

BLESSING KWAIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 10 July, 17 July & 24 October 2018

Criminal Appeal

P Chigumba, for the appellant
C Mavuto, for the respondent

WAMAMBO J The appellant was convicted after a trial of contravening section 113 (2) (d) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] and sentenced to 12 months imprisonment of which 6 months were suspended on condition of good behavior. The remaining 6 months were suspended on condition appellant paid restitution to the complainant in the sum of US\$1 400 on or before 30 June 2017.

The appellant is appealing against both conviction and sentence.

The grounds of appeal on conviction are divided into three lengthy paragraphs. The first ground is that appellant had no contractual relationship with complainant and thus the complainant had no *locus standi* to bring a complaint against appellant. The second ground of appeal is that the trial court erred by finding that appellant prejudiced the complainant or David Satenga complainant's husband of US\$1 400. The third ground of appeal is that the trial court should have called Elvis Gonde, Shane Kubonera and Kubvoruno as witnesses as they used duress and death threats to obtain money belonging to David Satenga from appellant.

The purported grounds of appeal on sentence are firstly that appellant was a first offender who never benefited from the commission of the offence and secondly that the court erred by imposing both a lengthy suspended sentence and also ordering restitution.

The grounds are summarized above. In their original form they are rambling and unclear, They appear to have been formulated by the appellant without the assistance of a legal practitioner.

The facts are largely common cause. Anna Mbichoro approached appellant for assistance to recover US\$950 owed to her. Appellant demanded US\$200 from her for the assistance he would render her and she duly gave it to him. She followed up with appellant to check on the progress to recover her money. In January 2016 she approached appellant who told her he had used her money to which he retorted that he would give her back her money after he was operated on. Appellant specifically told her he would give her US\$1 400 which he had received on her behalf but no longer had it. Appellant became evasive and would not pick up her calls. At one stage after a report had already been lodged with the police appellant approached her at home and gave her US\$22 for purposes of possibly settling the matter out of court.

In cross examination appellant suggested that David Satenga, complainant's husband had told her what to say. He implied that complainant did not deal directly with him as he only dealt with David Satenga. Complainant however did not waver in her response and maintained that it was her not her husband who dealt directly with the appellant.

The first ground of appeal can be disputed of with ease. That the charge sheet refers to the wife and not the husband is neither here nor there. In any case both of them testified and proved that the appellant obtained money from them in order to recover money owed to them. Further that when the appellant received money due to them as a couple he stole it.

With regard to the second ground of appeal the trial court came to the decision that the amount defrauded by the appellant is US\$1 400 after a careful analysis of the evidence. Part of the evidence proving prejudice of US\$1 400 came from the appellant himself. The trial magistrate also adequately dealt with all the grounds of appeal when responding to the grounds of appeal as contained in the notice of appeal.

As for the third ground of appeal against conviction it is clearly of no merit. The trial court convicted the appellant on the available and adequate evidence adduced by both the state and the defence. It is unclear how the trio whom the appellant alleges should have been called as witnesses would have assisted his case. In his defence outline the appellant referred to one Nyepera and two other men who were allegedly sent by David Satenga to collect money from him. In an attempt to

shift the blame as it were the appellant in cross examination of David Satenga alleged that he had given money meant for David Satenga to Nyepera and Satenga's two sons.

In further confusion the appellant testified that among other people, a magistrate was involved in extorting him, only to make a u-turn and allege that it was in fact a clerk who had implicated a magistrate. What becomes, clear is that the defence case contains contradictory statements by the appellant.

In the full circumstances as outlined above we are satisfied that the conviction is unassailable.

When dealing with the appeal on sentence it is important to seriously consider the principles on sentencing contained in a plethora of decided cases.

In *S v Nhumwa* S40-88 KORSAH JA at p 5 had this to say:

“It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court”

In *S v Ramushu and Others* SC 25/93 at p 5 GUBBAY CJ stated as follows:

“In every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is preeminently a matter for the discretion of the trial court and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attached on the general ground of being excessive, should only be altered if it is viewed as being disturbingly in appropriate.”

The trial court in its reason for sentence considered the full circumstances including the appellant's personal circumstances, the circumstances of the offence and the interest of society.

It is of outmost importance to place the circumstances of the complainant into the balancing act before passing sentence. In this case a couple lost a substantial amount of money at the hands of appellant whom they had entrusted to recover money they were owed.

The appellant clearly benefited from the offence. In the judgment the trial court found as follows:

“His dishonest behaviour is exposed by his attempt to say David Satenga send men to collect the cash, why would he wait for someone to ask for the cash and involve other people when indeed he was paid the cash. It was easy to say he was not paid than try to give back the cash in bits and pieces.”

The trial court was alive to the need to balance various factors in sentencing. In the reasons for sentence the trial court considered that appellant was a first offender, the need to temper justice with mercy, and the need to give the appellant a chance to reform. It is also clear the trial court, was wary of appellant being mixed with hardened criminals thus the sentence passed.

In the circumstances of this case after applying the principles cited in the *S v Ramushu* case supra and *S v Nhumwa (supra)* we are satisfied that the appeal against sentence is unmeritorious.

In the result we order as follows:

The appeal against both conviction and sentence is dismissed in its entirety.

HUNGWE J agrees.....

Lawman Chimuriwo Attorneys at Law, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners