

MUNYARADZI MUSWE
and
MUNYARDZI MARASHA
and
RODRICK MUTINHIMA
and
TENDAI TAMBARA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHITAPI JJ
HARARE, 31 March & 1 April 2021

Criminal Appeal

S Chatsama, for the applicant
R Chikosha, for the respondent

ZHOU J: This is an appeal against both conviction and sentence imposed upon the appellants by the Magistrates Court at Nyanga. The appellants were convicted of public violence as defined in s 36 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were each sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition that each one of them does not within that period commit any offence involving violence for which upon conviction he is sentenced to imprisonment without the option of a fine. A further 4 months imprisonment was suspended on the condition that each of them would retribute the complainant in the sum of \$250. This left an effective sentence of 20 months imprisonment.

The respondent through its counsel filed a notice in terms of s 35 of the High Court Act [*Chapter 7:06*] in terms of which it conceded that the conviction is unsafe as it is not justified by the evidence led on behalf of the state. This court accepts that the concession was properly made.

It is common cause from the evidence led that there is a longstanding dispute between the complainant and his father on the one hand, and one Givmore Renzva on the other hand. The dispute pertains to mining claims at the Chitsero mining area. All the appellants are employed by

Givemore Renzva. During the month of July 2019 a group of about 30 people invaded the claims over which Givemore Renzva was carrying on mining operations. At the time of the invasion the appellants and other employees were not at the site. There was only the security guard who alerted them to the invasion. The invaders claimed to have been incited to invade the site by the complainant. The complainant denied engaging these persons to invade Givemore Renzva's site. Nothing turns on that denial for the purposes of this appeal. It was not disputed that acting on a tip off an employee of Givemore Renzva recovered a sack which contained machetes which had been brought by these persons. The appellants took the machetes to the police.

In an attempt to resolve the situation created by these unwelcome visitors who claimed to have been sent by the complainant, the appellants sought to engage the complainant. It is common cause that the appellants and many other persons from the compound in the area walked to the complainant's site, They were accompanied by some employees of the complainant. There is a dispute as to how the crowd that followed the appellants to the complainant's site conducted itself and what the aim of the members of this crowd was when they visited the complainant's site

The allegations against the appellants which formed the basis of the charge are that the appellant's were acting in common purpose with the members of the crowd and that they unlawfully and forcibly disturbed the peace, security or order of the public to a serious extent by throwing stones at the complainant's premises. The state led evidence from six witnesses who contradicted each other on material aspects. These witnesses were Nathan Tendai Munyuchi (the complainant) Richard Nyangani, Elias Sagunda, Dyke Mupuwa, Tinotenda Chidhiya and Andrew Mukuzinga.

Nathan Tendai Manyuchi stated that the appellants and the other persons in the crowd were violent and threw stones which forced the workers at the site to flee to different sections of the premises. He stated that he also escaped from the violence and went to a section where the stones could not reach. It was only upon his return after the crowd had left that he discovered that window panes and the roof of his building had been damaged. Ellias Sagunda and Dyke Mupuwa said that the appellants were amongst the people who went to the complainant's site and disturbed peace. It turned out that Dyke Mupuwa was actually part of the group which left the compound and went to the complainant's site. Another state witness, Andrew Mukuzunga was also within that same crowd. These two, Dyke Mupuwa and Andrew Mukuzunga, are the only ones who went inside the mining site. They were employed at the complainant's mine which appears to be the only reason

why they were not arrested. Andrew Mukuzunga had participated in a meeting which had agreed to go to the complainant's site. He personally had undertaken that he would go inside the complainant's site to call him to come and explain the issue of the persons who had claimed to have been sent by complainant to take over the mining site where the appellants worked. He did as he promised, went through the gate but was dismissed by the complainant together with the other people who were outside the gate. His evidence contradicts the complainant's claim that all the employees had escaped to take cover. He stated that the complainant actually came out of the building and told the witness and the appellants to leave his site because complainant had not sent the invaders to Givemore Renzva's mine.

On the alleged damage to the window panes of the complainant's building a state witness gave exculpatory evidence, which the learned Magistrate dismissed as unscientific. Tatenda Chidhiya who was the investigating officer stated that the broken pieces of glass at the complainant's premises suggested that the window had been broken from inside the building and not from outside as suggested by the complainant. This witness's overall observation was that the appellants had not committed any offence and that the information given by the complainant was false. He was not impeached by the State. It was not open to the learned magistrate to merely dismiss his evidence and choose that evidence which implicated the appellants in the commission of the offence. This was a serious misdirection. The learned magistrate said nothing about the evidence of Andrew Mukuzunga and Dyke Mupuwa who not only accompanied the appellants and others to the complainant's premises but were the only two persons who entered the premises. The allegation that the complainant and his workers ran away for their lives or were scattered was clearly false as some of the state witnesses contradicted it by their evidence.

Except for the investigating officer, all the other state witnesses were employees of the complainant. Yet the investigating officer stated categorically that no offence had been committed. He was the only neutral witness. The learned magistrate chose to reject his evidence, and ignored the contradictions in the evidence of the other state witnesses. It was clear that a force outside the investigation team was pushing for the prosecution of the appellants against the clear advice of the investigating officer.

All in all, the evidence led on behalf of the state did not prove that the appellants committed the offence.

In the result, it is ordered as follows:

1. The appeal succeeds, and the verdict of the court *a quo* is set aside and the following is substituted:

“The accused persons are found not guilty.”

CHITAPI J agrees

Chatsanga and Partners, appellant’s legal practitioners