PETRONELLA KAGONYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND MANYANGADZE JJ
HARARE, 29 September and 17 October 2022

Criminal Appeal

T Magwaliba with *R Mahuni*, for the appellant
Z Macharaga with *C Muchemwa*, for the respondent

CHIKOWERO J:

[1] This is an appeal against both conviction and sentence pursuant to a full trial of the appellant on a charge of theft of trust property as defined in s 113(2(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

[2] She was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. A further 8 months imprisonment was suspended on condition the appellant pays restitution in the sum of US$10 000.00. This leaves an effective prison term of 16 months in the event full restitution is effected.

[3] The respondent opposed the appeal.

FACTUAL BACKGROUND

[4] On 20 June 2018 and in her then dual capacities as the Minister of Labour and Social Welfare and the Member of Parliament for Goromonzi South Constituency, the appellant wrote to Supa Mandiwanzira who was Minister of Information, Communication Technology and Cyber Security at the time.

[5] The latter was also a Member of Parliament.

[6] In the letter, the appellant requested a donation of computers for 28 schools in Goromonzi South Constituency. The list of the schools, all electrified, was attached to the

correspondence. It was therein highlighted that, resources permitting, the quantity requested was 10-15 computers per school.

[7] On the same day, Mandiwanzira wrote to the Chairman of the Board of Trustees, Universal Services Fund, imploring the fund to favourably consider the appellant's request. He attached a copy of the appellant's letter. Mandiwanzira copied the appellant, the Permanent Secretary in his Ministry and the Director General of the Postal and Regulatory Authority of Zimbabwe (POTRAZ), naming all these office bearers.

[8] POTRAZ received its copy of Mandiwanzira's letter on 26 June 2018.

[9] The necessary due diligence was conducted. It revealed that no school in Goromonzi South Constituency had benefitted from the E-Learning Programme, Phase 1.

[10] The matter was escalated to Parliament.

[11] Thereafter, POTRAZ decided to donate 20 computers to be shared equally between two (2) schools in Goromonzi South under the E-learning Project. The appellant had the discretion on the choice of such schools.

[12] On 12 July 2018, POTRAZ called the appellant's office to collect the donated computers.

[13] This prompted Cathrine Befura, the appellant's Personal Assistant, to prepare a letter, under the appellant's hand addressed to POTRAZ. That document, duly stamped and signed by the appellant, authorized Evans Kagonye to collect the computers on behalf of the former. The letter was marked for the attention of one Hilda Jera of POTRAZ.

[14] Evans Kagonye is the appellant's brother. He appeared at POTRAZ on 12 July 2018 whereupon he signed a document to acknowledge that he had received the 20 computers on behalf of the appellant. The top part of the document reads:

> "POTRAZ ICT EQUIPMENT HANDOVER FORM
>
> The following ICT Equipment has been handed over to Honourable Kagonye for distribution to Goromonzi South Schools – 2 schools 10 computers per school.
>
> Purpose: E-learning Project
>
> LIST OF ICT EQUIPMENT HANDED OVER"

[15] Thereafter, the handover form reflects the make, model and serial number of each of the 20 computers.

[16] Hilda Jera, as the person handing over the computers on behalf of the Universal Services Fund, appended her name, signature and dated the form.

[17] As recipient, Evans did the same, down to his national registration number, on behalf of the appellant.

[18] The form also contained the following portion, completed by Evans filling in his name and collecting capacity:

> "I Evans Kagonye in my capacity as driver have collected and agree to hold in trust the above ICT equipment for e-learning purposes on behalf of beneficiaries intended under the USF e-Learning project. I undertake to hand over the ICT equipment to the intended beneficiaries and contact details to USF/POTRAZ within 30 days of receipt of the ICT equipment."

[19] The trial court found that the appellant received these 20 computers, which were in the form of laptops. It found that the appellant, well aware of her obligation to deliver the same to schools in Goromonzi South Constituency under e-Learning Project proceeded to donate two laptops to tertiary students at campaign rallies and a third, one to a Ruwa School for the physically impaired. She also failed to account for the other seventeen laptops when called upon by POTRA to do so. The appellant had contended that the laptops were availed to her by the Ministry of Information, Communication Technology and Cyber Security for donation to the needy in Goromonzi South Constituency having been procured through her letter of 26 June 2018 addressed to the said Ministry. Her explanation was that under this arrangement she had no obligation to account to anybody, POTRAZ included.

THE APPEAL AGAINST CONVICTION – THE ISSUES

[22] Although the appellant raised 8 grounds of appeal against the conviction, the issues falling for determination are:

- Whether the trial court correctly found, as a fact, that there was a trust agreement between the appellant and POTRAZ.
- If so, whether the 20 laptops were trust property
- If so, whether the appellant failed to account for the laptops.

DISPOSAL OF THE APPEAL AGAINST CONVICTION

[23] We are satisfied that the conviction is unimpeachable.

[24] We have no basis for disagreeing with the trial court's assessment that Kennedy Dewera, the director of Universal Services fund, was a credible witness.

[25] Dewera testified that the 20 laptops were donated by POTRAZ to schools in Goromonzi South Constituency under the E-Learning Project. This was substantiated by the heavy paper trail which we have already adverted to in this judgment. That paper trail was initiated by the appellant's request for the donation. It was concluded with the handover form, signed on behalf of the appellant by Evans.

[26] The learned magistrate was correct to effectively place no reliance on Befura's testimony that Evans brought the 20 laptops from POTRAZ without any documentation. She was right to reject Evans' evidence that he did not remember whether Hilda Jena gave him a copy of the completed POTRAZ computer handover form together with the laptops. The learned magistrate correctly noted that Evans, a Master's degree holder, could not have signed that document without reading it. There would have been no purpose in generating that particular paperwork in the first place if the process of handling over was as informal as Evans wanted the trial court to believe.

[27] The appellant herself had commendably recognized the need for transparency and accountability in going so far as to list the primary and secondary schools in need of computers, 28 in total, and the ideal number of computers which each school, funds permitting, needed.

[28] Mr Mandiwanzira, the appellant's colleague, had been equally alive to the need for transparency and accountability in taking the matter up, by writing to and copying all the stakeholders.

[29] Due process having been undertaken by all relevant persons and institutions in the procuring and collection of the laptops, we agree that there was no way that the appellant, a whole cabinet Minister would, suddenly and out of the blue, not know of the existence of the duly completed handover form at the material time that she disposed of the laptops.

[30] After all, the donation of laptops to the Goromonzi South Schools by POTRAZ was the very reason for all the paper work from beginning to end, including her written authority for Evans to collect that very donation from POTRAZ, and the POTRAZ call that preceded the drafting of that letter by her personal assistant and the signature of that letter by the appellant herself.

[31] In all these circumstances, can it in all honesty be accepted that she did not know that POTRAZ was the donor and the beneficiaries were two Goromonzi South Schools? Like the

trial magistrate, we reject that defence as not only improbable but beyond reasonable doubt false.

[32] Evans is her brother. He was her driver at the material time. She signed a letter authorizing him to collect the donation from POTRAZ on her hehalf. We agree with Mr *Macharaga* that whether he gave her the duly completed handover form is, at the end of the day, neither here nor there. He is not the unsophisticated witness he sought to portray. He is a holder of an Undergraduate degree as well as a Masters Degree. He read the handover form. He signed it. He collected not one but 20 laptops, on behalf of the appellant, for two Goromonzi South Schools. Even though he handed over the laptops to Befure, the appellant's Personal Assistant at the time, it would defy all logic that he did not, himself, report back to his principal-cum-sister that he had collected the 20 laptops donated to two Goromonzi South Schools by POTRAZ, and that she had the honour of choosing those schools.

[33] In her defence outline, the appellant denied receipt of the 20 laptops. That was a long shot. She put the respondent to the proof of its allegations.

[34] Through Mr M*ahuni*, she cross-examined Dewera and the investigating officer to that effect. The two insisted that the appellant received the 20 laptops.

[35] In her defence outline, she neither revealed nor asserted that she received the laptops pursuant to a letter she addressed to the Minister, Mandiwanzira as a donation for the needy, not schools.

[36] She only sprung up this defence, in bits and pieces, in cross-examining Dewera and when the matter had proceeded into the defence case.

[37] But there were other problems with her letter of 26 June 2018, around which her newly found defence was anchored. First, the copy served on the respondent for purposes of the trial was unsigned. The learned magistrate's copy, which she produced as an exhibit, bore her signature yet these were admitted by herself to be copies of the same letter. She failed to explain the anomaly. Second, although she claimed that the letter of 26 June 2018 was delivered to the Ministry of Information Communication Technology and Cyber Security, it did not bear that Ministry's stamp to acknowledge receipt. Third, the appellant conceded that the letter was not responded to. Finally, the appellant conceded that there was no evidence that her letter of 26 June 2018, was ever received by POTRAZ. Amidst all this, she still contended

receipt of the 20 laptops was in itself evidence that her letter was responded to, and favourably acted upon. What she meant by response was not a written reply to her correspondence but the fact of delivery of the laptops.

[37] If that were to be found to be reasonably possibly true, said the trial court, the appellant needed to have called Mandiwanzira as a defence witness. We agree that this cannot by any stretch of the imagination be described as placing an *onus* on the appellant to prove her innocence. Given the myriad problems bedeviling her newly found defence, and the overwhelming evidence placed before the trial court by the prosecution, the least that appellant could have done was to place Mandiwanzira onto the witness stand. We are not surprised that she did not do so.

[38] It is common cause that the appellant did not deliver the 20 laptops to the two schools in Goromonzi South Constituency. This means she dealt with those laptops in a manner contrary to that provided for in the trust agreement.

[39] We observe also that Dewera's testimony that, after the police had become seized with this matter, Evans, despite promising to do so, neither returned the witness's calls nor furnished the duly completed acquittal forms for the 20 laptops, went unchallenged. Also unchallenged was Dewera's evidence, that further calls to appellant's office were initially unanswered and, when somebody decided to pick the calls, the responses were to shuttle the witness from one person to another, over the phone, all to no avail. Finally, the witness was not challenged when he testified that on the occasion that he sent an engineer to the appellant's office to collect the duly signed acquittal forms the result was that the messenger was given uncompleted acquittal forms.

[40] In all the circumstances, this judgment has demonstrated that all the issues raised in the appeal against conviction have been properly decided against the appellant. Indeed, the appeal against the conviction is completely devoid of merit.

THE APPEAL AGAINST THE SENTENCE

[41] Despite contending that the sentence is manifestly harsh and excessive as to induce a sense of shock, Mr *Magwaliba* did not refer us to any decided cases where similarly placed accused received lighter sentences. We agree with Mr *Muchemwa,* who composed the respondent's heads of argument and Mr *Macharaga,* who presented oral argument on behalf

of the respondent, that the trial court properly balanced the aggravatory and mitigatory factors in assessing an appropriate sentence.

[42] That court, which had the sentencing discretion, rendered full and sound reasons for the sentence it imposed. The appellant, who had the *onus* to persuade us that the sentence is shocking, did not go beyond asserting that the sentence is disturbingly inappropriate. The sentence does not shock us. If anything, it appears to err on the side of leniency. But that is beside the point.

[43] We do not agree that the trial court sentenced the appellant on the principles applicable to the offence of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law Code. The trial Court took into account the fact that at the time the offence was committed, the appellant was the Minister of Public Service, Labour and Social Welfare. Accordingly, one of her key result areas was to enhance social protection of vulnerable groups in the country. The E-Learning project was put in place to support rural schools by providing computers for use by vulnerable school children. The appellant was the best person to have appreciated the need to take the laptops to rural schools as a way of removing some of the barriers to accessing education. As a Member of Parliament, she also betrayed the school children and other members of Goromonzi South Constituency at large. She abused her position of trust. She became an obstacle to social development. She diverted laptops acquired using public funds for her own selfish ends. To that extent, the trial court discerned traits of corruption in the way that the appellant committed the offence and was mindful of that in assessing sentence. We do not think that is tantamount to sentencing on the basis that the appellant had committed the offence of criminal abuse of duty as a public officer.

[44] It is true that the state outline put the value of the 20 computers at US$8 000. But the testimony of Dewera that the value was US$10 000 was never challenged, despite the fact that appellant's counsel had been served with the State outline and other State papers to enable the appellant to prepare for trial. What this all means is that the value of the laptops was not an issue at the trial. It cannot be an issue on appeal. The trial court was correct in suspending a portion of the sentence on the condition that the appellant pays restitution in the sum of US$10 000.

[45] We are satisfied that sound reasons were given for not imposing a fine or ordering the appellant to perform community service. It is not a given that a custodial sentence is

inappropriate in all cases where the effective prison sentence does not exceed 24 months. Each case depends on its own circumstances. See Wellington Muchirahondo v *The State* HMT 14/21. We share the trial court's view that a community service sentence or a fine would have sent the wrong message to society that, despite the serious developmental challenges this country is grappling with, one can steal goods meant for vulnerable members of the society, purchased using public funds, and, in the learned magistrate's words "get away with it". The need for general deterrence was not over-emphasized in excluding a non-custodial sentence. Indeed, the mitigation weighed heavily with the trial court and explains why the sentence, which we think errs on the side of leniency, was ultimately imposed. The appellant was a female first offender, with a young child and had also fallen from grace. The learned magistrate considered that the last factor was a punishment on its own. She sentenced with that in mind.

[46] We are sitting as an appellate court. We can interfere with the sentencing discretion of the trial court only if the sentence is disturbingly severe such that it induces a sense of shock or where there was an improper or unreasonable exercise of discretion. See *S* v *Kwenda & Anor* HH 37/10; *S* v *Mundowa* 1998(2) ZLR 392(H).

[47] The sentence imposed does not shock us. The trial court did not misdirect itself in any way in assessing sentence. We observe that the penalty for the crime of theft of trust property ranges from a Level 2 fine or twice the value of the property, whichever is greater, to a maximum of twenty-five (25) years imprisonment or both. The sentence imposed falls within this range.

[48] The appeal against the sentence is unmeritorious.

ORDER

[49] In the result, the appeal be and is hereby dismissed in its entirety.

MANYANGADZE J, agrees: …….

Mahuni Gidiri Law Chambers, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners