

POLICE	C R REFERENCE	COURT RECORD REFERENCE	F P REFERENCE	P P's REFERENCE
WATERFALLS	138/08/06	3097/06		2374/06

SUMMARY JURISDICTION

**IN THE COURT OF THE MAGISTRATES
FOR THE PROVINCE OF MASHONALAND
HOLDEN AT MBARE**

BEFORE

ESQUIRE MAGISTRATE

FOR THE SAID PROVINCE ON THE

NAME OF ACCUSED WELLINGTON CHIBEBE AGE 43 YEARS

(hereinafter called the accused)

charged with the crime of

**ASSAULTING OR RRESISTING A PEACE OFFICERS DEFINED IN
SECTION 176 OF THE CRIMINAL LAW (CODIFICATION AND
REFORM) ACT CHAPTER 9:23**

In that on the 15th of August 2006 and at Simon Mazorodze roundabout waterfalls Harare, Wellington Chibebe unlawfully committed an assault upon Sylvester Makonyonga a peace officer who was in uniform and on duty, by pushing him around or by violent means resisted the peace officer the peace officer acting in the course of his duty knowing that he is a peace officer acting in the course of his duty knowing that he is a peace officer or realising that there is a real risk or possibility that he is a peace officer.

SUMMARY OF CASE

STATION: WATERFALLS **CR NO.** 138/08/06 **CRB NO.** 3097/06

OFFENCE: ASSAULT OF RESISTING A PEACE OFFICER AS DEFINED IN SECTION 176 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT CHAPTER 9:23

DATE: 15/08/06 **TIME:** 20:30hrs **PLACE:** SIMON MAZORODZE
ROUNDABOUT
WATERFALLS

ACCUSED AND ADDRESS: WELLINGTON CHIBEBE **AGE** 43 YEARS
127 Carrick Creagh Road
Borrowdale, HARARE

ACCUSED (S) is/are in custody at Waterfalls police cells.

COMPLAINANT & ADDRESS SYLVESTER MAKONYONGA **AGE** 27 YEARS
RES: ZRP MBARE CAMP
HARARE

PRECISE:

01. Complainant is Sylvester Makonyonga aged 27 years who resides at Mbare Camp Harare and stationed at Mbare Police currently attached to operation sunrise. Complainant is an attested member of the force and is of the rank of a sergeant.
02. Accused is Wellington Chibebe aged 43 years who resides at number 127 Carrick Creagh Road Borrowdale, Harare and is employed by Zimbabwe Congress for Trade Union (ZCTU) as a Secretary General.
- 03.

17/08/06

CRB 3097/06

BEFORE: Mr. Katiyo N

PP Mr. Nyazamba

INT Ms Moyo

Mr Muchadehama for the Accused person

Defence Counsel: - Accused 41 years old. He is aware of the allegations he is facing. He understands the allegations and there is no need for the allegations to be read. He however has complaints against the police.

His arrest and subsequent detention in custody is unlawful. I wish to have it placed on record on those two aspects. He was stopped at a roadblock where police were illegally searching for bearer cheques. He was stopped by D/C Marufu and although he did not have a warrant of search the Accused gave a go ahead.

Accused advised him that he had been searched before but Constable Marufu ordered them to disembark from the vehicle to assist him in the search.

He was ordered to switch of the engine. He alleged that the Accused wanted to run away with eventuality of being shot. The Accused never intended to run away. Sergeant Mukunyonga was called to come and search his vehicle. He came and grabbed him by the collar and throttled him trying to pull him out of the car.

The Accused's collar got torn. The Accused is wearing the same T-Shirt he was wearing and the court can be shown the torn part. Accused demonstrates the lower front of the T-shirt collar, which was torn.

He was wearing safety belts, which made it difficult to pull him out of the car.

He was assaulted by Mukunyonga throttled, slapped twice. He was not resisting the police officers in any way.

Sergeant Marufu was called and Accused was handcuffed from behind. The handcuffing was not meant to secure the Accused's arrest. It was too tight and was meant to hurt, him and not to secure him. That in itself is an assault.

He was taken to Waterfalls Police Station because he was refusing to be searched. No allegations were levelled against him at the roadblock.

The allegations of assault were duly advised to the Accused at Waterfalls Police when they were about to record a warned and cautioned statement.

The assault is now in terms of section 176 of this code.

We want the allegations to be investigated and the court to order the State to specifically order the State to make these investigations and report to court on the next remand date.

Soon after he was detained at Waterfalls police we made representations for him to be released given the triviality of the allegations.

We brought to the attention of the police that the Accused is a family man with fixed abode and that he is a Secretary General of the ZCTU and was never going to run away.

But the Response was that Inspector Makuze of Matapi police had ordered that the Accused person was not to be released for whatever reason.

Also that the Dispol, Sadzama had ordered for his continuous detention and that the Accused person was a problem. All these were according to the Accused person.

It is unlawful to detain when you ought not to detain.

We also told the Officer in Charge that the Accused had been assaulted by Mukonyonga and his colleagues and that he wanted to make a report to that effect.

A/I Pfidze refused for he said that was a counterpart. The court should direct the State to have the report accepted.

There is already a challenge against the new codification act as it is ultravires section 89 of the constitution.

Bail

We had intended to apply for bail now we understand bail is not opposed. He is a family man, ZCTU Secretary General. He be remanded out of custody.

THAT ALL

S/C- The State had only prepared for bail application but in view of what has been raised by the defence I need time to respond.

Court – This is not an application as per indications by the defence but a complainant against the police.

State's response at 14:15 hours

The defence have registered their concern to the circumstances surrounding the arrest of the accused and his subsequent appearance.

Also their complaints against the police.

I will not comment on the issues raised by the defence.

The defence requested the court to order investigations of the assault. If the court orders the investigations to be done the State will oblige.

Bail

The State is not opposing the admission of the Accused to bail

The State believes the Accused will indeed stand trial.

If he is admitted to bail we request that he must not.

1. Interfere with State witnesses.

The Witnesses are:-

1. Constable Matanhire
2. Constable Marufu
3. Sergeant Sunday
4. Sergeant Mukonyora

THAT IS ALL

The trial will commence on the 4th of September 2006. Defence Counsel confirms.

Defence Counsel I want to thank my learned colleague for conceding to my request.

I also thank him for conceding that he be remanded out of custody.

Court Ruling

The court having taken into consideration the submissions made by both parties the State and the defence will make the following comments:-

To start with the defence and appeared like they were.....an application for refusal remand but they clarified that all they doing was to have their complaints against the police regarded.

Further the court cannot therefore go on to comment on the issues raised by the defence about what they allege as illegal road blocks to search for old

bearer cheques as this is misplaced, it is not the right for a to raise such an issue.

Also the issue of unlawful arrest cannot be dealt with at this stage, as the defence has not made such an application. This court therefore treats whatever submissions made by the defence as only complaints against the police.

If at all the police assaulted the accused outside the boundaries of the minimum force as permitted by law. The State is obviously obliged to carry out investigations. The police can only use force on effecting arrest where that suspect is resisting.

Minimum force may even result in the death of suspect and still falls within the legal ambit of the law depending on the force being used by the suspect.

The Court therefore orders the State to establish the true state of affairs at the time of the accused's arrest as per concession by the state and report back their findings on the next date, which is the 4th of September 2006.

As bail – since it is not opposed by the State the Accused will be admitted bail on the following conditions: -

See record cover.

Even though the State wanted the Accused to free bail the court is of the view that the allegations being faced by the Accused assaulting a police officer on duty cannot be trivialised to the extent of allowing free bail.

04/09/07

Defence – Counsel There was an application for the State to investigate the assault on the Accused and were also supposed to have reported to the court telling them their findings.

Court – yes Mr Prosecutor.

A- your worship I was advised that a docket has since been opened at Waterfalls police. The CR 286/08/06. The police are investigating a complaint filed by the accused.

D/C The State is having selective investigations. The Accused are being treated more equal than others why is it taking so long for them to investigate the case.

Court – Concerns noted.

The defence has given notice to the State of our intention to apply for referral of the case to the Supreme Court in terms of section 24 of the constitution.

S/C The State needs about 40 minutes to respond to the giving of notice or rather have the matter postponed.

Adjourned at 10:03hrs 04/09/06

Resumed at 11:15hrs 04/09/06

S/C Mr Nyazamba

Will the defence make their application today? We are waivering our rights to three day notice.

We are ready to hear the application. The issue of the case law for SA is neither here nor there.

Court Ruling

If the defence undertakes to serve the State with their application papers on or before the 17th of September 2006 the application for PP will be granted otherwise the court was reluctant to do so.

Matter PP to 7/09/06 for the referral application.

7/09/06

PP 7/09/06

We had our opportunity to go through the defence submissions.

Court Mr. Prosecutor the defence counsel submit first since they are the applicants in the matter.

Defence Counsel application.

Mr. Muchadehama I handed over copy of the submission I intend to rely on. In the application I will rely on the submission now filed as a record. It is an application for referral of the matter to Supreme Court in terms of 24(2) of the constitution.

Once such a request had been made the Court shall refer the matter to Supreme Court. It can only refrain from doing so if the request is frivolous and vexatious. And therefore the matter should be referred to Supreme Court. The Accused person's rights have been violated. Because of that violation we are requesting this court to refer the matter. I have cited quite a number of cases.

It is based on 3 main submissions:-

1. The Act under which the accused was arrested was unlawful alternatively – section 3 of the new code is unlawful.
2. Even if the Act was lawful the section under which the accused were charged is unlawful.

The code seeks to nullify Roman Dutch Law completely and this is unlawful.

Section 89 of the constitution says the law of Zimbabwe shall be Roman Dutch Law as modified by any other subsequent legislation in Zimbabwe.

The new codification is completely doing away with the Roman Dutch Law and not modifying.

Detailed submissions as per heads files in the record.

For the Government to do what they did they needed to amend the constitution first. Parliament could not simply do what they did.

That is all.

State Counsel

The application is frivolous and vexatious. It is premised on the wrong side of the law. I will submit that Section 89 of the constitution is still operational. The Criminal Law Codification and Reform Act is subsequent legislation modifying Roman Dutch Law section 3 is not actually extinguishing that Law.

This Codification was made under the Act of Parliament through the same constitution the law was not changed but was simply modified.

Madzimbamuto vs. Larder – Burke and another (1) RLR 1968.

The Appellant was caught on the wrong side of the law was challenging the continuity of the law. The law had been made by sovereign Government that was in place. The question, which wrote where whether and should abide by 1961 constitution or 1965 constitution.

This is the law in force, because it was created by Parliament.

RE Chinamasa 1999 (2) ZRP The Appellant had wrongly interpreted the constitution.

In determining whether it is frivolous and vexatious the court can consider the submission on the *Martin vs. The AG and another at PP 157.* Where it is said the word frivolous connotes in its ordinary and natural wrong, the raising by question marked by a lack of seriousness one inconstant with logic and

good sense and clearly so groundless and devoid of merit that a prudent person could not possibly fail to obtain relief for it.

Vexatious means causing annoyance to the opposing party in the full appreciation that it cannot succeed in that rose bona fide and finally referral of the case would be to permit the opponent to be vexed under a form of legal process that was baseless.

DAISON vs. AG 1911 (1) KB 410 (CA)

If the application is granted the state will be vexed.

THAT IS ALL

Reply by the defence counsel

He said the application is based on a wrong interpretation by the law this is precisely what we want the Supreme Court to decide.

The omission to amend section 89 was wrong.

Court Ruling

Full reasons to follow.

30/11/06.

**IN THE MAGISTRATES' COURT
FOR THE PROVINCE OF MASHONALAND
HELD AT MBARE**

C R B NO.3097/06

In the matter between:-

THE STATE

Vs

WELLINGTON CHIBEBE

RULING OF THE COURT

This is an application made in terms of section 24 of the Constitution of Zimbabwe. The Application was brought by the Accused through his defence counsels, Mbidzo, Muchadehama and Makoni Legal Practitioners. The application arises from the arrest of the Accused, who in this case happens to be the Secretary General of Labour Body Union as Zimbabwe Congress for Trade Union abbreviated as (ZCTU).

He was arrested on the 15th of August 2006 at a roadblock manned by the police along Simon Mazorodze Road. He was subsequently charged under the new Criminal Law (Codification and Reform) Act, chapter 9:23, specifically section 176, for resisting arrest.

This application now seeks to have this case referred to the Supreme Court on the grounds that the Accused person committed no offence, since the law under which he was charged is ultra-vires constitution therefore unlawful. The defence allege among other things, that his arrest is in violation of his constitutional rights as detailed in the submissions filed as of record. The State opposed the application, arguing that the defence is wrongly interpreting the law.

In terms of the section 50 relied upon by the defence in making this application, the court is obliged to refer the matter to the Supreme Court unless the application is frivolous and vexatious.

The defence in their submissions they argued that section 89 of the constitution was defied in that it gives the law to be administered in Zimbabwe, by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June 1891 as inodified by subsequent legislation having in Zimbabwe the fine of law.

They also further argued that section 3 of the Criminal Law (Codification and Reform) Act is doing away with Roman Dutch Law as enshrined in section 89 of the Constitution. Section three of this code says that Roman Dutch Law no longer to apply. The defence further argues that if the legislature wanted to do away with the Roman Dutch Law was supposed to make the necessary amendments first before coming out with the new law.

That further argues that section 89 of the constitution as amend by section 13 of the second amendment (Act 25 of 1981) specifies that the common law of Zimbabwe shall be Roman Dutch Law.

They further argue that modify or modification, as the power to reduce something, to limit something to an extent, or degree or restrict its meaning i.e. in general admiration of something according to Webster's New International dictionary of the English language, 2nd edition. They argue that the code does not limit or reduce our criminal law but instead it seek to introduce a whole range of new crimes and hence does not modify the Roman Dutch Law of the cape within that ordinary or primary meaning of modifying. A power to modify does not include a power to extinguish something in their application they cited a number of cases where similar applications have been made and this court shall not repeat those cases. On the other hand the state argues that on the Criminal Law Code seeks to do is none other than modifying the existing Roman Dutch Law as enshrined by section 89. They argue that this is a modification by subsequent legislation. They further argue that it is the legislation who came our with the law through the constitution and that the defence is misinterpreting the law. They also cited three or so cases in support of their argument and went on to define the words, frivolous and vexatious. They say that the accused finds himself on the wrong side of the law thus wants to hide behind constitutional issues. The State argues that the defence's application should simply be dismissed and have this accused tried.

Having closely analysed the submissions by both the defence and the State, the court came to the conclusion that the application by the defence cannot be dismissed at face value. The court reached this conclusion after looking at section 89 of the constitution visa-vi the section 3 of the new Criminal Law (Codification and Reform) Act chapter 9:23. The former talk of Roman Dutch Law as the law to be administered and yet the latter talks of non-application of the Roman Dutch Law. In substance one may have the feeling that not much has changed but legally my interpretation may manifest from the defence is of the view that this is new law is unconstitutional whereas the State is of the view that the defence is wrongly interpreting the law

Without really commenting on the issues raised by the defence about section 176 of the new law the court is satisfied that justice can only be served if the question is referred to the Supreme Court for a proper interpretation of the law on the aspects raised.

The court finds no prejudice to the state if the matter is referred. Above all the State even wanted the Accused released on free bail. So the application by the defence counsel cannot be said to be frivolous and vexatious.

This court is therefore satisfied that the defence has managed to establish good grounds upon which this case can be referred to the Supreme Court. Therefore the application is hereby granted.