

ARTWELL KAMHESI

versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI- MUZAWAZI JJ

CHINHOYI, 10 January & 6 April 2023

Criminal Appeal

J Zuze, for the appellant

TH Maromo, for the State

MUZOFA J

[1] The appellant was convicted after a trial on two charges of theft and escaping from lawful custody in contravention of s113 (1) and s185 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. On the first count he was sentenced to 6 months imprisonment of which 3 months imprisonment was conditionally suspended on condition of good behaviour the remaining 3 months imprisonment was suspended on condition of restitution. In respect of the second count, he was sentenced to pay a fine of ZWL\$ 30 000 in default of payment 30 days imprisonment.

[2] Dissatisfied by the outcome the appellant noted an appeal against both conviction and sentence in respect of the two charges.

[3] The background facts are largely not in dispute. The appellant was a police officer based in Mutorashanga. One of his duties was to receive and receipt fines from persons issued with tickets by the police on behalf of his employer. On the 30th of December he issued a receipt under Z69J 0159235 for ZWL \$2000-00 to Wendy Matibiri. When the receipts for the day were collated and computed in preparation for banking it was discovered that the appellant did not hand over the money to the station administrator.

[4] On the second count it is alleged that on the 2nd of February 2022 the appellant was lawfully arrested for theft. While in the custody of Sergeant Mutepeya he escaped from such lawful custody.

[5] The appellant denied both offences, despite that he was convicted and sentenced as already set out.

[6] Dissatisfied by both the conviction and sentence, the appellant noted an appeal. Three grounds of appeal against conviction were set out which raise the following issues,

- i. That the court a quo misdirected itself in finding the appellant guilty when there was no evidence that he received the \$2000 from Wendy Matibiri 'Wendy'.
- ii. The court a quo misdirected itself in convicting the appellant on both counts when the State failed to prove beyond a reasonable doubt all the essential elements of the two offences.
- iii. The court a quo misdirected itself when it relied on the receipt issued by the appellant as evidence that he had received ZWL\$2000-00 yet the evidence before it showed that he did not receive such money on behalf of the State.

[7] In respect of sentence the only ground of appeal was that the court a quo misdirected itself when it issued an order for restitution in circumstances where the State was not deprived of any money.

[8] In his prayer the appellant requests this court to find him not guilty and acquit him. In the event that both convictions are upheld, that the sentence imposed by the court a quo on the first count be set aside and substituted with a sentence of 6 months imprisonment wholly suspended on the usual condition that he does not commit a similar offence within 5 years.

[9] The respondent did not oppose the appeal. In its heads of argument, the respondent posited that the evidence established that the appellant received US\$10-00 and not ZWL\$2000-00. Therefore, it was a misdirection by the court a quo to find him guilty of theft of ZWL\$ 2000-00 which he did not receive in the first place.

[9] The respondent correctly noted that the proper citation of the charge must have been theft of trust property in contravention s113 (2) (a) of the Criminal Code. It also correctly set out the essential elements of the offence as expounded in *Ndlovu v The State* HH299/16. Besides that nothing much turns on the case, in that case there was no dispute that the appellant had received the money on behalf of her employer. The appeal court upheld the conviction on the basis that there was adequate circumstantial evidence which allowed no other inference except that the appellant stole the money.

[10] According to the respondent the appellant dealt corruptly with the employer's property and therefore the appropriate charge must have been abuse of office under s176 of the Criminal Code. On the other hand, counsel for the appellant was of the view that this was more of a disciplinary issue that the appellant failed to comply with set down procedures in receipting the employer's money.

[11] We could not accept both counsel's exposition of the law as regards the facts of this case. We asked counsel to file supplementary heads of argument on whether this court can exercise its review powers and substitute the charge with criminal abuse of office or amend the charge to reflect theft of US\$10-00.

[12] Having had regard to both counsel's supplementary heads of argument and proper research it is apparent that this court cannot exercise its review powers to amend the charge to reflect theft of US\$10-00. It is not in dispute that the charge is that the appellant received ZWL\$ 2000-00 on behalf of the employer yet the accepted evidence is that he received US\$10-00. As such there was no proof that he received the amount alleged. The difficulty that arises in amending the amount to US\$10-00 is that as of the date of the commission of the offence, there was no evidence that the employer accepted fines in the United States Dollars.

[13] This court also cannot, in the exercise of its review powers amend the charge to criminal abuse of duty in terms of s274 of the Criminal Code referred to us by counsel for the defence. Section 274 of the Criminal Code provides,

‘Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged.’

In our view the essential elements of the other offence must appear on the charge. In this case the essential elements of criminal abuse of duty can be gleaned from the state outline and the evidence. It would be amiss of this court to extend its powers to that extent.

[14] Having properly considered the facts of this case we come to the decision that the court a quo did not misdirect itself. The accepted evidence is that Wendy paid US\$ 10-00. The appellant was supposed to swipe the \$2000 RTGS in place of the US\$10-00. At the time of the transaction these two were in agreement that \$2000 RTGS had been paid. That is why the receipt was issued.

[15] The court a quo cannot be said to have misdirected itself in relying on the receipt. The receipt is admissible evidence in terms of s281 of the Criminal Procedure and Evidence Act. In considering the weight to attach to such a document the court can have recourse to all the circumstances whether appearing from the document concerned or otherwise in terms of s283 thereof. There is no doubt that the appellant was aware that his employer did not accept US dollars, despite that knowledge he issued a receipt. The probabilities are that Wendy’s explanation as to why she was issued with a receipt is the truth as opposed to the appellant’s version. The court a quo properly rejected the appellant’s version that he issued the receipt without receiving any money.

The appeal against conviction has no merit.

[16] In respect of sentence, the appellant impugns the order of restitution. There is no merit in this ground of appeal. Going by the evidence from Wendy the appellant received US\$10-00. He was supposed to swipe an equivalent amount. For all intents and purposes by not fulfilling his part he prejudiced the employer. This practice to receive US dollars from customers and swipe on their behalf even though not sanctioned is widely practiced. This is

the unfortunate situation brought about by the use of a multiplicity of currency. The accused did prejudice his employer and the order for restitution cannot be impugned.

[17] In respect of the second count, we found the ground of appeal too general. It is trite that grounds of appeal must be clear and concise. To simply allege that the state failed to prove its case beyond a reasonable doubt lacks particularity. Clear averments must be set out of which element(s) was not proved. The second ground of appeal is therefore struck off.

From the foregoing the following order is made.

The appeal against both conviction and sentence be and is hereby dismissed.

Mangwana and Partners, appellant's legal practitioners.

National Prosecuting Authority, the respondent's legal practitioners.

BACHI- MUZAWAZI J Agrees _____