CHENGETAI MUKARO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 11 October 2018 & 13 February 2019

Criminal Appeal

W Chagwiza, for the appellant
Ms F Kachidza, for the respondent

HUNGWE J: The appellant was convicted for contravening s 52 (2) of the Road Traffic Act [*Chapter 13:11*] "Negligent driving".

He was sentenced to a fine of $350 in default of payment 3 months imprisonment. He filed a notice of appeal crafted as follows:

> "In all the circumstances of the case the trial court ought to have found appellant guilty of a lesser offence of driving without due care and attention as envisaged in s 51 of the Road Traffic Act in light of the fact that the accident was a result of a trivial momentary lapse of concentration."

Clearly' there is no appeal before us. This way of drawing notice and grounds of appeal comes nowhere near meeting the requirement of being clear and specific as provided in r 22 (1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979, ("the Rules").

Rule 22 (1) of the Rules require that the appellant sets out clearly and specifically the grounds upon which a party intends to appeal. The requirement of clarity and specificity in the Rules is meant to direct the court's attention, as it prepares for the appeal, on the particular error or misdirection the appellant will rely on in urging the court to allow his appeal. It is also intended to direct the respondent on the points upon which argument will be advanced on appeal. That way, the respondent is informed, before-hand, of the points on which the appeal will be argued. He will then prepare his case in order to meet the proposed appeal on those specific grounds.

I find it necessary to restate what is trite and assumed commonly understood concepts regarding appeals. In an appeal, the appellant may appeal against his conviction on a question of

law or of fact or both fact and law. It is common to allege an error in a finding of fact of a conclusion of law. It is also common to allege a misdirection in either a finding of fact or conclusion of law or both fact and law. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence of and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation.

It will be clear from the above that the above "statement" does not constitute a ground of appeal as it is neither clear nor specific in respect of whether the error or misdirection alleged is one of law or fact or of both. It does not direct the court to any error or misdirection which wrongly influenced the court in the determination of issues on trial, whether those issues be of a factual or legal nature or of both. Nor does the statement point exactly which portion in the court's reasons for judgment the error or misdirection occurred. Clearly, such a generalized statement of criticism of a conviction cannot amount to a ground of appeal.

A proper ground of appeal must, *ex-facie*, inform the court with such clarity and specificity that the court is unambiguously informed on whether the appeal is based on an error of law or one of fact or of both. The court must be left in no doubt, if some misdirection on a finding of fact or conclusion of law is relied on, what that misdirection is or what that error of law or fact is. A generalised statement of complaint, such as demonstrated in the above "ground", leaves the court without any information as to what the cause of complaint is. Consequently, in a long line of cases, this court, as well as the Supreme Court, has held that a failure to adhere to the requirements of r 22 (1) of the Rules will result in a finding that there is no appeal before the court. See *R v Emerson & Others* 1958 (1) SA 442 (SR); *R v Kirby* 1961 (1) SA 626 (SR); *S v Kondoni* 1982 (1) ZLR 76 (S); *S v McNab* 1986 (2) ZLR 280 (SC); *S v Jack* 1990 (2) ZLR 166 (SC).

As if this was not enough, what was meant to pass as heads of argument was anything but heads of argument. The heads of argument begin with the heading: "Take Notice That…..". Then there is an introduction which outlines the facts found proved by the court a quo. The next paragraph is titled "Appropriate Charge." Wherein it is suggested that the court a quo ought to

have convicted the appellant of a lesser charge and sentenced him appropriately. The next paragraph deals with what is termed "Distinction Between the Offences." A comparison of the provisions of section 51 and section 52 of the Road Traffic Act [*Chapter 13:11*] is made and the conclusion that it was competent for the court a quo to have convicted appellant for contravening s 51 of the Act. No authority for this is cited. The heads conclude by addressing an appeal against sentence wherein it is submitted that because of the trivial nature of the accident a verdict of the lesser charge be retained.

The drama is worse compounded by the filing of a notice by the Prosecutor-General in terms of section 35 of the High Court Act *[Chapter 7:06]*. It is critical to set out the facts upon which the appellant was convicted in the court below. The court in its judgment relied on the evidence given by the complainant. That evidence established as fact that appellant straddled into complainant's lane thereby colliding with the complainant's motor vehicle. This fact found corroboration in the evidence given by an independent witness who also saw how complainant's motor vehicle was struck. The witness tried to stop the appellant without success. The appellant only stopped after complainant blocked his path. In his defence outline the appellant states that he only realized that an accident had occurred after the complainant stopped him by blocking his lorry, a fuel tanker. He did not see how the complainant's motor vehicle was damaged in the accident.

Ms *Kachidza* filed a notice in terms of s 35 of the High Court Act. [*Chapter 7:06*] indicating that she did not support the conviction. In our view that concession was misplaced. We took that view in light of the fact that the appellant was driving a motor vehicle carrying 40 000 litres of liquid. As such the appellant was under a positive duty of care to make sure that in negotiating his horse and trailer, he did so with appropriate regard to other road users. Therefore, by changing lanes upon leaving a controlled intersection and colliding into a motor vehicle the appellant did not display the reasonable care and skill expected of a driver of such a vehicle. Drivers of heavy trucks bear extra responsibility regarding safety of the roads. A momentary lapse of concentration may have tragic consequences but fortunately on this occasion there was none. In failing to negotiate his way through traffic safely, the appellant was therefore negligent. However in the present matter we were constrained to dismiss the appeal on the basis that there was an admission

of negligence by the appellant himself. We therefore failed to fathom the basis of the concession by the respondent. We respectfully disagreed with the concession.

Having convicted appellant for contravening s 52 (2) of the Road traffic Act [*Chapter 13:11*], the court was obliged to cancel the appellant's drivers licence and prohibit him from driving for at least two years. This is precisely what the trial court did. We find that there was no misdirection in the assessment of sentence.

We therefore dismiss both the appeal against conviction as well as against sentence.

WAMAMBO J Agrees……..

Kwenda & Chagwiza, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners