ALVIS SIYAWAMWAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 12 and 22 October 2021

Criminal appeal

T. Pfumayi, for the appellant
T. Kangai, for the respondent

CHIKOWERO J: This is an appeal against the decision of the magistrates court convicting the appellant of unlawful entry into premises committed in aggravating circumstances as defined in s 131 (1) (a) as read with s 131 (2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The sentence imposed, which is not appealed against, is twenty-nine months imprisonment of which five months was suspended on the usual condition of good behavior.

The trial magistrate found that the appellant had unlawfully entered the complainant's house and stolen certain property therefrom.

The appellant had denied such entry. He averred that he had bought the radio and speaker in question from Mafaro Gutu, who used to work for the complainant.

This property was recovered from a third party who had bought the same from the appellant.

In addition, the magistrates court reposed credibility in one Paul Muza, who testified that he had, in broad daylight, seen the appellant entering the complainant's house through the window. The appellant and Muza knew each other. No issue of mistaken identity arises. It was after this incident that it was discovered that the complainant's property had been stolen.

Although the respondent did not object there can be no doubt that the first and third grounds of appeal are invalid. They are not clear and concise. They read as follows:

> "1. The Court *a quo* erred at law in convicting the appellant in circumstances whereby the evidence that had been placed before the court did not pass the test of proof beyond reasonable doubt.
> 3. The court *a quo* erred and misdirected itself in law and fact in its assessment of state witnesses' evidence as proved facts when in fact it had not been found to be proven."

These grounds of appeal are general and vague. They do not inform the trial magistrate, the respondent and the appellate court of the particular findings which the appellant seeks to impugn. They amount to a licence allowing the appellant to traverse the entire length and breadth of the record in an endeavor to overturn the conviction. In addition, the latter ground is in substance a duplication of the former. All that the appellant is saying is "I am not guilty because I am not guilty." That cannot be a ground of appeal. See *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Proprietary) Ltd and Another* 2013 (2) ZLR 309 (S), *Dr Nobert Kunonga* v *The Church of the Province of Central Africa* 2017 (1) ZLR 181 (S).

Since the respondent did not ask us to strike out these invalid grounds of appeal, we will determine this appeal without any further reference to them.

The appellant criticized the magistrate for not having called Gutu to give evidence. Because of this failure, so it is contended, the appellant's defence that he bought the property from Gutu was not shown to be beyond reasonable doubt false.

We cannot agree. The magistrates court had no duty to place any evidence before it, particularly where the appellant, even though unrepresented, was able to appreciate the materiality of such evidence to his own defence. To begin with, he was not being charged with theft. The conviction would still have been safe where the court was satisfied that it was proven that the appellant had unlawfully entered the complainant's house but had not stolen anything therefrom.

Secondly, if the appellant thinks that Gutu's evidence was relevant, then he should have called that person as a defence witness.

It follows that there is no merit in this ground of appeal.

Finally, the appellant concedes in his last ground of appeal that he failed to properly cross-examine the State witnesses. He concedes also that he did not deny critical aspects of the evidence adduced by the respondent. However, he contends that he should still not have been convicted

because the trial magistrate failed to ensure that the appellant properly presented his defence and focused on issues on which the matter turned.

We have read the record. The magistrate explained the provisions of ss 188 and 189 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The record reflects that the appellant understood the explanation. Indeed, the appellant proceeded to give a succinct defence outline.

At every stage of the proceedings, the Court explained, to the appellant's understanding,P the latter's procedural rights. That he failed to conduct any meaningful cross-examination cannot be the fault of the magistrate. Indeed, such failure can be attributed to the fact that fundamental features of the case for the prosecution were common cause.

The appellant did not dispute that he was seen by Paul Muza entering the complainant's unoccupied house, through the window. He did not dispute that he possessed the complainant's property and proceeded to sell it to one Mare. The respondent's case was simply that the appellant unlawfully entered the complainant's house through the window and, as an added feature of the aggravating circumstances, had gone on to steal from that dwelling-house. It was competent for the magistrate to infer that the appellant's undisputed link with the complainant's stolen but ultimately recovered property, taken together with the unchallenged evidence that the appellant had been seen entering the house in question through the window, meant that the respondent had proved its case beyond reasonable doubt.

In our view, there is no merit in this appeal.

In the result, the appeal be and is dismissed.

ZHOU J agrees…….

Muzondo and Chinhema, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners