

MIKE JIRI  
and  
GIANT MUNSAKA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUREMBA & MUSHORE JJ  
HARARE, 27 December, 2017

### **Review Judgment**

MUSHORE J: This case first came to my attention by way of an urgent application under case number HC 10767/17. The parties were cited as Mike Jiri and Giant Munsaka as the applicants. The respondents were (1) Magistrate Chakanyuka N.O. (2) The Prosecutor-General (3) Chief Magistrate Mishrod Guvamombe N.O. and (4) Tariro Gwatidzo. The urgent application was for a stay of criminal proceedings in the Magistrates Court, the reason being that applicants suspected that the Magistrate was biased against them; and as a result they had sought that she recuse herself for refusing to furnish reasons why she had dismissed their application for a dismissal of the State's case, in circumstances where the accused believed that the arrest and prosecution were unjustified. I was unable to entertain the matter on urgent basis due to the fact that accused had not annexed a record of the proceedings which would have enabled me to ascertain whether or not there was merit in the propriety of their allegations against the Magistrate. Accordingly after hearing the parties I removed the matter from the urgent roll because the papers were not in order.

However before the parties left my Chambers both the State representative and the legal practitioner representing both accuseds advised me that the accuseds had been remanded in custody pending judgment on the basis that they could abscond without arguments having been made as to their likelihood to abscond. Both counsel advised that the accused had not posed any such threat because accused had co-operated in their arrest and prosecution at all times. Both counsel asked me to intervene in the unprocedural and unlawful detention. I then asked that the current application for a review be placed before me for a determination of whether or not an irregularity had occurred *a quo*, and I requested both Counsel to attend to enquiring

about the unlawful detention and to advise the magistrate that they agreed that the accuseds had been wrongfully remanded into custody. I further directed and that the accuseds ought to be released until I had reviewed the matter and the appeal had been determined and then to return the next day with a progress report. The following day both counsel advised me that they were shocked to have found out that the accuseds had (without their lawyer present) been summarily convicted and sentenced to 6 months imprisonment for criminal trespass by the magistrate in the absence of their legal counsel, who of course was engaged in the issues I had directed him to attend to. A week or so later, the record was placed before me for review and the following are my findings.

Evidence from the record.

The criminal proceedings in the Magistrates' Court referenced above arose from a charge levelled against both the accused of criminal trespass by one Mary Misihairambwe. The evidence and the charge sheet clearly pertained to a civil dispute between the accuseds and the complainant over a stand which complainant claimed to have been allocated to her. Complainant claimed to have been allocated the stand in 2013. When she gave evidence, her evidence clearly supported a complaint of double allocation of land and not criminal trespass. This is so because she came to know of first accused's claim to the stand when she visited the stand and saw that there was a structure already built and some bricks and sand which did not belong to her. She even admitted that she knew that accused one had also been allocated the stand. Out of frustration, she made a report of criminal trespass against accused one, and I must express my surprise that the Police opened a docket upon the basis of the facts which clearly speak to a crime having been committed by accused 1. More illogical is that complainant admitted that she met accused 2 for the first time when he came to the Police Station to make enquiries about 1<sup>st</sup> accused's so-called arrest. She also stated that she had never seen accused 2 on the stand in question. It was simply upon her orders that accused 2 was also charged with criminal trespass. From that point on an unlawful arrest became an irregular prosecution and irrational conviction where none of the essential elements for a conviction for criminal trespass was evident.

Accuseds proved that they were the lawful owners of the land. Complainant failed to show her right to claim ownership. Under oath complainant stated that she owned the stand in question due to the fact that she owned a card from UDCORP. She claimed that UDCORP had

been allocated the land in question by Local Government and that because she was a cardholder she was lawfully entitled to claim the stand as being hers. However both accuseds produced offer letters from the Ministry of Lands and they produced proof that the Co-operative Society which they belonged to, that being Tongovell had been allocated the land by the Ministry of Lands by government gazette per *Lowveld Sugarcane Growers Association v Ministry of Land and Rural Settlement L.A 22/16*. The President had not reversed the allocation. From the evidence, the interloper was the complainant.

The 3<sup>rd</sup> State witness who was a Principal Administration Officer in the Ministry of Local Government by the name of Everest Nyamadzano, was unable to disprove accuseds' rights to the stand in question. His entire evidence was very poorly given and contained no substance, neither did he take complainant's case any further.

#### The law.

The facts and circumstances of the case in no way whatsoever support the charge of criminal trespass. Criminal trespass is defined in the Criminal (Codification and Reform) Act [*Chapter 27: 09*] as being:

#### **“132 Criminal trespass**

(1) Any person who

(a) enters any land knowing or realising that there is a real risk or possibility that such entry is forbidden; or

(b) having entered any land fails or refuses without lawful excuse to leave the land when called upon to do so by the lawful occupier or any other person with apparent authority to require him or her to leave;

shall be guilty of criminal trespass and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.

(2) It shall be presumed, unless the contrary is shown, that a person accused of criminal trespass knew or realised that there was a real risk or possibility that entry into the land in question was forbidden where the land was an enclosed area.

(3) For the purposes of subsection (2)—

(a) an “enclosed area” means an area of land the perimeter of which is enclosed by a sufficient wall, fence or hedge that is continuous except for one or more entrances that are barred or capable of being barred by a gate or other means; and

(b) in considering whether a wall, fence or hedge is “sufficient”, no regard shall be had to its design or state of repair as long as it is apparent to a reasonable person that the wall, fence or hedge was intended to enclose the area of land concerned”

It is surprising that the accuseds were arrested for criminal trespass given the facts in the matter. It is shocking that the accuseds were prosecuted and tried and convicted for criminal trespass. Since none of the essential elements were present in this matter, it is clear that the prosecution and trial in the matter was unwarranted and highly irregular.

The proceedings.

During the arrest; prosecution and trial, the accused were distressed by the court *a quo*'s insistence to proceed with the trial without considering the accused's concerns and the perceived negative attitude she displayed towards them. It was then that they asked for the Magistrates recusal which she summarily denied them of without reason. In their urgent application for a stay of the proceedings *a quo*, the accuseds had annexed affidavits taken from independent witnesses who were alleging corruption between complainant, the prosecutor and the court *a quo*. These affidavits were the evidence which I alluded to above which appeared *ex facie* the urgent chamber application and which would have required the recording of evidence before a determination on such allegations could be made. It is not within my premises to make a finding on the corruption allegations; although I must express that there is a need for such an enquiry to be made given the bizarre turn of events, the attitude of the court and the speed of the proceedings and the lack of evidence.

For the reasons which I stated more fully above, I find that the accused are not liable for criminal trespass. The prosecution, conviction and sentencing are shockingly irrational. The proceedings in the Magistrates Court were not in accordance with real and substantial justice and cannot be certified as such.

Accordingly I order as follows:

“That the conviction *a quo* be and is hereby quashed and that the sentence be set aside and that the finding of the court *a quo* be altered to read “*Both accused are found not guilty and are acquitted*”.

MUREMBA J agrees.....