BOTHWELL TAURAI NYAMANDE

versus

THE STATE

HIGH COURT OF ZIMBABWE

MWAYERA & MUZENDA JJ

MUTARE, 6 November 2019

**Criminal Appeal (Reasons for Judgement)**

*C Ndlovu*, for the appellant

*M Musarurwa*, for the respondent

MUZENDA J: On 14 August 2019 the appellant appeared before the senior Magistrate sitting at Mutare facing a charge of Robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that on 13 August 2019 and Kale Church Federation, Dangamvura, Mutare, the appellant unlawfully and intentionally used violence and attempted to strike Tinashe Munyanyi on his hands with an axe and stole GTel X5 cell phone. The appellant who was not legally represented pleaded guilty, he was convicted and sentenced to 5 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of future good behaviour.

On 22 August 2019 the appellant noted an appeal against conviction and advanced two grounds of appeal which were spelt out as follows:

Grounds of Appeal

1. The learned trial magistrate erred and misdirected himself at law when he failed to fully and exhaustively canvass the essential elements of the offence with the appellant who was not legally represented and the conviction is not proper and in accordance with real and substantial justice.
2. The learned trial magistrate erred and misdirected himself at law by failing to explain the gravity of the offence to the unrepresented appellant and to adequately inform him of his constitutional rights relating to legal representation.

On the date of hearing the appeal, Mr *C Ndlovu*, who appeared on behalf of the appellant abandoned ground of appeal number two and chose to pursue the first ground. The state did not have problems with that and the withdrawal of that ground of appeal was allowed. Mr Ndlovu proceeded to attack the proceedings of the court *a quo* arguing that the trial court did not comprehensively and exhaustively put across to the appellant the essential elements of the offence of Robbery, moreso where the appellant was not legally represented. He went on to argue that the essential elements of robbery consists of theft of property by unlawful and intentional using of violence or threats of violence to induce submission to the taking of it from the person of another or in his/her presence. The threat of violence or the violence itself should sustain a charge of robbery or be intended by the perpetrator to induce or cause the owner of the property to relinquish his or her property.

Mr *Ndlovu* further submitted that the reading of the record of proceedings does not show that the essential elements of robbery were established. He added that the trial magistrate did not ask the pertinent question as to what the appellant intended to attain by threatening the complainant with an axe. The essential elements of the charge of robbery, he goes on in his submissions, were not properly canvassed by form of questions put to the appellant by the court *a quo*.

When the court showed Mr *Ndlovu* the manuscript of the record of proceedings, he admitted that the had not read the long hand noted by the court, he also admitted that when the notice of appeal was prepared, the legal firm’s professional assistant might have not read the record of proceedings, he further admitted before the court that after reading the manuscript of the record of proceedings, the attack by the appellant contained in the residual round of appeal had no merit. The trial court comprehensively covered all the essential elements of robbery and the appeal had no merit at all.

It is very disturbing to note that an appeal is prepared by a legal practitioner without first of all going through the whole record of proceedings including the notes captured by a judicial officer, moreso where the fulcrum of the appeal is centred on the allegations of failure by a court to put essential elements of a charge to the appellant. The whole idea of certifying the transcript by all stake-holders is to confirm that what is contained in the transcribed record is a true and accurate reflection of the manuscript. Whether the notice of appeal was prepared by another legal practitioner, the legal practitioner arguing the appeal must acquaint oneself with both the manuscript as well as the transcript. All this is done to avoid misleading the appeal court. Appellant’s legal practitioners found themselves in a very difficult position to attack the conduct of the trial magistrate as it clearly appeared in the record of proceedings that all the essential elements of robbery were competently and clearly put to the appellant and appellant admitted to them without hesitation and was properly convicted on his own plea of guilty.

As earlier indicated herein appellant’s legal practitioners conceded that the appeal had no merit and it was accordingly ordered as follows:

The appeal be and is hereby dismissed.

MWAYERA J agrees \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_