

JORAM NGWENYA

And

CLEOPAS MOYO

Versus

FADZAI MTHOMBENI N.O.

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 22 JUNE 2012 & 17 JANUARY 2013

Adv. S. Nkiwane for the applicants
Ms A. Munyeriwa for the respondents

Court Application

KAMOCHA J: The applicants appeared before the regional court in Bulawayo facing a charge framed in the following manner:-

“Contravening section 131(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23 (Unlawful Entry into Premises and Theft).

In that on the night of 30th of June and 1st of July 2011 and at Matabeleland Taxidermist Company, Bulawayo, Joram Ngwenya, Ngoma Mangoma and Cleopas Moyo or one or more of them unlawfully and intentionally entered into the premises of Matabeleland Taxidermist Company without authority or permission from the lawful occupier and stole seven elephant tusks the property of Matabeleland Taxidermist Company and in their lawful custody.”

The facts as outlined by the state were that the applicants were all employed by Matabeleland Taxidermist Company in Belmont, Bulawayo. On Wednesday 29 June 2011 Joram Ngwenya, who was the first accused in the criminal trial had been instructed by his superiors to stop working on the elephant tusks but ignored the instructions. Instead, he allegedly connived with accused 3 Cleopas Moyo to leave 5 elephant tusks in the skinning room that day and another 2 the following day which was Thursday. They agreed to leave the 7 tusks in the

skinning room which they knew was insecure as it was not secured by any alarm system. That was contrary to the company policy which stipulated that elephant tusks were to be left in the safe which was secured with an alarm system.

Under cover of darkness during the night of 30 June into the morning of 1 July 2011 the two accused teamed up with accused 2 Ngoma Mangoma who had access to keys to the premises and proceeded to the premises and used duplicate keys to open the main gate and then broke into the company skinning room and stole 7 elephant tusks which Joram Ngwenya and Cleopas Moyo had left there. The seven elephant tusks were valued at US\$45 000 and only one of them valued at US\$7 000 was recovered.

All the three pleaded not guilty but accused 1 and 3 were found guilty as charged despite their protestations. Accused 2 was, however, found not guilty and acquitted. Accused 1 and 3 were each sentenced to undergo 10 years imprisonment of which 3 years imprisonment was suspended for five years on the customary conditions of future good behaviour.

Thereafter, the two accused engaged the services of legal practitioners who in their wisdom decided to launch this application for review seeking the following relief:-

“It is ordered that:-

- (1) the conviction and sentence of the applicants by the regional magistrates’ court on the 20th of October 2011 sitting at Tredgold Building in Bulawayo presided by the 1st respondent be and is hereby set aside;
- (2) the matter be referred back for trial *de novo*”.

The applicants’ amended grounds for review were based on two issues. Firstly, they contended that there was no charge called unlawful entry and theft according to the provisions of section 131 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

Secondly, the applicants alleged that the trial court had denied them the right to request statements of outgoing mobile phone calls to prove that they had never called Booker Huni as the court said it was too late to do that.

The record of proceedings, however, does not show where or when the trial magistrate refused or prevented the production of such evidence. At the hearing Mr Nkiwane who represented the applicants fairly conceded that the second ground was not going to be persisted with as it was not borne out by the record of proceedings. It was accordingly abandoned and nothing turns on it.

In as far as the remaining ground for review is concerned, there is some substance in the contention that there is no longer a combined crime of unlawful entry and theft. These are

now two separate offences in terms of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Theft *simpliciter* is found in section 113 of the Act while unlawful entry into premises is to be found in section 131.

The allegations *in casu* were that the applicants unlawfully entered the premises and while inside they stole seven elephant tusks therefrom. When they unlawfully entered into the premises their main purpose was to remove the seven elephant tusks which they had placed in the skinning room. They went there to commit a crime thereby aggravating the crime of unlawful entry into premises. See section 131 (2) (c). It was not proper to frame the indictment the way it was done in this case.

What then was the effect of framing the charge in that manner? Does such irregularity warrant the setting aside of the proceedings and referral of the case back to the court a quo for a trial *de novo*?

For this court or judge of this court to quash or set aside a conviction or sentence by reason of any irregularity or defect in the record or proceedings the court or judge must be convinced that a substantial miscarriage of justice has actually occurred. See section 29(3) of the High Court Act Chapter 7:09. I am far from being convinced that any miscarriage of justice let alone a substantial one actually occurred in this case.

Were the applicants prejudiced in anyway by the sentence imposed on them? The answer is No. A person convicted of unlawful entry into premises in aggravated circumstances is liable to imprisonment for not more than 15 years. The trial court was within its powers when it sentenced each accused to 10 years imprisonment of which 3 years imprisonment was suspended on the usual conditions of future good behaviour.

In conclusion, I hold that the irregularity cited by the applicants does not warrant the quashing or setting aside of the conviction or sentence. I would, in the result, dismiss the application with costs.

Mlweli Ndlovu & Associates applicants' legal practitioners
Attorney-General's Office respondents' legal practitioners