

THE STATE
versus
ELIZABETH KALENGA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & MUSAKWA JJ
HARARE, 13 July 2018

Criminal Review

CHITAKUNYE J. The above case came to my attention through a Newspaper article headlined “Student Nurse jailed for using forged papers”. The article informed everyone who cared to read that a woman who used false documents to secure admission as a trainee nurse was jailed for 15 months.

My concern was with the effective jail term of 10 months for the nature of the offence alleged. I requested for the record of proceedings in terms of s 29 (4) of the High Court Act [*Chapter 7:06*] which states that:

“(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.”

When the record of proceedings was placed before me for review my view of the sentence was confirmed.

The facts were that:

The accused person in the above matter was charged with Fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

The allegations were that sometime in mid – May 2016 Parirenyatwa School of Nursing advertised in Newspapers that they were recruiting Trainee nurses and that the vacancies required candidates to have at least five Ordinary level passes with grade C or better including English language and a science subject.

In response to the advert, the accused person on 15 June 2016 submitted a fake Ordinary level Certificate with seven passes at grade C or better including the required subjects which was in her name bearing candidate number 010400/3082 to Parirenyatwa School of Nursing to secure admission as trainee nurse. The accused was duly enrolled as a trainee nurse based on the fake certificate.

Subsequent to her admission the Zimbabwe Anti-Corruption officers got a tip off and arrested her. Investigations with the Zimbabwe School Examination Council (ZIMSEC) revealed that the certificate was not authentic. The candidate number on the certificate belonged to someone else who had not passed the examinations.

The accused is a 29 year old female first offender, single with 2 minor children to take care of.

Upon being arraigned before the trial magistrate the accused pleaded guilty and was duly convicted.

The conviction is proper.

She was then sentenced to 15 months imprisonment of which 5 months was suspended for 3 years on the usual conditions of good behaviour. The accused was thus left with an effective 10 months imprisonment.

An effective imprisonment for the offence in question is rather shocking and out of sync with sentences in similar cases. In holding this view I am mindful of the fact that the issue of sentencing is within a trial court's discretion. Indeed as noted by GUBBAY CJ in *S v Ramushu* S-25/93 at page 5:

“But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is a pre-eminently a matter of discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general grounds of being excessive, should only be altered if it is viewed as being disturbingly inappropriate.”

In *casu*, I am of the view that the sentence in this matter was disturbingly inappropriate considering the developments in approaches to sentencing.

This court has on numerous occasions pointed out that effective imprisonment must only be used as a last resort, where court is satisfied that there is no other non custodial sentence that would be suitable.

In *S v Zulu* 2003(1) ZLR 529 (H) court held, *inter alia*, that:

“Over the years the courts have emphasised that imprisonment is a severe and rigorous form of punishment, to be imposed as a last resort and when no other form of punishment will do. There has also been a shift from the more traditional methods of dealing with crime and the offender

towards a more restorative form of justice, which takes into account the interests of society and the victim. This is a holistic approach to sentencing, in that it punishes the offender, causes him to pay reparation and integrates him into society.”

See also *S v Shariwa* 2003 (1) ZLR 314 (H)

In instances where a sentencing court is satisfied that a sentence of 24 months or less will be appropriate, this court has exhorted sentencing officers to seriously consider community service as a viable option to imprisonment.

In her reasons for sentence the trial magistrate justifies her imposition of the harsh penalty in these words:

1. Accused person used a fake Ordinary level certificate to get a place on the nurse training programme. The offence suggests adequate prior planning which point to a disturbing syndicate of producing fake certificates. Accused said she was referred to a certain woman by her friend. This woman then produced the fake certificate.
2. The conduct of the accused discredits our education system and exposes innocent consumers of services to incompetent people riding on the back of manufactured qualifications. I shudder to imagine the implications of a nurse who is responsible for human life but is unqualified. There is a need to protect the public from similar minded persons. I am also of the view that as long as there is a market for fake certificates, those who produce them continue to flourish. It is therefore appropriate to deal with the ‘market’ in a deterrent manner.
3. I am aware of the sentencing policy that calls for the treatment of female first offenders with leniency. I am however satisfied that this case calls for a departure from that policy in a bid to protect the public by a deterrent sentence. A non-custodial sentence will send the wrong message. The personal circumstances of the accused are outweighed by the circumstances of the commission of the offence. I will however reward accused for pleading guilty by suspending a portion of the sentence.

The above reasons do not in any serious way show that the trial magistrate properly applied her mind to the options of non custodial sentences. She seemed subsumed with a desire for deterrence. Such approach has been discarded by our courts and the approach is for restorative and rehabilitative justice.

Had the trial magistrate cared to examine other cases of the use of fake educational qualification certificates she would have noted that, in her case there were no aggravating factors warranting imprisonment. In as far as she noted the need for an effective custodial sentence she could easily have opted for community service. The assertion that non-custodial sentence will send the wrong message is clearly misplaced. Effective implementation of a sentence of community service would in fact serve the concerns the trial magistrate expressed.

In *S v Jumbo* 1992 (2) ZLR 153 (H) SMITH J after considering a number of decided cases where accused persons had been sentenced for fraud involving the use of false education certificates to obtain employment, in effect concluded that:-

“where the accused is charged with fraud on the basis that he has used a false educational certificate to obtain employment but once employed he has apparently performed the work satisfactorily, it is a misdirection to find that the accused has defrauded the employer of the amount of salary he has received and that the employer has suffered prejudice to that extent. In such cases a fine will usually be an appropriate sentence and there should be no condition imposed relating to the restitution of wages as the accused will have worked for his wages.”

The cases reviewed involved accused persons who had worked for considerable periods using false educational certificates.

In *casu*, the complainant was not shown to have suffered any financial prejudice. All that is alleged is that the accused caused the Parirenyatwa School of Nursing to enrol her and to suffer prejudice to good administration.

The fear that the trial magistrate shuddered to think about of the risk of unqualified people toying with human life was farfetched as the facts do not show that accused had been tasked to deal with patients. The facts do not even show that she had attended any training or had been trained for any length of time. It was thus a serious misdirection for the magistrate to pontificate on what would have happened when accused had not been trained at all. Equally there was no indication that had she trained she would have failed to perform. In the event she passed her passing in the training would be the determining factor as to her competence. Clearly the trial magistrate misdirected herself in premising her sentence on such assumptions.

In my view, this is a case where a fine would have met the justice of the case for the act of using a false certificate to secure enrolment at the school of nursing.

A sentence in the region of \$200 in default of payment one month imprisonment would have sufficed.

Accordingly therefore the conviction is confirmed but the sentence is hereby set aside and is substituted by the following:

The accused is sentenced to \$200 or in default of payment 1 month imprisonment. In addition 4 months imprisonment which is wholly suspended for 5 years on condition that the accused does not within that period commit any offence involving dishonesty and for which he is sentenced to imprisonment without the option of a fine.

The accused must be allowed to pay the fine proportionate to the outstanding period of imprisonment and be released forthwith.

MUSAKWA J. I concur