

SYDNEY MAGUMISE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 29 October 2018 & 21 October 2019

Criminal Appeal

E. Mubaiwa, for the appellant
S. Fero, for the respondent

CHATUKUTA J: The appellant was arraigned before the magistrates court, charged with contravening s 126 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Cap* 9:23], that is robbery. The allegations were that on 8 January 2018 and at Juru Post Office, Juru Growth Point, Goromonzi, whilst in the company of another person, he waylaid one Dancan Goora. He kicked Dancan Goora to the ground and assaulted him with booted feet and open hands and unlawfully took a pair of tackie shoes, a cellphone, a camouflage hat and \$15. He then ran away. He was convicted despite his plea of not guilty and was sentenced to five years imprisonment of which six months were suspended for five years on the usual conditions of good behaviour. A further 2 months imprisonment was suspended on condition that the appellant resituated Dancan Goora in the sum of \$80.

Aggrieved by the conviction only, the appellant filed the present appeal on 25 January 2018. The following are the grounds of appeal set out in the Notice of Appeal:

- “1. The trial Court misdirected itself by concluding that the Appellant did not give reasons for assaulting the complainant when in fact the accused gave the reasons.
- 2 The trial Court misdirected itself when it found that the Appellant acted in common purpose with another when same had not been established by evidence on record.
- 3 Trial Court misdirected itself by concluding that the appellant had robbed the complainant when in actual fact the intention to commit robbery was not established.
4. The Trial Court misdirected itself by failing to address the issue of identification of the appellant given that he was not legally represented during the trial.”

On 5 February 2018, the appellant supplemented his grounds of appeal as follows:

- “1. The court misdirected itself to conclude that the appellant was guilty when the actual crime of robbery was not proved beyond reasonable doubt.

2. The court misdirected itself when it concluded that accused robbed the complainant when no money was recovered from him in order to link him to the offence.
3. The court misdirected itself when it failed to consider Appellant's defence which was a probable story."

The respondent took a preliminary point that the supplementary grounds of appeal were fatally defective and did not in any way supplement the grounds filed on 25 January 2018. They were in fact new grounds of appeal which did not refer to the grounds of 25 January 2018.

The only circumstance under which an appellant can file additional grounds of appeal is by way of an amendment as provided for under r 6 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 (S.I 504/79)(the Appeal Rules).

"6 (1) The Attorney General or an appellant as defined Part V, VII, or VIII, may amend his notice of appeal by lodging a notice in duplicate with the Registrar setting clearly and specifically the amendment to the ground of appeal-

- (a) In the case of an appeal against conviction or conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of appeal;"

Although the grounds were filed within twenty days as stipulated in r 6, their filing raised three issues, that:

- (a) Firstly, whether or not the rules provide for "Supplementary Grounds";
- (b) secondly, whether or not, assuming that they were intended to be an amendment they comply with the rules by setting out that they are an amendment and in what way they amend the earlier grounds; and
- (c) lastly, if they are clear and specific.

The rules do not provide for "Supplementary Grounds". They provide for an amendment to grounds that would have already been filed. Assuming that the appellant erred by referring to the second grounds as "supplementary grounds" and it was intended that they amend the first grounds, they do not seem to do so. As rightly submitted by the respondent. the grounds of appeal filed on 5 February 2018 are in no way related to the first grounds of appeal. It appears that the second grounds were a realisation of the inadequacy of the first grounds of appeal. It appears they were supposed to be additional to the first grounds. Instead of improving on the first grounds they in fact compounded the inadequacy of the first grounds as they are hopelessly fatally defective.

At the commencement of the hearing the court queried whether the grounds were in compliance with Rule 22 (1) of the Appellate Division (Magistrate's Court) (Criminal Appeal) Rules, 1979 (S.I. 504 of 1979). The rule reads:

"22 (1) The appellant shall, within fourteen days of the passing of sentence, or, where a request has been made in terms of sub-rule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal....."

The court was of the view that the grounds, both in the initial notice of 25 January 2018 and 5 February 2018 were not clear and specific and therefore fatally defective.

The appellant submitted that the grounds were adequate although not elegantly formulated. It could be discerned from the grounds what the attack on the trial court was. Mr Mubaiwa sought to rely on GARWE JA's decision in *Jainos Zvokusekwa v Bikita Rural District Council* SC 44/2015 where the court noted that:

"22 In my view, the remarks made in Granger's case (supra) need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. If it is clear that an appellant is criticising a finding by an inferior court on the basis that such finding was contrary to the evidence led or was not supported by such evidence, such a ground cannot be said to be improper merely because the words "there has been a misdirection on the facts which is so unreasonable that no sensible person would have arrived at such a decision" have not been added thereto. If it is evident that the gravamen is that an inferior court mistook the facts and consequently reached a wrong conclusion, such an attack would clearly raise an issue of law and the failure to include the words referred to above would not render such an appeal defective. After all, there is no magic in the above stated phrase and very often the words are simply regurgitated without any issue of law being raised." (own emphasis).

The appellant seemed to have overlooked the remarks that the grounds must be concise and specific. As stated in *Dr Nobert Kunonga v The Church of The Province of Central Africa* SC 25/2017 at para 32, once a ground begs the question "so what", that ground is not concise and specific and is accordingly fatally defective. The grounds in both Notices beg the very question, "so what". It is not for the appeal court to interrogate the grounds so as to establish what the appellant wished to say. The record for appeal is set out starting with the grounds of appeal for a purpose, that is to let the court know what the appeal is about. The grounds must therefore speak for themselves as to what to look for in the rest of the record of proceedings.

The question whether or not grounds of appeal are clear and specific has haunted the appeal courts for a long time. In *Dr Nobert Kunonga v The Church of The Province of Central Africa* ((*supra*)), a subsequent decision by GARWE JA, the court was still agonising over poorly drafted grounds of appeal. GARWE JA observed at para 19 that:

“[19] Rule 32 of the Rules of this court provides that the grounds of appeal contained in a notice of appeal must be clear and concise. Many decisions of this court and the courts in South Africa have, over a long period of time, explained what is meant by the term, but this notwithstanding, many lawyers, including very senior ones, continue to experience considerable difficulty in properly formulating grounds of appeal that comply with the Rule. I think it is necessary to trace the various decisions of the courts on this aspect over the years, both in South Africa and this country.”

He thereafter analysed decisions of the courts in Zimbabwe and South Africa. The thrust of those cases is that grounds of appeal must not only be concise but must also be specific. It is clear from the decisions that grounds of appeal must identify the error of the court and how that error goes to the root of the conviction.

The grounds in the present appeal, in a nut shell, simply state that that the accused was convicted when he should not have been convicted. The grounds are analogous to those criticised in the various cases cited in *Dr Nobert Kunonga v The Church of The Province of Central Africa* ((*supra*)) as they are argumentative and in our view beg the question “so what” or as remarked by McNALLY JA in *State v Jack* 1990 (2) ZLR 166 (SC) that “he is not guilty because he is not guilty. (See also particularly *S v McNab* 1986 (2) ZLR 280 (SC)).

They cannot be said to comply with the rules. They are therefore fatally defective.

Accordingly, it is ordered as follows:

1. The preliminary objection is upheld.
2. The grounds of appeal are fatally defective.
2. The appeal is struck off the roll.

MUSAKWA J: agrees:

Tavenhave Machingauta, appellant’s legal practitioners
Prosecutor General’s Office, respondent’s legal practitioners