

FLORA MAGIDHA
and
ELTON MWADIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAKUVA AND MOYO JJ
BULAWAYO 1 JUNE AND 3 SEPTEMBER 2015

Criminal Appeal

J Nyarota for the appellants
T Hove for the respondent

TAKUVA J: This is an appeal against conviction and sentence. The appellants were convicted by a magistrate on a charge of theft. Each was sentenced to

“24 months imprisonment of which 8 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence which involves dishonesty for which he is sentenced to imprisonment without any option of a fine. Of the remaining 16 months imprisonment, 6 months imprisonment is suspended on condition each accused pay (sic) restitution to the complainant in the sum of \$2414 through the clerk of court Kwekwe on or before 30 April 2013. Effective – 10 months imprisonment.”

The facts as outlined in the state outline are as follows:

The first appellant is employed by the Ministry of Education and Culture as a school Headmistress at Ruvimbo Government Primary School, Kwekwe. The second appellant was at the relevant time an accounting student at Kwekwe Polytechnic attached to Ruvimbo Government School as a trainee school bursar. In March 2012, an anonymous report to the Ministry head office indicated that funds at Ruvimbo School were being misappropriated.

Following that report, the Ministry dispatched an audit team to carry out an audit at the school. The team’s report showed that during the period January to December 2011, the two appellants received a sum of US\$4829 for levies from pupils. The two then connived and converted the money into their own use.

The charge that the two appellants faced was framed thus:

“Charged with the crime of theft as defined in section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on the actual dates unknown to the prosecutor and during the period from January to December 2011 and at Ruvimbo Government School Mbizo Kwekwe both Flora Magidha and Elton Mwadiwa or one or more of them unlawfully took a total sum of US\$4829 from the school levies knowing that Ruvimbo Government Primary School is entitled to own or possess or control the property or realizing that there was real risk or possibility that Ruvimbo Government Primary School may be so entitled and intending to deprive Ruvimbo Government Primary School permanently of its ownership possession or control.”

After a full trial, the court *a quo* convicted both appellants and imposed the sentence referred to above. Both were dissatisfied and appealed to this Court on the following grounds;

“Re: Conviction

- (i) The learned magistrate misdirected himself and accordingly erred in holding that the first appellant was responsible for incidents of under and overbanking notwithstanding clear evidence that she was not responsible for receipting and banking monies collected.
- (ii) The learned magistrate further erred and misdirected himself when he convicted the first appellant of theft simply on the basis that she was the chief accounting officer at the school by virtue of being the headmistress and supervisor of second appellant.
- (iii) The learned magistrate again misdirected himself by relying on an audit report which was not thorough and exhaustive as it did not take into account evidence of payments made out during the relevant time.
- (iv) The court *a quo* also misdirected itself and accordingly erred when it totally disregarded the payment vouchers, invoices and receipts for payments made during the relevant time. The court *a quo* ought not to have disregarded the documents on the basis that they were not made available to the auditor during the time of the audit despite a clear explanation that the documents were no longer in the second appellant’s custody.
- (v) The learned magistrate erred in convicting the appellants of theft on the basis that they did not follow Treasury Instructions to bank money before receipting despite evidence from the School Development Association Chairman and Treasurer that they authorized them to use money before banking.

- (vi) The learned magistrate further misdirected himself and erred in finding second appellant guilty on the basis of failing to follow Treasury' Instructions notwithstanding that the instructions do not apply to the School Development Association funds and he was not a civil servant.
- (vii) The learned magistrate also misdirected himself and erred in concluding the Ministry of Education, Sports and Culture was the complainant in the case despite clear evidence that the money in question belonged to the School Development Association.
- (viii) The learned magistrate misdirected himself and erred in completely disregarding the evidence of the School Development Association Chairman that as the owners of the money they never invited the auditor nor made a complaint to the police against the appellants.
- (ix) The learned magistrate erred and misdirected himself by convicting the appellants despite conflicting evidence by the auditor.
- (x) The learned magistrate erred by completely disregarding the evidence of the auditor where she completely exonerated the appellants of theft and that they were only guilty of failing to follow proper accounting procedures.
- (xi) The learned magistrate erred and accordingly misdirected himself by dismissing the receipts, payment vouchers and invoices as not being authentic without any evidence to that effect and despite the fact that some of the receipts were from reputable companies such as *inter alia*, OK Zimbabwe Ltd, National Social Security Authority, Farm and City, City of Kwekwe and First Pack. Further and in any event neither the state counsel nor the auditor ever suggested that such receipts were not authentic.
- (xii) The learned magistrate also misdirected himself by disregarding the auditor's evidence that first appellant was charged because she had been implicated by second appellant yet second appellant never incriminated the first appellant at all.
- (xiii) The learned magistrate again erred and misdirected himself by finding second appellant guilty notwithstanding the fact that he was a student on attachment and working under instructions and was monitored by a qualified Government Bursar.
- (xiv) The learned magistrate further erred and accordingly misdirected himself by convicting the appellants of conniving to steal the money without any evidence before it to prove any connivance."

Both appellants also appealed against sentence. They prayed for the setting aside of both the conviction and sentence and substitution thereof with a verdict of not guilty.

At the hearing of the appeal, Mr *Hove* for the respondent conceded that there was insufficient evidence to sustain a conviction against the second appellant. He however persisted with the argument that the first appellant was properly convicted although he did not support the sentence; Mr *Hove* submitted that the basis of the conviction in respect of the first appellant is that she failed to produce supporting documents during the trial. This argument has no merit for four main reasons, namely;

- (i) It is common cause that the documents “referred to were generated and kept by the second appellant who was a student on attachment under the supervision of a government bursar. Surely in such a scenario, the safe custody of these documents cannot be held against first appellant.
- (ii) It is again common cause that the bulk of the missing documents were produced later but the court *a quo* disregarded them simply because they were not produced during audit.
- (iii) Further, the court *a quo* doubted the authenticity of these documents because some of them were “not supported by vouchers and receipts.”
- (iv) Also the long and short of the auditor’s evidence is that first appellant as the chief Accounting officer failed to properly account for the money. However, this falls far short from establishing the essentials of the crime of theft preferred by the State. At pages 36 and 37 of the record of proceedings, the auditor remarked thus;
“I never used the word theft but I said in my report that the money was not accounted for,”

Later, the auditor stated;

“I did not say the money was stolen but I said there was no proof of expenditure” see pages 41 and 44 of the record of proceedings.

A close examination of the evidence led at the trial leads to the conclusion that the state failed to prove theft against the first appellant beyond a reasonable doubt. The following factors clearly demonstrate this conclusion;

- (a) it was never proven who the complainant is in this case between the School Development Association and the Ministry of Education, Sports and Culture. The chairman and treasurer of the School Development Association denied that the association funds were stolen see pages 51 and 54 of the record.

- (b) the mere fact that first appellant was the chief accounting officer does not mean she stole the money as failure to effectively supervise second appellant does not constitute theft.
- (c) the first appellant was not responsible for receipting and banking monies collected by second appellant.
- (d) second appellant was just a student on attachment who was working under the direct supervision of the Government Bursar who monitored him throughout his attachment programme.
- (e) the State failed to show that the appellants acted in common purpose to commit the offence of theft.
- (f) the State failed to prove that School Development Fund is a statutory fund subject to Treasury Instructions.
- (g) the audit report far from being conclusive, did not prove any theft but simply established that second appellant did not follow Treasury Instructions.

The subjective impression created by the evidence as outlined above is very adverse to the State case. It is for that reason that I make a finding that the State failed to prove theft beyond a reasonable doubt. In the result, one is obliged to quash the convictions of both appellants and set aside the sentences.

I therefore order as follows;

- (i) The appeal in respect of both appellants succeeds.
- (ii) Both the conviction and sentences are set aside and substituted with a verdict of not guilty.

Takuva J.....

Moyo J.....agrees

Wilmot and Bennet appellants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners