

THE STATE
versus
STANLEY NDEMERA
and
EMMANUEL MUTAMBIRWA

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 24 July, 8 and 16 August 2024

Sentencing Judgment

Assessors: Mr Kunaka
Mr Mhandu

W Mabhaudhi with L Masuku and F C Muronda, for the State
A Rubaya, for the 1st offender
T T G Musarurwa, for the 2nd offender

CHIKOWERO J:

[1] The offenders together with two others who have since been acquitted were jointly charged with the crime of criminal abuse of duty as public officer as defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”).

[2] The offenders are male adults aged sixty-six and fifty-three years old respectively.

[3] Both pleaded not guilty but were convicted on 8 July 2024 following a protracted trial.

[4] The Court found that they illegally created three commercial stands on City of Harare land, which was reserved for public open space and recreation, and sold that land to three sister companies.

[5] The land sold was part of a big piece of land already on lease, as public open space and for recreation, to Old Hararians Sports Club. The lease agreement will expire in 2044.

[6] Simply put, the offenders criminally abused their duties as public officers by selling urban council land without complying with the mandatory provisions of s 152 of the Urban Councils Act [*Chapter 29:15*] and s 49 of the Regional Town and Country Planning Act [*Chapter 29:12*].

[7] Section 174(1) of the Criminal Law Code provides that a person convicted on a charge of criminal abuse of duty as a public officer shall be liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both.

[8] It is trite that where a penal provision affords the option of a fine a court should seriously consider imposing a non-custodial sentence and reserve imprisonment for bad cases.

[9] The State produced a Victim Assessment Report prepared by Thompson Marufu. He is the Principal Financial Advisor in the Ministry of Local Government and Public Works. Messrs Rubaya and Musarurwa, representing the offenders, cross examined Marufu.

[10] In *S v Gomba* and others HH 391/23 the Finance Director of the City of Harare and the Chamber Secretary were convicted of a charge of Criminal abuse of duty as public officers as defined in s 174 of the Criminal Law Code. They had sold council land without complying with the relevant statutory provisions. Such sales were to handpicked beneficiaries. They were each sentenced to 8 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour. Their appeal against conviction and sentence was dismissed by the Supreme Court. The facts of the matter are broadly similar to those of the case before us.

[11] The Criminal Procedure (Sentencing Guidelines) Regulations, 2023 provides for a presumptive penalty of 2 years imprisonment where the crime of criminal abuse of duty as a public officer is committed in aggravating circumstances. Where the offence is committed in mitigating circumstances the presumptive penalty is a level 5 fine.

[12] Both are first offenders. The first is sixty-six years old while the second is thirteen years younger.

[13] The first offender is married. The marriage is blessed with four children aged 34, 31, 25 and 21 years old. The quartet is unemployed and dependant on the first offender.

[14] The twenty-one year old is a university student in Canada. The first offender pays this child's university fees.

[15] The twenty-five year old is under psychiatric care with the first offender picking up the medical bills.

[16] The first offender assists some extended family members. His siblings, (both diabetic) are looked after by him. His nephews namely X and Y are studying at a named secondary school in this country. Their father, brother to the first offender, is late. The first offender pays their school fees.

[17] He is a holder of a Masters in Business Administration obtained from the University of Zimbabwe in 2009. He is also a registered Public Accountant having attained the professional qualification in 1999 with the Chartered Institute of Secretaries.

[18] The first offender is a man of some means. He owns one house in Chitungwiza and another in Marimba, Harare. He has three motor vehicles and seventeen bovines. He keeps the animals at his farm.

[19] The conviction means he has lost his job at the City of Harare where he was the Acting Finance Director.

[20] He has fallen from grace.

[21] The second offender is married. He is father to four children, three of whom are still dependants. One is a second year student at a local university, the other a Form 3 student while the youngest is a Grade 7 pupil.

[22] The second offender is a realtor and valuer. He is the holder of three Bachelors Degrees namely Science (Quality Surveying), Commerce (Banking and Finance) and Science (Real Estate Management). He also holds a Masters of Science (Real Estate Management) degree.

[23] He is a member of the Real Estate Institute of Zimbabwe, Valuers Council of Zimbabwe and Chartered Institute of Secretaries. He is a Chartered Secretary. He is studying for two Masters of Science degrees in Quality Surveying and Construction Project Management.

[24] He is a lecturer at the University of Zimbabwe and an independent consultant for construction projects. His average monthly income is US\$2000.

[25] He lives in his Belvedere house and owns three motor vehicles.

[26] Being diabetic and hypertensive, the second offender requires regular medical attention.

[27] The conviction means the second offender has lost formal employment both at the City of Harare where he was the Manager, Estates and Valuation Division as well as his lecturing post at the University of Zimbabwe.

[28] He too has fallen from grace.

[29] Section 8 of the Sentencing Guidelines, in relevant part, reads as follows:

“8. General provisions on aggravating circumstances.

Subject to the Criminal Law Code or any other law, the following circumstances shall be taken as aggravating –

- (a) ...
- (b) evidence of prior planning and premeditation;
- (c) where the offence was committed in furtherance of organised crime or the perpetrator was part of an organised criminal gang;
- (d) ...
- (e) ...
- (f) where the offender abused a position of power, authority or trust;
- (g) where the offender played a leading or significant role in the commission of the offence;
- (h) there were multiple victims or multiple incidents;
- (i) ...
- (j) the offence resulted in considerable material or economic loss to a victim of crime”

[30] Section 9 of the Sentencing Guidelines lists the general mitigating circumstances. These include the remote likelihood of re-offending and positive prospects for rehabilitation as well as inordinate pre-trial detention undergone by an offender.

[31] The general mitigating and aggravating factors listed in the guidelines are not exhaustive. A court may, in considering sentence, find other mitigating and aggravating factors outside those set out in ss 8 and 9.

[32] The illegal creation and sale of the three stands, to three handpicked related companies, could not have been possible without prior-planning and premeditation on the part of the offenders.

As already indicated, they were the Acting Finance Director and Manager, City Valuation and Estates Division of the City of Harare at the material time. They involved the Town Clerk and the Finance and Development Committee of the Council among others, to create paperwork sufficient to give a semblance of legality and regularity to what was a crime. This is aggravatory.

[33] In convicting the offenders the court, under HH 293/24, indicated that there was an organised criminal group within council, involved in the commission of the offence. Specific mention was made of one Nyabeze, the head of the planning division. Other members of the organised criminal group, would include key persons in each of the three beneficiary companies. This is because the three sister companies not only purchased the rights in the illegally created pieces of land but did not go through public tender process. That land was not available for sale anyway, even as purported commercial land, because it was part of a larger piece of land already on lease by council to Old Hararians Sport Club until 2044. The land was being leased for public open space and recreation.

[34] The offenders abused their positions of power, authority and trust. Chapter 9 of the Constitution deals with the principles of public administration and leadership. Section 194 sets out some of the basic values and principles governing public administration. Three bear special mention. Public administration must meet people's needs, it must be accountable to the people and transparency must be fostered by providing the public with timely, accessible and accurate information. Under the same Chapter s 196 deals with the responsibilities of public officers and principles of leadership. Section 196(3) reads as follows:

“196(3) Public officers in leadership positions must abide by the following principles of leadership-

- (a) objectivity and impartiality in decision making;
- (b) honesty in the execution of public duties;
- (c) accountability to the public for decisions and actions; and
- (d) discipline and commitment in the service of the people.”

These principles are the antithesis of corruption by public officers in leadership positions in serving the public. Section 196(1) of the Constitution clearly expresses that authority assigned to a public officer is a public trust. That authority must be exercised in a manner which is consistent with the purposes and objectives of the Constitution, demonstrates respect for the people and promotes public confidence in the office held by the public officer. The City of Harare is a

tier of government. It is government at a local level. That the offenders held senior positions in the City of Harare, and abused that authority is a betrayal of public trust. That too is aggravatory.

[35] The rights and interest in the land in question would never have been sold without the involvement of the Acting Finance Director (the first offender) and the Manager, City Valuation and Estates Division (the second offender). They played significant roles in the commission of this offence. Their moral blameworthiness is not lessened by the fact that other culpable persons were not prosecuted.

[36] The transgressions could easily have been charged as three counts. We will, however, assess sentence on the basis that the offenders were charged and convicted of one count, albeit involving three illegally created pieces of land. This is prime land measuring 2544m², 5886m² and 10580m² respectively.

[37] Marufu's evidence was largely unhelpful to the court. He did not visit the land in question before appearing to testify. He did not know whether there were any developments on the land and, if so, by whom. We do not accept his assertions that the three beneficiary companies paid the purchase price and that the money was used to pay the salaries of council workers. We found in convicting the offenders that the prosecution did not prove that the three beneficiary companies paid the purchase price. What the prosecution placed before us at the pre-sentencing stage did not translate to furnishing that which was previously missing. It follows that we do not accept that the money was paid as purchase price and was used to pay the salaries of Council workers. We say so for two reasons. First, that evidence is inadmissible hearsay, as Marufu simply relayed to us what he claims to have been told by one Kusangaya. Kusangaya was not called to testify. Second, in the absence of proof that the purchase price was paid, the question of that money having been employed to pay salaries does not arise.

[38] Twenty-nine years ago, this court in *Motsi v A-G & Ors* 1995(2) ZLR 278(H) per MUBAKO J said at 292C – E:

“In most states, the problems of corruption and white-collar crime are pervasive and difficult to detect and uproot. The evils of corruption are difficult to exaggerate. I agree with Mr Chikumira's description of corruption as ‘an ugly offence which pollutes the very fountains which the public survives on’... There is no argument but that in Zimbabwe the incidence of corruption is widespread and growing and outpacing the ordinary police methods of investigation. For that reason, the state

has brought into the field other investigating agencies such as the Central Intelligence Organisation, the Economics Crimes Unit and the Investigator in terms of the Prevention of Corruption Act... The intention of the legislature was to provide powers which enable society to combat corruption more effectively than before. Corruption was perceived as a pressing social need which called for extraordinary powers to meet the task of combating crime.”

[39] We are mindful of the fact that these sentiments were not aired in the context of assessing sentence. But they are relevant for our purpose. It would be naïve to proceed on the basis that the offenders received no ill-gotten reward in return for illegally selling this prime land in Harare to the three handpicked companies. Although the extent of the benefit remains unknown, we are satisfied that the offenders benefitted from the commission of the offence. Since 1995 the incidence of corruption in the public sector has grown in leaps and bounds. Various institutions, including the Zimbabwe Anti-Corruption Commission, have since been set up to deal with the scourge of corruption. The situation has become that bad.

[40] The offenders have lived clean lives until the ages of sixty-six and fifty-three years respectively. They have assets, professional qualifications and work experience enabling them to live a clean life. They are unlikely to re-offend. They have lost their formal employment. They have fallen from grace. They have heavy family responsibilities. Their health is poor. A custodial sentence will have devastating consequences not only on the offenders but also on their dependants.

[41] But such a sentence is inevitable. A non-custodial sentence, be it a fine, community service, a wholly suspended prison term or a combination of all three would not meet the justice of this case. The aggravating factors, which we have set out in this judgment outweigh the mitigation. Mr Mabhaudhi referred us to *Attorney- General v Chinyerere and Anor* 1983(2) ZLR 329(SC) where the point was made that corruption in the public service must necessarily attract heavier penalties than corruption elsewhere. The offenders must be adequately punished. Since eradicating corruption is a fight, the sentence must communicate an appropriate message to the society at large, which includes would-be offenders. The 8 years imprisonment with portion suspended, suggested by the state, is too lenient and will send the wrong message to the society.

[42] Each offender is sentenced as follows:

10 years imprisonment of which 1 year is suspended for 5 years on condition the offender does not within that period commit any offence involving dishonestly and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Effective: 9 years imprisonment.

*The National Prosecuting Authority, state's legal practitioners
Rubaya and Chatambudza, first offender's legal practitioners
S Kampira Attorney, second offender's legal practitioners*