

PETER CHIKUMBA
and
GRACE NYARADZAYI PFUMBIDZAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 29 March 2016 & 12 April 2017

Criminal Appeal

MUSHORE J: The appellants were charged, tried and convicted in the magistrates court of one count each of Criminal Abuse of Duty as defined in s 174 (1) (a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. They were each sentenced to 10 years imprisonment with 3 years suspended for five years on conditions of good behaviour. At the time when the offences were allegedly committed, the first appellant was employed by Air Zimbabwe Holdings (Pvt) Ltd as the Group Chief Executive and the second appellant was employed as the Company Secretary and Legal Manager. It was alleged by the State that the appellants, whilst acting in concert, wrongfully and unlawfully appointed Navistar Insurance Brokers (Pvt) Ltd [hereinafter referred to as “Navistar”] without going to tender as is strictly required by law; and thereby showed favour to Navistar. The State alleged that the appellants conduct was inconsistent with their duties as public officers because it was required of them as public officers to have gone to tender to invite offers from other companies.

Section 174 (1) (a) of the Criminal law (Codification and Reform) Act reads:-

“174 Criminal abuse of duty as public officer

(1) If a public officer, in the exercise of his or her functions as such, intentionally-

- (a) does anything that is contrary to or inconsistent with his or her duties as a public officer; or
- (b) omits.....

for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both”

For the sake of completeness, I mention that the appellants were charged in the alternative with having contravened section 30 of the Procurement Act [*Chapter 22:14*] as read with s 5 (4) (a) (2) and s 35 of the Procurement Regulations [S.I. 171/2002] which deals with the appellants' statutory obligation to have gone to tender in specific circumstances, such as the circumstances of this matter. Because the appellants were convicted in the main, the alternative charge became immaterial.

The first appellant raised 19 grounds against conviction and 5 grounds against sentence in his initial notice of appeal which was filed with this court on 21 April 2015. The second appellant raised 7 grounds against conviction and 4 grounds against sentence in her initial notice of appeal which was filed on 16 April 2015.

On 1 September 2015, roughly five months after the initial notices of appeal were filed, the appellants both filed notices of amendments to their grounds of appeal. The first appellant announced his intention to add a further 4 grounds to his 19 initial grounds of appeal against conviction. The second appellant sought to add a further 3 grounds to her initial 7 grounds of appeal against conviction. It is noteworthy to mention that the first and second appellants' proposed additional grounds were identical in all respects.

On the day of the appeal hearing, counsel for both appellants' got up to introduce their new notices of appeal; and to move for their amendments to be adopted. The respondent's counsel objected to the amendments being allowed to be introduced and raised 4 reasons why his objection ought to be upheld.

1. The first point he raised in objection was that that both the appellant's grounds of appeal in their original notices of appeal, were not in compliance with r 22 sub rule 1 of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules S.I. 504 of 1979.
2. The second point was that the first appellant's Heads of Argument are not compliant with r 238 (1) of the High Court Rules, 1971 in that they are long-winded and convoluted and did not serve the purpose for which they were intended. The respondent's counsel suggested that the appellants ought to withdraw the appeal from the roll and ask for an extension of time within which to prepare proper heads of argument.

3. The third point was the amended grounds for both counsel were filed out of time and that neither of the appellants had made the requisite application for condonation. Further he submitted that because both of the appellants' original notices of appeal grounds constitute a nullity and did not comply with the rules, the amended grounds could not be canvassed or relied upon.
4. The fourth point was that the appellants were estopped from raising the point of law which was being raised through the amendment, on the basis that it was being canvassed for the first time on appeal.

Whether there has been a lack of compliance with r 22 (1) of the Rules?

At the commencement of the hearing the first appellant withdrew grounds 7, 9, 10, 11, 12, 13, 14, 16, 17 and 18 from his original notice of appeal against conviction. Thus the first appellant retained grounds 1 – 6, 8 and 15 of the original notice of appeal. The first appellant's counsel submitted that the remaining grounds were in compliance with the rules. Grounds 1 - 6, 8 and 15 read as follows:-

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“Grounds of Appeal (1st appellant)

Ad conviction

1. The court *a quo* erred in fact and in law in convicting the appellant of abuse of duty as a public officer on the basis of the State having proved its case against him beyond any reasonable doubt yet the State had made a concession that it had not satisfied the burden of proof required in a criminal trial against the appellant and that it had no direct evidence linking the appellant to the offence but circumstantial evidence which evidence was clear not enough to satisfy the onus of proving its case against appellant beyond any reasonable doubt.
2. The Trier of fact erred in fact and in law when it convicted the appellant on the basis of evidence of the co-accused person, Grace Pfumbidzai, whom it not find to be a credible witness as she had given a plethora of mutually destructive defences to the charges. Thus the court *a quo* erred in fact and at law in basing a conviction on inadmissible evidence of another accused's extra-curial statement without ensuring that the rules of admitting such evidence and ultimately relying upon it had been satisfied.
3. The trial court grossly misdirected itself in fact and at law when it convicted the appellant yet there was no *nexus* between the appellant and the essential elements

of the offence more particularly that there was no evidence at all that the appellant individually or in connivance with the other accused intentionally and without going to tender appointed Navistar on the 18th March 2009 as the Air Zimbabwe Holdings (Pvt) Limited's Local Aviation Insurance Brokers.

4. The court *a quo* erred at law and in fact I relying on evidence from witnesses who were not credible and whose evidence was materially conflicting and contradicting. The trial court relied on the evidence of one Nyakabau a shopped witness who gave contradictory evidence and whose evidence was clearly a recent fabrication as it materially contradicted grace Pfumbidzayi's evidence in relation to how the alleged presentation and/or meeting involving Navistar, FBC and Coleman had been held or conducted.
5. The court *a quo* erred in fact and at law when it found that the appellant was involved in the appointment of Navistar on the 18th March 2009 yet it found as a matter of fact that the appointment of Navistar was not an Executive Management decision and that Grace Pfumbidzayi had lied that Appellant had told her to appoint Navistar in the presence of one Norbert Machingauta. The Court in fact that appointment was done by Grace telephonically and confirmed by her letter of March 18, 2009.
6. The trier of fact erred in facts and at law when it inferred that the appellant by writing "Grace, for your relevant action" meant she had to process the appointment which 'inference' is not supported by any positive proved facts in that by the 21st March 2009, Navistar had already been appointed and logically the appellant could not have retrospectively sanctioned the appointment of Navistar Insurance Brokers (Pvt) Ltd.
8. The trier of fact erred fundamentally in fact and at law in finding that as a matter of fact the Appellant had held a meeting attended by Marsh Insurers Brokers, ZIMRE and Grace Pfumbidzayi on or about the 17th March 2009 yet there was no evidence led in Court showing that there was such a meeting held by the said parties prior to the 20th March 2019. The court *a quo* erred in fact and at law in failing to appreciate that Exhibit 15 written by Sam Nyamhamba clearly showed that the only meeting involving the four parties had been held on the 20th March 2009 and not before that date as found by the trier of fact.
15. The trial Magistrate erred in fact and at law when she found that the Appellant was not credible witness yet his evidence was independently corroborated by other witnesses whom the court found to be credible and that other documentary exhibits relied upon by the court as well as that the Appellant had been very steadfast in his defence even in the face of intense cross examination"

The grounds which remain and, which I have paraphrased above, consist of an attack on findings of fact rather than raising points of law as is required when taking a decision up on appeal. To that end they are fatally flawed. The second appellant's notice of appeal is also

fatally flawed. Her notice of appeal is crafted in the format of Heads of argument complete with references to case law as one would expect from Heads of argument. Second appellant's original notice of appeal also fails to identify errors on points of law but instead, as is the case with the first appellant. In it she makes numerous of attacks on the court *a quo*'s findings of fact.

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“GROUNDS OF APPEAL AGAINST CONVICTION (Second appellant)

1. The learned Magistrate misdirected herself at law by failing to adopt the correct judicial assessment of all the evidence adduced in the trial. See ***S v Tambo 2007 (2) ZLR 32 [H]***
“the correct judicial assessment of evidence must be based on establishing proved facts whose proof must be a result of a careful analysis of all the evidence led”
2. The learned magistrate misdirected herself at law when she concluded that Budhama Chikamhi the auditor was a credible witness and yet he stood to gain financially from testifying against the Appellant in the trial. See ***S v Tsvangirai 2004 (2) ZLR 210 (S)***
3. The learned Magistrate misdirected herself on the facts when she concluded that Appellant was aware from mid-February 2009 that the airline's fleet was uninsured and yet unchallenged evidence from March Insurance Broker's Chief Executive Mr Nyamhamba was that both the broker and the insured only realised this fact on the 17th March 2009 through a communication from Willis directed through Zimre, the re-insurer.
4. The learned Magistrate misdirected herself on the facts or law when she made a finding that the realization that the airline's fleet was uninsured by the 17th March 2009 did not constitute a crisis or emergency and that was inconsistent to the evidence adduced by the prosecution.
5. The learned Magistrate erred or misdirected herself at law when she failed to appreciate that s 30 (2) of the Procurement Act [*Chapter 22:14*] was meant to provide a safety valve to enable state procurement agencies to procure commodities expeditiously to the benefit of the State and the nation at large in times of dire need and emergencies as was the case herein without following the cumbersome time consuming normal tender procedure. See ***S v Mangoma 2011 (1) ZLR 617 [H]***.
6. In determining whether Appellant abused her office as a public officer, the learned magistrate erred or misdirected herself by omitting to consider the motive and surrounding circumstances behind the appointment of Navistar Insurance Brokers (Pvt) Ltd. See ***S v Mangoma 2011 (1) LR 617 (11) at 623***

Thus the essential element of showing favour to Navistar Insurance Brokers (Pvt) Ltd was not proved. Consequently there was insufficient evidence to prove beyond reasonable doubt that the Appellant was guilty of the crime charged.

7. The learned Magistrate erred or misdirected herself at law by dismissing the Appellant's explanation that the appointment of Navistar Insurance Brokers (Pvt) Ltd was an act of necessity to avert operating an airline illegally/unlawfully due to lack of aviation insurance. See *S v Mupatsi* 2010 (1) IR 529 [H]

"No onus rests on an accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied that not only is the explanation improbable, but beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal"

Of the above grounds of appeal, it was only ground 5 which appears to be an attempt in raising a point of law. However the ground is neither clear nor is it specific and when reading it one is left wondering what the cause for complaint is. It leaves the court without a clue as to the misdirection/s by the court *a quo*'s. Thus the second appellant's initial notice of appeal is fatally flawed. That being the case in respect of both the appellants, there were no appeals before the court on the hearing date.

Neither of the appellant sought condonation for the late filing of their amended grounds, and on that basis alone the notices of amendments themselves are not properly before the court.

The appellants submitted that it is competent to apply for condonation at the hearing of the matter.

However the question is whether or not a fatally defective notice of appeal can be amended. The legal position is that if the original notices of appeal are defective, then there is no appeal before the court. If there is no appeal before the court, then the matter ends there. It is not possible to amend or to seek condonation of a fatally defective notice of appeal. In *Hama v National Railways* 1996 (1) ZLR 664 (SC) the Supreme Court found that if a notice of appeal is fatally defective, then it is incapable of being amended for being incurably bad. Mr *Mpofu* for the first appellant sought to persuade us that the decision in *Hama*'s case supports his contention that he can competently apply for condonation. However the *Hama* case is distinguishable from the present matter in that in *Hama* the party who moved the amendment withdrew its first notice of appeal; thus presenting the amended notice of appeal

as a belated notice of appeal as opposed to an amendment of the original notice of appeal. The Supreme Court in accepting that the original notice of appeal had been withdrawn then regarded the amended notice of appeal as being the only notice of appeal and accordingly treated the notice of amendment as a belated notice of appeal for which condonation could be sought.

In *casu* the appellants are asking us to cause the original grounds cited in the initial notice of appeal to be added to by the new grounds because they are not abandoning their original notices of appeal. As I mentioned earlier the initial notices of appeal filed by the appellants are fatally flawed. In asking us to allow them to add new grounds to a fatally flawed notice of appeal, we find simply that the appellants are not entitled to add to something which is incurably bad.

Furthermore, it is important to recognise that in the *Hama* case, the court was applying its mind to the civil rules of the High Court and the various portions dealing with condonation. Mr *Mpofu* suggested that the measure for competently settled grounds of appeal is that if they are ‘concise’; then they’re sound. The authority for his proposition was a Supreme Court judgment in the matter of *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd and Anor* SC43/13. However, his submission is not applicable to the current set of circumstances because in the *Econet* was focused on the rules for civil appeals and not criminal appeals. The requirement in criminal appeals is that the grounds be outlined in a ‘clear and specific’ manner in terms of r 18 of the Rules of the Supreme Court, 1964 and r 22 910 of the Supreme Court (Magistrates’ Court) (Criminal Appeals) Rules, 1979 as opposed for the requirement that the grounds be framed in a ‘concise’ manner per r 32 (1) of the Rules of the Supreme Court, 1964 which applies to civil appeals.

In *casu* the manner of appealing is governed by a number of rules which are very specific in guiding the parties as to what is and what isn’t permissible.

Rule 6 of the Supreme Court (Magistrate Court) (Criminal Appeals) Rules, 1979 reads as follows:-

“6. Amendment of notice

- (1) The Attorney-General or an appellant as defined in Part V, VI, VII or VIII may amend his notice of appeal by lodging a notice in duplicate with the Registrar setting out clearly and specifically the amendment to the grounds of appeal-
 - (a) in the case of an appeal against conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of an appeal;

(b) in the case of an appeal against sentence only.....”

In the present matter, the notice of amendment was handed up at the hearing of the appeal so the court and the respondent only laid eyes on it for the first time on the hearing date on 28 March 2016, some eleven months after the original notice was filed; and thus well beyond the time limits mentioned in r 6 sub rule 1 (a). The notices of amendment were neither preceded by nor accompanied with any applications for condonation. Instead both the appellants counsel attempted to make them part of their original notices of appeal.

The rules are peremptory. In the instances of a criminal appeal, the trial court must comment upon the decision taken to appeal against its ruling and the reasons for challenging his or her finding. [See DUBE J’s instructive analysis in *Christopher Nyamukapa v The State* HH 60/2012)] However in *casu*, the Magistrate concerned had no knowledge that additional grounds had been raised by the appellants for challenging his/her ruling.

Further, r 28 requires that the magistrate who dealt with the matter should make a statement on the grounds of appeal within four days of the appeal being noted, after which the Clerk of Court is required to remit the statement to the Registrar of the High Court for forwarding to the Supreme Court for an appeal certificate. Rule 28 reads:-

“28. Response by magistrate to notice of appeal

- (1) The magistrate may, within four days of the noting of an appeal in terms of rule 27, deliver to the clerk of the court a statement containing any comments which he may wish to make on the grounds of appeal.
- (2) The clerk of the court shall, as soon as he receives any statement referred to in sub rule (1) and in any event not later than five days after the noting of the appeal in terms of rule 27; send to the Registrar the record of the proceedings of the case together with any statement referred to in subrule (1)”

Thereafter the documents mentioned in r 28 (2) are then forwarded to the Supreme Court for the issuance of a certificate. The magistrate is then required to respond to the granting of a certificate in accordance with r 30:-

“30. Response of magistrate to granting of certificate

- (1) the magistrate shall, within five days of notification in terms of paragraph (a) of subrule (2) of rule 29, so far as may be necessary having regard to any judgment or statement filed of record, deliver to the clerk of the court a statement in writing setting forth the facts which he found to be proved and his reasons for judgment and sentence and dealing with the grounds of appeal; and such statement shall become part of the record”.

Neither rules 6, 28 and 30 have been mentioned by both appellants, and there has been no explanation given why that is so. It is disheartening to see counsel pay little attention to the rules which they should refer to when they prosecute their appeals. The notices of amendment cannot be made in a rushed manner and then expect to pass without a strict observance of the rules.

Besides that, the appellants are trying to cure fatally defective grounds through the unprocedural filing of amendments. Fatally defective grounds can never be amended. The appeals were void *ab initio*.

In any event, the point sought to be introduced through the amended notice, i.e. the defence that the appellants were not public officers at the time the offences were committed, was never raised *a quo*. In fact *a quo* both appellants accepted that they were public officers at the time that the offences were committed. The appellants cannot suddenly introduce a new defence on appeal.

The Heads of Argument filed by both the appellants do not comply with the clear and strict provisions requirement laid out in r 238 (1) (a) of the High Court Rules 1971 both in form and content. They are voluminous and not in a good way. They are rambling narratives which give a factual point of view the way that the appellants would have wanted the court *a quo* to analyse the facts. Both the appellants' heads of argument are of no assistance to the court. They are not clear. No points of law are made neither do they cite any authorities. Accordingly in terms of r 238 (2) of the High Court Rules, 1971 the appellants are deemed to be barred.

It is for all of the above reasons that we find that both appeals must fail. Accordingly we order as follows:

“First and second appellants appeals are dismissed with costs”

HUNGWE J agrees.....