

CHRISTOPHER NYAMUKAPA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZIMBA-DUBE J
HARARE, 17 November 2011

Criminal Appeal

M. Kajokoto for appellant
E. Nyazamba for respondent

DUBE J: The appellant appeared before a Mvurwi magistrate facing a theft of trust property charge in terms of s 113 of the Criminal Law (Codification and Reform Act) [Cap 9:23]. The State allegations were that the appellant received US\$ 2 440-00 from his employer for purposes of paying wages for contract workers at Tel One Mvurwi Depot. Instead of handing over the money to the intended beneficiaries, the appellant converted the money to his own use. The appellant was convicted and fined USD 300 or 6 months imprisonment.

Aggrieved by the conviction, the appellant appeals against both conviction and sentence. His grounds of appeal are as follows:-

“AD CONVICTION

Appellant argues that the court *a quo* erred or misdirected itself in one or more of the following ways:-

1. Whether or not the court *a quo* heavily relied on unsafe evidence which did not point to the guilt of the appellant.
2. Whether or not the court *a quo* relied on flouting of workplace procedures by the appellant as evidence of theft, the charge alleged by the State.

AD SENTENCE

3. Whether the court *a quo* imposed a disproportionate and stiffer penalty without regard to the accused’s personal circumstances, mitigation and contrition”.

The respondent’s counsel, Mr *Nyazamba*, raised a point *in limine* which he requested the court to deal with before proceeding to deal with the merits of the matter. He

submitted that the notice and grounds of appeal raised in respect of conviction fall short of the requirements of rule 22(1) of the Supreme Court (Magistrates Courts) (Criminal Appeals), Rules 1979, (hereinafter referred to as 'the rules'). He submitted further that the appellant's grounds of appeal are vague and too generalised. That the rules require a notice of appeal to be clear and specific and to indicate whether the misdirection alleged is one of fact or law. He urged the court to dismiss the appeal as it is not properly before the court, is a nullity and on the basis that there is no appeal before the court. The respondent's counsel in his response submitted that there was no need to give further details because the notice of appeal states clearly what the grounds of appeal are. He maintained that the grounds of appeal state what was not canvassed by the trial court and that the substance of appellant's appeal was that the state had failed to prove its case beyond a reasonable doubt. He contended that the state has not suffered any prejudice as the grounds are amplified by appellant's heads of argument.

The court directed the parties to proceed and argue the matter on the merits and indicated that its ruling will be encompassed in the main judgment.

Rule 22(1) provides that a notice of appeal should set out "clearly and specifically the grounds of the appeal". Failure to comply renders the notice a nullity. In terms of r 47, if the notice is a nullity and the time for noting an appeal has lapsed, the right to appeal must be deemed to have lapsed.

Our Criminal courts in practice do not strictly scrutinise grounds of appeal for compliance with the requirements of rule 22(1). The Attorney General's office has in the past not paid particular attention to the format of grounds of appeal and most grounds of appeal though not complying with the rules, have gone unchallenged resulting in litigants not adhering strictly to the rule. There is need to comply with the rules of court. There are a number of cases which have emphasised the need to comply with this rule as well as set out the requirements of the rule. In *Killian v Geregskade Uitenhage* 1980 (1) SA 808, the court set out the requirements of a notice of appeal and held that,

"a notice of appeal requires that the points upon which an appellant relies on be set out in precise detail so that the respondent can know the points upon which a decision is required. The magistrate must be properly informed," of the grounds upon which the appeal is based.

Grounds of appeal should be clearly stated and should not be in general form. As enunciated in *R v Jack* 1990 (2) ZLR 166, a notice without meaningful grounds of appeal is not a notice of appeal, and if the time within which to note an appeal has lapsed, it cannot later be amended and the right to appeal falls away.

The first ground avers that the trial magistrate relied on unsafe evidence to convict. If the ground is meant to challenge the magistrate's findings of fact, it is not specifically so stated. In *R v Emmerson* 1958(1) SA 442 at 442, BEADLE J said the following approach was emphasised,

“...if the ground of appeal is that the magistrate erred in law this should be stated, and the particular mistake of law which the magistrate is alleged to have made should be set out. If however, the ground of appeal is that the magistrate erred on the facts this should be stated, and the appellant should go further and state whether the magistrate erred in accepting the evidence led or in regarding that evidence as sufficient to prove the offence”.

A ground that the court *a quo* misdirected itself in that it heavily relied on unsafe evidence which did not point to the guilt of the appellant is too general. It lacks precise detail of the points the appellant seeks to rely on. It is vague as it does not state whether the magistrate erred in law or fact.

The ground seems to attack the magistrate's findings of fact. Appellant is not clear whether the magistrate erred in accepting the evidence led or in regarding the evidence as sufficient to prove the offence. That ground was not adequately canvassed.

The second ground raises the query whether or not the court relied on flouting of work place procedures to prove the offence of theft. Respondent's style is quite interesting. Instead of stating his ground of appeal, he poses a general question. Furthermore, that question is vague and does not state whether the challenge is of law or fact. Both grounds of appeal are superficial and empty and do not comply with the rules.

The procedure governing filing of notices of appeal is a procedure separate from that for heads of arguments. The two processes serve two different purposes and the processes are filed at different stages. Grounds of appeal are required at the initial stages of the appeal to inform stake holders of the appeal. Heads of argument on the other hand serve a completely different purpose of identifying the heads of argument in opposition to or in support of the appeal. It is inappropriate to file grounds of appeal that are vague on the premise that these will be bolstered up by the appellant's heads of argument as that objective is not achievable. Filing of grounds and a notice of appeal is not a mere formality. The grounds should

therefore be precise, clear and unambiguous at the stage at which they are filed. Appellant's argument that the defects in the notice of appeal are cured by the heads of argument does not therefore find favour with this court.

This court cannot overemphasize the need for grounds of appeal to be always clear and precise. They should set out in detail the points upon which the appellant relies. They serve a purpose which is to advise the trial magistrate of the points challenged on appeal. The magistrate's views and comments in turn are meant to assist the appeal court on the points challenged. It is difficult for a trial magistrate who is expected to reply to an imprecise ground of appeal to make a meaningful response. The respondent should also be sufficiently informed of the requisite points the appellant wishes to take on appeal so that the respondent is capable of making a meaningful response. The appeal court on the other hand should be adequately advised on points over which its decision is required. Looking at the contents of the grounds and the format in which they are in, this court is at a loss as to the basis of this appeal and the points over which its decision is required. It is undesirable to pose questions in a notice of appeal whose purpose it is to identify issues and clearly define them for purposes of the appeal.

A notice of appeal which does not comply with the rules of law, at law is a nullity. The present grounds of appeal are a nullity as they fall far short of the requirements of r 22. The application succeeds.

Notwithstanding that the grounds of appeal are a nullity, we would still dismiss the appeal on the merits for the following reasons;

Mr *Nyazamba* supported both conviction and sentence. Appellant's counsel submitted that it was illogical for the court to conclude that appellant stole the money when there is someone else who had keys to where the money was left and there is evidence that he entered that room searching for pins. That the inference drawn by the learned trial court was not consistent with all proved facts.

The trial magistrate convicted appellant after finding that the appellant failed to follow procedures and that his design was to steal the money. That he failed to give the money to his assistant or put the money in a lockable cabinet and instead put it in an unlocked drawer. That he failed to make a report and only did so on Thursday after being prodded to report by his co-accused.

The trial magistrate found that the only reasonable inference to be drawn is that the appellant misappropriated the money. That the possibility that anyone else other than accused

stole the money is very remote. That his conduct, when he received the money and upon discovery of the theft shows that he stole the money. The trial court convicted the appellant on the basis of circumstantial evidence and drew the inference that he stole the money. The trial court considered and had regard to all the circumstances of the case as well as his explanation for failure to secure the money and to report the theft soon after discovering the offence, before coming to the conclusion it did.

What this court is being called upon to decide is whether the inference drawn by the court *a quo* was the only reasonable inference to be drawn from the proven facts.

It is trite that where a judicial officer convicts an offender on the basis of a finding of circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy the inference sought to be drawn. The inference drawn must be the only reasonable inference that can be drawn from the proved set of circumstances.

See, *S v Marange and Ors* 1991(1) ZLR 244

S v Hartlebury and Anor 1985(1) ZLR p1 (HC)

S v Machakasa SC 106/89, for that approach

The court is required to have regard to all the facts and the probabilities of the matter and as WOODERMEYER JA in *R v Blom* 1939 AD 188 @ 202-203 put it,

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:-

- (i) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
- (ii) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct”.

Appellant gave his own account of the events leading to the loss of the money. Whilst there is no onus on an appellant to show his innocence, the court was still required to be satisfied that his explanation was improbable and that his explanation was false. As put in *R v Difford* 1937 AD 370 @ 373.

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

See also *R v N* 1946 AD 1023.

The learned trial magistrate considered both the state version and appellant's explanation. The court considered cumulatively all the evidence available. There is sufficient evidence on record to support the conviction. Appellant violated the standing procedures for securing money. He kept money in a drawer instead of a locker in his office. He gave the keys to another person and failed to tell him that there was some money in the drawer. He went away for four days without paying the wages when he was required to ask his second in charge to take over the assignment if he could not perform it himself. He was aware that the contract workers required to be paid before the holiday break. Upon his return, he spent a day without asking for the keys and his explanation is that the person with the keys did not have them close by. When he subsequently entered the office at 8 am, he says that he did not notice that the money was missing until three hours later. After discovering that the money was missing, the appellant did not make an immediate report. He did not inform his second in charge of the theft and yet he had a meeting with him the same day. His explanation is that he had not decided to tell him. When asked in cross examination why he did not later phone him, he gave no response. He failed to report until he was prodded by a colleague to report the theft. He failed to report the theft the same day only to report the next day. His explanation that he did not phone him because he had not decided to tell him shows that he had something to hide. Appellant's explanation for failing to secure the money and to report the theft on time is improbable, fanciful and unreasonable. The only reasonable inference that can be drawn is that he stole the money. His conduct is not consistent with a person who had had money stolen from him but someone who stole the money and had something to hide. The trial court cannot be faulted for the approach it adopted.

Having found no misdirection on the part of the trial court, this court finds no basis for interfering with the lower court's findings. As remarked by KORSAN J in *S v Masawi and Anor* 1996(2) ZLR 472(S) commenting on the findings of a lower court,

"If these findings have support in the facts established and in reasonable inferences, they are conclusive on appeal. After conviction a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there substantial evidence to support it".

Appellant challenges the sentence imposed on the basis that it is unreasonably stiff. The trial magistrate in considering the appropriate sentence considered that the appellant was

a first offender with family responsibilities. That he has since reimbursed the complainant. The court also considered that the appellant's moral blameworthiness is very high. It considered imposing both a custodial sentence and community service and decided against such sentences.

Appellant stands convicted of a very serious offence. Theft of trust funds is viewed in very serious light. He stole from employer and breached the trust entrusted in him and he cannot expect to be treated leniently. As put in *Ndlovu v S* SC 84/84 per GUBBAY JA @ 99.

“the offence involved a serious breach of trust placed in the appellant by his employer.....The regrettable prevalence of theft by employees occupying positions of trusthas resulted in the court issuing stern warnings that such offenders cannot expect to be treated leniently”.

The aggravating features of this case far outweigh the mitigating features. The magistrate properly considered that the appellant has since compensated complainant. The court was not expected to place too much weight on the mitigating effect of restitution as appellant was convicted of a very serious offence and his moral blameworthiness is very high. He stole from his employer and he did so out of greed rather than need as he was gainfully employed.

Our courts view seriously the offence of theft of trust funds.

As put in, *Mayberry v S* HC-H 248/86.

“In cases involving dishonesty a willingness or ability to make restitution is always a mitigating factor. Generally speaking, it will be given considerable weight especially where the accused is a first offender. The judicial officer should try to ensure that the complainant is compensated for his pecuniary loss at the expense of the accused, but a balance must be struck with the seriousness of the offence ...”

Similar sentiments were expressed in *S v Mpofo* 1985(4) SA 322.

The learned trial magistrate properly considered that the appellant was gainfully employed and stole out of greed rather than need. Applicant stands convicted of a very serious and prevalent offence and he stole from his employer thereby breaching the trust entrusted in him. His moral blameworthiness is very high.

What is in appellant's favour is the fact that he is a first offender and ordinarily all efforts should be made to keep first offenders out of jail.

A suspended sentence would not have met the justice of the case. A caution and discharge would also not have been appropriate regard being had to the aggravating features of this case. Appellant is lucky that he got away with a fine. A short and stiff custodial

sentence would in our view, have met the justice of the case. Appellant is lucky that he got away with a fine. If the trial court erred, it erred on the side of leniency.

In the result, the appeal is without merit and is dismissed.

BHUNU J, agrees

Kajokoto and Company, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners