

THE STATE

Versus

MELLANIA MAJAYA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 30 JANUARY 2003

Review Judgment

CHEDA J: This record was forwarded to me from the scrutinising

Regional Magistrate with the following comments.

“The accused who is 26 years old and a clerk at a school in Gokwe misrepresented that she was a civil servant giving an E.C. number belonging to a teacher at the school accused works and through that misrepresentation accused was recruited as an inspection Officer for Gokwe South Rural District Council Voters’ Roll. Accused was to receive a fee of \$16 000,00 which she never got as this was later discovered.

The facts of the case are that accused underwent the required training and was deployed to perform the work. It is not clear if she performed the work and if so for how long as the trial magistrate did not canvass that aspect. The mitigation adduced from the accused is devoid of any detail. The accused was sentenced to 12 months imprisonment with labour of which 6 months were suspended on condition of good behaviour hence she will serve an effective sentence of six months imprisonment with labour.

My view is that the sentence imposed is unduly harsh in the circumstances. Accused is a female first offender. She pleaded guilty to the charge. Accused only occasioned potential prejudice. She has now lost her job as a clerk at the school. My view is that a fine would be appropriate in the circumstances and at most accused should have been sentenced to perform community service. The reasoning by the trial magistrate does not show that the option of a fine or community service is inappropriate.

In view of the potential prejudice to the accused and the attendant delays I saw no cause to refer the matter first to the trial magistrate. The record is referred for your views.”

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The accused is a female first offender who pleaded guilty to the charge and has now lost her original job as a clerk. It is a general practice in our legal system that female first offenders are treated more leniently than their male counterparts. See *R v Harvey* 1967 RLR 203, *S v Malunga* 1990 (1) ZLR 124 (HC), *Peggy Gwatidzo v S* HH-271(A)/90, unless it can be shown that the aggravating features of the case, far much outweigh the mitigating ones.

In the present case accused's misrepresentation resulted in potential prejudice of \$16 000. The trial magistrate unfortunately did not establish whether she rendered service in her capacity as an Inspection Officer. In matters involving misrepresentations of this nature, wherein an accused proceeds to perform work in a manner which the intended officer could have done, it is a factor which should be considered in accused's favour. As it has not been proved that there was actual prejudice to the complainant, sentencing accused to an effective prison term is indeed unduly harsh.

The courts have stated time and time again that our sentencing policy has dramatically changed in that judicial officers should first explore non-custodial terms of sentencing before resorting to imprisonment. Imprisonment being a rigorous punishment should be resorted to only in the absence of any other suitable non custodial sentence. Imprisonment should be reserved for more serious offences. This principle was made clear in *S v Matize* HH-148-88 and it still holds good to this day.

Judicial officers are urged to first seriously consider community service for offences where if imprisonment were to be imposed would not exceed 24 months. This approach is aimed at accommodating the offender in society as opposed to leaving him condemned for offences which are not comparably serious.

HB 23/03

See *S v Tigere* HH-225-93
S v Mugebe 2000(1) ZLR 376
Ndlovu v S 1994(1) ZLR 290
S v Kashiri HH-174-94
S v Gumbo 1995(1) ZLR 163
S v Santana HH-110-94

I therefore agree with the learned Regional magistrate that the sentence is excessive.

It indeed induces a sense of shock.

I have discussed this matter with my brother CHIWESHE J who also agrees that the sentence cannot be left to stand. This is a case where community service would have been the most appropriate form of sentence. But because of the period already served by the accused this option is no longer appropriate. I therefore confirm the conviction but set aside the sentence. The accused has already served her sentence by now.

I substitute the said sentence with the following:

“12 months imprisonment with labour wholly suspended for 5 years on condition accused is not convicted within that period of any offence of which dishonesty is an element and for which upon conviction she is sentenced to imprisonment without the option of a fine.”

Accused should be released immediately.

Chiweshe J I agree