STORY RUSHAMBWA
versus
BRIGHT MPIYABO
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 17 May 2023 & 7 June 2023

Criminal Appeal

P Nyeverai, for the 1st appellant
A Sibanda, for the 2nd appellant
F I Nyahunzvi, for the respondent

CHIKOWERO J

1. This is an appeal against conviction only. The appellants were after a full trial convicted on a charge of criminal abuse of duty as public officers as defined in s174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The 1st appellant was sentenced to 30 months imprisonment of which is months were suspended for 5 years on the condition of good behaviour. The 2nd appellant was sentenced to 15 months imprisonment of which 6 months were suspended for 5 years on condition of good behaviour.

   BACKGROUND
2. The material time appellants were a magistrate and clerk of Court, respectively, stationed at Kwekwe Magistrates court.
3. On 31 December 2019 the 1st appellant was on leave. The trial Court found that well aware that he was on leave, and therefore not supposed to handle fresh matters, the 1st appellant criminally abused his duty as a public officer by dealing with an urgent ex – parte application for a spoliation order wherein he granted an order directing the Zimbabwe Revenue Authority (ZIMRA) to release a motor vehicle which it had seized on the basis that the importer had not paid customers duty. The motor vehicle was being held by ZIMRA as it was earmarked for production as an exhibit in a criminal trial at the magistrates court in Bulawayo. By dealing with and granting the order for release of the motor vehicle in those circumstances, the 1st applicant was found to

have done so for the purpose of showing favour to one John Mapuranga ,who Mapuranga, who claimed to have innocently purchased the motor vehicle without any knowledge tht the importer had not paid the requisite customs duty. At the same time, the 1st appellant was found to have shown disfavour not only to ZIMRA, who had lawfully seized the motor vehicle, but also to the Zimbabwe Republic Police, which intended to produce , the motor vehicle as an exhibit in the criminal trial at Bulawayo . The 2nd appellants conviction was based both on his own conduct and his association with what the 2nd appellant hand alone. The former placed the record of the urgent *ex parte* application before the latter well aware that the latter was on leave and therefore not authorised to deal with the matter at all. This was to ensure that Ms Mutukwa, the magistrate who was properly dealing with civil matters while the 1st appellant was on leave, would not hear the matter. In other words, the 2nd appellant because he was acting in connivance with the 1st appellant in criminally abusing their duties as public officers, placed the record before the 1st appellant for the agreed purpose of showing favour to Mapuranga and disfavour to Zimra and the Zimbabwe Republic Police wrought through granting of the order.

THE GUIDING LEGAL PRINCIPLES IN THIS APPEAL

4. What the appellant are attacking are factual findings of the lower court. The applicable principle in the circumstances is that an appellate court can only interfere with factual findings of a lower court where such findings are irrational or not supported by the evidence. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *Chimbanda* v *Chimbwanda* S 28/02. *S* v *Katsiru* 2007(1) ZLR 364(H); *Shuro* v *Chiuraise* SC 20/19; *Chevhu Housing Cooperative Society Limited and ors* v *Crest Breeders international (Private) Limited and Anor SC* 19/21.
5. With this legal principle in mind, we proceed to determine the appeal.

DETERMINATION OF THE A APPEAL

6. The appellant attack the factual finding that the 1st appellant was not a " civil magistrate" on 31 December 2019. The argument is premised on certain exhibits which were produced at the trial which demonstrated that he dealt with civil matters before he proceed on leave. Therefore, so it was submitted, he lawfully dealt with the urgent *ex*

parte application on 31 December 2019 although he was on leave on that date since he was the only magistrate available at the time that the application was filed.

7. We agree with Mr Nyahunzvi that there is noting irrational in the finding the 1st appellant was not authorised to deal with the urgent *ex parte* application, which was a civil matter. The duty roster which was produced as an exhibit clearly showed that it was Ms Mutukwa who was authorised by the resident magistrate to deal with civil matters of which the urgent ex parte application was one such, during the period up to 31 December 2019. The 1st appellant's leave covered the period from 16 December 2019 to 12 January 2020 according to the approved leave form produced as an exhibit. The duty roster showed that from 15 October 2019 to 31 December 2019 the 1st appellant's court work was to preride over criminal trials and pre-trial conferences. His out of court duties for the same period were checking the civil register, general supervision of staff, security, maintenance of grounds and " deposit fines" (the last being a summary of the actual duty itself.)
8. It was never the 1st appellant's evidence that he dealt with a pre-trial conference on 31 December 2019, despite a pre-trial conference being civil in nature. He was by them already on leave. As for other civil matters, the duty roster itself proved that the appellant, was in any event not a "civil court" on 31 December 2019. The finding that he was not authorised to deal with the application in question on 31 December 2019 is supported by the duty roster , among other pieces of evidence which we will advert to in disposing of the 4th ground of appeal. Consequently, the 1st ground of appeal is meritless.
9. The trial court found that the 1st appellant did not grant a final order, that the 2nd appellant did not withhold the record of the ex parte application from 27 December 2019 and that one Shepherd Tundiya was in the 1st appellant's chambers, representing Mapurazi, when the order was granted. The appellant's contend that these findings mean that the lower court erred in convicting them. Nothing can be farther from the truth. Our analysis of the 4th ground of appeal will demonstrate why we say so. In the meantime, it suffices that we record that the 2nd ground of appeal is also without merit.
10. It is convenient to simultaneously dispose of the 3rd and 4th ground of appeal. They raise overlapping issues. The grounds read:

> "3 . The learned magistrate erred at law when he overlooked and omitted to consider the other possibilities which could be reasonably drawn from circumstantial inferences that he made thereby misdirecting himself in finding that there was favour to John

> Mapurazi disfavour to the Zimbabwe Revenue Authority and that they Appellants connived.
> 4. The Court *a quo* erred in in making a finding that the Appellant's conduct was inconsistent with their duty as public officers by dealing with the ex parte application in violation of the duty roster and also whilst the 1st appellant was on leave when the work that was done was consistent with their duties. In so doing he paid lip service to the defences tendered by the appellants."

11. A reading of the 3rd ground of appeal suggests that it may be vague. However, the respondent did not raise any issue relating to the validity of that aground of appeal. He preferred to oppose the appeal on the merits. Having heard argument on the merits, we will determine the appeal on its merits.

12. Mapurazi, who testified as a state witness said he neither knew nor gave. The appellants any gift, consideration or reward. The appellants sang the same song so to speak. The lower court did not think that this was decisive. It took the view that the showing or favour or disfavour could be inferred from the proved facts. It analysed the evidence, both documentary and oral, assessed the credibility of the witnesses set out the facts that it found to have been proved and concluded that the only reasonable inference to be drawn therefrom was that the appellants were induced by a gift or consideration to act as they did. Further the lower court found that the appellants had failed on a balance of probabilities, to rebut the presumption that they breached their duties for the purpose of showing favour to Mapurazi disfavour to ZIMRA and the Zimbabwe Republic Police. As for the appellant's defences, the lower Court found that the same were beyond reasonable doubt false.

13. We think that the decision to convict both appellants is unimpeachable. It was common cause that the 1st appellant was on leave on 31 December 2019. It would have defied logic for the 1st appellant while on leave, to have lawfully dealt with a fresh matter being parte application in question. The resident magistrate, Nazombe, was at the same court station throughout the day on 31 December 2019 so was Mutukwa, whose duties included dealing with civil matters inclusive of the one that the 1st appellant entertained and disposed of. These witnesses testified, and were believed, that thy were at the station the entirety of 31 December 2019. The attendance register, which was produced as an exhibit, bore this out. The 1st appellant did not sign the attendance register. This must only have been so because he, being on leave, was not on duty. The record reflects that the 1st appellant did not deal with any other matter on the day in question save the urgent ex parte application. It was common cause that he neither saw nor talked to any other magistrate stationed out Kwekwe on the day in question. An intern testified, and was believed, that the 1st appellants spend less than 10 minutes in his

chambers on the day in question. The court also accepted testimony that after the 1st appellant had dealt with the application, which had been brought by Tundiya on behalf of Mapurazi, Tundiya then went into the 1st appellant's chambers and came out in no time at all. The 1st appellant did not dispute that, but claimed that Tundiya had come through without being ushered in and uninvited to wish the former compliments of the New Year. Despite averring in his defence outline that he did not know the first appellant was on leave, the second appellant did not challenge, the resident magistrate's evidence that the second appellant was a diligent clerk of Court. The resident magistrate's undisputed testimony was that prior to 31 December 2019 and at a time when the first appellant was already approached the former and highlighted that the civil register was not being checked as the first appellant, was on leave. The second appellant sought to know who would perform that duty whereupon the resident magistrate stated that she would check the civil register herself during the period that the first appellant was on leave. In these circumstances, the lower court found that the second respondent's defence that he placed the urgent *ex parte* application before the first appellant in chambers, because he did not know that he was on leave, and therefore not authorized to deal with fresh matters, to be beyond reasonable doubt false. The second appellant knew the contents of the duty roster, was aware of the standard operating procedures in place at Kwekwe magistrate's court and, per the resident magistrate, should have sought her authority on whom to allocate the application if indeed the second appellant had failed to find Mutukwa. The resident magistrate testified that she had not given the first appellant verbal authority to deal with the application in question. She had not even known on the fateful day that the first appellant had appeared at station let alone dealt with an urgent *ex parte* application. The authority that she had given him, since he was on leave, was confined to dealing with his partly heard matters on specified dates, these being two or three days before Christmas and not on any other date beyond that. This was so because she needed a record of the dates when he had carried out duties while on leave so that she would compensate him for those days once his leave expired. Although coached as an interim order we note that the order that the first appellant granted was final. Spollatory relief can never be sought in an urgent ex parte application because such relief is final, not interim. See *Blue Range's Estates (Pvt) Ltd* v *Muduviri and Anor* 2009(1) ZLR 368(S).

14. The 1st appellant's defence that he had been authorized to present himself at Kwekwe Magistrates Court on 31 December 2019 to deal with his partly-heard criminal matters

and, out of a sense of duty, agreed to entertain the urgent ex parte application on being told by the 2nd appellant that no other magistrate was immediately available, was correctly rejected. No evidence was placed before the trial court to suggest that the 1st appellant either postponed or otherwise dealt with any criminal matter on 31 December

15. The lower court did not err in concluding the only reasonable inference to be drawn from the proved facts was that the appellants connived to have the 2nd appellant place the record before the first appellant so that he would corruptly favour Mapurazi by granting the order directing ZIMRA to release the motor vehicle. That was the only possible conclusion that the lower court could have reached on an assessment of the evidence as a whole. As observed by the lower court the sequences of events on the day in question justifies the inference drawn that both appellant were guilty. The first appellant was on leave. Being on leave means that a judicial officer is not allowed to handle fresh matters unless authorized by the head of the station. But what did the first appellant do? He did not sigh the attendance register, as was the norm at Kwekwe Magistrates Court. He went into his chambers. Some few minutes later Tundiya brought the application in question to the clerk of court, the second appellant. The latter opened a court record. He took it to the first appellant in chambers. The 1st appellant quickly grants final order. That order was incompetent, so was the application itself. Tundiya, without anyone clearing him, went into the first appellant's chambers. In no time he was out. So was the first appellant, who had come to deal solely with that matter. He neither saw nor spoke to the two magistrates on duty. The whole drama played out in less than 10 minutes. The question is, did the appellants take the risk of acting corruptly nothing? Because they had breached their duties as public officers by acting inconsistently there to the favour of Mapurazi and to the prejudice of ZIMRA and the state in the criminal matter at Bulawayo, the had to rebut the presumption in s 174(2) of the Criminal Law Code, namely that they acted for the purpose of showing favour or disfavour to the persons already indicated in this judgment. See state Chogugudza 1996(1) ZLR 28(SC); *Undenge* v *State* HH 222/18. This they failed to do.

16. The appeal is completely devoid of merit.
17. The appeal be and is dismissed.

CHIKOWERO J:……..

KWENDA J:…….Agrees

Mavhiringidze and Mashanyare, first appellant's legal practitioners
Mhaka Attorneys,second appellant's legal practitioners
The National Prosecuting Authority, respondents legal practitioners