

THE STATE
Versus
ISAAC MAPIKI

HIGH COURT OF ZIMBABWE
MUZOFA & BACHI -MZAWAZI JJ
CHINHOYI, 30 November, 2023

Review Judgment

MUZOFA J: The accused was convicted on a charge of removal of an animal from one place to another in contravention of s59 of the Parks and Wildlife Act (Chapter 20:14). He was sentenced to 12 months imprisonment of which 6 months was conditionally suspended for 5 years. A further 3 months imprisonment was suspended on condition of restitution. Effective sentence 3 months imprisonment.

On scrutiny, the Regional Magistrate raised two issues. Firstly that the Magistrate ordered payment of restitution when s105 of the Act refers to compensation. Secondly that the Magistrate suspended a portion of the sentence on condition of payment of restitution yet the section is specific that the compensation is in addition to the sentence. The Magistrate conceded the errors.

On the first issue, in my view substance should give way to form. There is a very thin line between restitution and compensation. Both terms refer to placing the complainant to the position he/ she or it was before the commission of the offence. The substance is that the accused was ordered to make good. There is no need to interfere with the proceedings on that basis.

On the second issue s105 provides additional penalties for contravention of the Parks and Wildlife Act. A court may order compensation for killing of a domestic animal. The accused killed a porcupine and a common duiker. There was no evidence before the court that the two animals were domestic animals. It follows then that if the animals were not domesticated compensation could only be made under s104 which is similarly worded but refers to compensation for hunting an animal.

Section 104 of the Act provides,

104 Court may order payment for hunting of animal

(1) Where a person is convicted of an offence in terms of this Act involving the hunting of any animal, the picking of any plant or the catching of any fish and—

(a) the person convicted has appropriated or disposed of any animal, plant or fish which forms the subject of the charge and which has not been restored to the land on which it was hunted or picked or the water in which it was caught, as the case may be; or

(b) the commission of the offence has caused the death of an animal or fish or the destruction of a plant or has made it necessary or expedient for an animal or fish to be killed or a plant to be destroyed; the court shall, in addition to any penalty which it may impose on the person convicted, order him to pay—

(i) in the case of an animal, plant or fish which was hunted, picked or caught in a national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park, or of any specially protected animal, to the Authority;

(ii) in any other case, to the appropriate authority for the land on which the animal was hunted or the plant was picked, or for the water in which the fish was caught;

such amount as may be specified in respect of the animal, plant or fish concerned in terms of subsection (2).’

The wording of the section is clear that in addition to any sentence imposed the court may order compensation. In *S v Mutetwa 2015 (1) ZLR 578(H)* the court addressed the issue of compensation. Although the court was dealing with compensation under the Criminal Procedure and Evidence Act, the principle enunciated therein applies in this case. After analyzing the provisions the learned Judge opined that where the compensation is made subject to a suspended sentence it is part of the sentence. Where it stands alone it is not part of the sentence and is not subject to any limits. By parity of reasoning, it follows that by making the compensation ‘in addition to’ there was no intention to make the compensation part of the criminal sentence sanctions. That part of the order can be enforced separately.

In essence I agree with the learned Regional Magistrate.

Besides the issues raised by the learned Regional Magistrate, the sentence is harsh in the circumstances. Had the Magistrate taken into consideration the provisions of s12 and the presumptive penalties under SI 146/23 a different sentence could have been imposed. The

accused's social background per s12 were scantily canvassed, just some bare minimum. The Magistrate could not have made an informed decision on those facts.

Then on the penalty the mitigatory factors outweigh the aggravatory factors. The accused said he did not hunt the animals they were killed by his dogs, this was not disproved. He did not use a snare which would be aggravatory. As already alluded to there is no information where these animals originated. The approach is to accept the less onerous option, they were taken from a place other than a national park, safari or a sanctuary. Of course two animals were involved but there was no information that the accused hunted them. He was found with meat. Under these circumstances the presumptive sentence is a level 4 fine. To sentence the accused to an effective custodial sentence was therefore a misdirection.

The accused was sentenced on the 17th of October 2023. He has served more than enough. The justice of the case requires that the sentence be altered to what he has already served only because he has served otherwise a fine would have been appropriate.

Accordingly the sentence imposed by the court a quo is set aside and substituted by the following.

'5 months imprisonment of which 4 months imprisonment is wholly suspended for 3 years on condition the accused does not within that period commit an offence involving hunting or removing an animal from any land without a permit for which accused is sentenced to imprisonment without the option of a fine. In addition the accused to pay compensation to Zimbabwe Parks and Wildlife US\$2000-00 or its ZWL\$ equivalent at the prevailing auction rate on the date of payment.'

BACH-MZAWAZI Agrees