GETRUDE MUTETI
and
BRUNO GORE
and
JOHNSON CHIMBUMU
and
STELL ZHAKATA
and
AFEBBIE GUWETE
and
TARIRO MHATSA
and
PROSPER WILLIAM
and
TARIRO ELLIAM NYAMANDE
and
ERNEST GIYA
and
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 16 August 2014 and 16 August 2017

Criminal Appeal

S. Kachere, for the appellants
R. Chikosha, for the respondents

BERE J: The appellants were arraigned before a Bindura Magistrate Court facing 3 (three) counts of malicious Damage to Property as defined in s 140 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In relation to count 1 all the 9 (nine) appellants were jointly charged. In respect of count 2 and 3 only the appellants 6 to 9 were charged.

After a protracted trial, the appellants were convicted as charged. In respect of count 1 the appellants were each sentenced to 24 months imprisonment of which 6 months were

suspended on condition of future good behaviour. Another 6 months were suspended on condition of restitution leaving them each with an effective goal sentence of 12 months.

Counts 2 and 3 were treated as one for purposes of sentence in respect of each appellant from sixth to ninth appellants. Each appellant was sentenced to 18 months imprisonment of which 6 months were suspended on condition of future good conduct, a further 6 months imprisonment was suspended on condition of restitution, leaving each to undergo an effective sentence of 6 months imprisonment.

Dissatisfied with the outcome of their trials all the appellants noted this appeal against both conviction and sentence.

The combined grounds of appeal in respect of all the appellants were given as 16 which I will simplify as follows:

The main ground of appeal against conviction is that the appellants believe that the court *a quo* erred in allowing one Bladge Mazofa, an evangelist with the Seventh Day Adventist Church (SDAC) to testify in respect of the damaged church property when he was not authorised to do so by the church.

The second ground of appeal is that the learned magistrate misdirected himself by convicting the appellants when the State had not presented sufficient evidence to justify the conviction of the appellants.

Finally, the appellants alleged that the court *a quo* had misdirected itself in failing to properly assess the evidence that was presented before it, the argument being that in the eyes of the appellants the evidence should have led to their acquittal.

I have tried to simplify the otherwise poorly drafted grounds of appeal. It was this poor drafting which prompted Mr *Chikosha,* for the respondent to raise a technical objection on the notice of appeal and urged the court to dismiss the appeal, the argument being that the grounds of appeal did not meet the minimum requirements of r 22 (1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979.

The clumsy nature of the notice of appeal was apparent but as the appeal court we grudgingly decided to use our discretion and proceeded to hear the appeal on merits despite the respondent's misgivings.

On merits the respondent sought to support the conviction by arguing that an objective assessment of the evidence that was presented to the court *a quo* made the

convictions unavoidable. Those submissions made sense to us as the appeal court as I will endeavour to show hereunder.

The technical objection raised by the appellant's counsel

As already referred to in the refined first ground of appeal the appellants sought to attack the correctness of the stance taken by the court *a quo* in allowing the first State witness Bladge Mazofa to testify on how the SDAC property was damaged when he had not been clothed with authority by the Church to do so. In raising this argument the appellant's counsel sought to rely on the decision allegedly taken by the court in the case of M*all (Cape) Pty Ltd* v *Merino Ko-operaisie Bpk*[1] where counsel referred to WATERMEYER J as having said;

> "There is judicial presedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of notice in motion proceedings. Unlike an individual an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution."

Counsel also made reference to the case of *Eastview Gardens Residents Association* v *Zimbabwe Reinsurance Corporation Ltd and Others*[2] and *Mashonaland Turf Club* v *Nyamangunda*[3] as authorities in support of his contention.

With respect, it occurs to me that counsel misunderstood the ratio that was laid down by WATERMEYER J in the *Mall (Cape)* (*supra*). What counsel referred to as ratio in that case was in fact *obiter dicta* found on p 351 of the case. The correct ratio formulated by the learned WATERMEYER J is to be found in the headnote on p 347 which reads as follows:

> "…… When an artificial person, such as a company commences notice of motion proceedings some evidence must be placed before the Court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Though the best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, such form of proof is not necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough evidence has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf."

It is this same position of the law which is re-stated in the other two cases referred to above. It does seem to me that by emphasising on the need for authority counsel failed to appreciate that there is a deliberate distinction that is made between civil and criminal

[1] 1957 (2) SA 547 (C.P.D) at p 351
[2] 2003 (2) ZLR 388 (H)
[3] 2009 (1) ZLR 160 (H)

matters. In criminal proceedings like in the instant case there is no need for one to obtain any authority to enable him/her to testify in court on behalf of the State. Any person who sees a criminal act being committed is competent and compellable to give evidence unless the law provides otherwise. This is not one such case.

Bladge Mazofa, when called upon to testify was doing so not on behalf of SDAC but was testifying on behalf of the State because he had seen some of the appellants indulging in a criminal activity so he was by operation of law competent and compellable to give evidence. The trial Magistrate did not err in allowing this witness to testify.

The judgment of the court a quo in this matter covers 8 pages. It was well written and the evidence well captured and assessed.

In the middle of the trial the State Prosecutor applied for an inspection in loco whose outcome had the positive effect of further strengthening an already strong case against the appellants.

Where there was need to rely on circumstantial evidence the court properly laid the legal position and properly applied the gathered evidence to the well-known and properly articulated legal position.

With respect to the appellants it was probably the thoroughness of the judgment of the court *a quo* that made it impossible if not practically difficult for them to properly articulate meaningful grounds of appeal.

j It is not true that the trial court did not appreciate or explore the principal appellant's alleged entitlement to the land on which the criminal offences were committed. The learned Magistrate properly captured that issue in the following; "the defence over emphasized the issue of ownership as the key element of the offence of which the accused person are charged but did not cite any authority to that effect. This offence is committed when one intentionally causes damage or reasonably foresees that such damage may occur against another person's property knowing that another person is entitled to own, possess or control any property (*sic*)."

Defence counsel in his close submissions asserted that it is clear that it could not be established who is the lawful occupier of the piece of land and that assuming that accused 1 is the lawful occupier we will have no case of malicious damage to property as she has a right to destroy illegal structures put on her plot. Two witnesses from lands office were called and

they testified to the effect that the church is the lawful occupier, a map was even produced in court to that effect, and an offer letter" [my emphasis]. What flows from the reasoning of the learned magistrate is that he was fully conscious of the issues involved and that he made a definitive finding that the church was the lawful occupier of the land in issue. That sound reasoning cannot be faulted given the nature of the evidence which the magistrate accepted.

Our unanimous view is that the conviction of the appellants in this case was beyond reproach and that the conviction therefore ought to be upheld.

Consequently the appeal against conviction is dismissed.

Appeal against sentence

The defence criticized the prison term imposed by the court a quo on all the appellants and argued that given the circumstances under which these offences were committed the trial court should have seriously considered a non-custodial sentence. In his filed heads of argument, Mr *Chikosha*, who appeared for the State did not make any submissions on sentence. We take it that in principle the State was not opposed to the appellant's appeal against sentence. The court therefore remains at large on the question of sentence.

We do note with concern that despite the learned magistrate having decided to settle for a sentence which falls within the community service grid, there is absolutely no indication on record that the court seriously considered such a sentence. There was no enquiry carried out to ascertain the suitability or otherwise of such a sentence. Such an approach amounts to a misdirection.

We consider it as mitigatory than the evidence led suggests that the first appellant was the dominant culprit in this matter as she had tremendous influence on the rest of the appellants and that all they did was done in advancement of her personal gain or interest. These appellants were just blindly following her specific instructions.

Whilst accepting the seriousness of these offences as captured by the trial court, we do not believe that only a prison term was appropriate.

For these reasons we intent to partially interfere with the sentence of effective term of imprisonment imposed by the court *a quo* by setting it aside and substituting same with community service.

The effective term of imprisonment imposed on each of the appellants is accordingly set aside and substituted with community service.

The matter is remitted back to the trial court for the court to carry out the necessary enquiry to enable it to impose community service as directed.

HUNGWE J agrees……..

Musariri Law Chambers, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners