ARNOLD SHAVA
versus
THE STATE
and
STORY RUSHAMBWA (N.O)

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYAO 11 FEBRUARY 2016

Criminal Review

MAKONESE J: In an application for review in terms of section 26 of the High Court Act [Chapter 7:06], the High Court may only rely on the record of proceedings as the only official record of what occurred in the court *a quo*. The court may not look beyond what is contained in the official transcript and an allegation made by a litigant that the record does not provide an accurate reflection of the proceedings would have to be supported by other evidence, more particularly the exchanges between the trial magistrate and the accused person as recorded in the court record. The applicant appeared before a magistrate sitting at Zvishavane on 19 September 2015 facing one count of unlawful entry as defined in section 131 of the Criminal Law Codification and Reform Act [Chapter 9:23] and a further count of theft in contravention of section 113 of the same Act. The accused and his co-accused Tapiwanshe Muzvondiwa pleaded guilty to both counts and were sentenced to 18 months imprisonment of which 6 months was suspended for 5 years on the usual conditions. The applicant filed an application for review on 24 September 2015, through his legal counsel, complaining that the trial magistrate failed to properly record the applicant's response, in particular that applicant had not tendered a guilty of plea as reflected by the record of proceedings. The relief sought by the applicant is an order for the quashing of the entire proceedings and an order for the matter to be tried *de novo* before a different magistrate.

I requested the trial magistrate and the public prosecutor to file written responses to the allegations made. A perusal of the record indicates that the learned magistrate put to the accused persons the charge and the applicant and his co-accused gave unequivocal pleas of guilty in respect of both counts. The accused persons seem to have freely and voluntarily and without any undue influence pleaded to the charges. The following exchange took place between the magistrate and the applicant if one goes by the record.

"Q. Are the facts true and correct?
A. Accused 1 – Yes
A. Accused 2 – Yes
Q. Do you admit that on the 2nd of September 2015 and at village Mbwende, Chief Negove you broke into the complainant's house as alleged?
A. Accused 1 – Yes
A. Accused 2 – Yes

Q. How did you gain entry?
A. Accused 1- we used an iron bar to break the door and gain entry.

Q. What did you want to do in the house?
A. Accused 1 – to steal
A. Accused 2 – to steal

Q. Do you admit that upon gaining entry into the house upon then stole complainant's property in the manner alleged?
A. Accused 1 – Yes
A. Accused 2- Yes

Q. What did you want to do with the property?
A. Accused 1 – to sell it
A. Accused 2 – to sell it

Q. You therefore admit that your intention was to permanently deprive the owner of his property.
A. Accused 1 – Yes
A. Accused 2 – Yes

Q. Any defence to offer?
A. Accused 1 – none
A. Accused 2 – none

Verdict – Both guilty as pleaded."

A further perusal of the record reflects that the applicant made submissions in mitigation and this is what he had to say:

> "Aged 26 years. Not married. Survives as a cross-boarder trader and realizes an average of R2500 per month. No money in person. No savings. No assets of value."

On being asked by the trial magistrate why he committed the offence the applicant stated that he had erred and asked for forgiveness.

The State prosecutor who handled the proceedings filed a response to the allegations being made by the applicant in this matter and stated in part as follows:

> "----As already mentioned, when the accused person was arraigned before Mr Story Rushambwa who was the presiding magistrate the charges were put to them, he was then asked to tender his plea. He then tendered guilty pleas to both counts. The facts were read and explained to him in terms of section 188 and 189 of the Criminal Procedure and Evidence Act [Chapter 9:07]. He was then asked whether he had understood the facts to which he answered in the positive. The court then proceeded to record the rest of his pleas. In as far as I am concerned the accused tendered unequivocal guilty pleas. He did so freely and voluntarily without any undue influence exerted on him.
>
> Had it been that the applicant pleaded not guilty to both counts; I as the trial prosecutor would have made an application for separation of trial as provided for in section 190 of the Criminal Procedure and Evidence Act [Chapter 9:07].
>
> I am therefore surprised as to why the applicant is now making an about turn."

It is important to observe that in its exercise of its review powers this court is empowered in terms of section 26 of the High Court Act [Chapter 7:06] to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within and under its jurisdiction.

Section 27 of the High Court Act provides as follows:

"(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-

(a) Absence of jurisdiction on the part of the court, tribunal or authority concerned.

(b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be.

(c) Gross irregularity in the proceedings or the decision ---."

Upon a careful perusal of the record of proceedings I cannot find anything to suggest that there was any irregularity in the manner in which the proceedings were conducted. I must observe that I am confined to the record of proceedings and I am bound by what appears in the record. See the cases of *S* v *Ncube* 2012 (1) ZLR 422 (H) and *S* v *Davy* 1988 (1) ZLR 386 (S).

In all the circumstances of the case I make a finding that the application for review has no basis both at law and in fact.

I accordingly, dismiss the application.

Makonese J……..