GEORGE SANDINHA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 30 September, and 8 October 2014

**Criminal Appeal**

*Machaya,* for the appellant
*F. Kachidza,* for the respondent

MANGOTA J: The appellant and his co-accused, one James Gurupira, were charged with contravening s 81(1) of the Parks and Wildlife General Regulations as read with General Laws Amendment Number 5 and s 11(1) (b) of the Parks and Wildlife Act [*Cap 20:14*]. The State alleged that on 13 November, 2013 and at Kenval Farm which is in Stapleford area, Harare the appellant and his accomplice were found to have had in their possession four pieces of unregistered or unmarked ivory.

The appellant and his co-accused denied the charge as a result of which they were tried. The co-accused, James Gurupira, was acquitted at the close of the State case. The State, it was evident, could not, from the evidence which it adduced, establish a *prima facie* case against him. The appellant was, however, placed on his defence and was subsequently convicted of the offence. The court *a quo* found no special circumstances which would have allowed it to remain at large. It, accordingly, sentenced him to the minimum mandatory sentence of 9 years imprisonment.

The appellant appealed against both conviction and sentence. His story, in denying the charge, was that he did not have any unmarked ivory in his possession when the police arrested him. He said he was James Gurupira's farm worker at the time of the alleged offence. He stated that, in the afternoon of 14 November, 2013 he had gone to the farm site to check if the area which his employer marked to plant maize had effectively been disked. He said while he was at the farm, police who were not in uniform approached, and started to

harass, him demanding to know who the owner of the ivory they had recovered near his employer's farm was. It was his testimony that he is a disabled person who had difficulties in talking. He stated that when the police realised that he stammers when he is talking, they started harassing him and told him that the reason which accounted for his inability to properly answer questions which they were putting to him was that he was the owner of the ivory. He said he was taken to Harare Central Police Station where the police assaulted, and forced, him to implicate his employer.

During the hearing of the matter, the court was at pains to appreciate what the entire appeal was all about. The grounds of appeal which had been prepared and filed for, and on behalf of, the appellant were couched in unclear and unspecific terms. They, in that regard, were not compliant with r 22 (1) of the Supreme Court (Magistrates Courts) [Criminal Appeals] Rules 1979. The rule reads, in part, as follows:-

> "1. The appellant shall, ….. note his appeal by lodging with the Clerk of the Court notice….. setting out clearly and specifically the grounds of appeal….." (emphasis added)

The court stresses for the benefit of the appellant and others who will lodge notices of appeal with this, or any other, court that what the appellant is attacking in the judgment of the convicting court must be set out in the manner laid down by the rule. A generalisation such as the one which was set out in the appellant's grounds of appeal against both conviction and sentence is not good enough. It does not point out where the magistrate erred or misdirected himself.

The remarks of RABIE, JA, (as he then was) on the matter which is under consideration are pertinent. He stated in *Killian* v *Messenger of Court*, Uiitenhage, 1998 (1) SA (AD) that:-

> "Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the court may know on which points a decision is required……. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can comply with the duties imposed on him by the rules……".

There is, in the court's view, no doubt that non-compliance with the rules is detrimental to the administration of justice. The court will, therefore, not be lax in dealing with such. That is so as the rules are for the benefit of the appellant, the respondent and the court. *In casu*, the court was constrained to treat, or not to, the appeal as not having been properly placed before it. It requested counsel for the appellant to justify the latter's position on the matter. She could not because of the generalised nature of the grounds which she had prepared and filed. When she was pressed further on the matter, she prayed that the appeal be treated as a review; a process which she knew as much as the court did that its procedural requirements were completely different from those of an appeal. Indeed, the grounds, as framed, tended to gravitate more in the direction of a review than they were in that of an appeal.

The court did not, in the interests of justice, take a robust approach of the matter. It accepted that, reading in-between the lines of the grounds as framed and filed, the appellant meant to convey some message to it though in a vague and somewhat embarrassing way. It, accordingly, proceeded to deal with the appeal as had been placed before it.

Viewed from the perspective of the probabilities and improbabilities of the case, the court could not and did not accept the appellant's version of events. He said the police brought the ivory which they had in their possession to him and used it as evidence against him. He could not advance any reason to show that the police did have a motive to incriminate him for a crime which he had not committed. The court mentions, at this stage, that it is not in the nature and practice of members of the police force to plant incriminating material(s) on persons who are not known to them with a view to arresting them as the appellant would have the court believe. If the police had found the ivory in an abandoned state, the probable thing they would have done in the circumstance would have been to treat the ivory as found property and leave the matter at that. They would have had no desire to incriminate the appellant or any other person for that matter as they stood to gain nothing at all by such conduct.

It is the court's considered view that the version of the respondent's witnesses all of whom were members of the police force accords more with the truth than the appellant's version. They said they acted on a tip-off from their informant and they drove to the scene of crime where they observed the appellant and another walking side-by-side on a dusty road which is in Stapleford area. The appellant and the other person whose description the informant had clearly defined to them were holding a sack as they walked on the road, the

witnesses said. They stated that when the appellant and his companion saw them approaching, the two of them dropped the sack on the ground and started running in different directions. They gave chase to the appellant whom they apprehended when he had covered a distance of 50 metres from the sack which the appellant and his companion had dropped, they said. They averred that they returned to the sack with the appellant and, on opening the sack, they discovered that its contents were four pieces of unmarked ivory.

The witnesses, it is common cause, were not mistaken in their identification of the appellant as the person whom they saw holding the sack with another. They never lost sight of him as they gave chase. The witnesses, the appellant and the sack with its contents were all contemporaneously within each other's vicinity. The appellant, they said, was running away from them in an open space. The appellant said he was on his employer's farm when the witnesses approached, and apprehended, him. He, to the stated extent, corroborated the witnesses' testimony on the point of where he was when they arrested him.

The issue which the appellant raised as regards the alleged discrepancy in the evidence of the witnesses as read with the outline of the State case cannot take the appellant's case any further than where he left it. The witnesses' testimony cannot be discredited on that alleged discrepancy alone. The case of *S* v *Nicole* 1991 (1) ZLR 211 (S) which the respondent cited in response to the appellant's mentioned ground of appeal does adequately dispose of the appellant's argument on that matter.

The other grounds which the appellant raised were difficult, if not impossible, for the court to appreciate. They were so generalised to the extent that the court could not tell what, in the learned magistrate's judgment, the appellant was attacking. The respondent made an attempt at responding. His responses to grounds which lacked clarity and specificity was, understandably so, also generalised. The court could not make any head or tail of what the appellant's concerns were under the mentioned circumstances.

It is when such matters as are stated in the foregoing paragraphs are taken account of that it cannot be seriously argued that the conviction of the appellant was improper. The appellant failed to establish, on a balance of probabilities, that the magistrate either erred or misdirected himself on any matter which relates to his conviction.

In so far as the sentence which the trial court imposed on the appellant is concerned, the court remains of the view that counsel for the appellant had inadvertently overlooked the fact that the offence which the appellant had been convicted of required that he be sentenced to a mandatory minimum term of 9 years imprisonment if he failed to show the court the

existence of special circumstances which would allow the sentencing court to remain at large. The court *a quo* inquired, as the law required, into the issue of the existence, or otherwise, of special circumstances. The appellant failed to show any such special circumstances and the court whose hands were tied down to the dictates of the law sentenced him to the mandatory minimum term of imprisonment. It was not at large to sentence the appellant to a fine or to community service as counsel for the appellant was suggesting.

The court has considered all the circumstances of this case. It is satisfied that the appellant's appeal against both conviction and sentence cannot succeed. The appeal is, accordingly, dismissed.

HUNGWE J agrees:……

*Machaya and Associates,* Appellant's Legal Practitioners
*National Prosecuting Authority,* Respondent's Legal Practitioners