

THE STATE
versus
SHADRECK NJIKIZANA

HIGH COURT OF ZIMBABWE
MUZENDA AND SIZIBA JJ
MUTARE, 2 MAY 2025

CRIMINAL REVIEW

SIZIBA J:

1. The best criminal sanction for ordinary offenders who fail to comply with maintenance orders is a prison term wholly suspended on condition of paying up the arrears that are owed. A court of law which is faced with these offenders should tread cautiously and be very slow to resort to a sentence that would destroy or diminish the offender's source of livelihood or income as such a sentence may not be in the best interests of the children who are meant to be assisted by the income realized through such legislative intervention. Another common pitfall in this area of the law which should always be avoided is the imposition of a litany of criminal sanctions heaped upon the same offender in one offence which may result in excessive punishment which would be disproportionate, unduly harsh and irregular.

THE FACTUAL BACKGROUND OF THE MATTER

2. This is a criminal review case that came to my IECMS portal accompanied by a letter from the scrutinizing Regional Magistrate who raised a query about the propriety of the sentence of a fine on a conviction for failure to comply with a maintenance order in terms of s 23(1) of the Maintenance Act [*Chapter 5:09*].
3. The convict in this case appeared before the trial magistrate in Rusape Magistrates Court on 15 April 2025 facing a charge of failure to pay maintenance in contravention of s 23(1) of the Maintenance Act [*Chapter 5:09*]. He pleaded guilty

to the charge and he was accordingly found guilty. There is no question about the propriety of the conviction. The convict was then sentenced on the same date to pay a fine of US\$110 or in default of payment 30 days imprisonment. In addition, 7 days imprisonment was wholly suspended on condition that the offender pays the sum of US\$40 to the complainant through her bank account on or before 17 April 2025.

4. During the trial proceedings, it was common cause that the convict had been ordered to pay maintenance of US\$50 per month in respect of his minor child through an order that had been granted by consent on 6 December 2024 and which was to take effect on 31 October 2024. It was also common cause that the convict had defaulted to make payment for the months of January to March 2025 and thus leading to arrears of US\$150. It was also common cause that by the time that the convict was sentenced, the complainant had deposed to an affidavit acknowledging that she had been paid a sum of US\$110 by the convict and thus leaving a balance of US\$40. It was also common cause that the accused person was a first offender who had pleaded guilty to the offence. He was employed as a mechanic at Rimbi Tours earning a monthly salary of US\$280.

THE ISSUE FOR DETERMINATION

5. The only issue for determination in this case is whether the sentence imposed by the trial magistrate upon the convict was competent and appropriate at law.

THE LAW AND ITS APPLICATION

6. Section 23(1) and (2) of the Maintenance Court Act [*Chapter 5:09*] is relevant in this case and it provides as follows:

“23 Criminal offence for failing to comply with maintenance order

- (1) Subject to subsection (1), any person against whom an order to which this section applies has been made who fails to make any particular payment in terms of the order shall be guilty of an offence and liable to imprisonment for a period not exceeding one year.***

*(2) If a person is convicted of the offence referred to in subsection (1), **the court may, in addition to any penalty which it may impose, order that all payments in terms of the order, including any payments which are in arrears, shall be made through the clerk of the appropriate maintenance court of the province or district where the convicted person resides.***

7. The above sentencing provision has attracted various interesting interpretations from this court. In *S v Agere* HH 123-18, CHITAPI J remarked as follows at p 5 of the cyclostyled judgment:

*“Simply put, the punishment for failure to make payment of maintenance in terms of an order of court is imprisonment not exceeding twelve months or one year. The offence is therefore viewed by the courts as a serious one. **The legislature in its wisdom did not provide for the alternative of payment of a fine or for a combination of imprisonment and a fine as with most statutory breaches.** Maintenance as the name implies has to do with the upkeep of the beneficiary of the order without which such beneficiary would not be able to survive a normal life. The payment of maintenance ensures that the beneficiary’s requirements to live in terms of food and other wants are catered for. It is an order directed against the responsible person to play his or her part towards the sustenance of the beneficiary. Errant defaulters must always keep in mind that they will be sentenced to imprisonment if they default complying with a maintenance order for payment of any money required to be paid in terms of the order.*

The magistrate was therefore wrong to impose the payment of a fine as punishment. The punishment of imprisonment is however invariably suspended on condition that the defaulter does not offend again.” (My emphasis)

8. In *S v Chagomoka* HH 584-15, at p 2 of the cyclostyled judgment, my sister MATANDA–MOYO J, though not dealing directly with the issue of whether or not a fine for the offence *in casu* was competent but addressing the issue of alternative non-custodial sentences that could be imposed for the same offence remarked as follows:

*“The magistrates must thrive to use other sentencing options that ensure the best interests of the children are catered for. Criminalisation of failure to pay maintenance was a way of ensuring that parents take the issue of maintenance seriously. However, the magistrates must familiarise themselves with alternative sentencing principles that ensure the interests of the children are not compromised. **A prison term should be reserved for serious defaulters. Magistrates should make use of payment of fines, periodical imprisonment, writs of execution and suspended sentences.***” (My emphasis)

9. What is clear is that the literal reading of the penal provision in s 23(1) of the Maintenance Act [*Chapter 5:09*] provides for imprisonment for one year as a

maximum penalty for the crime of failure to pay maintenance. The fact that the court is at large to impose any other penalty to the offender is also provided in subsection 2 which goes further to elaborate that in addition to any such penalty, the offender may be ordered to clear up his arrears of maintenance. The provision for a fine is one of the forms of punishment which a court of law may impose in terms of s 336(1) of the Criminal Procedure and Evidence Act [*Chapter 09:07*]. In terms of s 14 of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023, a court of law is obliged to consider non-custodial sentencing options of punishment before imposing a custodial sentence depending on the nature or gravity of the offence before it. In my view, if the legislature had intended to totally exclude the provision of a fine for the crime of failure to pay maintenance, it would have expressed itself more clearly in curtailing the sentencing discretion of the court. In the absence of a clear indication that the one year imprisonment is only a maximum sentence which can co-exist with other non-custodial forms of punishment which a court may impose as and when appropriate, it may therefore not be safe to conclude that a sentence of a fine for this offence is incompetent under any circumstances.

10. Having said such, I must proceed still to consider whether the sentence that was imposed upon the convict in this case was appropriate or not. It appears to me that the learned trial magistrate was unduly harsh in sentencing the convict in this case and he was not alive to the rationale behind punishing offenders of this nature as intended by the legislature as well as the interests of the children which considerations should have been uppermost in his mind in meting out the penalty to the convict.
11. An effective prison term, community service or a fine are forms of punishment that should not be easily resorted to for offences of failure to comply with maintenance orders because these forms of punishment have the undesired effect of destroying an offender's source of livelihood or diminishing it to the detriment of the minor children who are meant to benefit from such income. An ideal sentence should

preserve the income sources of the offender whilst inducing the defaulter to comply in paying up his or her arrears of maintenance. This is what the legislature intended in making provision for this offence. The effective imprisonment or fine should be imposed only in exceptional cases where the defaulter is acting deliberately with impunity and in flagrant disregard of the legal processes which are meant to address the best interests of the children.

12. In *Msimbe v The State* HH 686-15, the court at p 3 of the cyclostyled judgment stated the rationale for punishing offenders of this nature as follows:

“The rational for the criminal sanction is not punishment for the disobedience for punishment’s sake, but rather to coerce the defaulter to comply with the order in future. Understandingly, it is a remedy of last resort, only to be employed when all endeavours to bring the situation under control have failed, or are almost certain to fail. (See Ansah v Ansah [1977] 2 ALL ER 638 (CA) at 643 c.)”

13. In the case at hand, the imposition of a fine of US\$110 upon the convict was unduly harsh, extremely severe and uncalled for. He had pleaded guilty to the charge. He was also a first offender who had already paid a greater part of the arrears and reduced them from US\$150 to US\$40. His earnings were only US\$280 a month which needed to be channeled towards his own upkeep as well as that of the minor child. He was not difficult and uncooperative to the administration of justice. What would have been appropriate for him was simply a short imprisonment sentence wholly suspended on condition of payment of his arrears. To then add a wholly suspended imprisonment term on condition of payment of arrears on top of the sentence of a fine amounted to a double punishment for a single offence which cannot be competent at law. See *The State v Chagomoka (supra)* at p 1 of the cyclostyled judgment.

14. It is on the basis of the above reasons that the sentence imposed by the trial court cannot stand and it must be set aside whilst the conviction must be upheld as noted by the learned Regional Magistrate and also accepted by the trial magistrate. I will therefore order as follows:

- (a) The conviction of the convict be and is hereby confirmed.
- (b) The sentenced imposed by the trial court upon the convict is hereby wholly set aside on review.
- (c) The convict is sentenced to 30 days imprisonment wholly suspended on condition that he pays his maintenance arrears of US\$40 to the complainant through her bank account on or before 30 May 2025.
- (d) The record shall be returned to the trial court to appraise the convict of his sentence on review and if he had already paid the fine, he must be refunded such money by the Clerk of Court.

SIZIBA J

MUZENDA J agrees _____