GILBERT NYENYAI
and
FANUEL ZIVENGWA
and
SIMBARASHE SHAVI
and
TINASHE SAMOTO
and
EVERMORE MASUKA
and
WATSON SADZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 29 March 2018 & 18 February 2019

Criminal Appeal

R Mabwe, for the appellants
R Chikosha, for the respondent

WAMAMBO J: Appellants were convicted of contravening s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (abuse of duty as a public officer).

They appealed against both conviction and sentence and we upheld the appeal on the turn.

Respondent's counsel filed a concession in terms of s 35 of the High Court Act [*Chapter 7:06*]. The Court Order wherein we upheld the appeals reflects the Judges that heard the appeal as HUNGWE & MABHIKWA JJ. The correct position is that it was HUNGWE & WAMAMBO JJ.

The appellants were charged in the following terms:

Criminal abuse of duty as defined in s 174 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In that on 28 October 2018 at around 1130 hours and at Gilchrist and Cooksey Shop, along Julius Nyerere Way, Harare (the accused) either one or more of them in their capacity as public officers being members of Harare Municipal Police, before issuing a ticket of the alleged offence towed and impounded omnibus registration number ADC 3843 which was parked and driven by Mike Matambo to the prejudice of same realising that there was a real risk or possibility that what they were doing was contrary or inconsistent with their duties as public officers and an act of disfavor towards said Mike Matambo.

The charge is rather inelegantly drafted. A close reading of the charge however suggests that the crisp issue is that the appellants committed the offence by towing and impounding Matambo's vehicle before issuing a ticket.

The court *a quo* defined the issue to be decided on as follows;

> "the issue in dispute is whether or not the complainant's commuter omnibus was towed and impounded with no ticket having been issued, thereby contravening S.I 104 of 2005 which is the Harare Clamping and Tow Away, by laws 2005."

S.I. 104 of 2005 is mentioned in the State outline as having been flouted by the appellants.

S.I. 104 of 2005 contains the following definitions in the interpretation section

> "authorised person" means any person employed or delegated by Council to carry out any function in terms of these by-laws."
> "tow away" means the removal by an authorised person of a motor vehicle parked or stationary in violation of these by-laws to a secure compound.
> "wheel clamp" means a device used to immobilise a motor vehicle parked or stationary in contravention of these by-laws.

Section 4 of S.I.104 of 2005 reads as follows:

> "Wheel clamping and towing away
> 4 (1) An authorised person may, if he or she has reason to believe that a violation of the Harare Traffic By-Laws, 1983 specified in the First Schedule, has been committed, immobilise or cause such motor vehicle to be immobilised by way of a wheel clamp."

The first point to note is that the accused were not charged of contravening S.I 104 of 2005. The next point is that infracting S.I 104 of 2005 does not necessarily imply committing an offence under s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Section 174 provides as follows:

"174 Criminal abuse of duty as public officer

(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 fire not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both."

The State wrongly charged the accused for contravening s 174 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were supposed to choose whether the unlawful act of the accused fell under (a) or (b). It appears however from a reading of the charge that it apparently falls under (a).

The appellants were employed as members of the Harare Municipal police at the time of the alleged commission of the offence. They fall squarely within the definition of a public office.

Section 169 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] defines public officer, among other definitions as: "A person holding or acting in a paid office in the service of the State, a statutory, body or a local authority"

The next issue to be grappled with is did the appellants contrary to their duties do something contrary or inconsistent with their duty as public officers to show disfavour to any person.

In this case following closely on the charge sheet, did the appellants tow and impound an omnibus registration number ADC 3843 parked and driven by Mike Matambo contrary or inconsistent with their duty as public officers to show disfavour to Mike Matambo.

The state evidence failed to prove that the appellants contravened s 174 of the Code. It appears that one of the State witnesses discovered that there is S. I. 104 of 2005 and convinced the police to press charges under s 174 of the Code.

Even a reading of S.I. 104 of 2005 does not help the State case to prove the offence charged. The State failed to prove that the appellants were not authorized persons. If they were the State failed to prove that the appellants immobilised the vehicle in question. There is no evidence of the said vehicle being towed. To the contrary evidence proves it was driven to Central Stores.

One Godfrey Andrew Manjere a superintendent at City of Harare and a superior to the appellants testified in the defence case. His evidence exonerated the appellants.

We find that the State is correct in their concession. The State, in their concession made the following submissions which we agree with

> "Contrary to the findings of the Court *a quo* s 4 (2) does not create the offence of towing a vehicle without issuing a ticket. Neither can one be convicted of an offence where it is proved that they towed a vehicle without issuing a ticket. The offence rather lies in immobilizing before issuing a ticket
>
> In *casu*, were the court to even construe s 4 (2) as placing an *onus* on towing authority to issue a ticket appellants would remain without liability for none of them towed the said vehicle
>
> (iii) At any rate the non-issuance of the ticket by an authorized official other than the appellants, cannot be interpreted as acting in a manner that is inconsistent with their duties. Various pieces of extant legislation including the Traffic By Laws 1983, the Roads and Road Traffic Regulations 1974 and s 33 (4) of the Road Motor Transportation Act (*Chapter 13:15*) allow and empower appellants to remove vehicles that obstruct roads without issuing a ticket at the point of either immobilizing or towing."

We find in the circumstances, that the State's concession is correct.

In the result we order as follows:

The conviction is quashed and the sentence is set aside.

HUNGWE J agrees …………………………………..

Kanokanga and Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners