

SPENCER JOUBERT
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUSHORE JJ
HARARE, 1 & 23 March 2016

Criminal Appeal

P. Mtukwa, for the appellant
E. Makoto, for the respondent

MUSHORE J: The appellant was found guilty and convicted of one count of indecent assault as defined in s 67 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 8 months imprisonment of which 4 months were suspended for 5 years on condition of good behaviour. The remaining 4 months were suspended for 5 years on condition of good behaviour. The remaining 4 months were suspended on condition that the appellant completed 140 hours of community service at the High Court of Zimbabwe. Aggrieved by both the conviction and sentence, the appellant filed an appeal.

On the day prior to the hearing the respondent filed a notice by the Prosecutor-General to the Registrar of the High Court in terms of s 35 of the High Court Act, [*Chapter 7:06*]. In its notice, the respondent gave its reasons for the concession it was making as against the conviction, which reason I will not dwell upon in any great detail save to state that the respondent found the conviction to be unsafe on the basis that the complainants evidence was insufficient and inconsistent. The court's focus at the hearing was to invite submissions on the Notice of Appeal itself because from a preliminary perusal of the notice it appeared the grounds of appeal filed by the appellant fell short required standard set out in r 22 (1) of the Supreme Court (Magistrates Courts) Criminal Appeals) Rule 1979 (S.I. 504/79).

Whilst making submissions, counsel for the appellant conceded (and properly so in my view), that grounds 1, 2, 3 and 5 were not proper grounds in terms of the rules.

Regarding the one and only ground against sentence, counsel for the appellant abandoned it, his reason being that the appellant had already performed the community service part of the sentence and thus there was little point in pursuing it.

All that remained from the entire notice of appeal was ground 4 as against conviction, which counsel for the appellant resolutely submitted was a proper ground in terms of the rules. In its reply, the respondent argued that on hindsight ground 4 was also defective.

Ground 4 of the notice of appeal is framed as follows:

“4. The court *a quo* erred at law by convicting the appellant when there was reasonable doubt that the complainant was lying in her evidence. In so doing, the court *a quo* therefore erred in convicting the appellant on the mere uncorroborated testimony of a single witness which was strongly weakened by the appellant in his defence”.

Rule 22 requires an appellant to set out grounds of appeal clearly and specifically. There is ample judicial precedent elaborating upon what is required by an appellant in presenting grounds which are clear and specific. Generally speaking where the grounds lack clarity to such an extent that they do not inform the appeal court where exactly and specifically it can be said that the court *a quo* misdirected itself, then and in that event, the notice of appeal will be fatal to the appeal. It is not enough to allege a misdirection and not point out to the appeal court where specifically the court *a quo* misdirected itself.

In *S v Jack* 1990 (2) ZLR 166 (S) McNally JA stated at p 167G:

“It seems to be widely believed that when a client who has been convicted and sentenced belatedly instructs a legal practitioner, all that is necessary is that a notice of appeal be lodged setting out the most cursory and meaningless ground, with (sometimes) the proper grounds will be substituted when the record is available. This is not so. A notice of appeal without meaningful grounds is not a notice of appeal. Since it is a nullity it cannot later be amended”.

In *R v Emerson* 1957 R & N 743, Beade CJ with the approval of a full bench had this to say:

“I do not consider that such general grounds of appeal as, “the conviction is against the weight of the evidence”, or “the evidence does not support the conviction” or “the conviction is wrong in law” are in compliance with the rule.”

Turning to the present case, and to the appellant’s ground under scrutiny, there is nothing clear in the statement:-

“4. The court *a quo* erred at law by convicting the appellant where there was reasonable doubt that the complainant was lying in her evidence.”

The language used here is so generalised as to fall well short of the rules.

The appellant continues

“4. The

In so doing (?) the court *a quo* therefore erred etc.....”

Ground 4 is not a proper ground of appeal for want of compliance with r 22 (1). In the result, the notice of appeal is defective in its totality.

I need to remark on the tendency for legal practitioners to attempt to cause the defect to be cured at the actual hearing by ploughing into the record of proceedings to find evidence in order to improve upon or amplify their notice of appeal.

Let it be made known to all legal practitioners that a nullity is a nullity; it is incapable of being amended either *viva voce* by filing an amended notice of appeal at the hearing itself. It is therefore neither competent nor is it desirable for an appellant to attempt to enjoin an appeal court to make an enquiry into the evidence in order that a defective notice be built upon, modified and/or improved from a nullity to something less obscure. Such a defective notice guarantees the demise of an appeal.

It is disconcerting that legal practitioners appear to think that they can prepare notices of appeals without ever having properly studied the rules or ever having looked at them. Legal practitioners are encouraged to properly acquaint themselves with the rules prior to preparing a notice of appeal.

In *S v Mc Nab* 1986 (2) 280 (S) at pp 283H to 284A Dumbutshena CJ had this to say:-

“It is in the discretion of the court to refuse condonation even in cases in which the respondents do not object to relief being granted to the applicants. In cases in which defective notices of appeals are filed in most cases applicants’ legal practitioner who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioner. In my view, clients should in such cases suffer for the negligence of their legal practitioner.”

Steyn CJ in *Salojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) pp 141 C gave the position thus:-

“There is a limit beyond which a litigant cannot escape the result of his attorneys’ lack of diligence or insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect of this court.”

In the present matter such is the fate which befalls the appellant. Rule 22 is peremptory and judicial precedent is clear on the point.

In the light of the foregoing, the appeal fails at the first hurdle for want of compliance with the rules. That being so there is no appeal before the court. The matter is struck off the roll.

Musengi and Sigauke, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners