KENANI PHIRI

VERSUS

THE STATE

HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 7 MARCH AND 17 MARCH 2011

S. Mguni, for appellant
K. Ndlovu, for Respondent

CRIMINAL APPEAL

CHEDA J: This is an appeal against sentence only. The undisputed facts of this case are that appellant was employed by Small Enterprises Development Corporation (SEDCO). On the 1st of October 2009, he assumed the post of acting Branch Manager whilst the Branch Manager was on leave. Amongst his duties was to disburse funds to clients. During the month of October 2009, he received an allocation of funds for a certain number of individuals and companies one of which was Yonah Transport which had been allocated Z$5 000.

Instead of disbursing the said allocation to Yonnah Transport, he allocated it to one Gugulethu Ndlovu whose loan application had been approved, but, funds were not yet allocated to her by Head Office Harare. Appellant, therefore, acted in a manner that was inconsistent or contrary with his duties as a public officer. His unlawful actions, resulted in actual prejudice to Yonnah Transport.

Appellant was charged with contravening Section 174 (1) (b) of the Criminal Law and Codification and Reform Act [chapter 9:23]. He pleaded not guilty, but, was, however, convicted and sentenced to 18 months imprisonment of which 9 months imprisonment was suspended for 3 years on condition of good behaviour.

Appellant in support of his appeal has argued that he should have been sentenced to a non-custodial sentence. His reasoning is based on the case of *Rutsvava v State* SC 2/90 where it was held that, where an offence provides for an option of a fine, a judicial officer must first consider a fine.

This, infact is the correct legal position and infact the learned trial magistrate considered this option as he stated the following in his reasons for sentence:

> ''First offenders should be kept out of prison if there are no compelling circumstances. In *casu*, it is this court's considered view that the degree of moral blame worthiness is high.''

In that regard his approach in my view cannot be faulted. We were further referred to the cases of *State v Mujaya* HB 15/03; *State v Shariwa* HB 37/03 and *State v Mpofu* HB 73/03 where this court held that failure to consider community service for sentences within the region of 24 months imprisonment is a misdirection. This approach still obtains in our courts. However, this approach applies to non-serious cases only, as it will be absurd to lump all such cases in this category. Judicial officers are at large to distinguish such cases and approach this principle with caution. The decisions in the above cases do not take away the reasonable approach expected of judicial officers to seriously consider appropriate sentences in particular circumstances. Infact going by the number of cases coming before this court of late, it appears that this otherwise noble principle is now being abused. Time has now come for Magistrates and all those charged with the delivery of justice not to swallow the said principle hook, line and sinker.

Corruption is a very serious offence. In *casu* Yonnah Transport, a business concern was legitimately allocated funds presumably after satisfying all the necessary requirements some of which were paid for, for example project proposals which are a necessity in the determination of a loan application. It is clear that Yonnah Transport had a commercial fulfilment to meet which was in the interest of both the national economy and itself. After all these preparations, appellant who was placed in a position of trust, had a high responsibility, was therefore, expected to discharge his duties in a fair and just manner, but decided to twist the procedure and allocate public funds to a not-yet-due borrower for his personal reasons. Although, it is not clear what his motive was, the only irresistible conclusion is that he must have been actuated by illegal and /or immoral considerations. Whatever, it was, this conduct is reprehensible and deserves censure which should serve as a general deterrence to all those who are in the forefront of promoting and propagating this scourge in our society.

For the above reason, I find that the sentence imposed by the court *a quo* was for all intents and purposes fitting for the said offence in the circumstances.

The appeal is accordingly dismissed.

NDOU J ..... I agree.

Hwalima, Moyo and Associates, Appellant's Legal Practitioners
Criminal Division, Attorney General's Office, Respondent's Legal Practitioners