

SILENT GWANGWADZA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & BERE JJ  
HARARE, 7 July 2015

### **Criminal Appeal**

*J Ndomene*, for the appellant  
*F Kachidza*, for the respondent

HUNGWE J: The appellant was convicted of theft as defined in s 113 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. He was sentenced to four years imprisonment of which two years were suspended for five years on the usual conditions of good behaviour and a further year on conditions of restitution. He appeals against both conviction and sentence. He raised only two grounds of appeal, namely that because there was no formal audit conducted, therefore the conviction was not sound in law. Secondly, the appellant relied on the non-production at his trial or absence of his own distribution book to contend that the conviction was unsafe.

At the conclusion of the hearing we did not hesitate to dismiss the appeal in its entirety as we were convinced the appeal lacked merit. Clearly, the appellant either was attempting to try his luck as much as he could or misconceived the reasoned judgment by the court *a quo*. Dealing with the first ground, the basis of the conviction was not a perceived general deficiency in the stock or cash or the book balances. The conviction was based on the fact that he admitted that he received specific amounts of money for specified purposes. He also admitted that he did not apply these resources in the appropriate way or for the agreed purpose, nor was he able to account for it despite his claim, when confronted, that he had the cash in his cash box. In fact the main witness told the court that she believed that they would find cash in the box he kept as he insisted, on each occasion he was asked to account for the balances, that he had the money. This was not a sophisticated accounting deficiency nor was

it difficult to prove that in fact it was the appellant who had to account for the specific amounts of money. The evidence showed that a sum of US\$ 19 524-00 was withdrawn and given to the appellant over time. The procedure was that after each event for which a specified amount of money outlaid for a specific purpose had passed, the appellant would be called to account. The appellant would agree that there was a specific amount outstanding therefore due to the complainant. He agreed specifically that he had applied these amounts to his personal use. What would an audit be required to prove? Once parties to litigation admit certain facts as not in dispute, that fact is no longer an issue. It is accepted as fact. There is no need to formally prove it as it is admitted. The appellant's submission in mitigation is quite telling in this regard. When asked why he committed this offence the appellant stated that he used the money for daily needs of his family. Surely this is not a response from someone who did not use the money for his own use.

As for the claim that because the distribution book was not available at trial the conviction was unsafe, the answer is found in his own explanation as to how he left his office. He was asked to leave the office. He did not hand it over to his employer as he believed it was not part of the assets belonging to his employer. In short, he took it along. When asked to account for the missing money he did not say that he left the book which reflected that he had used the money as agreed but that he was still reconciling his figures and had the cash in his cash box. If he had an explanation of how he used the money set out in that book, he surely would have stated this fact right from the outset. He never asked anyone about where this book was because he took it away. In any event it would not have helped him as he never sought to rely on it. He merely maintained that he could account for it after reconciling his figures. He failed to do so. In fact he admitted that he had spent part of the money on his medical needs which included giving part of the money to men of God! For an accountant this clearly is a forlorn admission of impropriety with company resources. His appeal for these reasons has no merit.

Regarding the appeal against sentence, we find the sentence quite appropriate in all the circumstances of the case. The appellant was an accountant. He was especially trained on monetary issues. He had no excuse to act this way. There is no suggestion that the sentence invoked a sense of revulsion at all.

In the event we dismissed the appeal in its entirety.

BERE J authorises me to say that he agrees with this judgment.

*Maposa Ndomene Maramba*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners