

THE STATE

VERSUS

WILSON BANDA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 JULY 2010 AND 15 JULY 2010

Review Judgment

MATHONSI J: This matter came before me for review in terms of section 57 of the Magistrates Court Act following the conviction and sentence of the accused person by the Magistrates Court sitting at Western Commonage, Bulawayo on the 16th June 2010.

The accused was convicted of fraud (5 counts) in contravention of section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and sentenced to 3 years imprisonment of which 18 months was suspended for 3 years on condition of good behaviour leaving the accused with an effective jail term of 18 months. The accused had pleaded guilty to all 5 counts.

After examining the record of proceedings I ordered the immediate release of the accused person from prison as I was of the view that the sentence of imprisonment was uncalled for in the circumstances of this matter. These are my reasons for doing so.

The allegations against the accused are that on the 16th May 2010 at Full Gospel Church of God in Mpopoma, Bulawayo he had misrepresented to the 5 complainants that he would secure jobs for them at the Zimbabwe Electricity Supply Authority and that they were required to pay US\$20-00 each for stationery to be used during inhouse training. Each of the

complainants paid him US\$20-00 bringing the total to US\$100-00. Needless to say that he did not secure the jobs for the complainants but converted the money to his own use.

The accused was arrested and taken to court where he readily pleaded guilty to all 5 counts of fraud. Prior to that the accused had made full restitution to all the 5 complainants who each submitted affidavits to the court confirming that they had been paid and petitioning the court to be lenient in sentencing the accused. The pleas by the complainants for a lighter sentence to be passed fell on deaf ears as the Magistrate went on to sentence the accused to 3 years imprisonment as already alluded to above.

The accused is a 35 year old first offender who pleaded guilty to the charge and made full restitution. Although he is not married he has a 2 year old child and committed the offence because he needed money to buy food. These are very compelling mitigating factors which the Magistrate does not appear to have taken into account in assessing sentence.

The only aggravating factor is that he stole from 5 people but even then this is extinguished by the fact that he repaid them within a month of the offence and as such prejudice is not there at all. The amount of money involved is also small.

Section 136 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] provides:

“Any person who makes a misrepresentation:-

- (a) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and
- (b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;

Shall be guilty of fraud if the misrepresentation causes prejudice to another person or creates a real risk or possibility that another person might be prejudiced, and be liable to:-

- (i) A fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greatest; or
- (ii) Imprisonment for a period not exceeding 35 years; or both.”

It is trite law that where a statute he imposes a penalty of a fine and an alternative penalty of imprisonment, the court must first give effect to the fine. Imprisonment should only be reserved for those serious cases or where the offence is committed in aggravating circumstances.

In this particular case, the Magistrate did not even consider imposing a fine and without any justification whatsoever, settled for imprisonment.

This is not a serious case of fraud, neither was it committed in aggravating circumstances as would attract such term of incarceration. This is particularly so when regard is had to the fact that there was no prejudice suffered by the complainants and the accused is a first offender.

In terms of the relevant section of the Code, the appropriate sentence in this matter should have been a fine. I therefore quash the sentence imposed by the Magistrate. Considering that the accused person has already served not less than 20 days in prison, he is therefore entitled to his immediate release.

Accordingly it is ordered that:-

- (1) The conviction of the accused stands

(2) The sentence imposed against the accused is hereby quashed and in its place is substituted a sentence of 20 days imprisonment.

(3) As the accused has already served that period he should be released immediately.

Mathonsi J.....

Cheda J agrees.....