

SERGEANT BOTORO 056068
Versus
THE COMMISSIONER GENERAL OF POLICE
And
THE POLICE SERVICE COMMISSION
And
SUPERINTENDENT NYONI (The trial officer)

HIGH COURT OF ZIMBABWE
BACHI MZAWAZ J
HARARE, 17 January 2021 & 8 February, 2023

Opposed application for Review

T. Muvhami, for the applicant
D. Jaricha, for the respondents

BACHI MZAWAZI J: In this opposed application for review, applicant is seeking an order for the setting aside of both the conviction and sentence imposed on him by the respondents, the permanent stay of the prosecution of his offence in violation of paragraph 34 of the schedule to the Police Act [Chapter 11:08], and cost of suit. The unpolished grounds for review are as follows;

- a. The 3rd Respondent did not give reasons for sentence. As it stands the sentence remains guesswork. The 1st respondent surprisingly appears to have accepted that fatal irregularity.
- b. The 3rd Respondent failed to treat the trial court as a court of record. That alone constitutes a gross irregularity which is fatal. It is mind boggling how the first respondent condoned that conduct.
- c. The 1st respondent allowed a conviction of the Applicant where there is no nexus between the elements of the offence and the Applicant.
- d. The 1st respondent disposed of the appeal without hearing the applicant contrary to provisions of section 69 of the Constitution.

At the hearing of the matter, the first ground of appeal was abandoned and accordingly struck off. An application for condonation for the late filing of heads of argument and the upliftment of the automatic bar was through the consensus of the parties granted. Both parties abided by their written submissions.

This is one of those applications where the court, if not for the interests of justice and finality to litigation would not have entertained. The papers are in disarray and it shows lack of seriousness on the part of the legal practitioner concerned. In future the court will not hesitate to have the matter struck off the roll.

Briefly, the applicant, a member of the police force was charged and convicted for contravening paragraph 34 of the schedule to the Police Act Chapter 11:10 section 29 and 30 of the said Police Act [Chapter, 10:11], by the 3rd respondent in a disciplinary trial convened for that purpose. The charge was framed as “Performing any duty in an improper manner”. The allegations being that applicant performed duty in an improper manner by clearing two oxen in the name of Elphas Mafoti on ZRP Form 392 serial number 3004369 without following the Police Service clearance procedures as stipulated by ZRP circular 04/2009.

The factual background is that, the applicant who was in charge of anti-stock theft, procedurally issued out a stock clearance certificate to one Elphas Mafoti. It is alleged that, the livestock clearance certificate showed that the seller was the same as the buyer yet the applicant was supposed to visit the kraal where the alleged beasts were, ascertain the owner of the beast as reflected on the stock card and confirm with the village head that indeed the owner of the beast is the one disposing of the livestock. In addition, it was the applicant’s duty to carry the permits book to the said kraal and enter the requisite details in triplicate.

It is common cause that, the evidence which was led by the State revealed that the name of the village head entered by the applicant in the said documents was non-existent. The person to whom the beasts were cleared to had no cattle pen at his homestead nor did he have any cattle of his own. There were also discrepancies on the triplicate copies issued out by applicant with the original and the duplicate indicating forgery and tampering. Evidence led also linked the applicant to the seller in that there was an exchange of an amount of \$50.00 eco cash in between them.

Applicant admitted clearing one beast to Elphas Mafoti’s but denied any wrong doing but that he was being framed by this second witness, the alleged buyer who was convicted of the theft of the same beasts by the criminal court. He stated that he followed all procedural requirements as per circular 04/2009. He indicated that he physically went to Elphas Mafoti’s homestead and physically checked the cow and a witness (who was not mentioned) confirmed ownership and clearance was done. The applicant further indicated that he gave Elphas Mafoti two copies of completed Form 392 which had exactly the same information as the fast copy. He told the trial officer, that that an amount

of RTGS\$50.00 was payment of money he had given to Elphas Mafoti for fuel since fuel dealers demanded cash as payment. He also denied the initial allegations that he was an accomplice to the stock theft as he is the one who had sold the beasts to the said Mafoti. He further refuted ever receiving USD500.00

Nevertheless, Applicant was convicted and sentenced to 10 days imprisonment at Chikurubi Detention Barracks. His appeal to the 1st Respondent in term of section 37 of the Police Act, [Chapter, 11:08] against the decision of the 3rd respondent was unsuccessful. He has now approached this court challenging both decisions simultaneously.

The respondents argue that whilst this court is empowered to review proceedings and decisions of inferior courts and tribunals there is no basis upon which this court can interfere with the findings of the respondents as they were not grossly irregular.

On analysis, it is trite that in terms of section 26 and 27 of the High Court Act, [Chapter 7:06,] this court has inherent jurisdiction to entertain or review all proceedings and decisions as advanced by the respondents above. Section 27, outlines the grounds upon which the decisions of lower courts may be reviewed. It stipulates absence of jurisdiction, interest in the cause, bias, malice, or corruption and gross irregularity in the proceedings or decision concerned. Section 28 denotes that on review of any civil proceedings the High Court may set aside or correct the proceedings or decision. See, *Masvingo Rural District Council v Chikwenya & ORs 2000(1)ZLR*.

However, upper courts in general are wary to interfere with such decisions and the autonomy of quasi-judicial bodies serve in very exceptional circumstance of grave injustices and or gross miscarriage of justice. In *Choruma Blasting and Earthmoving Service (Pvt) Ltd v Njanja & Ors 2000(1) ZLR 85(S)*, it was held that:

“An appeal court will generally not interfere with the exercise of discretion by the lower court. However, the appeal court is entitled to substitute its discretion for that of the lower court where the lower court’s exercise of its discretion was based on an error, such as where it has acted on a wrong principle, or it took into account extraneous or irrelevant matters or did not take into account relevant considerations or it was mistaken about the facts”.

See *Barros of Anor v Chimphonda 1999(1) ZLR 58(S)* at p 625-63A, *State v Chikumbirike 1986 (2) ZLR 145 (S)146F-G*.

Since the first ground of review, which had been the corner stone of the applicant’s line of attack, has been retracted, the second one also automatically falls away as it speaks to one and the

same thing. That being so, the court is not satisfied that the applicant has demonstrated that he has made a case for review or the relief sought.

In my view, the findings by the respondents cannot be faulted. There is no irregularity at all in the findings nor the sentence of the lower court. There were inexplainable and irrefutable anomalies on all the three copies of the clearance certificate. The most glaring one is that the seller and the buyer being one and the same person. If applicant was doing his work prudently he would not have processed the clearance certificate. The coincidence of lending and borrowing money as per the applicant's defence is too much, making the applicant's version more improbable. The most damning evidence was the failure to comply with Circular 04/2009 dated 23 October 2009.

The charge of performing duty in an improper manner is based on Zimbabwe Republic Police Circular 04/2009 issued on 23 October 2009 by the National Co-ordinator Anti-Stock Theft titled **PROCEDURE ON CLEARANCE OF LIVESTOCK BY POLICE: USE OF ZRP LIVESTOCK CLEARANCE CERTIFICATE (FORM 392)**. The trial court drew attention to item 8(vi) which stipulates that: **"No clearance should be done if the police officer is in doubt. Thorough investigations should be carried out before clearing the beast"**.

In light of the above excerpt, the applicant did not do the necessary verification of the village head, the cattle pen from whence the beasts were taken or ascertain ownership with the stock cards as required by the governing regulations.

Thus, it is this court's conclusion the third ground lacks merit as the 1st respondent acted as a court of appeal. An appeal is confined to the four corners of the record. There is no Constitutional issue to talk about therefore ground four is equally meritless. The sentence is not outrageous. It is within the parameters of lenient sentences. In conclusion the applicant has failed to provide good grounds warranting the interference with the impugned decision. As a result, both conviction and sentence were proper.

Accordingly, the application is dismissed with costs.

Mugiya and Muvhami Law Chambers, applicant's legal practitioners.
Civil Division of the Attorney General's Office, for the respondents.