JAISON MAX KOKERAI MACHAYA

And

CHIBURURU CHISAINYERWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO AND KABASA JJ
BULAWAYO 29 MAY AND 15 JUNE 2023

Criminal Appeal

A. Muchadehama, for the appellants
T. M Nyathi, for the respondent

KABASA J: The appellants appeared before a Provincial Magistrate sitting at Gweru Magistrates Court facing a charge of contravening section 174 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 – criminal abuse of office. They both pleaded not guilty but were both convicted after a full trial. They were each sentenced to 48 months imprisonment of which 18 months were suspended for 2 years on the usual condition of good behaviour, leaving each one with an effective 30 months to serve.

Dissatisfied with both conviction and sentence they appealed to this court. The grounds of appeal against conviction are repetitive and unnecessarily prolix, 21 in all. The grounds of appeal against sentence are equally unnecessarily repetitive. The following is what, in our view, captures the core of what the appellants are disgruntled with.

Grounds of appeal

Ad Conviction:-

1. The court *a quo* erred in convicting the appellants on the evidence of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 10th witnesses' evidence when such evidence did not establish the offence with which the appellants were charged.

2. The court *a quo* erred and misdirected itself in holding that the 1st appellant had no right to call Gokwe Town Council officials to a meeting when his duties allowed him to.

3. The court *a quo* erred and misdirected itself in holding that the 1000 stands given to Striations were commonage stands and thus failed to appreciate that the *corpus delict* was non-existent.

4. The court *a quo* erred and misdirected itself in convicting the 1st appellant when his duties were not outlined and how he acted contrary to such duties was not proved.

5. The court *a quo* erred and misdirected itself in convicting the 2nd appellant on the basis of common purpose when such was not proved.

6. The court *a quo* erred and misdirected itself in convicting the 2nd appellant when evidence did not prove a breach of any of his duties.

7. The court *a quo* erred and misdirected itself in holding that the appellants had shown favour to Striations when the evidence showed the contrary.

The rest of the grounds of appeal are subsumed in these 7 grounds of appeal.

As regards sentence, the following grounds adequately capture what was said in 7 grounds of appeal:-

1. The court *a quo* erred in imposing a sentence which did not take into account the mitigatory factors, thereby paying lip service to these factors whilst over-emphasizing the aggravatory factors.

2. The court *a quo* erred in coming up with a wholly inappropriate sentence which is not in line with precedent and which was informed by irrelevant considerations.

Background facts

The 1st appellant was the Resident Minister for Midlands whilst the 2nd appellant is the Midlands Provincial Planning Officer.

In 2012 the two decided to acquire stands illegally from Gokwe Town Council. Acting under the guise of pursuing the National Housing Delivery Programme they called for an informal meeting with Gokwe Town Council officials and requested for stands which they said were to be allocated to civil servants. The council did not have such stands whereupon the two agreed that the 2nd appellant prepare a layout plan for an area named Mapfungautsi Extension. The plan was then sent to the Council for adoption prior to its approval by the Minister of Local Government. The plan was subsequently sent to the Department of Physical Planning and was approved. The 2nd appellant was supposed to then advise the Council of such approval but failed to do so. Pressure was subsequently brought to bear on the Council to adopt the plan which it did. The 2 then exerted pressure on Council to release 1000 stands of the total 3 360 Mapfungautsi Extension stands. The Council resisted the demands and handed over the 1 000 stands to the Ministry of Local Government, as commonage. The Council handed over the stands and generated a letter to that effect, which letter 2nd appellant re-directed to 1st appellant diverting it from the recipient, Department of State Lands Management. The 1000 stands were then handed over to Striations World Marketing for development contrary to the commonage policy.

The 1st appellant subsequently wrote to the State Lands Management Department for survey instructions and pretended to be working in partnership with Council. The 1 000 stands were said to be for Mapfungautsi Extension 1 but there was no such project. The stands allocated to the Ministry were also stated as 100 yet the Council had given the Ministry 1000 stands. Survey instructions were subsequently given and the 1 000 stands were surveyed. Striations commenced developing the stands and sold some of them to unsuspecting members of the public, 92 people paid for the stands which were sold at $3 900 each. The rest of the stands were held for speculative purposes.

In order to cover their tracks, 1st appellant wrote to the surveyor advising him that his costs would be paid by Striations and not Council and this was meant to ensure the clandestine operation would not be exposed.

The 1st appellant thereafter instructed the Secretary of the Midlands Housing Delivery Programme to generate minutes indicating that a meeting was held by the Housing Committee offering Striations to develop the 1000 stands but no such meeting had been held. Investigations revealed that the 2 directors of Striations had ties to 1st appellant, one Chikwira held a position in the ZANU (PF) provincial structures and was the 1st appellant's immediate subordinate whilst one Machakaire was a former Ministry employee in the Physical Planning office and is a planning consultant in Gweru.

Following investigations the 2 appellants were arrested. The prejudice caused by their actions was $900 000. The 2 appellants denied these allegations *in toto*.

THE EVIDENCE

The court *a quo* heard evidence from a total of 10 state witnesses. Both appellants testified in their defence and had no witnesses to call.

The first witness was the Deputy Director – State Land Management. She was not privy to a meeting that the 1st and 2nd appellant held with Council officials as she was not there. She equally was not part of the decision to give the land developer Striations the contract to develop the stands in question. The Mapfungautsi project land was state land under the supervision of the local authority but the Ministry of Local Government had the role to manage such land. The Ministry would get 10% of serviced stands from the local authority which were commonage and these would be allocated to home seekers.

Land developers would be appointed by the local authority or by the Ministry's head office and such developer was supposed to submit an application and be subjected to vetting to ensure they had capacity before appointment.

Her Ministry had requested 10% commonage from Council but had not been favoured with a response. The 1st appellant's office then generated a letter handing over 100 stands of the Council's first phase of 1 000 stands. A survey instruction was given for the 1 000 stands but the generation of the letter allocating the 10% commonage was not 1st appellant's mandate. It was therefore unprocedural. The subsequent allocation of the land to a land developer was also unprocedural.

The 2nd appellant as a physical planner had to come up with the lay-out plan and in doing so he was doing what was expected of him. The witness could however not comment on whether he did so procedurally as she was not his supervisor.

The witness's evidence essentially pointed to the unprocedural manner in which the Mapfungautsi project was handled.

The 2nd, 3rd and 5th witnesses were the Gokwe Town Council officials who were called to a meeting by the 1st appellant, which meeting was also attended by the 2nd appellant. The 1st appellant requested for 1000 stands for low cost housing which were to be offered to civil servants. There was no lay-out plan at that stage and so the 2nd appellant was to come up with one. Council decided to give the stands to the Ministry instead. A lay-out plan was then done which had about 3 000 stands and 2nd appellant forwarded it to Council asking them to consider it. Council did and adopted it.

Striations subsequently submitted designs as the land developer and Council assumed Striations was working with the Ministry as Council brings in a land developer after holding a full Council meeting which was not done.

However since the land had been given to the Ministry, Council had no power over it.

These witnesses' evidence established the following:-

1. The meeting called by the 1st appellant was a first. It had not been done before. No minutes were taken and there was no formal written invitation for the meeting.

2. Council resolved to give the 1000 stands as commonage to the Ministry and not to 1st appellant.

3. Council was happy with the project as it was development oriented. There was need to develop Gokwe and similar projects had been successfully done elsewhere.

4. Whilst the meaning of commonage was not clear, Council gave the 1 000 stands as commonage.

The 4th, 5th and 6th witnesses were the Provincial Housing Officer, (PHO) the Senior Principal Administrative Officer (SPAO) and the former Provincial Administrator for the Midlands Province. Ordinarily these witnesses would attend Committee meetings chaired by the 1st appellant under the National Housing Delivery Programme (NHDP). The Provincial Physical Planning Officer (PPPO) who is 2nd appellant, the Provincial Administrator, the 1st appellant, the Chief Lands Officer and the Provincial Housing Officer were committee members and the purpose of the committee was to operationalise the National Housing Delivery Programme policy document.

The Provincial Administrator (P.A) did not attend the meeting where 1st appellant requested for the 1000 stands. She was not aware of it until the Investigating Officer informed her. She therefore took no part in the Mapfungautsi project although the minutes generated suggested so.

In her absence the Senior Principal Administrative Officer would act on her behalf.

This Principal Administrative Officer signed the minutes generated by the P. H. O. but he was merely asked to sign such minutes by the 1st appellant. He also signed a letter offering Striations the development contract for Mapfungautsi and he signed on behalf of the P A. He however had not attended a meeting appointing Striations. He felt obliged to sign the letter as he could not refuse a superior's orders.

The P. H. O. who generated minutes of the meeting called by the 1st appellant had not attended such meeting and merely came up with the minutes as dictated by the 1st appellant. The minutes were to the effect that Council had offered 1 000 stands and Striations had been appointed as the developer. 10% of these stands were to be given to the Ministry as commonage.

The 1st appellant as chairperson of the committee was supposed to call for a meeting and he was the initiator of housing development projects. He could allocate land to people and to private developers and the private developer would charge for servicing of the land.

Striations had been allocated land for development before as it had proved that it had the capacity.

These 3 witnesses' testimony established the fact that the 1st appellant was mandated to intervene to ensure the National Housing Delivery Programme was on course and had the prerogative to initiate the projects. He could also intervene where a particular local authority was not actively participating in pursuit of the National Housing Delivery Programme. He however was not supposed to act single handedly but as the chairperson of the committee tasked with the task to ensure the success of the National Housing Delivery Programme.

The 1st appellant did not follow procedures in calling for the committee meeting, the appointment of the land developer and overstepped the supervisory role he was supposed to assume.

The 8th witness was the Investigating Officer who merely narrated what investigations he carried out which the witnesses already testified on.

The 9th witness was one of the directors of Striations who got the Mapfungautsi project. His evidence was to the effect that his company had previously applied to the 1st appellant and were awarded the first project. They had to attend at the P. A's office for a presentation meant to show that the company had the requisite capacity to achieve the land developing task. After successfully winning the first project, they were awarded a second project. They made another application and got the Mapfungautsi project but this time they did not do a presentation. The company was supposed to service the stands and remit 10% to the Government. They did not complete the servicing as the land was invaded at a time they had advertised the stands less the 10% which was government allocation. 92 people had signed sale agreements with Striation.

This witness confirmed that he was once employed by the Ministry of Local Government and that the Co-director of Striations had a top post in the ZANU (PF) party.

The witness's evidence therefore established that the proper procedures were not followed when the Mapfungautsi project was given to Striations. The project however suffered a still birth due to the interruption by people who invaded the land.

The last witness was the Acting Principal Director with the Ministry of Local Government. He explained the procedure that was to be followed.

His evidence was to the effect that where state land was concerned, the local authority or the state could initiate the development process through feasibility studies of the land. If

done by Council, a committee would then come up with a resolution and rope in the physical planning office. Once that office was satisfied, a lay-out plan would follow which would be vetted and sent to head office for approval. The 1st appellant played a supervisory role in these processes.

Council had no physical planner and so utilised a Ministry official, who was the 2nd appellant.

However procedures were not followed in the Mapfungautsi project and the local authority was not consulted.

Determination of the court *a quo*

It is from this evidence that the court *a quo* held that the 1st appellant violated processes and the 2nd appellant aided the 1st appellant by coming up with the lay-out plan and participating in an unprocedurally called meeting. The lay-out plan was approved without the participation of the local authority because the 2nd appellant did not follow procedure, he did not seek the adoption of the plan by the Council before its approval by the Ministry. But for his participation 1st appellant would not have managed to accomplish the spearheading of the Mapfungautsi project. Their actions were motivated to show favour to Striations, the appellants took 1 000 stands unjustifiably and Striations benefited by selling the stands to the detriment of the targeted beneficiaries.

Analysis

Were these findings supported by the evidence? Did the evidence prove the appellants' guilt? After hearing counsel's submissions we allowed the appeal in respect of the 2nd appellant, the reasons thereof will become clear later on in this judgment. We reserved judgment in respect of the 1st appellant.

The grounds of appeal as regards conviction all speak to the fact that the witnesses' evidence did not prove the offence with which the appellants were charged. The grounds of appeal raise the one issue which is whether evidence proved that the appellant diverted 1000 stands allocated to the Ministry of Local Government and gave them to Striations which then sold them causing prejudice of $900 000 to the Government.

Section 174 of the Criminal Law Code, Chapter 9:23 provides that:-

"(1) If a public officer, in the exercise of his or her functions as such, intentionally –

(a) does anything that is contrary to or inconsistent with his or her duty as a public officer, or

(b) omits to do anything which it is his or her duty as a public officer to do;

for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both

(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour as the case may be, to that person."

In *Kasukuwere* v *Mujaya and 3 Ors* HH 562-19, the following questions were held to be pertinent, which questions the court *a quo*, aptly captured, that is, is the accused a public officer, what duty is he entrusted with, how is he required to discharge it, what did the public officer do, was he, in doing so or omitting to do so intentionally in a manner inconsistent with his duties, if that is so, was this done to show favour or disfavour to any person.

Whilst the appellant's duties were not outlined as contended by Mr. Muchadehama, it is important to note that the charge related to them

> "unlawfully taking 1 000 stands that had been allocated to the Ministry of Local Government as commonage and for the purposes of showing favour to Striations World Marketing diverted and offered the said stands to Striations and later sold the stands to members of the public."

Even if the duties of the appellants had been outlined, the import of the charge spoke of criminally diverting stands allocated to the Government and offering them to a company and thereafter sold the stands to members of the public. In other words the stands were stolen and given to a land developer and subsequently sold causing a prejudice of $900 000.

What public official's duties would ever entail diverting stands and selling them to their benefit? This is why we are of the view that the charge itself clearly spoke to a criminal enterprise and not merely a failure to discharge set out duties.

The evidence, including the evidence from the appellants showed what the duties of the 2 appellants were with regard to the National Housing Delivery Programme policy.

The evidence from the witnesses showed that the 1st appellant was mandated with supervising the implementation of this project as the Resident Minister and chairperson of the committee set up to run with the project.

None of the witnesses' evidence showed a diversion of 1 000 stands and the subsequent selling of the stands. There was reference to a list of beneficiaries who were to benefit from the 10% which were to be commonage. There was no follow up to this evidence on whether such beneficiaries would not have benefited had the land not been invaded.

There was a conflation of what was described as state land and what commonage was.

The 1st appellant testified to the effect that as the Governor of the province, he had a mandate to, *inter alia*, see to the development of the province. He was the chairperson of the National Housing Delivery Programme and where local authorities were not performing he was to intervene. Gokwe Town Council was lagging behind and so he called the council officials to encourage the implementation of the project.

Granted his overzealousness raises suspicion and the manner in which he did not follow procedure equally raises suspicion. However did the evidence prove the charge of diverting 1 000 stands and selling them causing a prejudice of $900 000?

In *R* v *Difford* 1937 AD 370, the court said:-

> "No onus rests on the accused to convince the court of the truth of any explanation which he gives, if he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Besides showing what the procedure was in relation to the housing project and the fact that such procedure was not followed to the letter, the evidence did not show a diversion of stands and the subsequent selling of the same. The matter could have been prosecuted better, especially if the state had focused on leading evidence in support of the charge and the facts upon which such charge was anchored.

Mr. Nyathi, for the state conceded as much after questions were posed by the court with regard to the adequacy of the evidence proving the appellants' guilt.

It could be that the 1st appellant had ulterior motives and was intending to take these stands for his benefit but did the evidence show that? We think not.

Section 174 is unfortunately very wide and may inadvertently encompass situations where public officials display overzealousness and a failure to appreciate checks and balances but falling short of criminally abusing their office.

A reading of the evidence brought out one striking issue, this was that the local authority embraced the 1st appellant's efforts as they saw that as a welcome development to their local authority area.

The committee members pointed out to the lack of adherence with procedure but again appreciated that the 1st appellant was mandated with ensuring that the project succeeded. The stands in question could not be "stolen" as they are essentially Government property with anyone seeking to allocate such without authority risking eviction. The land is still there as Government property, albeit now in the hands of the invaders.

The reverse onus in section 174 (2) kicks in when the state has proved that a public officer has acted contrary to his duties for the purpose of showing favour.

Counsel for the appellants cited several cases on the onus of proof which reposes in the state. (*S* v *Mhlongo* 1991 (2) SACR 207 (A), *R* v *Hlongwane* 1959 (3) SA 337 (A), *S* v *Van der Meyden* 1999 (1) SACR 447 (W) and *S* v *V* 2000 (1) SACR 453 (SCA)

All 10 witnesses' evidence did not prove that which the state case hinged on, i.e. the basis of the charge. Had these witnesses proved the allegations as outlined in detail in the state outline, the state would have, without a doubt, proved its case beyond a reasonable doubt. This was however not the case.

Granted, the 1st appellant's explanation regarding the 1 000 stands and his decision to write to the Ministry "offering" the 10% commonage is suspicious but suspicion no matter how strong can never amount to proof of an accused's guilt.

We got the impression that the 1st appellant in his misguided eagerness to prove himself worthy of his appointment by the President failed to appreciate that his supervisory role and his chairmanship of the committee overseeing the implementation of the National Housing

Delivery Programme did not mean he was to spearhead the process whipping others into line and flouting procedures in the process.

As for 2nd appellant his role was no different from the other players who attended the meeting, came up with minutes and signed the letter offering the land developer the Mapfungautsi development contract.

The 2nd appellant did that which he was called upon to do as the planning officer in coming up with the lay-out plan. None of the Gokwe Town Council officials spoke of their being side-lined in that process. On the contrary the Council engineer and Secretary for the Council said the Council adopted the lay-out plan after it was submitted to it. He spoke of no coercion as suggested by the court *a quo*.

We therefore had no problem allowing the 2nd appellant's appeal soon after hearing argument and only reserved judgment in respect of the 1st appellant.

The finding by the court *a quo* that the 2 appellants flouted due process for the purpose of showing favour to Striations under the pretence of pursuing government and public interest and that the two bullied Gokwe Town Council to apportion them land and ultimately sold the land to be detriment of the targeted beneficiaries is not borne out by the evidence.

The court *a quo* therefore made findings and reached conclusions not borne out by evidence and therein lies the misdirection. The appellate court can interfere with the court a quo's factual findings if such findings are not supported by the evidence (*Barros and Anor v Chimpondah* 1999 (1) ZLR 58 (S).

Disposition

We therefore came to the conclusion that the case against the appellants was not proved beyond a reasonable doubt.

The conviction is therefore not safe and cannot stand. With this finding no useful purpose will be achieved in looking at the appeal against sentence. With the conviction being vacated the sentence equally falls away.

In the result we make the following order:-

1. The appeal be and is hereby allowed.

2. The decision of the court *a quo* is set aside and substituted with the following:-

"Both accused are found not guilty and acquitted."

Kabasa J……

Moyo J…….. I agree

Mbizo, Muchadehama & Makoni, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners