HB-89-15
HCA-185-09

EDNA SIBANDA
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & MOYO JJ
BULAWAYO, 16 MARCH AND 14 MAY 2015

Criminal Appeal

R. Mahachi for the appellant
T. Makoni for the respondent

MUTEMA J: This is an appeal against a sentence of 24 months imprisonment of which 8 months imprisonment were suspended for 5 years on the usual conditions of future good conduct.

The appellant who then was aged 32 years was arraigned before a senior magistrate sitting at Kezi on 24 November, 2009 facing a charge of contravening section 4(1) as read with section 3(1) (a) of the Domestic Violence Act [Chapter 5:16].

The allegations were that on 1st November 2009 at her homestead in Natisa area of Matobo the appellant, by means of an unlawful act which resulted in direct infliction of physical injury, severely and intentionally burnt Prince Nkosi, her son aged ten years on both palms with hot charcoal and on the mouth with hot ashes.

The agreed facts are that the complainant was doing grade 4 at Whitewater Primary School. On the day at around 0800 hours the appellant went to church leaving the complainant and his sister Adelite Nkosi at home. Around 1300 hours the complainant became hungry and took the appellant's jollie juice/sweet aid valued at R1 which he diluted with water and drank. On returning from church and discovering the consumption of the sweet aid the appellant accused the complainant of being a thief who should be taught a lesson. She took the complainant into the kitchen hut where she took two pieces of hot charcoal and put each in the complainant's palm. She proceeded to fill a tablespoon with hot ashes and put it on the complainant's lips. Due to the pain he felt the complainant started screaming but the appellant

ordered him to keep quiet. As a result the complainant suffered severe burns on the palms and lips. The appellant took the complainant to Natisa Clinic where she lied to the clinic staff that the complainant fell into the fire on his own. It was only after teachers at his school had observed the burns and interviewed him that the complainant disclosed the offence leading to the school head reporting the matter to the police. The complainant was medically examined on 5 November, 2009 and a medical report was then compiled. The doctor observed burns on both palms and on the lips and opined that although there was no potential danger to life or permanent disability likely to occur to the complainant, the degree of force used to inflict those injuries was very serious.

The appellant pleaded guilty to the charge. She is a first offender who is married with four children. She vends vegetables realizing around R150 per month. She went to school up to form 4. She had US$150 and P360 in savings and three goats and a donkey as assets. She said she was very angry at what complainant had done, hence the punishment.

Following the imposition of the sentence alluded to above on 24 November 2009, the appellant's current legal practitioner noted the appeal against the sentence on 4 December, 2009. The gravamen of the appeal is simply that the appellant should not have been visited with an effective custodial sentence, instead, the trial court should have imposed a non-custodial sentence such as community service.

The appeal having been noted on 4 December, 2009 we raised eyebrows as to why it took so long – up to 16 March, 2015 – to have the appeal heard. A perusal of the record and Mr M*ahachi's* explanations revealed the following sad slipshod and slapdash way by Mr *Mahachi*, of prosecuting the appeal. The notice of appeal was served only on the criminal registrar and office of the then Attorney General on 4 December, 2009. Contrary to appeal rules it was not served upon the clerk of Kezi Magistrates' Court. On 18 December, 2009 the criminal registrar's office issued a warrant of liberation for the appellant. Although *ex facie* appeal record cover it is endorsed that appellant was on bail there is nothing in the record showing who granted the bail, when and where or how much it was.

The next document is a piece of paper with this court's letter heads written

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with the criminal registrar's date stamp on 21 May 2010. It is not known who in that office gave the matter the appeal number – even the stamping of 4 December, 2009 on the notice of appeal by the two offices alluded to above are not signed for.

The matter lay in abeyance, shrouded with its secrecy until13 February, 2013 when the now resident magistrate of Kezi wrote to the provincial magistrate in Gwanda querying the circumstances leading to the issuance of the warrant of appellant's liberation alluded to above. On 10 March 2013 the provincial magistrate directed that a warrant of arrest be issued for the appellant. That prompted the appellant's legal practitioners to serve the more than three year old notice of appeal upon the clerk of Kezi Magistrates' Court on 18 March, 2013. Promptly on 19 March 2013 the clerk of court at Kezi forwarded the notice of appeal and the record of proceedings to the trial magistrate who was then based at Plumtree for processing of the appeal record which was done and the processed record was sent back to Kezi from Plumtree on 11 April, 2013 and received at Kezi on 23 April, 2013. Meanwhile, as far back as 21 December, 2009 CHEDA J had confirmed the proceedings on review.

On 27 May, 2013 appellant's legal practitioners were called upon by the registrar's office to file their heads of argument by 21 June, 2013. They did not do so. On 16 July, 2013 the appeal was deemed abandoned and dismissed. On 5 August, 2013 a warrant for appellant's arrest was issued by the magistrate at Kezi. This jogged Mr *Mahachi* to apply for reinstatement of the appeal which MAKONESE J granted on 10 September, 2013. On 13 September, 2013 Mr *Mahachi* wrote to the Kezi Magistrates' clerk of court attaching the order for reinstatement of the

appeal and requesting the clerk to issue a warrant of liberation for the appellant. Thereafter the appeal again lay in abeyance for more than a year. I presume this was because appellant's heads of argument filed on 15 October, 2013 were not served upon the respondent until this year.

At the hearing of the appeal Mr *Mahachi* on being quizzed by the court about the delay in prosecuting the appeal, conceded that the delay was occasioned by himself. Indeed from the chronology of events postulated above he could not have had any other plausible explanation except to concede and apportion the blame squarely on his sole shoulders.

We are not privy to the reasons why, in view of the brazen and suspect non-observance of the appeal rules *in casu* as expounded *in extenso supra*, this appeal was reinstated but clearly this is one case in which the salutary words of DUMBUTSHENA CJ as he then was in *S* v *McNab* 1986 (2) ZLR 280 (SC) @ 284 should have been, with respect, heeded. Therein the learned Chief Justice said, "It is in the discretion of the court to refuse condonation even in cases which the respondents do not object to the relief being granted to the applicants. In cases in which defective notices of appeal are filed it is in most cases the applicant's legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioners. In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Ano NO* v *Minister of Community Development supra* at 141C – E when he said:

> "There is a limit beyond which a litigant cannot escape the result of this attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to the neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are …"

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of Court to the detriment of the good administration of justice."

Regarding the merits or otherwise of the appeal it is trite that sentencing is the prerogative of the sentencing court and the appellate court is generally loathe to interfere unless there exists a clear injustice or misdirection. In the instant case while Mr *Mahachi* conceded in his oral submissions that appellant's conduct was abhorrent for a mother cannot abuse her child in that manner he still contended that the sentence was harsh. The pith of his argument was that appellant pleaded guilty, is a first offender and if incarcerated no one will remain taking care of the children. He suggested that a sentence of 12 months imprisonment with half suspended on condition of good behaviour and the balance on condition of performance of community service will meet the justice of the case.

Mr *Makoni* maintained that the appeal be dismissed for lack of merit.

Section 4(1) of Domestic Violence Act provides:

> "… any person who commits an act of domestic violence … shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding 10 years or both such fine and such imprisonment."

In his reasons for sentence the learned trial magistrate said:

> "The accused although a first offender, perpetrated a gothic and barbaric crime that is viewed with indignation, contempt and abhorrence by the public. As a mother, she severely and undeservingly punished a 10 year old son by burning him on the palms and mouth for drinking a R1 worth sweet aid. Mothers are synonymous with love and care. Although a first offender, her behaviour is distinguishable. A fine will trivialize the offence. An option of community service too, will be inadequate. A prison sentence, appropriately suspended on condition of good behaviour will meet the justice of this case. This is a serious offence … The fact that she is a mother to the victim aggravates this offence. A gaol sentence will be appropriate."

It is pertinent to point out that the appellant was in fact taken through the community service enquiry. The learned trial magistrate cannot be faulted in his reasoning *supra* that a fine or community service will trivialize the offence. There is no jot of misdirection on his part.

Those of a rustic background would remember with shivers how rural women used to punish hens that would have "eaten their own eggs." The women would take a piece of burning wood and burn the hen's beak until only a stump remained so that thereafter the hen's beak would not be able to peck and break the egg shell in order to drink the contents again.

The above scenario can be equated to the appellant's conduct *in casu*. Her conduct was devoid of any maternal instinct inspite of the fact that she was the one to blame by leaving the complainant with no food for the day. Hunger being not a good teacher of morals got the better of the complainant and understandably so. How could a mother worth her motherhood cast away the cloak of maternity and brutally punish her own ten year old son in such a primitive fashion for such a miniscule infraction worth not even a teaspoon? As if that was not enough appellant felt no remorse and had to effrontery to tell fibs to clinic staff in an endeavour to sweep her dastardly act under the carpet.

What appellant did contravenes section 53 of the Constitution. She subjected the son to torture, cruel, inhuman and degrading treatment or punishment. This case is not one of sparing the rod and spoiling the child. Section 81 of the Constitution confers on every child the right to parental care, protection from maltreatment, neglect or any form of abuse and the right to nutrition. By her conduct the appellant sorely breached the complainant's constitutional rights enshrined in the Bill of Rights.

It does not matter that the appeal took this long to be heard. As already stated the delay lies squarely on appellant's legal practitioner's shoulders and this one is a proper case where appellant must bear the consequences of her agent's negligence.

Also, it matters not that if incarcerated appellant's children will remain with no mother. They will remain with their father. After all complainant himself is now 16 years old. He is now

a teenager and not a child. If it were in other societies the appellant, for this domestic child abuse, would surely have been stripped of custody of her children for she certainly does not deserve custody after exhibiting such cruelty to the complainant.

There was no misdirection by the learned trial magistrate in the manner in which he assessed the sentence that he imposed upon the appellant. The sentence is properly deserved.

In the result the appeal against sentence is without merit and is accordingly dismissed in its entirety.

Moyo J …….. I agree

T. Hara & Partners, appellant's legal practitioners
Prosecutors General's Office respondent's legal practitioners