Judgment No. HB 1/11
Case No. HCA 53-4/09
CRB 418-9/09

IDAH NYABEZA

And

MUNYARADZI MURENGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 NOVEMBER 2010 & 13 JANUARY 2011

B Dube for appellants
T Makoni for the respondent

Criminal Appeal

CHEDA J: This is an appeal against both conviction and sentence of the magistrates' court which sat at Gweru on 20 May 2009.

The appellants are employed as headmistress and deputy headmaster of Cecil John Rhodes Primary School (hereinafter referred to as "the school") at Gweru. They were charged with contravening section 7(1) of the Children's Act (Chapter 5:06) [herein referred to as the "Act"] which reads:

"7. **Ill-treatment or neglect of children and young persons**

(1) Subject to subsection (4), if any parent or guardian of a child or young person assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or to injure or detrimentally to affect his health or morals or any part or function of his mind or body, he shall be guilty of an offence,"

The allegations against them are that on 6 March 2009 at 0800 hours, all pupils, teachers and the headmistress (first appellant) where at the assembly when first appellant announced that all pupils who had not paid levy fees (herein after referred to as "fees") were going to learn whilst standing. She went further and declared that a pupil was only going to be allowed to sit on a chair after paying fees.

On that day, pupils started their lessons sitting on chairs. However, at about 1100 hours, second appellant moved around classrooms enquiring as to how many pupils had not paid their fees. He then adopted a slogan “no levy no chair”. He ferreted a total of 239 pupils from grades 1-7 classrooms and ordered them to stand in front of the class room whilst those who had paid fees were sitting on chairs at the back.

On the following day, the 10th, second appellant came back again in all class rooms of grades 1-7 and ordered all those who were in default of payment of fees to take their chairs outside the classrooms. The pupils complied and the chairs were indeed taken out by the caretaker, one Dennis.

All the 239 pupils spent the whole day attending their lessons whilst standing.

Second appellant further instructed the class teachers to only allow pupils to sit on chairs upon production of an invoice (sic) receipt to the caretaker who would then issue out a chair. This practice continued up to the 13 March 2009, when the police received information about the unlawful conduct of the appellants and this led to their arrest.

In attacking the magistrate’s decision appellants have made various allegations which in my view are a hybrid of one issue being whether or not conducting lessons whilst standing by some pupils qualify as ill treatment. Through their legal practitioner, have argued that the court *a quo* erred in convicting them as there was no evidence to support the conviction and consequently the conviction should be set aside. It is their further argument that in the event of the appeal being upheld the sentence should be set aside and substituted with a fine not exceeding level 7.

Mr *Mabhaudi*, for the respondent agrees with them as he does not support the conviction. He is of the opinion that the conviction is not supported by evidence on record.

At the trial the state led evidence from three pupils namely Vuyo Ndlula grade 7, Patience Zvomusekwa grade 4 and Emmanuel Mpofu grade 5 blue. All these witnesses are pupils at the school and their evidence was that first appellant made an announcement that those who had not paid fees were going to have their chairs withdrawn from them. After this declaration, second appellant went around the classrooms withdrawing chairs resulting in them learning whilst standing from 0730 hours to 1300 hours. They corroborated each other on the material facts being:

(1) that first appellant announced that all those who had not paid fees would learn while standing;
(2) that second appellant carried out this order immediately thereafter; and

(3) that they endured pain as a result of this action by both appellants.

I find that the learned trial magistrate's finding that appellants' defence could not be sustained in view of the overwhelming evidence led, proper. I am surprised that respondent finds fault in his finding while all the essential elements have been proved and they are there for everyone to see. In fact the facts are so clear so much that even he who runs can read them. The state witnesses corroborated each other in all material respects, namely that:

(1) first appellant made the relevant announcement at the assembly;
(2) second appellant followed up this order by visiting each and every classroom looking for defaulters;
(3) those who subsequently paid fees were given chairs; and
(4) it is only those who had not paid fees that were made to stand in front of the class from between 0730 hours to 1300 hours.

I find no fault on the part of the magistrate in making this finding of fact. In, my view, it would have been a misdirection to find otherwise.

Appellants argued that they were wrongly convicted as they had a defence being that the reason why pupils were standing was because there were inadequate resources. Inadequate resources due to no fault of the offender is excusable as per section 4 of the Act.

Subsection 4 reads:

"*Proof that any failure which is the subject of a charge in terms of subsection (1) was due to lack of means and that such lack of means was due to none of the following –*

(a) unwillingness to work;
(b) misconduct;
(c) the incurring of debts or obligations which, in all the circumstances of the case, are unreasonable;
(d) omission to take reasonable steps to obtain relief from any other person legally liable to maintain the child or young person concerned or from any association, authority or institution whose purpose is the relief of indigency;

shall be a good defence to the charge."

The facts proved during the trial are that first appellant desired to collect fees expeditiously and announced that chairs would be withdrawn from those pupils whose parents had not paid fees. Second appellant moved from class room to class room enforcing that order. Those pupils who had paid fees **but** where in a class room where the chairs were inadequate

where made to attend lessons sitting on desks and not standing like those who had not paid. Appellants and their witnesses were found not to have been truthful as they did all they could to protect their superiors.

In my mind, this was a clear intention to punish those who had not paid. The process was very selective with a desire to ill treat those who had not paid. This was by no means coincidental but deliberate.

For that reason alone, respondent had proved its case beyond reasonable doubt.

The issue of tuition or levy fees has been a topical issue for a number of years. It is, therefore, necessary to deal with it at this point once and for all. In my opinion the issue of fees directly relates to the law of contract.

When a parent and/or guardian [herein referred to as("parent (s))"] secures a place for a child at a school or tertiary institution [hereinafter referred to as ("institution")] a contract is entered between the said institution and the parent with regards to the payment of fees. The said contract can either be express or implied. The parent undertakes to pay all fees which the institution levies against the student from time to time. Failure by a parent to do so results in the institution of legal proceedings against the parent to recover the said fees. No valid legal steps or proceedings can be taken against a minor who has no contract with the institution to pay fees, to do so is an abuse of authority on the part of the institution which is an undue pressure to enforce payment of fees using pupils as prawns. This is, therefore, unlawful.

There, however, exists an implied contract between the institution that the student or pupil that he/she will abide by all rules and regulations of the institution. Any breach of such rules is punishable by the institution more often than not directly on the pupil, for example caning where permissible.

The court takes judicial notice that for a long time now, pupils continue to be shut out of school premises, forced to do manual work and have their school results withheld in order to force parents to pay outstanding fees. Such action by institutions is illegal as it contravenes section 7(1) of the Children's Act *supra*. While the authorities are entitled to their fees, they should resort to a legal way of recovering fees from the pupils or students, through their parents.

The locking of school gates for late comers is also a contravention of the said section. Surely, a civilized way of enforcing discipline can be employed thus avoiding that which is likely to cause suffering so as to injure or detrimentally affect a pupil's health or morals. A minor child attending school, many a time has no urgent, reliable and efficient means of taking

himself/herself to school as he/she entirely depends on his/her parent. There is, therefore, no logic in punishing the minor child by locking him/her outside the school gate.

In this regard, the Ministry of Education has been on record advising school heads and heads of institutions not to expel, suspend or withhold pupils or students' school results on the basis of non-payment of fees.

Those who have been acting in the said manner should cease this unlawful practice as they are committing an offence under the Children's Act, *supra* and parents whose children are subjected to this type of punishment should report such practice to the police.

For the above reasons I am of the view that the conviction was proper.

As far as sentence is concerned, I agree with both counsels that it was on the harsh side in the circumstances. It has, therefore, to be interfered with.

The following order is made:-

(1) The conviction is confirmed;
(2) The sentence is set aside and is substituted by the following:

Each - $250 or 6 months imprisonment.

Ndou J ………………………………………………. I agree