‘Good day Nqobile Dlamini. As for me I am not childish..... I hope you will not regret this because I want to show you what it means to be a Magistrate.’

[9] The applicant states that she was “shocked and puzzled by these unprovoked and unsolicited threats by the second respondent. Her first reaction was to telephone him and find out what was this all about. She tried three times but the second respondent would not answer her calls, on his mobile telephone. She then called him on his landline, (at work). This time he answered. She duly identified herself as the caller and asked him why he had sent her the two messages referred to above. In response “....the second respondent merely shouted at me and called me derogatory names ...and then hung up the telephone without any explanation.”

[10] Having thus failed to get an explanation from the second respondent, she decided to go and see him at his place of employment to “make peace with him.” (See paragraph 18 of her affidavit).

[11] At the Magistrate's court premises, she went to the enquiries or reception desk and was there referred to the second respondent's secretary or clerk. She related her story to the said clerk and also showed her the threatening messages she had received through her mobile telephone. This she did after being questioned by the said clerk. After speaking to the second respondent over the telephone, the clerk told the applicant that the second respondent would not see her. When she sought advice from the clerk on what to do about the issue, the clerk could only advise her "to handle the matter with caution [and] to also protect the office of the second respondent." She immediately went and reported the matter at the Mbabane Police station where she was advised to come back on Monday; 11 November 2013. She did as advised and a statement was recorded from her that day.

[12] On 12 November 2013, she was arrested by two male police officers whilst at her work place and charged with the crime of contempt of court. From there she was taken and appeared before the second respondent on two counts of contempt of court. These charges were read to her in court by the second respondent. These charges as they appear on the record of the proceedings read as follows:

“Count One

The accused is guilty of the crime of **CONTEMPT OF COURT**

In that upon or about the 8<sup>th</sup> of November, 2013 and at or near the Mbabane Magistrate's Court in the district of Hhohho, the said accused did wrongfully and unlawfully approach and accost the Clerk of the Court and demanded to forcefully be allowed to "Phathaphatha" and did thereupon utter the contemptuous words, "**I want to see Phathaphatha because I want to deal with him and sort him out**", (Ngifuna kubona Phathaphatha Ngifuna kumsorter ngimtjele off, ngoba uyangedzelela) with intention to violate the dignity, repute or authority of the Magistrate in his capacity as a Judicial Officer and did thereby commit the crime of **CONTEMPT OF COURT**.

Count Two

The accused is guilty of the crime of **CONTEMPT OF COURT**.

In that upon or about the 8<sup>th</sup> November 2013 and at or near the Mbabane Magistrate's Court in the district of Hhohho, the said accused did wrongfully and unlawfully approach and came to the Magistrate's Court and remonstrated with court officials with a view to be allowed to Magistrate Mdluli's Chambers with intention to impugn and violate the dignity, repute or authority of the said

Magistrate in his capacity as a Judicial Officer and or insult, fight or attack or assault the said Magistrate and di thereby commit the crime of **CONTEMPT OF COURT.**”

[13] In order to give a complete picture on the events which took place in court on 12 November 2013 when the applicant appeared before the second respondent, I shall quote verbatim what appears on the record of those proceedings:

“ABC – elects to conduct own defence

The court explains to the public prosecutor before court the nature of the proceeding against the accused in the dock as “summary proceedings” and trial of accused for contempt of court charges arising at the court premises allegedly by accused. The court further explains that in such instance, the court will as prosecutor and judge cite accused appropriately permitted law.

To the accused in the dock the court again takes the opportunity to advise her that she has a legal right to instruct, an attorney or legal representative to come and assist her in the trial. Her answer



verbatim, "I do not need any lawyer and even on Friday I did not need one when I came to see you."

Accused shows animosity to the court and has a defiant demeanour at the proceedings as she looks like she is ready to snap at any time.

Charges are read to her, she indicates that she understands them, but what has been read to her now has additions of things that she did not say nor do on Friday. It has been insisted if she understands what has been read to her and replies in the affirmative and pleads NOT GUILTY to both counts.

Court : In order for these proceedings to be concluded in orderly court function you will speak when ordered to do so or where you are given the opportunity to do so. This is not a shebeen where everyone talks at the same time. Do you understand?

Accused : Yes.

Court : You are cautioned that where you are standing, you referred to as the accused as the charges has been read to. I do not know how far you went at school, but please listen to the interpreter as she is

speaking in Siswati. You will still have the right to change and require the services of an attorney at any time during these proceedings. You may decide to change your plea from that of not guilty to guilty.

Accused : I have told you that I do not need any lawyer and I will not change not guilty to guilty.

Court : In terms of the law related to contempt of court you will be given the opportunity to explain your conduct alleged on Friday and you may tender your apologies to the court. You may proceed.

Accused : What has been read to me now has additions. At 1500 hours I received an sms from Phathaphatha, you, accusing me of sending to you anonymous sms on your cellphone.

Interpreter : Interjects, do not refer to the Magistrate as Phathaphatha in court or you, he is referred to as Inkosi yeNkantolo.

Accused : But I am talking about him I will refer to him by name as he is the one who send me two smses. When I called his office on his landline, I introduced myself as Nqobile Dlamini and you said “yewena ngwadla I am going to show you what a magistrate is chubeka nje” then you dropped the phone.

I took a taxi to your court intending to ask you to show me the smses you were referring to. When I got to the magistrate's court I showed the police your messages and they referred me to this lady, your clerk, (pointing at the clerk of court). I told her that you had sent me the two messages which I also showed her and I wanted to see you about the smses which you allege were sent by me. The clerk called you and then told me you did not want to see me. Then I left to the police post to report and I was referred to a Mr Sihlongonyane. That is all.

Court : Do you know what was reported to the Magistrate?

Accused : I do not know.

Court : It was reported that you came to the Magistrate's court in a very angry mood and you spoke in a commanding voice first to the police showing them your cellphone that "ngifuna Phathaphatha atongikhombisa lama sms lengimtfumelele wona, nangimshayela akabambi lucingo lwakhe, kuoffice landline yakhe ubambile wakhuluma name wase ubekaphansi. Angikacedzi ke naye."

Accused : I was angry but I did not talk in an angry voice.

Court : When you got to the clerk you were still in the same angry fighting mood, when you repeated the words and also showed her the smses on your phone. It was further reported that when the clerk try

to reason with you, you remonstrated with her and indicated that you wanted to go into the Magistrate's chambers by force if they refused you. You took a few steps towards the stairs and you were warned not to that.

Accused : No I did not fight the clerk, I was not here to see her but you.

Court : After you were told that the Magistrate did not want to see you, you still insisted that you were not leaving until you see him. You said the words, "ngeke ngimyekele, uyangedzelela Phathaphatha."

Accused : I did not say those words.

Court : No one reported that you told the police or the clerk that on the office landline I called you ingwadla, but you have said it in open court why?

Accused : Because that is what you said to me on the telephone.

Court : The magistrate did not call you with the insulting word you have just said in court, you now making it up to embarrass him.

Accused : Yes you did.

Court : Are you an ingwadla?

Accused : I do not know from you.

Court : The magistrate did not call you to come to the court, is that correct?

Accused : No.

Court : If you say you were threatened by the Magistrate sent by the words in the smses what kind of threat did you think it was?

Accused : I do not know what you were going to do to me, but I wanted you to show me the smses that were sent by me.

Court : If you came to the person who had threatened you don't you think he would have carried out the threat on you. Why do you bring yourself to the place of the person who was threatening you?

Accused : It is my way of doing things in life, I always confront people who accused me of things that I have not done.

Court : You came to the magistrate's court ready to fight with the magistrate in his chambers or at most provoke him into fighting with you. Do you know, that you were being contemptuous by coming to demand to see the magistrate even after you could tell that he was not picking up your calls. You wanted to have the last laugh, bowufuna kutsi kugcine wena. That is contemptuous to the authority, reputation and dignity of the magistrate in the court where he sits as a magistrate. For you not to know that it is, either, you act plainly stupid or very

uneducated deliberately to prove your point. This court will not allow its dignity to be violated in this manner. If you felt you were being threatened by the magistrate you could have selected a variety of choices; report him to the police, report him to your supervisors or his superiors and let the matter be handed in civilized manner. But instead you chose force and wanted to carry it out at the magistrate's place of work as you have done with other helpless people around Mbabane. Unfortunately for them they were not magistrates and could not charge you with contempt of court. (Accused breaks down and weeps briefly and utters the words "bengingati kutsi ngiyedzelela ngiyacolisa ke")

Coming to the magistrate's court to confront and accost the person whom you feel has threatened you that he will show you what a magistrate is, was an act of total defiance and contemptuous demeanour to the magistrate signifying a mental make up which send "I will fix him lamsebentini wakhe".

Within these walls, the magistrate is an authority to be respected even if he is wrong, within the court premises you are not at liberty to accost him. This authority is just similar to that of the judges at the High Court and is granted by the law. It is the same law that

guarantees such authority and anyone breaking it will be in contempt as you are standing here charged.

It is the view of this court that you came to the magistrate's court to insult, threaten, fight or attack the magistrate and there was no urgency pushing you to come straight at him. The worst you wanted was to push him into personally or physically assaulting or manhandle you so that you put him into trouble. Those are evil intentions on your part and as a young lady it is most unfortunate. The magistrate knows you very well outside court, but shocked at the lengths in which you can be defiant and extremely arrogant, regardless of the nature of the surroundings.

Before I pronounce the verdict of this court, is there anything that you want to add to what you have said.

Accused : Nothing.

Court : You have failed to explain your actions on Friday having been given the opportunity to do so. In fact between Friday and today Tuesday you had ample opportunity to seek advise and assistance on the seriousness of your actions of coming to the magistrate's court in the manner that you did. Presumably someone else would have advised you to tender to apologies to the court. But you did not do so.

You have also not tendered any apology in court, in fact, the view of this court is that in open court, you have exhibited a defiant and contemptuous demeanour for the duration of the proceedings. Such lack of remorse over your past is not compatible with an apologetic state of mind under any similar circumstance. The court, therefore concludes that the contempt by yourself against this court is clear and beyond reasonable doubt and consequently you are found guilty as charged on both counts in the charge sheet.

#### MITIGATION

Court : Before the court passes sentences is there anything else that you ask the court to consider in your favour, anything, personal, work related or you may wish to tender your apologies.

Accused : I have nothing to say.

#### SENTENCE

At the end of this case the court will pass a sentence which will be a reminder to you that when a Magistrate says to you he will show you what a Magistrate is, you must take it seriously not as a threat, but as a warning that your conduct is getting off-side. Anonymous cellphone messages are so easy to prove where they come from. To a Magistrate such information can readily be made available by the



responsible persons without much effort, as was the case here. This was, therefore not an empty statement from the Magistrate. You should have acted your age as a young person being warned by a far older adult and heeded such warning.

The sentence will also serve as a punishment for the contempt shown on Friday and exhibited or carried forward through the duration of this trial. You will be sentenced to twelve (12) months imprisonment without the option of a fine for each count. The sentences will run concurrently. I advise that you to instruct or seek the services of an attorney to make an Application on you behalf, for review or appeal against conviction or sentence or both at the High Court, may the Lord have mercy on you, young lady.

Mag. P. Mdluli

12/11/13”

- [14] I have quoted and included the record of the proceedings in the court a quo, because, inter alia, the record shows or proves the shameful way in which the applicant was treated by the second respondent in the court a quo. This record makes very bad reading indeed. It shows how not to proceed with or

conduct a trial as a judicial officer. I shall deal with these issues in a moment or two below.

[15] It is trite law that as a general rule, criminal trials or prosecutions are to be conducted by the Director of Prosecutions who does so for and on behalf of the Crown. He prosecutes in the public interest and for the public good. See section 4 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) and the Director of Public Prosecutions Act, and the numerous cases thereon.

[16] There are, admittedly, exceptions to the above general rule such as (a) where the Director of Public Prosecutions declines to prosecute and the prosecution is done by a private prosecutor, (b) where the Director of Public Prosecutions, as a matter of law, requires the consent of the attorney general to prosecute and the latter declines such consent and (c) the incident giving rise to the crime occurs in court in the presence of the judicial officer and it amounts to a contempt of court. In the last instance, the presiding officer is entitled to deal with the matter summarily, without the involvement of the crown. This is geared or designed to maintain and restore order, honour, authority, respect and dignity of the court and to allow the orderly and

smooth adjudication of cases and other business of the court. It is in such cases, where the offence of contempt of court is said to have occurred in facie curiae – in the face of the court – that the court is entitled to deal with it in a summary fashion – even without the involvement of the public prosecutor. Milton, *South African Criminal Law and Procedure 3<sup>rd</sup> ed.* at 175 states that:

‘Contempt of court in facie curiae occurs when during the sitting of a court (‘in open court’) a person by word or conduct interferes with the administration of justice or violates the dignity or authority of the court.’

And I think it is in line with this exception that the second respondent attempted to deal with the matter of the applicant herein. (See *Herman Steffen v R*, Appeal 12/2000 (unreported) judgment of June 2001, *Bonginkosi Nkumane v s89 of Magistrate’s Court Act, Rev 15/92* delivered 25 May 1992, and *S v Nel*, 1991(1) SA 730 (A) at 749.

[17] From the outset, I observe that this was not an offence or crime that happened in facie curiae. It should not, therefore have been dealt with in that fashion. In saying so, I leave aside, of course, the issue whether what the accused did was a crime or not. The actions of the applicant whilst no doubt

took place at the magistrate's court premises, did not occur before the magistrate (court). The Magistrate did not see or hear what the accused allegedly said to his clerk, receptionist or court orderly. The exchanges between the applicant and these persons were not observed by the magistrate. The magistrate got a report on what had occurred or been said or discussed. This is plainly evident in these exchanges:

‘Accused: What has been read to me now has additions....

Court: Do you know what was reported to the Magistrate?

Accused: I do not know.

Court : It was reported that you ..... you said the words, ‘ngeke ngimyekele, uyangedzelela Phathaphatha.’ [I would not let it go because Phathaphatha is troubling or looking down upon me].

Accused : I did not say those words.

Court : No one reported that you told .... But you have said it in open court, why.

Accused: because that is what u said to me on the telephone.

[18] From the foregoing, it becomes clear that there were very serious or real disputes of fact as to what the accused had actually said or done at the magistrate's court on 8 November, 2013. But sadly, the second respondent,

faced with these disputes of fact, did not realize that evidence was needed to resolve these issues. He doggedly relied on what had been reported to him. He was profoundly in error in this regard and this aspect of the case demonstrates the pitfalls of the summary proceedings he adopted herein. These deficiencies leads me to the next issue I deal with in the preceding paragraph.

[19] On being arraigned, the applicant pleaded not guilty on both counts. By her plea he put everything in issue. As the events for which she had been charged occurred away from the magistrate (second respondent) or away from him, the second respondent could not thus act as a witness to such events. Those who had reported the incident to him, should, at least have been called. It certainly did not lie in the magistrate's mouth to tell the applicant that because no one told me that you said I called you an ingwadla (whore) over the telephone, ...you are now making it up to embarrass [me]. The second respondent was again, plainly in error in acting as a witness on matters he had not witnessed. These events did not happen in facie curiae and the applicant should not have been tried as if this was the case. Whatever the applicant did was not done during the sitting of the court.

[20] As noted above, in the second message sent to the applicant on 8<sup>th</sup> November, 2013, the second respondent threatened to show the applicant what a magistrate was capable of or could do. This threat was issued before the applicant presented herself at the Magistrates court. So, even before the applicant could go to the second respondent's place of work, the latter had unequivocally threatened to use his office or role as a magistrate to deal with her. Indeed in his judgment, the 2<sup>nd</sup> respondent made these rather startling remarks: '...you chose force and wanted to carry it out at the magistrate's place of work as you have done with other helpless people around Mbabane. Unfortunately for them they were not Magistrates and could not charge you with contempt of court.' The second respondent virtually said 'if you annoy me, whatever the circumstances, as long as I am a magistrate, you are in contempt of court. That cannot be correct and may in fact amount to an abuse of authority or office; thus the warning or caution in paragraph 1 hereinbefore, by First Baron Acton.

[21] The applicant also complains that she was not given a fair trial. She states inter alia that she was not allowed to say most of the things she wanted to say in explaining her conduct to the court and was also not given the chance to say anything in mitigation of sentence. She was also branded as stupid

and not educated. I do not think, that these complains are not justified. She was also not given the opportunity to call witnesses, if she so wanted. Her allegations have not been disputed by the 2<sup>nd</sup> respondent. Indeed, in the context of the proceedings in the court below, when the second respondent asked the applicant; “are you an ingwadla (whore)” he really meant are you not a whore? And at the end when he said “...may the Lord have mercy on you, young lady,” he no doubt did so with his tongue firmly on his cheek.

[22] Section 21 of the Constitution provides:

‘(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.

(2) A person who is charged with a criminal offence shall be –

(a) presumed to be innocent until that person is proven or has pleaded guilty;

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(d) given adequate time and facilities for preparation of the defence;

(e) permitted to present a defence before the court either directly or through a legal representative chosen by that person;

(f) afforded facilities to examine in person or by a legal representative the witnesses called by the prosecution and to obtain the attendance of witnesses to testify on behalf of that person on the same conditions as those applying to witnesses called by the prosecution.”

These provisions re-echoe those in the Criminal Procedure and Evidence Act 67 of 1938. (See sections 171, 172, 174 of the Act and the cases in our Law Reports dealing with those provisions).

[23] In *Keri Gwyn Lewis v S*, case no. 610/2006 (SCA), delivered on 2<sup>nd</sup> March 2007, the court noted that :

“[9] In *S v Mamabolo (ETV and others intervening) 2001 (3) SA 409 (CC)* para [51] – [59] the Constitutional Court considered the constitutionality of the summary procedure which led to a conviction of contempt, categorised as “scandalizing the court,” *ex facie curiae*. The court, referring to *S v Nel supra* prefaced its discussion of the constitutionality of the summary procedure by stating; ‘it should also be noted that we are concerned here with the kind of case where the orderly progress of judicial proceedings is disrupted, quick and effective judicial intervention in order to permit the administration of justice to continue unhindered.’ After having referred to several



unsatisfactory features of the summary procedure the court held that the procedure ‘which rolls into one the complainant, prosecutor, witness and judge – or appears to do so – is irreconcilable with the standards of fairness called for by s35(3)’. It then proceeded to consider whether the summary procedure is saved by s36(1) of the Constitution and held that in cases of alleged scandalizing of the court ‘there is no pressing need for firm or swift measures to preserve the integrity of judicial process’ and added: ‘if punitive steps are indeed warranted by criticism so egregious as to demand them, there is no reason why the ordinary mechanisms of the criminal justice system can not be employed’. It concluded that the summary contempt procedure in respect of alleged contempt *ex facie curiae*, ‘save in exceptional circumstances such as those in Chinamasa’s case where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable, is a wholly unjustifiable limitation of individual rights and must not be employed.’ The Constitutional Court thus recognized that there may be circumstances in which a summary procedure, at which the Constitutional rights referred to are not afforded to an alleged offender, may be adopted. An attempt to circumscribe the circumstances that would justify such a procedure

would be presumptuous. It is however self-evident that if the summary procedure, as opposed to a prosecution by the prosecuting authority, is not necessary in order to preserve the dignity or authority of the court or to permit the administration of justice to continue unhindered an accused person should be afforded a fair trial as required by s 36 of the Constitution.

...

[11] It should be added that when the summary procedure is permissible and adopted by a court, the court should bear in mind that the alleged offender may not know what the elements of the offence are and also that he had not had any time to prepare his defence and to consult a lawyer. The court should therefore realize that the alleged offender is in no position to adequately defend himself. For these reasons the court should take great care to ensure that an alleged offender who ostensibly acted contemptuously and who is unrepresented, is indeed guilty of contempt. The court should in particular make sure that the conduct complained of occurred with the intention to violate the dignity and authority of the court or to interfere with the administration of justice. Conduct which may ostensibly point to an intention to be contemptuous may prove not to be such.”

I fully endorse these remarks which are in my judgment pertinent in the instant case. Although the circumstances and the facts were different in *Keri supra* from the present application, these remarks represent the law that should guide judicial officers in this jurisdiction.

[24] I must add that not only was this matter inappropriate to be dealt with summarily as the second respondent did, the fact that there was the personal involvement of the second respondent in the matter on matters totally not connected with him as a judicial officer, the case should have been referred to the Director of Public Prosecutions and dealt with or heard by another Magistrate and not the second respondent. After all he was the complainant – on some issues not related to his office as a Magistrate. It was not proper for him to be the complainant, prosecutor, witness – though incompetent - and judge at the same time.

[25] *In Linnett v Coles [1986] 3 ALL ER 652 at 656* Lawton LJ said:

“Anyone accused of contempt of court is on trial for that misdemeanour and is entitled to a fair trial. If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a

mistrial, which is no trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there has been no unfairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, so as to make it a just one.”

(See also *Harmsworth v Harmsworth* [1987] 3 ALL ER 816 and *Attorney General v Newspaper Publishing plc and Others* [1987] 3 ALL ER 276 at 294). In the instant case, however, there were profound irregularities in the proceedings as I have already stated. These irregularities were highly prejudicial to the applicant and resulted in a failure of justice.

[26] Because of the above conclusion, it is not necessary for me to consider the issue of whether or not the conduct of the applicant herein amounted to the crime of contempt of court; or whether indeed there were two separate crimes of contempt of court committed by the applicant on the day in question. Finally, it would appear to me to be totally unacceptable and vain for a Magistrate standing at the balcony of his court house, to unlawfully

attack and assail an innocent passerby and when the attack is returned to him with interest to hide behind the walls of the court house and cry; “within these walls the magistrate is an authority to be respected even if he is wrong.”

[27] The above are my reasons for setting aside the conviction and sentence imposed on the applicant by the second respondent.

**MAMBA J**

**For the Applicant** : **Mr N. Fakudze**

**For the Respondents** : **Office of the Attorney General**