



FILE REF ZHRC/CI/0045/17

In the matter between:

ANNA MASUKA

COMPLAINANT

And

CONSTABLES DZIMANO

1ST RESPONDENT

And

ZIMBABWE REPUBLIC POLICE

2ND RESPONDENT

REPORT

1. INTRODUCTION

- 1.1 This report contains findings of the Zimbabwe Human Rights Commission (ZHRC/Commission), pursuant to an investigation undertaken by the ZHRC into a complaint alleging violation of the rights of arrested and detained persons and freedom from torture, cruel, inhuman or degrading treatment or punishment. The complainant is Anna Masuka of Ngundu Village, Ward 11, Gutu District, Masvingo Province. The complaint was

lodged with the ZHRC on 30 May 2017 and the field investigation was conducted from the 25th to the 27th of June 2017.

2. BACKGROUND TO THE INVESTIGATION

2.1. Complainant alleges that around 9 March 2017, villagers in her village demolished a church structure constructed by Morning Glory Church in their area. Around 12 March 2017, complainant and another villager were taken by police officers who included Constable Dzimano for questioning at Chinyika Police Base. They were released the same day. On 2 April 2017, two police officers, Constables Dzimano and Mlumbwa went to complainant's homestead intending to arrest her. She asked why they were taking only her yet the structure was demolished by the whole village. Constable Dzimano then forcefully grabbed her left hand and handcuffed her, injuring her hand in the process. She protested to the handcuffing arguing that her religion (Mwazha Christian Apostolic Faith) did not allow her to be handcuffed and that she was agreeing to go with them to the police station as they did on the first day of arrest but Constable Dzimano ignored her and started dragging her further injuring her in the process. Her blind mother who was sitting by the wall outside the hut asked what was going on and complainant told her that she was going to the police base. Complainant asked to change her clothes since she was menstruating and to take her tablets for chest pains but Constable Dzimano ignored her and continued to drag her.

2.2. On their way to the police base Constable Dzimano instructed her to run in front of the bicycles the officers were cycling but she refused. When the officers were deviating from the route she knew to the police base she asked where they were going but Constable Dzimano told her that she would do what he wanted. She refused to go their way because she feared for her life since there were no other people with them and because of the attitude of Constable Dzimano. Constable Dzimano tried to force

her by pulling her with handcuffs whilst dragging her on the grass but she resisted.

2.3. She was injured in the process and her hands got swollen. Constable Dzimano then started squeezing her nipples and hips and fondling her body. He tied her to a pole on the school fence of Nyamandi High School. Whilst tied to the pole from around 0700 hours to around 1400hrs she was exposed to the sun and had no access to ablution facilities.

2.4. Her cousin, Timothy Masuka who heard her cries whilst she was being dragged by the police went to the scene but by the time he arrived complainant was handcuffed to the pole but the police officers had left. He then called other villagers who waited for the police officers to come and asked them why they had tied her. Constable Dzimano then asked for forgiveness but complainant refused to accept the apology.

2.5. Complainant did not report the matter anywhere but police officers from Bhasera Police Station went to her homestead to investigate the matter. She was interviewed by a Chief Inspector and Sergeant Kuchera which led to the arrest of Constable Dzimano. The matter is pending before Gutu Magistrates Court. It was set down for 15 May 2017 but trial could not commence because complainant's witnesses had no transport fares to travel to Court.

3. MANDATE OF THE COMMISSION

3.1 The ZHRC is established as an Independent Commission in terms of Section 242 of the Constitution of Zimbabwe. The functions of the ZHRC are set out in Section 243 (1) (a)–(k) and include among others; to promote awareness of and respect for human rights and freedoms at all levels of society; to promote the protection, development and attainment of human rights and freedoms; to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate; and to investigate the conduct of any authority or

person where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person. Furthermore, the ZHRC can recommend the prosecution of offenders where human rights or freedoms have been violated.

- 3.2 The Zimbabwe Human Rights Commission Act [Chapter 10:30] in Section 9, empowers the ZHRC to conduct investigations into allegations of human rights violations.

4. METHODOLOGY

In conducting its investigations, the ZHRC employed a number of research tools encompassing desk research, focus group discussions, interviews with key informants and interviews with the complainant and the respondents.

4.1 Desk Research

The ZHRC conducted wide legal research into the framework governing human rights locally, regionally and internationally. This was done in order to identify and assess the human rights that were allegedly violated by the respondents.

4.2 Focus Group discussions (FDGs)

One Focus Group Discussion (FGD) was held in Ngundu Village at the village meeting place near Nyamandi High School in order to get a clear understanding of the case under investigation. The group comprised of twenty-two (22) women and eighteen (18) men from Ngundu and Rashamira villages. Both villages use the same grazing land and are headed by the same village head.

4.3 Interviews

The ZHRC interviewed complainant, her witnesses and respondents in order to make a balanced assessment of the situation. The interviews were used to extract qualitative data. The informants were not gathered in

a corporate meeting. Individual meetings were organised in recognition of the quality of data expected from this interaction as well as to maximise on the meeting with interviewees' knowledge on the investigation at hand.

The ZHRC interviewed the following:

3.3.1 The Officer in-Charge of Bhasera Police Station in Gutu District.

3.3.2 The Public Prosecutor of Gutu Magistrates Court.

These were targeted because of the various roles they play in their respective departments in protecting the human rights of citizens and in ensuring accesses to justice of complainant.

3.3.3 Complainant's two witnesses who were testifying for the state in court.

5. FINDINGS FROM COMMUNITY CONSULTATIONS

From the focus group discussions and interviews carried out during investigations, the ZHRC made the following findings:

5.1 The Police used unnecessary force in arresting Complainant

Complainant stated that when the police officers deviated from the route to the police base that was used by many people opting to use a bushy area, she refused to go their way because she was fearing for her life since there were no other people with them and because of the attitude of Constable Dzimano. Constable Dzimano then tried to force her by pulling her with handcuffs whilst dragging her on the grass. She was injured in the process and her hands got swollen. Her dress was also torn in the process.

5.2 Complainant was unnecessarily detained and ill-treated by the police

The villagers indicated that Constable Dzimano tied complainant to a pole on the school fence using handcuffs. Complainant's cousin who heard complainant's screams when she was being dragged by Constable Dzimano arrived at the scene and found complainant tied but the police had gone. He then called other villagers who gathered there until the two police officers came back seven hours later. They further stated that Constable Dzimano apologized to Complainant and to the villagers for tying complainant to the pole. He then unlocked the handcuffs and set her free.

5.3 Violation of traditional values by the Village Head

The villagers argued that the church was built on grazing land and that there was a letter from the District Administrator's office dated 24 June 2005 which stated that no structure was allowed to be built on that land and no one was allowed to cultivate on it. The office of the District Administrator reaffirmed the position in writing in 2016. Villagers alleged that the village head and the Chief of their area were disposing of the communal grazing land in a corrupt manner. They further advised that the village head confessed at a village meeting that he had received money from the church leaders to allocate them that land. The villagers stated that they were concerned that the church was built on a place where they take stones for their burials because in their culture they are not buried in sand. They also use the stones for building their homes. They said the place was their cultural heritage with a respectable grave and they perform their cultural rituals there. They further stated that over the past ten years three villagers tried to build on that land but they were reprimanded by the community. The villagers indicated that there was an area allocated for building churches in the community where other churches were built. They further stated that, grazing land was already scarce in their area hence their cattle would not have anywhere to graze if the land was constructed on.

5.4 The Public Prosecutor failing to represent state witnesses

Complainant and villagers complained that they were being summoned to attend Court but when they get to Court only one person testifies and they are required to go back to Court at a later date that is communicated to them by the Court. They said this was disrupting their work since it was harvest time and they were using a lot of money since each person required eight dollars for transport to travel to and from Court per day. At one point they were arrested for contempt of Court when they failed to attend Court because they did not have transport fares. They were also outraged that the investigating officer did not include in complainant's statement the fact that Constable Dzimano indecently assaulted Complainant.

6. APPLICABLE LAW

6.1 The Constitution of Zimbabwe Amendment (No.20) Act 2013

The complaint before the ZHRC is that the rights of arrested and detained persons, freedom from torture, cruel, inhuman or degrading treatment or punishment were violated by the Zimbabwe Republic Police. The Constitution of Zimbabwe is the supreme law of the land and the following provisions are key:

6.1.1 **Section 49 (1) (b)** which provides that *“Every person has the right to personal liberty, which includes the right not to be deprived of their liberty arbitrarily or without just cause.”*

6.1.2 **Section 50 (1) (c)** states that, *“Any person who is arrested must be treated humanely and with respect for their inherent dignity.”*

Recognition to respect fundamental human rights and freedoms of the people is one of the cornerstones of Zimbabwe’s founding values and principles as enshrined in **Section 3 (1) (c)** of the Constitution.

6.1.3 **Section 53** provides that *“no person may be subjected to physical or psychological torture or cruel, inhuman or degrading treatment or punishment”*. This section is one of the most essential rights particularly in the context of the present complaint.

6.1.4 **Section 70 (1) (a)** which provides that any person accused of an offence has the right to be presumed innocent until proved guilty.

6.2 National Legislation

6.2.1 The Criminal Law (Codification and Reform) Act [Chapter 9:23]

Section 93 (1) (a) which provides that any person who deprives an adult of his or her freedom of bodily movement, intending to cause such deprivation or realizing that there is a real risk or

possibility that such deprivation may result, shall be guilty of kidnapping or unlawful detention.

6.2.2 Police Act [Chapter 11.10]

The Act provides for the functions and disciplinary procedures of the Police Service. The Schedule to the Act provides for the following offences:

- 6.2.2.1 Section 19 provides that it is an offence for a Police officer to unnecessarily detain any person in custody.
- 6.2.2.2 Section 21, *'Using unnecessary violence towards, or neglecting or in any way ill-treating any person in custody or other person with whom he may be brought into contact in the execution of his duties.'*
- 6.2.2.3 Section 34, *'Omitting or neglecting to perform any duty, or performing any duty in any improper manner'.*
- 6.2.2.4 Section 35, *'Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force.'*

6.3 International Law

6.3.1 Universal Declaration of Human Rights (1948)

The general principle of liberty is a fundamental element of international human rights law. **Article 3** states that 'Everyone has the right to liberty.... of person'. **Article 5** provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' **Article 11 (1)** further provides that *'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'*

6.3.2 International Covenant on Civil and Political Rights

Article 7 of the Convention provides that, '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.....*' **Article 9 (1)** further provides that everyone has the right to liberty or security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 10 (1) states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

6.3.3 African Charter on Human and People's Rights

Article 4 of the Charter provides that, '*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*' **Article 5** 'Every individual shall have the right to the respect of the dignity inherent in a human being..... all forms of exploitation and degradation of men..... inhuman or degrading punishment and treatment shall be prohibited.' **Article 6** further provides that, 'every individual shall have the right to liberty and to security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

7. RESPONSE FROM INSTITUTIONS CITED BY THE COMPLAINANTS

In accordance with the *audi alteram partem* rule ("let the other side be heard as well"), the ZHRC held separate meetings with the respondents so as to hear their side of the story. From the separate meetings and in response to the allegations raised by the complainants, the following information was gathered:

7.1 Interview with the Officer In-Charge Bhasera Police Station.

The Officer in Charge was Inspector Munyori. He stated that the matter came to his attention following viral social media messages which he received whilst attending a meeting at the Police District Headquarters at Nyika. He advised his superiors about the

messages. He then travelled to Complainant's homestead to ascertain the matter. After his investigation he charged Constable Dzimano in terms of the Criminal Law (Codification and Reform) Act and in terms of the Police Act. In terms of the Police Act he charged him with performing his duties in an inappropriate manner. A disciplinary hearing was conducted at Nyika. Constable Dzimano was convicted and recalled from being a Member-in-Charge of a police base to being an ordinary police officer at the Police Station under the supervision of other officers. In terms of the Criminal Code, Constable Dzimano was charged with kidnapping or unlawful detention. The docket reference was CR 26/3/17. The case was still pending at Gutu Magistrates Court. It was at trial stage.

The Officer in Charge further advised the ZHRC that the complainant and two other villagers were charged with malicious damage to property in terms of the Criminal Code. They were alleged to be ring leaders of the demolitions. The trial of that case was yet to commence at Court.

7.2 Interview with the Gutu Public Prosecutor.

The ZHRC interviewed the Prosecutor in Charge of Gutu Magistrates Court in order to ascertain the case of the complainant. The Prosecutor advised that Complainant's case was still pending at Court. It was at trial stage. Concerning complainant's concerns about issues arising during cross examination, the Prosecutor advised that there was an omission of the essential details of the case by the Investigating Officer who omitted to include that Complainant's breasts and body were fondled by Constable Dzimano which amounts to a sexual offence of indecent assault. The ZHRC inquired whether the Prosecutor did not also have a duty at set down stage to ensure that the recorded statement from the police was reflective of complainant's case. The Commission also inquired whether the Prosecutor communicated to the state witnesses that they were entitled to witnesses' expenses to cover for their transport expenses. The Prosecutor advised that she had done the necessary documents for the witnesses to get their expenses and would ensure that they got reimbursement. The Prosecutor further

advised ZHRC that there was another pending case involving complainant on the allegations that together with other villagers she illegally demolished a church structure.

7.3 Interview with the Masvingo Area Public Prosecutor (APP)

The ZHRC paid a courtesy call on the Area Public Prosecutor and highlighted to him complainant's concerns regarding the case proceedings. The ZHRC advised that the complainant was not clear about how the case was proceeding, and as such it was advisable for the prosecution to explain to complainants the court procedures so that they could know what to do when in Court. The ZHRC also highlighted the issue of witnesses' expenses, information which was not made available to state witnesses resulting in them failing to travel to Court and being arrested for contempt of court when they failed to attend Court. The Area Public Prosecutor advised that he would engage the Judicial Services Commission to ensure that the witnesses' expenses were available. He further advised that he would remind the prosecutors to always advise state witnesses of their entitlement to receive witnesses' expenses.

8. ANALYSIS OF VIOLATION OF HUMAN RIGHTS

The rights that the ZHRC found to have been violated are discussed and analysed in detail below.

8.1 Rights of arrested and detained persons (Section 50 of the Constitution of Zimbabwe).

According to the Constitution any person who is arrested must be treated humanely and with respect for their inherent dignity. In the present case, complainant was physically, sexually, and emotionally abused by Constable Dzimano in violation of this right.

9. FINDINGS FROM INVESTIGATIONS

Based on the investigations conducted by the ZHRC and analysis of the Constitution and the applicable law, the ZHRC made the following findings;

- 9.1 Constable Dzimano was charged for abusing complainant in terms of the Criminal Code and in terms of the Police Act.
- 9.2 The Public Prosecutor did not perform her duty to represent state witnesses by failing to ensure that all the relevant issues to the case including sexual abuse were captured in the witness' statement. She also failed in her duty by failing to advise state witnesses on the court procedure so that they could understand why they were attending Court without all of them getting the opportunity to testify and why it was important for them to attend court until they were excused. She also did not advise them on their right to receive witnesses' expenses for transport.
- 9.3 The villagers demolished the church structure which was built on their grazing land.

10. CONCLUSION

From the above observations the ZHRC concluded that the ZRP made a rapid response to the matter through urgent investigation of the matter and by charging Constable Dzimano in terms of the Police Act and the Criminal Code and by reprimanding and warning him. The National Prosecuting Authority needs to ensure that the Public Prosecutors actively represent the state witnesses.

11. RECOMMENDATIONS

From the aforementioned report and findings, the ZHRC makes the following recommendations:

11.1 TO THE ZIMBABWE REPUBLIC POLICE

The Zimbabwe Republic Police should ensure that the human rights of suspects are always respected.

11.2 TO THE NATIONAL PROSECUTING AUTHORITY

The Public Prosecutors should be reminded at all times of their duty to represent the state witnesses and give the state witnesses the necessary advice in all cases.