TAWANDA MUTUNGAMIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA & TAGU JJ
HARARE, 27 October, 2014 and 10 November, 2014

Criminal Appeal

V. Makuku, for the appellant
E. Mavuto, for the respondent

MANGOTA J: The appellant who is a grade 11 Prison Officer was working at Gutu Satelite Prison Station at the time of offence which the State preferred against him. His duty, among others, was to take trial-awaiting prisoners to, and from, Gutu Magistrates' Court for either remand or trial. He was in that regard working with the magistrate who tried him as well as one Beatrice Mukaro who was the prosecutor at the court station at the time.

The charge which the State preferred against the appellant was that of fraud as defined in s 136(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The State alleged that, on 11 September 2013 and at Mupandawana Village which is in Chief Gadzingo's area, Gutu, the appellant misrepresented to one Asmel Muzembi that he had paid the sum of $150 to public prosecutor Beatrice Mukaro so that Asmel Muzembi who, on 10 September 2013, had been convicted of the crime of conduct which was likely to provoke breach of peace, would receive a lighter than otherwise sentence for the offence. The appellant, the State claimed, demanded that Asmel Muzembi refund him the $150 which he had paid. It was the State's contention that when the appellant misrepresented the position as he did, he knew that he had not paid any money to Ms Mukaro. It stated that the appellant's aim and objective were to deceive Asmel Muzembi as well as to cause the latter to act to his prejudice. It claimed that Asmel Muzembi whom it cited as the complainant was prejudiced in the sum of $70. It informed the court that $20 was unaccounted for from the day that Asmel Muzembi paid $70 to the appellant todate.

The appellant was tried and convicted. He was sentenced as follows:-

> "36 months imprisonment of which one (1) month is suspended on condition accused restitute complainant in the sum of $20 through the Clerk of Court Gutu on or before 29 November 2013, 10 months are suspended for 3 years on condition accused does not within that period commit any offence involving dishonesty to which he will be sentenced to imprisonment without the option of a fine.
>
> Effective 25 months. The $50 produced as an exhibit to be returned to complainant".

The appellant's appeal was against both conviction and sentence. He raised two main matters in his appeal against conviction. The matters in question comprised:

(a) the trial magistrate's recusal from hearing the case – and

(b) the prosecutor's mass interview of State witnesses.

The record is silent on the first matter save for what the appellant stated as his first main ground of appeal. It is pertinent that the appellant's statement on this aspect of the case is captured and analysed with a view to appreciating what took place between the court and the appellant on the same. What he stated reads:-

> "1. RECUSAL
>
> (a) The court erred in reviewing its decision to recuse itself. When the appellant first appeared in court, the court clearly stated that it could not hear appellant's request because it had recused itself. The court stated" 'I have recused myself, there is no way I can entertain any request from you".

The cited words refer to the appellant's initial appearance before the court *a quo*. As has already been stated, the discourse which took place between the trial magistrate and the appellant was not made part of the record. It, therefore, remains unknown. What is known, though, is that the trial magistrate and the appellant were, in some way or other, known to each other. Both of them worked at the same court house. One worked as a magistrate and the other as a prison officer who would bring remand prisoners in, and out of, court. It is not difficult under the circumstances to suggest that, when the magistrate saw the appellant in the dock, he must have uttered the words…."I can't hear your case. You are known to me. I, accordingly, recuse myself from your case". Whether or not such words carry the substance of an "order" or a "decision" on the part of the magistrate remains anyone's guess. That guess becomes more pronounced than otherwise when the appellant's second part of his first ground of appeal is placed into context. The part reads:-

> "In the premises, it was improper for the court to change its decision or order on the basis of the unrepresented appellant's persuasions" (emphasis added).

It is evident from the foregoing that the trial magistrate had not made any decision or order recusing himself. He simply flagged the issue of recusal with the appellant who, in the course of the discourse between them, persuaded the trial magistrate not to recuse himself but to go ahead and hear the allegations which had been preferred against him. What took place in the discourse which the trial magistrate and the appellant engaged themselves into cannot, in the view which the court holds of the matter, be said to amount to a decision or an order by the magistrate who heard the appellant's case.

The appellant and the respondent were of one mind on the point that the trial magistrate flouted the decision which he had made to recuse himself from the case. The respondent made some categorical statement which aimed at showing that the trial magistrate had recused himself from hearing the case. It made an effort to move the court to remit the record of proceedings to the court of origin with a directive that a trial *de novo* be conducted before a different magistrate.

The court does not agree with the views which the parties hold of the matter. Its reasons for the view which it holds have already been made known in the foregoing part of this judgment. The respondent is in error when it stated, as it did, that the trial magistrate made a decision or an order to recuse himself from hearing the case. He, if anything, discussed the issue of recusing himself with the appellant who persuaded him to hear the case and he, accordingly, heard the same their familiarity with each other notwithstanding.

Where it is accepted, for argument's sake, that the trial magistrate made a decision to recuse himself from hearing the case, the magistrate noted, correctly so, that the matter of recusal was procedural and, as such, he acted within the law when he varied his decision. The case of *Stumbles & Rowe v Mutinson* 1989(1) ZLR 172 (HC) which the trial magistrate referred the court to in his response to the appellant's first main ground of appeal remains relevant to this aspect of the appeal. The appellant's first main ground of appeal does not and cannot therefore hold in the circumstances of the above stated matters.

The appellant's second main ground of appeal was that the prosecutor in the case conducted a mass interview of State witnesses. The prosecutor's conduct was improper, he argued. The respondent did not address its mind to this aspect of the case. The prosecutor in the case informed the court *a quo* that what he did was to hand to each witness his or her

statement only. He remained adamant on the point that he did not discuss the case with witnesses for the prosecution. He insisted that he was not in any way biased against the appellant. The court *a quo*'s view was that the prosecutor, as an officer of the court, would not involve himself in an unbecoming conduct with regard to his prosecution of the appellant. Indeed, the record as it stands absolves the prosecutor from what the appellant had imputed against him. He, in the court's view, conducted himself in a fair and transparent manner throughout the course of the proceedings. It is for the mentioned reason, if for no other, that the court does not see any merit in the appellant's second main ground of appeal.

The appellant raised other matters which were directed at the substantive aspects of the case. He made a scathing attack of the complainant's evidence, his credibility in particular. He was also able to show the unreliability of the testimony of other State witnesses. The court is in agreement with the appellant on the point that the complainant's testimony left a lot to be desired. He lied to the court about his criminal past. He admitted, under cross-examination, that he was a drug dealer. He lied about his knowledge of the appellant. He could not profer any plausible reason which dissuaded him from reporting the appellant's alleged corruption to the police where he was performing his community service sentence or to court officials through whose court house he passed on his way home from the police station where he was doing community service. The complainant was, in the court's view, everything which a witness should not be as opposed to everything which a witness should be. A person who tells obvious lies whilst he is on the witness's stand cannot be believed and the complainant was one such person. He, to all intents and purposes, could not be believed at all. The court went to some great lengths in an effort to appreciate the reasons which persuaded the trial magistrate to believe the complainant's testimony, and disbelieve, that of the appellant. It noted that the court *a quo*'s reasons were, as it were, upside down in form as well as in substance. It placed the *onus* on the appellant to prove his innocence instead of having had it the other way round, so to speak. It is trite that, in all criminal trials, the burden of proof rests on the State to prove, through its witnesses, the guilt of an accused person. The proof must be established beyond reasonable doubt.

Apart from the complainant who was an incredible witness, the other State witnesses were contradictory, inconsistent and they gave the distinct impression that they had rehearsed their respective pieces of evidence before they testified in court.

The appellant's story which was not only credible but was also probable was rejected as a result of the misdirection which the court *a quo* suffered when it required the appellant to prove his innocence which should not have been the case. The appellant stated that he had loaned the complainant $90 and that he was demanding that sum from the complainant. He remained consistent with his story from the time that he gave his defence outline to the time that the trial was concluded. He was unshaken under cross-examination. His story held and remained believable. There was, in the court's view, certainly nothing wrong with the appellant sending text messages which related to what he said he was owed by the complainant to the latter person. The trial magistrate's statement which was to the effect that:

"there was generally a corrupt relationship between the accused and Muzembi" is totally unfounded as well as misplaced (emphasis added). The court finds it strange that, in the face of that statement, the trial magistrate was able to believe the complainant and to disbelieve the appellant when both parties were, according to him, of a corrupt disposition. The fact that the appellant might have told Muzembi that the crime which the latter person had been convicted of called for a fine and not a prison term does not, in itself, support the State's allegations against the appellant. The appellant, as a court official, might have had an idea of the range of sentences which courts more often than not mete out to offenders who were in the category of the complainant. His association with the courts and the manner in which courts assess and pass sentences could have assisted in his estimation of the sentence which the complainant was likely to receive for the offence he had been convicted of. There was, in the court's considered opinion, nothing wrong with the appellant going to the complainant's house to ask for what the latter owed to him. The questions which the trial magistrate raised in his judgment do all have an innocent explanation. The court *a quo* was, therefore, in error when it suggested that the answers to those questions connected the appellant to the offence. They did not and they do not.

It is the court's view that the appellant was wrongly convicted of the offence with which he was charged. He managed to show, on a balance of probabilities, that the State did not prove its case against him. The appeal, accordingly, succeeds. It is, in the result, ordered as follows:-

1. that the appeal be and is hereby upheld.
2. that the conviction be quashed and the sentence set aside
3. that the appellant be and is hereby found not guilty and is acquitted of the charge.

TAGU J: agrees ……

Ndlovu & Hwacha, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners