

MZINGAYE E.P. MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & MOYO JJ
BULAWAYO 13 SEPTEMBER & 21 OCTOBER 2021

Criminal Appeal

P. Buche for the appellant

K. Jaravaza for the respondent

MOYO J: In this matter the appellant was convicted of theft of trust property wherein it was alleged that he converted to his own use cash amounting to \$431 belonging to his employer. He was sentenced to pay a fine of \$500 or in default of payment 20 days imprisonment. At the hearing of the matter we dismissed the appeal and the appellant has requested for written reasons.

Here are the reasons. The notice of appeal has 2 grounds namely:

1. That the court *a quo* erred in failing to appreciate that in terms of the current Zimbabwean law electronic money and RTGS are the same and as such there was no theft.

The learned magistrate in response to this ground stated that cash was stolen as it was held in trust and that this is undisputed in the court record as appellant did not surrender back the cash he had been entrusted with but decided to do a transfer.

The 2nd ground of appeal was that the court erred in failing to appreciate that the appellant made the transfer before the next banking day and thus did not fail to account for the property. The learned magistrate responded to this ground by stating that the appellant's accounting was inconsistent with the terms under which he held those funds and that he failed to deliver the cash entrusted to him to his employer and that he did not do so.

We found no misdirection in the learned magistrate's reasoning and we dismissed the appeal *ex tempore*.

The facts of the matter were that the appellant had been tasked with banking court funds, he drove from Filabusi to Bulawayo and found one of the banks closed. This was on 25 August. He returned to Filabusi with the funds and the following day, which was a Sunday he effected an electronic funds transfer into the employer's account. Whilst in Bulawayo, he had phoned the Provincial Accountant and advised her that he wanted to bank the funds via electronic transfer and was told that he should not do so as that was not allowed and that it could in fact get him into trouble.

He went back to Filabusi the following day which was a Sunday he then did an electronic transfer. In fact per his own version at page 39 of the court record appellant said the reason he had called the accountant was because keeping the funds in his custody was a risk since he was going to spend the day in town and there was no one to keep the funds in the safe.

This in essence means after he returned to Filabusi with the money and was no longer spending the day in town where there was risk, he could simply keep it and give it to the employer on Monday. In fact the Provincial Accountant had offered to come and collect the money from Filabusi.

The learned magistrate found that the appellant was guilty of theft of trust property because he held trust property and contrary to the terms upon which he held the property he dealt with it as he pleased and later decided to effect a transfer to the complainant's account. The learned magistrate found that the conduct of the appellant fits the definition in section 113 (2) of the Code in that the appellant held trust property but in breach of the terms under which he held it (which were to deposit it in the bank in the form that he received it).

He used the property for a purpose other than which he or she was obliged to use it (in using the cash and then doing a transfer) to the complainant's bank account, the appellant committed the offence.

We thus found no misdirection with the trial court's findings and we dismissed the appeal.

Takuva J I agree

Messrs Mathonsi Ncube Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners