

JOE NYASHA KATOPE  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MWAYERA AND MUZENDA JJ  
MUTARE, 6 November 2019

### **Criminal Appeal**

*L Chigadza*, for the appellant  
Ms *T. L Katsiru*, for the respondent

MUZENDA J: On 31 January 2019 the appellant was convicted by the Rusape Provincial Magistrate on allegations of public violence as defined in s 36 of the Criminal Law Code. He was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of future good behaviour. Dissatisfied with both conviction and sentence, he filed an appeal against both conviction and sentence. On 6 November 2019 we dismissed the appeals and indicated that reasons would follow. These are they.

The state alleged that on 15 January 2019 and at Vengere Musika, Rusape, appellant acting in concert with persons whose names are unknown to the prosecutor, unlawfully disturbed the peace, security or order of the public to a serious extent by erecting barricades across Chiduku Road, and tearing a billboard of the President of the Republic of Zimbabwe, his Excellency E. D. Munangagwa.

The facts as spelt out in the state outline are to the effect that on 15 January 2019 at 0900 hours, the appellant together with the other two persons only known as “Boomers” and “Ma One” (still at large) led a crowd to Vengere Musika in Rusape. Whilst at Vengere Market, the trio incited each other and went on to tear the billboard of the President. They proceeded to ignite a tyre which was filled with card board boxes and attempted to torch the billboard. The trio commenced to block Chiduku road at N. Richards Wholesalers with concrete blocks, boulders and vending wooden tables. They only ran away from the scene after seeing a reaction team constituted by both police and the military. On 18 January 2019 appellant was apprehended at his house No. VE 55 Vengere Township, Rusape.

Accused pleaded not guilty and gave a defence outline to the effect that on the date in question he was at Vengere Market Bus Terminus, the case was fabricated by Fungai Murisa who has political differences with the appellant and had previously promised to fix appellant. Alternatively the whole case is one of a serious case of mistaken identity. Appellant prayed for his acquittal.

The appellant advanced grounds of appeal against conviction as follows:

- (1) The learned Magistrate misdirected himself by convicting appellant on the basis of the evidence of single witness who purportedly saw appellant allegedly committing the offence, when his evidence was not credible.
- (2) The learned Magistrate misdirected himself by failing to appreciate that there were self-contradictions by the witness Fungai Murisa as well as the other three police state witnesses.
- (3) The trial court misdirected itself by holding that appellant was hiding facts clearly show that he was asleep in his room having arrived without being noticed by his wife.
- (4) The trial court erred in failing to appreciate that the altercation between appellant and Murisa coupled with Murisa being apprehended by a soldier was more than enough motivation for him to falsely implicate appellant.

As against sentence. Appellant submitted that:

- (i) The sentence is so severe as to induce a sense of shock, taking into account the mitigatory factors presented by the appellant.
- (ii) The sentencing court erred in not considering a sentence of community service to a custodial sentence.

On the date of hearing the appeal, appellant applied to amend the prayer on the notice of appeal which application was not opposed by the state. The application for amendment was granted.

Looking at the grounds of appeal as spelt out by the appellant, basically two issues crystallises for consideration: whether Fungai Murisa was a credible witness worth to be believed by the trial court and secondly whether there were material contradictions between the evidence of Fungai Murisa on one hand and that of the police details on the other and whether those contradictions have a bearing on the state case. It is important to this court to

revisit the evidence of Fungai Murisa in detail. The witness told the court that he had known appellant as a driver of Zinenda Tours for a year. On the fateful day 15 January 2019, the witness went to Vengere Musika to do his work at the market and whilst seated there he observed people starting to gather around and others were whistling. He was 10 to 15 meters away. Among this group of people the witness managed to identify appellant donning blue helmet with Dynamos Football Club team stickers, a white t-shirt with blue stickers on the sleeves. The witness went to the scene and upon his arrival appellant walked away with the mob towards N. Richards Wholesalers. The witness spoke to the appellant<sup>1</sup>. The appellant then headed towards N. Richards. The witness then saw appellant lifting a vending table and placing it on the tarmac<sup>2</sup> and the crowd was urging him whistling and the witness was by then 30 to 40 meters from where vendors usually sell newspapers. The mob was composed of about 30 people. After the appellant placed the wooden table on the road the witness confided in Patience who was near to him that the witness was going to remove the table from the road to prevent motorists from causing accidents. The crowd was ululating and clapping, appearing to enjoy the proceedings. The witness managed to remove the table from the road, appellant approached the witness<sup>3</sup> and told him that if the witness was not happy with what was happening, it was good that the witness leave the scene and go to his house and sleep. The witness then stood by Patience and actually felt that he was going to be beaten by the crowd. Later the appellant teamed up with Boomers and Musariri (alias Ma One), the three hoisted a pillar and placed it on to the tarmac surface where the witness had removed the wooden table. The witness saw Musariri beckoning people to follow behind him, he was lifting his hands, the mob had swelled up to 100 people. Musariri reached the billboard showing the picture of the President and started throwing missiles at the picture. The witness observed appellant's accomplice, Boomers outreaching the billboard by ascending on pushcarts and shouted to the audience that he was going to tear the picture from the billboard and the crowd cheered him up to. He failed to tear the picture and dropped down. The billboard was about 3 metres high. However the crowd was pelting the picture, then the appellant raised Boomers by placing the latter on appellant's shoulders and Boomers tore the picture of the President off the billboard. After a while a reaction team composed of the army and the police arrived at the scene and the mob scattered.

---

<sup>1</sup> P 20 of the record of proceedings

<sup>2</sup> P 21

<sup>3</sup> P 22

The witness was extensively cross-examined by appellant's counsel about the full names of the appellant, politics and that there were motives that caused the witness to implicate the appellant. The witnesses remained adamant repeating the events which the court summarised herein. He was not shaken under cross-examination and indeed there is no doubt that the record shows that the evidence of the witness was believed by the trial court. The alleged contradictions by the appellant did not go to the root of the case. In our view the appellant failed to cross-examine the witness on crucial aspects of his evidence like placing of the wooden table and boulders on the road assisting Boomers to reach the President's poster on the billboard, such evidence is very crucial to the charge of public violence. The evidence places appellant at the epicentre of the disturbances, the witness was not a stranger to the appellant, the witness interacted with the appellant at the scene especially when the appellant removed the wooden table from the road after appellant had placed it there as a barrier to the motorists, the witness spoke to the appellant, surely all these features of the witness' evidence were hardly challenged by the appellant during cross-examination, we take it appellant agreed with the witness' evidence. In addition to the familiarity of the witness to the appellant, the witness went on to describe the nature of clothes which were worn by the appellant. We are satisfied that the learned provincial magistrate did not misdirect himself in dismissing the alleged contradictions by the defence and in finding the witness credible, he did not err in convicting the appellant on the basis of this witness' evidence<sup>4</sup>. The appeal against conviction ought to fail.

The appellant attacks the effective sentence of two years and argues that community service could have been appropriate in the circumstances. The reading of the record of proceedings shows that the learned provincial magistrate laboured on the aspect of sentence and capably in our view weighed the mitigatory factors favourable to the appellant and proceeded to suspend a total of a year from the sentence of 3 years imprisonment. However the aggravating features exhaustively captured by the sentencing court justified a custodial sentence. The manner the events of 15 January 2019 unfolded as described by the eye-witness, were electric, fearful and intimidating. Political demonstrations by nature can turn into violent, more so if the other side supporting the President could have reacted to the pelting and tearing of the picture posted on the billboard. Fortunately nothing ripened to such a melee and none was harmed, placing objects on a busy road like Mutare highway unavoidably creates an

---

<sup>4</sup> See *S v Magodo* 2017 (1) ZLR 294 at 294 C-E

unimagined catastrophe for the road users, exposing the passengers to risk, even death and further exposing vehicles to possible wreckage. All in all both the public and valuable properties are exposed by public demonstrators who unnecessarily become unruly. We appreciate that citizens and disgruntled people should be free to exercise their constitutional right to express their discontent publicly over any act that does not augur well with them, but equally they should do so without interfering with others constitutional rights of freedom of movement and right to privacy and safety of other persons as well as their property. The conduct of the appellant on the day in question was reprehensible and there is need by courts to pass deterrent sentences like the one passed on the appellant. The appeal court does not lightly interfere with the sentence of a lower court unless the lower court's discretion was not judiciously exercised<sup>5</sup>. *In casu* the appellant has failed to show how the lower court's discretion was not judiciously exercised. The appeal against sentence equally fails.

#### Disposal

The appeals against both conviction and sentence are dismissed.

MWAYERA J agrees \_\_\_\_\_

*Chigadza and Associates*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners

---

<sup>5</sup>.Like Chasweka v State HH 48/17  
Ram