KHEMETSO SIFISO PHUTHI
And
TAFADZWA CHIFUMURO
And
DENZEL KAMARATA & TONDERAI CHIDAYA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MANGOTA & KABASA JJ
BULAWAYO 20 SEPTEMBER 2024

JUDGMENT

K. Ngwenya for 1st appellant
N. M. Sibanda for 2nd appellant
N. Sithole for 3rd appellant
K. M. Guveya for the respondent

MANGOTA J

We heard these three appeals on 20 May, 2024. We considered them to be fatally defective and we struck them off the roll.

On 21 May, 2024 counsel for the appellants wrote, through one of them, requesting reasons for our decision. Our reasons are these:

The three appellants, and one other who did not appeal, appeared before the court of the regional magistrate sitting at Tredgold Magistrates' Court as four co-accused persons on 1 February, 2022. All four of them were convicted, after trial, of possession of raw ivory in contravention of Section 82(1) of Statutory Instrument 362/90 as read with Section 128(1) of the Parks and Wildlife Act (Chapter 20:14) as amended by Section 11 of the General Laws Amendment Act, Number 5 of 2021. No special circumstances were found to have been existent in respect of each one of them. They were, therefore, sentenced to a mandatory minimum sentence of 9 years imprisonment each.

Three of them were not satisfied with their conviction and sentence. They therefore appealed against both.

Each appellant criticises the decision of the magistrate who, they insist, should have found special circumstances to have existed in respect of each one of them. They, in so far as their conviction is concerned, move us to find them not guilty of the charge and to acquit them. Their view is that, where we refuse to find for them and uphold their conviction, we find special circumstances to be existent in the case of each one of them as a result of which we proceed to

sentence them to 18 months imprisonment which is wholly suspended on the following two conditions:

i) 6 months imprisonment being suspended for a specified period of time on condition of good future conduct on the part of each appellant- and the remaining
ii) 12 months imprisonment being suspended on condition each appellant performs 420 hours of community service at a given Government institution.

The appellants' shortcoming is premised on their failure to comply with the rules of court. Rules of court are specifically designed to assist litigants to file their papers at court as well as to prosecute their matters and/or defend themselves in their respective cases including appeals and/or reviews. Failure on the part of the litigant to comply with them renders the case which he (includes she) has filed to be fatally defective leaving the court with no choice but to strike it off the roll.

It is for the mentioned reason, if for no other, that each court of record has its own rules. These must be strictly adhered to unless a departure from them is granted after an application for the same has been made by the litigant.

The rules of court do not give a clear definition of the word *'record'* which, in legal parlance, is known as the record of proceedings. However, Rule 95 of the High Court Rules, 2021 makes reference to the word. The rule deals with what are termed Miscellaneous Appeals and Reviews. Paragraph (a) of sub-rule (14) of Rule 95 refers to what is known as a formal record of proceedings. It reads:

"within fifteen days of receipt of a notice, the tribunal or officer concerned shall-

(a) if a formal record of proceedings was kept, lodge it with the registrar".

It goes without mention that the formal notice which the paragraph refers to is the notice of appeal and/or review. Sub-rule (15) of the rule takes the matter which relates to the meaning and import of the word *'record'* further. It reads:

" Where a formal record is lodged, the provisions of Rule 62(5) shall, with the necessary changes, apply."

The above statement takes us to Rule 62(5) which reads as follows:

"The clerk of the inferior court whose proceedings are being brought on review or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of the service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record.

Provided that it shall be the responsibility of the party seeking a review to ensure compliance with this rule.

(6) The copies of the record shall be clearly typed on A4 size double spaced black record ink and on one side of the paper only. The copies of the record shall be paginated from the first

to the last page whether the pages contain evidence or not, and at the top of each page containing evidence the names of the witness giving such evidence shall appear."

Sub-rules 7, 8, 9, 10, 11, 13 and 14 of Rule 62 of the rules of court speak eloquently of *one and the same record* which the party seeking a review or an appeal must lodge with the registrar. The rules do not state that the appellants who are tried, convicted and sentenced by the magistrate on the same date and on a particular charge can duplicate the record of proceedings into three records of appeal with each lodging his appeal separate from those of his co-accused. This *is a fortiori the* case where the evidence which was led against them is from the same witnesses, the exhibits which were produced in court is the same, the defences which they tendered before the court *a quo* is the same and the reasons for their conviction and sentence are the same.

The rules of court, it has already been observed, do not define the word *'record'*. Record, in court parlance, are papers which a litigant and/or his adversary files at court. In a criminal trial such as the one which the regional magistrate heard in respect of the appellants, the record includes such of the papers of the prosecution as the charge sheet and the state outline and, where the accused person is legally represented, the accused's defence outline as read together with *viva voce* evidence of witnesses for the State, the accused person, his or her witnesses, if any, including all the exhibits which either side of the divide tenders in support of its or his or her case.

In a civil matter, the word *'record'* refers to pleadings of the plaintiff or the applicant, as the case may be, as read together with those of the defendant or the respondent including *viva voce* evidence from either side of the divide and, where the case goes to trial, as supported by annexures which either side of the divide produces or attaches in support of his or her case.

The clerk, or the registrar, of court constitutes the papers so filed by the parties to a case into a record to which he (includes she) gives a case number by means of which he is able to identify the case of the parties. He is the custodian of the record and he guards it jealously so that it is not mutilated by any litigant or by any person who may want to temper with it. That record remains one for all purposes and all matters which pertain to it. It remains one for purposes of appeal and/or review. It cannot be duplicated except where the rules of court allow it to be so duplicated for whatever reason.

No rule of court, therefore, allows a party to a case to duplicate a record which is filed at court into two or three records of appeal as the appellants did. The record *a quo* must be presented to the court of appeal as one and not as two or three records. This is so notwithstanding that the duplicated record contains all the material which is in the original record. The record as constituted by the clerk or registrar of the court *a quo* should be presented to the court of appeal as one and not as two or three records as the appellants did *in casu*. Apart from the fact that the law does not allow an appeal of a matter which was heard as one *a quo* to be duplicated into more than one appeal, the duplication of the appeal into three appeals is not only undesirable. It is also unprecedented.

The conduct of the appellants of creating three identical appeals from one record of the proceedings of the court *a quo* is, in our view, unprecedented. It finds no support in the rules

of court and/or in Practice Directions which the Chief Justice issues from time–to-time to augument the rules of court.

We failed to understand what the appellants meant to achieve when they duplicated one single record into three records for purposes of the appeal. All of them appeared before the learned magistrate as a set of co-accused persons each of whom was legally represented *a quo*. They do not explain what persuaded them to depart from established procedure by going out of their way to create three separate appeals out of one and the same case which they presented before the magistrate. They do not explain why they had to duplicate the record of proceedings *a quo* three times over when they appealed as they did. All of them were legally represented when they appeared before the court *a quo*. Each legal practitioner who represented any of them had his day in court in one and the same trial. Why they chose to adopt the procedure which is alien to the court's practice and procedure remains a matter for anyone's guess.

The undesirability of the conduct which the appellants indulged in can hardly be over-emphasized. Apart from creating unnecessary work for the court and clogging the roll of the court with unnecessary repetitions, the procedure remains fraught with a lot of vagueness and uncertainty, so to speak. What colours our most serious concern is what would have occurred if the three appeals were placed before three sets of judges of this court to hear and determine. The stated set of circumstances poses a substantial risk of yielding two or three contradictory judgments on the same subject-matter. That, it is our view, brings not only uncertainty but also confusion in the law which, as a matter of fact, must always be clear and certain.

Nothing prevented the appellants from preparing and lodging with the registrar one record of appeal and have their respective counsel argue on the same. They were, after all, tried as one group of accused persons when they appeared before the court of the magistrate. Their three separate appeals which are based on one and the same record of proceedings are misplaced.

As the court was pleased to enunciate in *Sikhosana & Ors v Roos t/a Roos se Oord & Ors,* 2000 (4) SA 561 (LCC) striking a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but it merely suspends the hearing thereof pending an application for reinstatement.

We considered the three appeals. We find them to be fatally defective. We direct the appellants to consolidate the three appeals into one appeal so that it is heard and determined as one case. We, in the result, strike the three appeals off the roll.

Kabasa J …….. I agree

T. J. Mabhikwa & Partners 1st appellant's legal practitioners
Shenje & Company 2nd appellant's legal practitioners
Ncube Attorneys 3rd appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners