HB 36/07

Judgment No. HB 36/07
Case No. HCA 120/06

KESEGOFETSE DIKATHOLO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 9 OCTOBER 2006 AND 8 MARCH 2007

Mr S Mlaudzi, for the applicant
Ms Wozhele, for the respondent

Appeal

CHEDA J: This is an appeal against both conviction and sentence.

Appellant, a Botswana national was charged with theft by false pretences, he pleaded not guilty but was convicted and sentenced to 7 years imprisonment of which 2 years imprisonment was suspended on condition he restituted complainant and a further 1 year was suspended for 5 years on condition of good behaviour.

The brief facts are that appellant entered into an agreement wherein he was to sell to complainant a Mercedes Benz for $1 900 000 000-00 (old currency). Complainant left for Botswana in order to collect the said motor vehicle after appellant had received the purchase price in Botswana.

On their way to collect the said motor vehicle they were confronted by members of Botswana Police who, on searching them, found that they were in possession of money which money on close scrutiny turned out to be counterfeit.

Appellant was then arrested, tried, convicted and sentenced as indicated supra. At the trial appellant was not represented. He is a Motswana national and is therefore proficient in the Tswana language.

During the trial he advised the court that he would have been comfortable with a Tswana interpreter, but his request was turned down.

On appeal his legal practitioner, Mr Mlaudzi, attacked this denial of his right to a Tswana interpreter among other issues he raised. Some of the issues raised are on the merits. The issue of an interpreter is procedural and it is this aspect of the appeal which I would like to dwell on.

A criminal trial is very rigorous procedure as upon conviction may result in incarceration thus depriving an accused of his liberty or at the worst deprive him of his life. It is for that reason that the State though the prosecutor is burdened with the higher proof of proof beyond reasonable doubt. Further it is accused's constitutional right to receive a fair trial. Section 18(3)(b) states: -

(3) " every person who is charged with a criminal offence-
(a) ----
(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

During the trial the following exchanges between the court and appellant and later on, the prosecutor took place.

"BY ACCUSED (To Court)
Your worship, is (sic) I am not happy about my English.

BY COURT (To Accused)
About your?--- About my English can you please allow me to use Tswana there are some other word that are I hard for me to hear hear?

BY COURT (To Accused)
Which word have you failed to hear?----Some other words I have (inaudible)?
But we have been speaking fluently since morning how did you communicate with the complainant which language did you use and when you come here which language here which language do you see because you told us you were here last June, I mean when you came to Zimbabwe in June last year which language were you using---The last time I came I was using Tswana.
But everything was clear in the morning up to the afternoon what has changed?---Some other words I can not get the meaning.

Other word like what? (Inaudible---) I do not think you are being honest you speak fluent English better than most of us. Yes give me other reason not that reason, you are not being honest?----I wanted to ask the complainant another question but I could not ask him because I did not know some other words to ask him.
Where did you attain your education?----In Botswana.
Up to what level, and you learn English there?----Yes I learnt English there.

BY COURT (To Prosecutor)
Mr. Prosecutor?---I really do not know your worship because even in the communication between him and the police and everyone else and his long warned and caution statement was in English.

BY COURT: (To Accused)
You are honestly not being honest so proceed, because if there was any problem we could have noticed that problem in the morning up to the time we adjourned but there was no problem at all. You take a seat this witness will give evidence. If you have any problem we hear of that problem later.

BY COURT: (To Accused)
May you please answer that question, do not avoid the question?----It is only that some other questions they are hard to me to say in English, you find that sentence is hard for me to say it. Why would the complainant go to report to the police if the deal was about the printing of fake notes which is illegal, why would he go to report himself to the police that he was involved in an illegal of printing fake notes, do you have a reason?----I cannot answer it, it is hard to me that is why I am saying some other questions they are hard to me say…."

This is how the trial proceeded. The language employed by the magistrate and the tone of his questions was in my view calculated to whip the accused into accepting to use the language he was not pro-efficient in. The reference to the use of the English language in Botswana has no relevance at all in this matter. One must remember that it is worse to appear in court in a foreign land. This can be exacerbated by the unfriendly attitude and underlining prejudice of the court. It is clear that appellant had elected to use a language he understood best. This request was turned down. These courts have on time without number

emphasised the adherence by judicial offices to the principle of treating accused persons fairly. Their right to a fair trial is a constitutional right, see *S v Garande* 2002(1) ZLR 297(H) at 302 where Ndou J remarked:

"It is a fundamental principle of our law and indeed of any civilised society, that an accused is entitled to a fair trial. The basic concept is that the accused must be fairly tried."

This is a true statement of our law and I completely associate myself with it. All judicial officers are expected to adjudicate on trials with this cardinal rule in mind and its application is to be applied with absolute certainty. In view of what transpired it is clear that the learned trial magistrate failed to accord the appellant a fair trial by depriving him to conduct his trial in a language he understood best. This failure, therefore, is a gross irregulatory of a material nature.

There are two types of irregulatories, one is that which is so gross in nature that it vitiates the trial, while the other is of lesser nature which the court of appeal is able to separate the bad from good, and to consider the merits of the case, including any finding as to the credibility of witnesses.

This approach was laid down in *S v Naidoo* 1962(4) SA 348 and was quoted with approval in *S v Nyamayevu* 1978 RLR 140.

Therefore, this irregularity, is, in my view, of a gross nature as it breaches appellant's constitutional right to a fair trial. In Nyamayevu's case supra it was held that in such circumstances the conviction should be set aside.

I find that this irregularity is so gross that it vitiates the proceedings. In other words there is no trial worth mentioning under these circumstances. This is a case where as a result of the gross irregularities committed by the court, the proceedings should be set aside without reference to the merits.

Accordingly the conviction and sentence are set aside and the matter is referred back for trial de novo before a different magistrate.

Ndou J……. I agree

Messrs Samp Mlaudzi and Partners, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners