THE STATE
versus
DAMSON ZUWA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 15 January 2014

Criminal Review

MATHONSI J: The accused person is a 38 year old single mother of 5 who was arraigned before a Magistrate at Harare facing 2 charges. On the first count, she was charged with forgery in contravention of s 137 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23] it being alleged that in November 2013 at Harare Civil Court, she had forged a ZETSS application form. On the second count, she was charged with lying under oath in contravention of the Justices of the Peace and Commissioners of Oath Act [*Cap* 7:09] it being alleged that on 29 October 2009 she had made a statement under oath which was false.

Following a full trial, the accused was, on 12 December 2013 found not guilty and acquitted on the first count. She was however convicted on the second count for lying under oath and sentenced to 15 months imprisonment of which 6 months was suspended for 5 years on condition of future good behaviour. This left her with an effective term of 9 months.

Briefly, the facts are that the accused filed an application for variation of a maintenance order in the Maintenance Court against one Lincoln Tafadzwa Ushamba, the father of one of her daughters by the name Khloe Lindsay Ushamba, seeking an increase of the maintenance because the child, who previously was attending kindergarten at German School Society, Harare was, with effect from January 2014 due to commence primary education at Heritage Primary School. The school fees at Heritage would be much higher than at German and as such this constituted a change of circumstances warranting an upward variation of maintenance.

The application must have been opposed necessitating the filing, by the accused person, of an answering affidavit. In advancing her case to justify why it was necessary for Khloe to attend Heritage School, the accused stated in the answering affidavit that it was the school of her choice because her 2 other daughters, Zoe and Cleopatra Damson, were going

to Gateway School which was comparable to Heritage. She wanted Khloe to enjoy comparable benefits at Heritage.

It turned out, following spirited investigations by Ushamba, that the accused person did not have children at Gateway. She lied. Instead her 2 other daughters were going to Borrowdale Brooke Academy. It is this little infraction which got the accused person into trouble. As I have already stated, she was convicted and sentenced aforesaid.

Section 10 (1) of the Justices of the Peace and Commissioners of Oath [*Cap* 7:09] provides for a sentence of a fine not exceeding level 7 or imprisonment for a period of up to 2 years or both. In arriving at the effective sentence of imprisonment of 9 months the trial magistrate reasoned thus;

> "Accused is a first offender to whom there is an emphatic general policy to the effect that wherever possible first offenders should not be sent to prison for fear of being contaminated by hardened and determined criminals. When one errs for the first time the chances of accused being reformed are higher than those of a readvist (sic).
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> Imprisonment has various deleterious effects ranging from regulation of one's personal life to personal liberty.
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> Accused is a female offender to whom imprisonment will bear more heavily than a male counterpart. Readivism is invariably, men. Accused is a family person to whom imprisonment will deprive her children of a breadwinner. However, this offence is on the increase and there is need for personal general deference. Accused falsely swore or took oath falsely by making false averment under oath and misled not only the commissioner of oaths but the maintenance court, in a bid to get increased varied quantum of maintenance to be paid to her child. This is a serious form of criminal behaviour as her lies affected the rights and obligation(s) of Lincoln Ushamba. The court cannot be made to make a false finding based on false facts. The filing of this false affidavit constitutes contempt of court. She was lucky not to be charged with contempt of court.
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> A fine will trivialise this reprehensible offence. A moderate term of imprisonment is called for."

Having said that, the magistrate went on to impose, not a moderate term of imprisonment, but an effective 9 months imprisonment.

It is clear that the trial magistrate paid lip service to the mitigating factors in this matter while lending overdue weight on the aggravation. As I have said, the accused person is a 38 year old single mother with 5 children to fend for. She is a female first offender and although the magistrate mentioned that such offenders should be kept out of prison, he went

on to do the opposite without showing why he had to depart from the sentencing policy of keeping first offenders out of prison.

In my view, it is insufficient to say that a female first offender should be imprisoned merely because the offence of lying under oath is on the increase, which itself is doubtful. It is also not clear why the court took the view that a fine or community service would trivialise the offence. Not only is that reasoning flawed in the extreme, it being unsupported by the facts, it also betrays a closed mind. It is a misdirection.

Where a statute provides for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to a fine, particularly on a first offender; see *S* v *Chawanda* 1996 (2) ZLR 8 (H) 10 C-G where MALABA J (as he then was) said:

> "The authority for the proposition that where a statute provided for a penalty of a fine or imprisonment, it is a misdirection on the part of the *sentencing* court to impose imprisonment without giving serious consideration to the imposition of a fine, particularly on a first offender, is found in the case of *S* v *Muhenyere* HB 31-92 cited by the accused's legal practitioner. At p 3 of the cyclostyled judgement in *Muhenyere's* case *supra* BLACKIE J, with the concurrence of CHEDA J, quoted with approval from the decisions in the cases of *S* v *Rutsvara* S-2-89 and *S* v *van Jaarsveld* HB – 110 - 90. The leaned judge said:
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> > 'It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases..... In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used?' "

Other than saying that a fine would trivialise the offence, an offence, which in my view is trivial anyway, the court did not explain why it was departing from the sentencing policy propounded in the foregoing authorities. Even if one has regards to the circumstances of the offence, there is no way the matter qualifies for the imposition of imprisonment.

The accused lied that her 2 daughters, Zoe and Cleopatra Damson, who were irrelevant in the application for a variation of the maintenance order given in favour of Khloe, were attending school at Gateway when in fact they were at Borrowdale Brooke Academy. So what? This would not have swayed the maintenance court at all because consideration of an application for variation hinged on the changed circumstances of Khloe and the ability of

Khloe's parents to pay. It's such an insignificant lie which may not have affected the outcome.

Taking into account the totality of all the circumstances of this matter, a small fine or a wholly suspended sentence would have met the justice of the case. The accused has been in prison since 12 December 2013 and it is too late to undo that. In order to achieve closure, I am of the view that she has suffered more than enough.

In the result, it is ordered that;

1. The conviction of the accused person is hereby confirmed.
2. The sentence is hereby set aside and in its place is substituted the following sentence, namely that;

   "The accused is sentenced to 60 days imprisonment of which 45 days imprisonment is suspended for 3 years on condition the accused does not, during that period commit an offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine."
3. As the accused has served more than the effective15 days, she is entitled to her immediate release.

CHATUKUTA J agrees