

MUNYARADZI GWISAI & 5 ORS
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 13 April 2012

A. Muchadehama, for the appellants
E. Nyazamba, for the respondent

MATHONSI J: This is an appeal against the decision of the Provincial Magistrate sitting at Harare delivered on 30 March 2012 in which he dismissed an application by the appellants for the suspension of their sentence of 12 months imprisonment or 420 hours of community service at institutions in Harare and Chinhoyi.

The appellants had approached the court *a quo* seeking that suspension pending an appeal which they noted to this court on 22 March 2012. As stated their application did not find favour with that court as a result of which they have approached this court as an appeal court.

Mr Nyazamba for the state has raised 2 points *in limine* namely:

1. That the appeal noted by the appellant against conviction and sentence is defective by reason that the appellants did not deposit with the clerk of court the costs for the preparation of the appeal record and did not make a written undertaking to make payment of the costs of such preparation.
2. That the appellants adopted the wrong procedure by bringing their appeal in terms of the bail rules instead of the ordinary appeal rules given that this appeal is

against the sentence of community service as opposed to a sentence of a fine or imprisonment.

The first point *in limine* relating to the costs of preparation of the appeal record is based on the requirement that an appellant should pay the costs of transcription of the record or undertake to pay. In his submissions Mr Nyazamba cited rule 24 (1) of the Supreme Court (Magistrates Court) (Criminal Appeal) Rules, 1979 which provides;

“The clerk of the court shall, on receipt of the payment or undertaking, as the casemay be, referred to in subr (2) of rule 22, give instructions for the preparation of the record.”

Subr (2) of rule 22 referred to therein provides:

“The appellant shall, at the time of the noting of an appeal in terms of subr (1) or within such period thereof, not exceeding 5 days, as the clerk of the court may allow, deposit with the clerk of the court the cost as estimated by the clerk of the court of one certified copy of the record in the case concerned.”

Subr (4) of rule 22 renders the appeal invalid by reason of failure to comply with the foregoing provisions. Mr Muchadehama for the appellants produced a letter dated 22 March 2012, the same day the appeal was noted, addressed to the clerk of court which undertakes to pay the cost of transcription. That letter was received by the clerk of court the same day.

Faced with that letter Mr Nyazamba for the state was forced to abandon his first point *in limine*.

The second point *in limine* relates to the procedure adopted and it is premised upon the notion that a sentence of community service is not a prison sentence or a fine as to entitle an aggrieved party to approach the court in terms of the bail rules. In my view that argument is devoid of merit.

The sentence imposed on the appellants is both a fine and imprisonment. The court *a quo* sentenced the appellants to a fine of US\$500-00 each or in default of payment 10 months imprisonment. In addition to that they were sentenced to 24 months imprisonment of which

12 months was suspended on condition of future good behaviour. The remaining 12 months was suspended on condition they complete 420 hours of community service.

The appellants are seeking the suspension of the effective sentence of 12 months alternatively community service, which they would otherwise have to serve in spite of the appeal in terms of s 63 of the Magistrates Court Act. I do not agree that they have adopted the wrong procedure or used the wrong platform. The bail court is the competent tribunal to entertain the matter. In any event, community service is a deprivation of liberty just like imprisonment.

When this was drawn to the attention of state counsel, he was constrained to abandon that point as well.

Regarding the merits of the matter, the appellants have attacked the decision to dismiss their application on the grounds, *inter alia*, that the court *a quo* misdirected itself in dismissing the application without a finding that the appeal had no prospects of success at the appellate court. It has been submitted on behalf of the appellants that the court *a quodid* not properly apply its mind to the application before it especially as it did not consider all the factors placed before it in that application including the prejudice likely to be visited upon the appellants if they perform community service before the appeal is determined given the obvious delays that occur.

On the other hand, the state is of the view that the appeal against both conviction and sentence is without merit, has no prospects of success whatsoever and for that reason the appellants should be made to serve their sentences. Mr Nyazamba relies on the authority of *S v Kilpin* 1978 RLR 282 (AD) where the appeal court pronounced at 286A as follows:

“The principles governing the grant of bail before conviction are entirely different from those governing the grant of bail after conviction and the difference is even more marked when the guilt of the accused is not in issue and the usual sentence for the offence is an effective prison sentence of substantial duration. It is wrong that a person who should properly be in goal should be at large and nothing is more likely to encourage frivolous and vexatious appeals than the attitude adopted by the magistrate in the present case.”

In the present case, the application for a stay of sentence was made after the notice of appeal had been lodged and the court *a quo* had the benefit of that detailed appeal when considering the application. It also had the benefit of lengthy oral submissions made by both counsel. In fact the submissions by counsel run into 10 pages of the transcribed record from page 75 to 85. It is therefore curious that the judgment of the court is spectacular by its brevity it being only 16 lines of the record. It reads as follows:

“Right, listen to the ruling. The court considered the submissions made by both counsels (sic) and in applications of this nature, some of the factors to be considered are whether there are prospects of success on appeal and the likely delay before the appeal is heard.

The accused were convicted of contravening s 188 as read with s 36 of the Criminal Law (Codification and Reform) Act. The evidence analysed in the judgment revealed that the key state witness was present in the room and narrated all that transpired and this was further corroborated by the accused themselves during their defence cases. It must be reiterated again that the accused were not found guilty of watching a video footage but that the video was just played to arouse feelings of hostility amongst those who attended as analysed in the judgment and the reasons for sentence.

The accused were found guilty after the state proved its case beyond a reasonable doubt. The essential elements of the offence were satisfied as clearly shown by the evidence on record. Hence, this court did not misdirected (sic) itself in any way by arriving at the verdict of guilty.

The application for the suspension of performing community service is hereby dismissed.

So that is the ruling.”

This is the entire judgment of the court *a quo* which is now being challenged on appeal. It is difficult to understand how anyone can attempt to defend this judgment. While the magistrate made reference to matters to be considered in an application of the nature before him, he did not even attempt to deal with them.

The magistrate busied himself with a narrative of how he arrive at the verdict and the sentence at the expense of the relevant considerations. The appellants had raised essentially 3 issues in their application namely:

1. That they have prospects of success on appeal for a variety of reasons contained in their notice of appeal. At the risk of commenting on issues still to be placed before the appeal court, I may hazard an example, being the contested issue of whether their conduct, be it “watching” or “playing” a video, constituted an offence as defined in s 188 as read with s 36 of the Criminal Law Code. In my view this is a critical issue which calls for interrogation by the appellate court.
2. That should they be made to commence performing community service they will suffer prejudice in the event that their appeal is successful as they would have served a substantial part of the sentence which may be overturned on appeal and yet no prejudice will be suffered by the state if the sentence is suspended.
3. That there is no risk of abscondment given that they had piously complied with their bail conditions and attended court even when they were facing more serious charges.

In my view these are the issues which should have occupied the mind of the court *a quo* in considering the merits of the application. It did not. Instead, as stated by Mr Muchadehama for the appellants, the court pre-occupied itself with justifying its judgment. This was a misdirection.

Indeed, there are no reasons for dismissing the application at all. State counsel has conceded that the court *a quo* did not give reasons for dismissing the application and in a way, although with tounge in cheek, he does concede that the points raised by the appellants were not addressed at all. He has however asked me to reconsider the evidence which he says will persuade me to uphold the decision of the magistrate.

I had occasion in the matter of *S vNdlovu and Anor* HB90/11 at p 3-4 of that judgment to comment on the failure by a magistrate to give reasons for a decision. In that matter I stated quoting *S vMapiye* S- 214-88:

“It is therefore not easy to ignore the possibility that the magistrate did not apply her mind at all to the case before her. Courts have repeatedly stated the need for judgments to be reasoned and for those reasons to be stated. As stated in *S vMapiye* s 214-88:

“To confirm the conviction on the second count, would in my view, result in a failure of justice. The omission to consider and to give reasons for convicting the appellant on count two is fatal to the prosecution case. It is a gross irregularity. Appeals are argued and decided on the contents of a certified record of the trial proceedings. If those contents are stored in the mind of the trial magistrate, they are not enough.”

It is a gross irregularity for a magistrate to omit to give reasons which reasons remain stored in his/her mind without being committed to paper.”

The decision of the court a quo, to the extent that it dealt with extraneous issues and contains no reasons for the result is impeachable. I am of the view that the court a quo addressed the wrong issues.

Having gone through the record I am satisfied that the appellants raise pertinent legal arguments especially relating to the legality or otherwise of their actions. Their appeal has merit and is indeed arguable. I am also of the view that the points raised in support of the application for a stay are very compelling indeed. Clearly they will suffer prejudice if they serve the sentence which might be overturned.

On the other hand, there is absolutely no prejudice that will be suffered by the state by the suspension of the sentence. The appellants have been shown to be committed to the finalisation of the matter and cannot be said to be flight risks. Indeed the state has not even attempted to argue along those lines.

I therefore come to the conclusion that the court *a quo* misdirected itself in dismissing the application which should have been granted.

In the result I ordered that:

1. The appeal is hereby upheld.
2. The performance of community service by the appellants is hereby stayed/suspended pending the determination of the appeal in case number HCCA248/12

MbidzoMuchadehama&Makoni, appellant's legal practitioners
The Attorney General's Office respondent's legal practitioners