

**THE STATE**

**VERSUS**

**SOLOMON MUKORE: CRB FIG 150/08**

**AND**

**LAMECK MUHONI: CRB 154/08**

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 22 JULY 2010

Review Judgment

**CHEDA J:** This is a review case.

The brief facts of the matter are that accused appeared before the Magistrate Court of the 31<sup>st</sup> January 2008 being charged with stock theft.

It is alleged that the accused connived to go and hunt at Two Tree Farm, Matobo district. While hunting they spotted a cow which they shot using an AK- rifle. They then skinned it, carted the meat to a hiding place. The crime was later discovered by a herdboys who followed the two accused's footprints to their hiding place. They were then arrested for this offence.

They were arraigned before the court wherein they pleaded guilty, were convicted and sentenced to 48 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition each accused does not within this period commit an offence of which dishonesty is an element and for which upon conviction each is sentenced to a term of imprisonment without the option of a fine.

The learned trial magistrate ruled that there were special circumstances which caused his departure from imposing the mandatory sentence. To him the special circumstances are that the accused had compensated the complainant and that they were first offenders. With due respect to the learned trial magistrate, payment of compensation can never be treated as a special circumstance. Special circumstances relate to the commission of the crime and not the circumstances surrounding the accused himself without more. That is mitigation.

The following are what the trial magistrate says persuaded him to find special circumstances:

- (1) that they were members of the armed forces
- (2) they used their service firearms to kill the beast, and
- (3) that they were employed at the time, therefore the offence was not committed out of need but greed,

Having found these factors as a fact, it is a contradiction for him to have departed from the mandatory sentence. If anything these findings are aggravating and not at all mitigatory.

Accused appeared before him on the 31<sup>st</sup> January 2008 and pleaded guilty. He did not pass sentence on that day but postponed the case to the 17<sup>th</sup> September 2008. No explanation is given for this conduct. It is common cause that where an accused appears on a plea, the case is invariably finalised on the same day. In my opinion, the postponement was ill motivated as it was designed to allow the accused time to pay compensation thereby receiving a sentence other than the mandatory one. It is clear therefore that the magistrate's sympathy lay squarely on accused's laps for one to yield to such unjustified lenience is very unfortunate and it therefore casts the court in bad light and should be condemned.

This conduct on the part of the magistrate is condemned.

There has been a serious miscarriage of justice in this matter as there was no reason why the mandatory sentence should not have been imposed.

The following is the order:-

- (1) The conviction is confirmed,
- (2) The sentence is set aside, and
- (3) The case is referred back to the same magistrate to impose the mandatory sentence as there are no special circumstances.

Cheda J.....

Kamocha J agrees.....