

THE STATE  
versus  
GRACE TSVERUKAI MUNYUKI

HIGH COURT OF ZIMBABWE  
PARADZA J  
HARARE, 3 March 2004

Criminal Review

PARADZA J: The accused in this matter was convicted of contravening Section 36(1)(a)(ii) of the Immigration Act, [*Chapter 4:02*], after she pleaded guilty of using a forged travel document knowing it to be forged. She was sentenced to pay a fine of \$200 000,00 or in default thereof ten months imprisonment. The forged passport was surrendered to the Registrar-General.

The facts that the accused admitted to are as follows:

Accused is a Zimbabwean citizen. Sometime prior to May 2002 she obtained a Malawian passport which was forged in such a manner that it described her as a Malawian citizen when in fact she was a Zimbabwean citizen. On 15 September, 2003 while in possession of the passport she approached Egypt Airways with the intention of buying some tickets. Presumably these were air tickets. Before she could purchase the tickets she was referred to the Malawian Embassy "for clearance" of the passport before it could be used to buy tickets. When the accused went to the Malawian Embassy she tendered the passport for clearance. It is alleged that she was arrested by their passport officer after he had discovered that the passport was not authentic.

Section 36(1)(a)(ii) of the Immigration Act, [*Chapter 4:02*] provides as follows -

- "(1) Any person who -
- (a) for the purpose of entering, remaining in or departing from Zimbabwe in contravention of this Act or any other enactment or

of assisting any other person so to enter, remain or depart, whether or not such other person is *doli capax* -

(i).....;

(ii) forges any permit or travel document, or any other certificate or document whatsoever or **uses any such permit, travel document, certificate or document knowing it to be forged; or**

(iii).....

shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding ten years or to both such fine and imprisonment.....". (My emphasis).

Clearly, the essential elements of that provision in so far as it relates to the charge preferred against the accused can be summarised as follows -

- (a) use of the document;
- (b) for the purposes of entering, remaining or departing from Zimbabwe;
- (c) knowledge that passport is forged.

What is of importance in this matter is that the court that convicted the accused should have been satisfied that indeed the accused had "used" the forged document for whatever purpose the accused intended to use it. It is therefore necessary under the circumstances that the presiding magistrate was expected to canvass those points fully and satisfy himself that indeed the forged document was "used" for a purpose that was clearly defined for it to fall under the provisions of Section 36(1)(a)(ii).

The word "use" is defined and interpreted both in our jurisdiction and elsewhere and the conclusion has been that the word "use" must be understood in the context within which it is placed. In the matter of *S v Magunda* 1994 (1) ZLR 212 (S) at p 244 GUBBAY CJ making reference to a number of English authorities and other dictionary sources concluded -

"The task, of course, remains essentially of maintaining the proper meaning of the word in its particular legislative setting".

I am unable to be persuaded to assign any other meaning of the word "use" other than its ordinary grammatical and linguistic meaning. A deviation from such an ordinary and grammatical meaning would only happen if it can be shown that it is warranted in the circumstances. My view is that if a person is alleged to have used a forged passport, the meaning of the word "use" of the forged passport should be confined to its ordinary meaning which relates to the usual and ordinary use of a passport which, in my view, is to facilitate either the coming in or exit of the possessor through a port of entry. In this matter under review the accused could not use the passport for its intended purpose because she was discovered before she could use it and while she was in the process of trying to purchase certain tickets that would then enable her to use the passport in the ordinary sense.

In the Oxford English Dictionary Vol X1 the word "use" is defined at page 468 as follows -

"The act of using a thing for any (especially profitable) purpose; a fact, state or condition of being so used; utilization or employment for, or for with some aim or purpose; application or conversion to some (especially profitable or useful), "

It is therefore clear from such a definition of the word that it involves some positive action in dealing with that document. To present a document for purposes of clearance or in an attempt to find whether that document is authentic does not to me amount to the use of the document in the ordinary sense. I must emphasise however that as indicated above the context of the piece of legislation must be borne in mind. It could very well be different if the offence is related to forgery or uttering of such documents. In the context in which the accused in this matter was charged for the use of a forged

document I find myself unpersuaded to think that indeed the conviction against the accused was proper.

Accused could very well have been convicted of other charges as defined in the same Section 36 or elsewhere in the Immigration Act. Unfortunately the record before me shows that nothing in that regard was canvassed.

This brings me to the issue of the essential elements as they were put to the accused. I have already indicated above what the elements of the offence are. It is therefore expected that before convicting the accused, the magistrate should have dealt with the essential elements of the charge as they appear in Section 36(1)(a)(ii).

The following questions were put to the accused -

"Q. Confirm that on 15 September, 2003 and at Egypt Airways and Malawian Embassy, you unlawfully intentionally used a forged Malawian passport?

A. Yes.

Q. Do you admit you knew it was forged?

A. Yes.

Q. Why did you do that?

A. My husband is in the United Kingdom and I have not seen him in a year and he also has not seen his son.

Q. Do you admit by so doing you were breaking the law?

A. Yes.

Q. Any lawful right to do so?

A. No.

Q. Any defence to offer?

A. No.

I find you guilty as you pleaded."

It is clear from the above that nobody knows why she was in possession of the forged passport. She did not tell the court that she wanted to go and join her husband at all or that indeed she had the means to purchase the tickets that would enable her to travel to join her husband. Inferences can be drawn from her answer to the question why

she did it but that is not enough. Where a person is pleading guilty the questions put to her must be clear and exhaustive and the answers she gives must be clear and exhaustive.

Further although she indicated that she knew that the passport was forged, it is not clear as when, how and where that passport had been forged. Questions intended at finding out exactly who did what, when and where and whether she was present when the passport was forged would help to satisfy the Court that indeed she knew that the passport was forged.

Also we do not know whether indeed she was going to leave the country and if so when, and whether she had the means to do so. The essential elements put to the accused during the hearing to me are insufficient. Under the circumstances I am unable to confirm the conviction and I therefore make the following order -

The conviction is hereby quashed and the sentence is set aside.

HUNGWE J, agrees.