

The LEGAL MONITOR

For feedback please email ZLHR on: info@zlhr.org.zw visit: www.zlhr.org.zw



26 March 2012

A newsletter published by Zimbabwe Lawyers for Human Rights for members & human rights defenders

**COST:
FREE**

Edition 136

Alarming

...Zimbabwe justice system in intensive care

On the day when Zimbabwe's neighbour, South Africa, celebrated Human Rights Day, with its President leading the call for protection of fundamental rights and freedoms, Zimbabweans instead face a renewed onslaught by the state which strikes at the very heart of their hopes and dreams for a democracy which respects their views and allows legitimate dissent and criticism to be expressed without fear of unnecessary and vindictive retribution.

The conviction of Munyaradzi Gwisai, Antonater Choto, Tatenda Mombeyarara, Eddson Chakuma, Hopewell Gumbo and Welcome Zimuto on charges of conspiracy to incite public violence on 19 March 2012 by magistrate **Kudakwashe Jarabini** is highly regrettable. The sentencing of the six to a fine, 24 months' suspended imprisonment, and 420 hours of community service each, is harsh to say the very least.

Having carefully scrutinised the two judgments, and the reasoning behind them, ZLHR is of the considered opinion that the conclusions reached were supported neither by evidence led during the trial, nor the laws of the land. Rather, they will be, and have been, perceived by all reasonable people to be a conduit for the delivery of a political message through the courts.

This political message is that Zimbabweans are not expected to freely and peacefully associate, even in the confines of their private and protected spaces; they are not expected to freely express their views, legitimately critique public officers, or express their dissent. Zimbabweans will not be allowed to question the authority of those who hold national and political office even where such officers may have failed to deliver on their mandate and obligations.

Intelligence operatives will be allowed to infiltrate such spaces with impunity, and the courts of our land will accept the fruits of their unlawful activities without providing credible backing for reaching such conclusions. Police will be allowed to torture detainees in attempts to build a case, and the prosecution and the courts will not come to the rescue of such victims by refusing to tolerate such heinous and now well-entrenched practices.

It is on this basis that Zimbabwe Lawyers for Human Rights (ZLHR) welcomes the news that both the convictions and the sentences imposed on the six are to be appealed.

It is a sad day indeed when we witness the destruction of public confidence in the ability of the courts to act impartially and in terms of the law to the extent which has occurred in the aftermath of this case.

The office of the Attorney General can also not be allowed to escape criticism for the manner in which its officers have conducted themselves in this matter.

International and regional human rights norms and standards oblige the prosecution to accord an accused person all the rights associated with a fair trial. A case in which detainees are tortured during pre-trial detention, spend 27 days in custody before being released on bail, and are then subjected to a protracted trial which impacts on their freedoms is an inexcusable abuse of the justice system for purposes of punishment whilst such accused persons are entitled to the presumption of innocence and the protection of their fair trial rights.

***It is a sad
day indeed***

when a prosecutorial authority is unable to see accused persons as human beings entitled to the protection of the law and their rights. The actions of the Attorney General, through prosecutors and law officers such as **Edmore Nyazamba** and **Michael Reza** must be condemned in the strongest possible terms. They must now search their consciences and live with the destruction they have wrought on the public perception of the office they represent.

ZLHR reiterates its call for comprehensive reform of the justice delivery system to bring an end to the perception that institutions such as the prosecutorial service and the courts are now just vehicles for the protection of entrenched political interests and a barrier to the legitimate questioning of public authority. The courts, in particular, will need to work extremely hard to recover from the blow they have been dealt as a result of this case in order to show that justice is blind, and that every person who appears before them will receive protection of the law and due process, without fear or favour, and regardless of their political and social persuasions.



Gwisai fights back

HARARE-They were arrested for watching footage of the popular Egyptian revolution and put up for death after the State charged them with treason.

Realising how weak its case was, the State reduced the charges against International Socialist Organisation (ISO) leader and University of Zimbabwe law lecturer Munyaradzi Gwisai, and five other social justice and human rights activists to conspiracy to commit public violence, alternatively inciting public violence or participating in a gathering with intent to promote public violence, breaches of peace and bigotry.

This resulted in a community service sentence.

The conviction of the activists, who have become popularly known as the “Zim Six” sent outrage, as people locally and internationally rallied behind them. Multitudes thronged the courts during the trial in a strong show of solidarity. The activists have launched a fight back.

What began as an amazing arrest in February last year and spilled into an equally dramatic trial and conviction is not about to end just yet.

Prominent human rights lawyer and Zimbabwe Lawyers for Human Rights member Alec Muchadehama, representing the six, has launched an appeal against both conviction and sentence.

Pushing for a jail term, prosecutor Edmore Nyazamba had told the court that a non-custodial sentence for the six “would be a ridicule” to the justice delivery system.

But the support Gwisai, Hopewell Gumbo, Tafadzwa Antonater Choto, Tatenda Mombeyarara, Eddson Chakuma and Welcome Zimuto have received as well as their determination to fight to clear their names through a High Court appeal filed last week, show that the real “ridicule” could have been to charge the six, let alone convict them.

From the start, the arrest and charges have been described by lawyers as politically motivated and lacking in evidence.

In the appeal filed on Thursday, Muchadehama lays this bare.

“The law used to charge the six is so repressive that it has no place in a democracy,” Muchadehama stated in the appeal.

The six were convicted under the Criminal Law (Codification and Reform) Act and sentenced to pay a fine of \$500 or face 10 months imprisonment.

Another 12 months imprisonment was set aside on condition that they are not convicted on public violence charges for the next five years.

Magistrate Kudakwashe Jarabini suspended another 12 months on condition that the accused persons perform 420 hours of community service.

Muchadehama stated in the appeal that section 188 of the law used to convict the six “is too broad and wide and couched in such general terms as to be unconstitutional.”

“Section 188 of the Act is unconstitutional and cannot reasonably be expected in a democratic society. It is in contravention of the Declaration of Rights in the Constitution. At the hearing of the appeal, the appellants will ask the High Court to strike down Section 188 of the Act by reason of it being unconstitutional and in violation of the Declaration of Rights,” stated the award winning human rights lawyer.

The role of a Central Intelligence Organisation (CIO) operative whose real identity was queried by Muchadehama during the trial also comes under check.

He identified himself as Jonathan Shoko, a police detective who attended the meeting undercover and turned out to be the State’s second witness.

Muchadehama unmasked him during the trial as a CIO operative whose real name was Rodwell Chitiyo, rendering his evidence suspect.

During trial, Muchadehama produced high school records and photos to prove that Jonathan Shoko was a fake identity adopted by Chitiyo, whose real job was being a State spy.

In the appeal, Muchadehama argued that Magistrate Jarabini “seriously erred” in his treatment of Shoko/Chitiyo as a witness.

“The Court shied away from deciding whether or not 2nd witness was Jonathan Shoko or Rodwell Chitiyo. The Court erred in saying that the identity was not material to the case,” stated Muchadehama.

He added: “The Court erred in holding that it was the Accused’s duty to lead evidence from the Registrar-General’s Office to prove the 2nd witness’ identity. Copies of the 2nd witness’ identity documents were filed of record by consent, the Court accepted them and so were various internet extracts and photograph.”

“The Court also erred in holding that the witness’ identity had no bearing on his testimony. It also erred in that the question of identity had a bearing on the question of credibility of the witness and consequently on the State case. It is submitted that the 2nd witness’ identity was put in issue to show that he was a dishonest witness,” stated Muchadehama, adding that the Court was wrong in relying on the evidence of a “dishonest” witness.

Muchadehama stated that Magistrate Jarabini failed to say whether or not Shoko/Chitiyo was credible and whether he believed him and the reasons for believing him.

Further, Shoko/Chitiyo failed to give any evidence on the six conspiring to commit public violence. *Continued on Page 3*

‘Zim Six’ Timeline

Munyaradzi Gwisai, Antonater Choto, Tatenda Mombeyarara, Edson Chakuma Hopewell Gumbo, and Welcome Zimuto case timeline:

- February 2011: arrested together with 39 others for watching video footage of Egyptian revolution
- March 2011: charges against 39 others dropped, leaving Gwisai and the other five to face treason charges
- July 2011: State drops treason charges. Prefers conspiracy to commit public violence, alternatively inciting public violence or participating in a gathering with intent to promote public violence, breaches of peace and bigotry charges. Trial fails to kick off as Magistrates Esthere Chivasa, Morgan Nemadire and William Bhilla all recuse themselves from the case
- September 2011: application to have charges quashed dismissed after Magistrate Kudakwashe Jarabini takes over. Trial kicks off and four state witnesses testify in five months
- February 2012: state closes its case. Defence lawyer Alec Muchadehama applies for discharge at the close of the State case
- February 2012: Magistrate Kudakwashe Jarabini says Gwisai and co-accused have case to answer
- March 2012: Gwisai and co-accused convicted, sentenced to 420 hours community service. Gwisai and co-accused launch High Court appeal

What they said about the Gwisai case

“There is no crime committed by Gwisai. There are two ways of overthrowing a government, one is through an election, and the second method is through mass mobilisation and it is perfectly legitimate for any society to organise against a government. What happens when government steals elections? Mugabe knows that elections do not matter - he will always claim to be still in office. If a government remains in power while not doing anything Zimbabweans have the right to organise,” constitutional law expert and National Constitutional Assembly chairperson, **Lovemore Madhuku**.

“The dictatorship is shaking. It is not yet fallen. This is a temporary reprieve. We are going back into the trenches. We are in the trenches. Their real aim was to put us in as an example ahead of their clear objective of stealing yet another election,” **Munyaradzi Gwisai**.

“Nothing has changed. The situation that we are going through now is what we have been experiencing in the last 10 years or so,” **Japhet Moyo**, Secretary General, Zimbabwe Congress of Trade Unions.

“Any sentence less than 10 years will only bring the justice delivery system to ridicule. Even if

the revolts did not take place, the court should take into account the historical background which our country shares with Egypt. Both countries are (former) British colonies and it happened at Tahir Square and here they said they would start at Africa Unity Square,” State prosecutor **Edmore Nyazamba**.

“Before civilisation, people accused of committing such an offence would be stoned to death even without trial,” prosecutor **Edmore Nyazamba**

“Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resist the authorities resists what God has appointed, and those who resist will incur judgment,” prosecutor **Edmore Nyazamba**, quoting the book of Romans.

“Any sentence that the court must take into account should consider that the accused were punished through torture. There is no reason to take them to prison,” **Alec Muchadehama** in mitigation before launching appeal.

“A lot of Commonwealth organisations are disturbed by this development. Many of us are working towards the eventual return of Zimbabwe

to the Commonwealth of Nations are worried about the signal the conviction and sentencing of Tafadzwa and her colleagues sends about the Government of Zimbabwe’s commitment to Commonwealth principles and values. The RCS sympathises with the families of the six activists, and the brave lawyers who defended them,” **Dhananjayan Sriskandarajah**, the Director of the Royal Commonwealth Society.

“Such medieval actions blemishes Zimbabwe as the only country which penalizes its citizens for merely watching television and discussing world trends and events. This is clearly part of the reason why Zimbabwean authorities elected to opt out of the Commonwealth so as to escape censure and scrutiny from their peers in light of Commonwealth values which uphold democracy, human rights, rule of law, and independence of the judiciary amongst others,” **Kumbirai Mafunda**, one of the Commonwealth Professional Fellows. He is a media and human rights campaigner.

“The Prime Minister is disturbed that the government he serves could criminalise people for watching videos. This not only besmirches the government’s image, but serves to confirm that Zimbabwe has not moved an inch in its respect

for human rights,” **Luke Tamborinyoka**, Prime Minister Morgan Tsvangirai’s spokesman.

“The Court has chosen a compassion approach against these accused who had strayed from the correct path,” **Magistrate Kudakwashe Jarabini** justifying why he imposed a non - custodial sentence.

“The trial was a deeply flawed show trial meant to strike fear in the hearts and minds of bonafide Human Rights Defenders, who have been executing legitimate work in Zimbabwe to promote democracy, good governance and above all conscientising Zimbabweans of their constitutionally guaranteed rights. From the beginning, the arrest, and the torture meted on the activists and their trial had all the hallmarks of political persecution meant to clampdown on dissenting voices,” **McDonald Lewanika**, director of the Crisis in Zimbabwe Coalition, and a Commonwealth Professional Fellow.

Tafadzwa Antonater Choto was awarded a Commonwealth Professional Fellowship in 2011 (CPF) but was unable to take it up as she was arrested and her passport confiscated for allegedly watching video footage of the Arab Spring protests.

Continued on Page 3

Tortured soldier sues minister

...case gives insight into vicious military justice system

HARARE-A man who joined the army, dedicated his life to serving the nation, but ended up being tortured is demanding US\$ 1, 5 million from Minister of Defence, Emmerson Mnangagwa and two counter intelligence operatives.

Sergeant Wilfred Jaure said he suffered severe torture led by two "sadistic" counter intelligence operatives during a punishing 277 days of detention at a military holding facility between July 2008 and

April 2009. In a lawsuit filed at the Supreme Court, Jaure said he spent almost a year in a "dark room" with Lieutenant Huni and Warrant Officer Class One Muzira leading the torture.

Jaure contends the two were acting on the orders of their employer, the Zimbabwe National Army, which falls under Mnangagwa's control, and he wants them to pay for their actions.

In his court papers, Jaure cited Mnangagwa as the first respondent, Lieutenant Huni as the second respondent and Warrant Officer Class 1 Muzira as the third respondent. The Attorney General is cited as the fourth respondent.

Before his ordeal, Jaure was a member of the army's crack Commando unit.

"I was arrested on 24 July 2008 by officers of the Zimbabwe National Army Counter-Intelligence Unit and I was immediately detained on the same day. I was only released from the said detention on 28 April 2009. In total I spent 277 days in army custody without a hearing and/or Court Marshall," said Jaure in court papers.

Tawanda Zhuwarara of Zimbabwe Lawyers for Human Rights is representing Jaure.

Jaure said his captors accused him of delving in politics.

"The conditions of my incarceration, the torture, taunts and psychological torment drove me to near insanity," stated Jaure.

"During the period of torture and detention, I experienced strange transformations all over my

body which included spasms, discoloration of the nails due to electric shocks, extreme pain all over my body, dizziness, painful migraine headaches, insomnia and when I did get to sleep I had constant nightmares," the former soldier said.

He said he was systematically denied medical attention in spite of numerous requests for treatment of his wounds and injuries.

Jaure said he had spent his tenure in the army dedicated to protecting the nation.

"What is constitutionally repugnant in my case is that the torture was carried out by army officials. The army in my view is designed to protect its citizens as well as its own officers and soldiers not to harm them. The army and its personnel are subject to the rule of law and are not exempt from liability where they violate constitutionally enshrined rights," stated Jaure.

His affidavit gives a rare insight into the dark side of military justice.

"The interrogations involved extreme torture, which torture I was made to undergo for consecutive days," said Jaure.

AMNESTY INTERNATIONAL PRESS RELEASE

21 March 2012

Zimbabwe: Sentencing of activists a setback for freedom of expression

The decision to convict and sentence six activists to community service and a fine for organizing a video screening on events in North Africa last year is a setback for freedom of expression in Zimbabwe, Amnesty International said.

The court ordered the men to carry out 420 hours of community service and fined them US\$500 after they were found guilty of "conspiracy to commit public violence".

"The court's decision to convict people who were merely exercising their internationally guaranteed right to freedom of expression is simply shocking. It's a reminder that Zimbabwe is still an unsafe place for activists," said Erwin van der Borgh, Amnesty International's Director for Africa.

"This ruling instils fear in anyone defending human rights in Zimbabwe. It is likely to restrict the work of activists in the country, and the convictions should be overturned immediately."

The six convicted activists are University of Zimbabwe law lecturer and former opposition

parliamentarian Munyaradzi Gwisai, anti-debt campaigner Hopewell Gumbo, Zimbabwe Labour Centre director Antoneta Choto, student leader Welcome Zimuto, and social activists Eddson Chakuma and Tatenda Mombeyarara.

Munyaradzi Gwisai and 44 social justice, trade union and human rights activists were arrested by police in February 2011 as they were attending a lecture entitled 'Revolt in Egypt and Tunisia - What lessons can be learnt by Zimbabwe and Africa'. Thirty-nine of the activists were later acquitted.

Following their arrest, all six activists told the court that they were tortured while in police custody and spent some 27 days in jail before being released on stringent bail conditions.

"The conviction of these activists shows there is still an urgent need for reforms to ensure respect for people's human rights in Zimbabwe. The unity government has done little to respect and protect fundamental freedoms" said Erwin van der Borgh.

"The hell Jaure went through"

- Interrogators using electric shocks all over Jaure's body, especially his genitalia, hands and toes.
- Sometimes hitting Jaure's genitals with elastic bands.
- Periodic vicious and sadistic attacks all over Jaure's body using various objects, which included iron rods, switches and other crude implements.
- Being hung upside down with his head submerged in a bucket of water to simulate drowning.
- Systematically starved, by being subjected to what army personnel call a spare diet. This involves one meal a day - often just sadza without any relish.
- Forced to wear leg irons for considerable periods of time when he was not being moved.
- Interrogators repeatedly taunting Jaure and suggesting he was to be killed soon.
- Barred from bathing, and cell not cleaned.

Gwisai appeals



Edmore Nyazamba... he would have been happier had the six activists been sent to jail.

Continued from Page 2

His evidence, Muchadehama stated, did not incriminate Gwisai and his co-Accused.

"What the witness attempted to do was to interpret his own perceptions of the video, give an opinion on the same and impute this to the Appellants. Unfortunately the Court fell in the same error," stated Muchadehama, adding that Magistrate Jarabini "appears to have worn the 2nd witness' shoes" in his reasoning.

Convicting Gwisai, Choto, Mombeyarara, Chakuma, Gumbo and Zimuto, Magistrate Jarabini described the group's watching of the video as "pathetic and to imagine what was happening in the video happening in Zimbabwe...could have been disturbing."

In the appeal, Muchadehama tears into the Magistrate's reasoning.

"It is submitted that the Magistrate was giving a subjective view of the video. Even in light of the 2nd witness' evidence that the video was shown as a time killer, the Magistrate held that the video was

shown to arouse feelings of hostility. In fact, the Magistrate removed the judicial cloak, jumped into the arena and started behaving like the 2nd witness who would interpret the video and impute his subjective view to the Appellants. The Court failed to consider that the video contained news clips about stale news of the Egyptian events," argued Muchadehama.

"Why would people's feelings suddenly get aroused on that day, when they had seen the news before?" queried Muchadehama, adding that Magistrate Jarabini convicted the six for watching the video.

Muchadehama said Magistrate Jarabini failed to distinguish between watching a video and showing the video.

"The Court instead said the video was played to arouse feelings of hostility. The Court failed to show whose feelings were meant to be aroused. Is it the Appellants' or the audience's? The emphasis on the video by the Magistrate was therefore misplaced and untoward hence the submission that the Court was taking a subjective view of the facts and had descended into the arena," argued Muchadehama.

What they said

Continued from Page 2

The Law Society of Zimbabwe is concerned at the conviction of Munyaradzi Gwisai and 5 Others this week on a charge of conspiracy to incite violence.

In our view the administration of justice ought always to reject laws curtailing individual freedom and act to protect rights of ordinary Zimbabweans except in extraordinary circumstances which justify restrictions. In normal political contestation it is unjust to criminalise free expression.

LSZ is therefore critical of all unjust laws including the one applied upon Gwisai and others and it is concerned too when courts enforce unjust laws in the face of Constitutional guarantees to freedom of expression.

We shall wait eagerly for the appeal outcome. In the meantime we hope that the constitutionality of the many freedom-unfriendly laws in Zimbabwe's Statute book will be determined upon sooner rather than later. Our hope too is that the authorities will step back and assess the damage which this has caused before pursuing similar cases again."

'Zim 6' to appeal against sentence

"The Legal Monitor managed to capture mixed emotions after six activists escaped a jail sentence and were fined \$500 each plus each of them has to perform 420 hours of community service."

