SHEPHERED TAVARUVA
and
MUKOKO CHINGWE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA& MANGOTA JJ
HARARE, 2 February and 30 March 2015

Criminal Appeal

F Chirairo, for the appellant
I Muchini, for the respondent

MANGOTA J: The appellants were charged with malicious damage to property as defined in s 140 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). They were, in the alternative, charged with negligently causing serious damage to property as defined in s 141 of the Code.

The appellants pleaded not guilty to the main and the alternative charges. They were, however, convicted of the main charge after trial and were each sentenced to 15 months imprisonment all of which were suspended on the following conditions:

(i) 5 months were suspended on condition of future good behaviour – and the remaining

(ii) 10 months were suspended on condition of restitution.

The state allegations in respect of the main charge were that, during the period which extended from 17 to 23 September 2012 and at Bushmead Farm, Masvingo, the appellants, whom one Casper Shumba contracted to combine harvest his barley, maliciously damaged or destroyed the barley in the course of harvesting the same. Its allegations in relation to the alternative charge were that the appellants, during the above mentioned period, at the mentioned Farm and pursuant to the contract which the parties concluded between them,

negligently caused serious damage to Casper Shumba's barley when they were combine harvesting the crop.

The appellants appealed against both conviction and sentence. They submitted that the state did not establish malice or negligence against them. They insisted that the matter was a civil and not a criminal one. They criticised the sentence which the court *a quo* imposed. They contended that the sentence was grossly excessive and it, therefore, induced a sense of shock.

The respondent's view was that the appellants' conviction was not supported by evidence. It stated that the testimony which the state relied upon did not reveal the requisite *meas rea* of malice or ill will on the part of the appellants. It submitted that the evidence did not show that the appellants were negligent in the manner that they combine harvested the barley. It, accordingly, filed a notice moving the court to deal with the appeal in terms of s 35 of the High Court Act [*Chapter 7:06*].

The appellants were alleged to have, out of malice, damaged or destroyed the complainant's barley which they were harvesting. The interpretation section of the Code does not define the words malice, damage or destroy. The words constitute the gravamen of the main charge which the state preferred against the appellants. One has, therefore, to look elsewhere for a definition of each of the three words and examine the same in the light of what the state alleged against the appellants.

Collins Thesaurus defines the word destroy to mean to reduce a thing to useless fragments or useless form as by smashing or burning. Destroy also connotes an act of demolishing, getting rid of, extinguish or putting an end to or burning down. *Slang's Dictionary* defines the word damage to mean to reduce the value of usefulness of (a thing) or impair appearance, value, usefulness or soundness. *Farlex's Free Dictionary* defines malice as a desire to harm others or the state of mind with which an act is committed and from which the intent to do wrong may be inferred or a desire to inflict harm or suffering on another. Simply put, malice refers to an evil intent or feeling a need to see another suffer.

The appellants could not, from the definitions, be said to have destroyed the complainant's barley as the latter alleged. They could not be said to have damaged the crop. It is difficult, if not impossible, to suggest that the appellants destroyed or damaged the barley in the context of *Farlex Free Dictionary* definition of malice.

It is clear that the evidence which the state led could not, and did not, support the appellants' conviction on the main charge. The court *a quo*, therefore, misdirected itself in a

very material way when it convicted the appellants of the main charge.

The appellants were, in the alternative, charged with having negligently caused serious damage to the complainant's barley when they were harvesting the same. Negligence connotes a failure to measure up to the standard of a reasonable person who, when faced with the situation with which the appellants were faced at the time of harvesting the barley, would have taken steps to guard against harm occurring. The questions which begged the answer were what harm, if any, did the complainant suffer and what steps should the appellants have taken to avert the harm.

The complainant suffered a reduced yield when the appellants harvested the barley. The loss which he suffered was not ascertained with any degree of certainty. Evidence which the state led showed that the loss could not be attributed to the manner in which the appellants harvested the barley. A number of factors affected the yield which the complainant realised. Chief amongst them was the effect of hippopotamuses which were alleged to have destroyed the crop before harvesting. The other factor was the decision of the complainant's manager who instructed the second appellant to drive the harvester to the track which was parked some distance away from the harvesting point to off-load the harvested barley instead of the track being driven to where the harvesting was taking place. That decision, it was observed, resulted in some spillages.

There was, in the premise, no evidence which showed that the appellants were negligent when they harvested the barley. They could not be convicted of the alternative charge when no particular of negligence was established against them.

The court remained convinced that the appellants were erroneously convicted. They should have been acquitted of both the main and the alternative charges. They were not malicious or negligent when they harvested the barley.

The record showed that the matter which is the subject of the present appeal fell more into the realms of civil cases than it did in the area of criminal law. The complainant contracted the appellants to harvest his barley. He alleged that he suffered a loss as a result of their conduct. His desire to have them prosecuted did not serve any purpose for him. The state could not and did not establish the appellants' guilt in respect of the main or the alternative charge beyond any reasonable doubt.

The court mentions, with some concern, the errors which the trial magistrate made.. He knew from the inception of the trial that the state had preferred two alternative charges

against the appellants. Notwithstanding his knowledge, he stated in the concluding part of his judgment as follows:

> "Accordingly therefore, it is my considered view that the state has managed to prove the accused persons guilt beyond any reasonable doubt. The two destroyed the complainant's crop realising that there was a real risk or possibility that the damage or destruction may result from his act or commission."

Such a conclusion is, with respect, vague and embarrassing. It does not tell what the appellants were convicted of. The last sentence of the judgment should have read:

> "The two destroyed the complainant's crop realising that there was a real risk or possibility that the damage or destruction may result from his act or omission" (emphasis added).

Omission and commission are two distinct words which convey two different ideas. They do not mean the same thing as the trial magistrate appeared to have wanted to portray.

The court *a quo*'s above mentioned concluding remarks do not inform the appellants of what they were convicted of. It is only when these remarks are read as a whole that it becomes apparent that the appellants were convicted of the main, and not the alternative, charge.

The court accepts that judicial officers who mann court stations throughout the country are very busy persons. It also accepts that, in the course of their busy schedules, they perform their work in a hurried manner and, in the process, they make some errors. Such errors cannot, however, be allowed to pass unmentioned as they tend to tarnish judicial officers' otherwise very commendable efforts. It is, accordingly, for the benefit of the judicial officer concerned as well as for others, that it is emphasised as a salutory principle of a judicial officer's work, that they should always pay attention to detail at every material moment. Persons who appear before a judicial officer have every right to know their fate. They are entitled to know what they have been convicted of and what they have been acquitted of without them having to go through a process of either deductive or inductive logic as the appellants in *casu* were called upon to do.

The most inexcusable part of the court *a quo*'s work is that which pertained to the first part of the sentence which was imposed on the appellants. It reads:

> "SENTENCE .... EACH: 15 months imprisonment of which 5 months are suspended on condition that the accused persons does not during that period commit any offence involving wilful or negligent destruction of anyone's property." (emphasis added)

There is no doubt that the trial magistrate dealt with this aspect of the case in a very

cavalier manner. He appeared not to have applied his mind at all to what he was doing. The period of time for which the sentence of 5 months remained suspended was not stated. Were the 5 months, one would ask, suspended for 3 or 4 or 5 years. There were some obvious grammatical errors which the trial magistrate did not make any effort to correct. The 5 months imprisonment were suspended on a condition which did not relate to the offence which the appellants had been convicted of. It was suspended on an erroneous basis. It could not be suspended on condition that the appellants do not commit any offence involving wilful or negligent destruction of anyone's property. That gives the distinct impression that the appellants were convicted of both the main and the alternative charges. That portion of the sentence is defective. The trial magistrate would have realised the defect if he had applied his mind to his work.

The court is satisfied that the appellants proved their innocence on a balance of probabilities, in respect of both the main and the alternative charges. Their appeal, therefore, succeeds *in toto*. They are, in the premise, found not guilty and are acquitted of both charges.

CHATUKUTAJ agrees _____

Saratoga Makausi Law Chambers, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners