THE STATE

Versus

JOE GUTUZA

And

MUNYARADZI MASAWU

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 JANUARY 2011

Review Judgment

MATHONSI J: The 2 accused persons were convicted of 1 count of contravening section 40 of the Road Motor Transportation Act, Chapter 13:15 (not Chapter 20:10 as cited in the record). The 1st accused Joe Gutuza was sentenced to 18 months imprisonment while the 2nd accused Munyaradzi Masawu was sentenced to 20 months imprisonment. Nothing was suspended on each of the sentences.

The allegations against the accused persons are that on the 8th December 2010 they were touting for customers at Plumtree Border Post. They were then arrested and taken into custody before appearing before the trial magistrate on the 10th December 2010. They both pleaded guilty and upon conviction they were sentenced as aforesaid.

In arriving at the sentences the trial magistrate took into account that the 1st accused had 2 previous convictions, the first one of which relates to contravening section 113(1) of the Criminal Law Code, Chapter 9:23, that is theft while the second one relates to contravening section 4 as read with section 3(1) of the Domestic Violence Act, Chapter 5:16. Both convictions arose in 2009.

In respect of accused 2 the trial magistrate took into account 2 previous convictions. In the first one he was convicted of theft on 18 June 2010 and sentenced to 3 months imprisonment while in the second one he was convicted on 19 October 2010 of contravening section 40 of the Road Motor Transportation Act, touting. The trial magistrate strongly rebuked them for coming back to court for the third time suggesting that they "have chosen the path of crime" and have "refused to reform". After discounting all other forms of punishment he

settled for imprisonment "with no part suspended to show the court's disdain to the path of life" they had chosen.

I am of the view that the magistrate misdirected himself in considering the previous convictions of the accused persons (except for the one where the 2nd accused was convicted of contravening section 40 of the Road Motor Transportation Act), as these convictions were irrelevant and had no bearing whatsoever on the charge they were now facing. It is this misdirection which clouded the trial magistrate's reasoning as exhibited by the rebuke he directed at the accused persons.

There was absolutely no basis for sentencing the accused persons to such lengthy terms of imprisonment for touting which is a far less serious offence. In the process the trial court completely ignored the penalty provided for in the Act. Section 40 provides:-

> "If the operator, driver or conductor of an omnibus or any person acting on behalf of such operator, driver, or conductor, by troublesome and frequent demands or by persistent following holds out the omnibus for hire to the public or acts in any way so as to cause annoyance or inconvenience to any other person, he shall be guilty of an offence and liable to a fine not exceeding level 4 or to imprisonment for a period not exceeding 3 months or to both such fine and such imprisonment."

A level 4 fine is an amount of $100,00 which clearly illustrates that the offence created by the section is not a serious one at all. How the magistrate was able to fathom the sentences he came up with is not easy to comprehend. No reason was given for overlooking the sentence of a fine other than to say that "a fine will not meet the justice of the case." How a fine would not be appropriate when the enabling statute provides for it is not explained.

It is trite that where a statute provides for a sentence of a fine and imprisonment, the court must give effect to a fine in the first instance and reserve imprisonment for the more serious breaches – see *S* v *Mlilo* HB-131-10 at p 2; *S* v *Banda* HB-67-10 at p 3. In sentencing the accused persons the way he did the magistrate fell into error as the appropriate sentence should have been a fine.

The same applies even to the 2nd accused because the fact that he was previously convicted of touting on only one occasion would not suddenly elevate a fineable offence of $100,00 to the status of such serious offence as would attract a lengthy imprisonment period imposed in this case.

In the circumstances, while confirming the convictions, I quash the sentences imposed by the trial magistrate. Considering that the accused persons have already served a month in prison, they are therefore entitled to their immediate release.

Accordingly, it is ordered that:-

1. The conviction of the accused persons stands.
2. The sentences imposed against 1st and 2nd accused persons are hereby quashed and in their place is substituted a sentence of 30 days imprisonment for each accused person.
3. As both have already served that period they should be released immediately.

Ndou J …… I agree