

THE STATE**Versus****MATHIAS MUNIKWA**IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 28 APRIL 2016**Criminal Review**

TAKUVA J: This matter came before me on automatic review. The accused had been convicted on his plea of guilty and sentenced to an effective 38 months imprisonment. Accused faced two counts, namely,

- “(1) Unlawful entry into premises as defined in section 131 of the Criminal Law Codification and Reform Act Chapter 9:23. In that on the 19th day of December 2015 at around 18:30 hours and at Mapiravana Farm, Mahamara, Lalapanzi Mathias Munikwa intentionally and without permission or authority from the lawful occupier of the premises entered the house of Nzane Muchengeti through unlocked door.
- (2) Theft as defined in section 113 of the Criminal Law Codification and Reform Act Chapter 9:23. In that on the 19th day of December 2015 at around 18:30 hours and at Mapiravana Farm, Mahamara, Lalapanzi, Mathias Munikwa unlawfully took one generator, one tent, one jacket, one pair of sandals, one bath soap and some food, the property of Nzane Muchengeti knowing that Nzane Muchengeti is entitled to own, possess or control the property or realizing that there was a real risk or possibility that Nzane Muchengeti may be permanently deprived of his ownership, possession or control of the property.”

The facts are that the accused resides at stand number 69 Village 1 Pauldale, Kwekwe and is employed at Mahamara Mine as a chrome miner. Complainant on the other hand resides and works at Mapiravana Farm in Lalapanzi. The accused and the complainant are not related. On the 19th day of December 2015 at approximately 18:30 hours and at Mapiravana Farm, Lalapanzi the accused unlawfully entered the complainant’s house through an unlocked door without authority.

In respect of count two, the accused unlawfully took the property mentioned in the charge sheet. It is valued at US\$626,00, while property valued at US\$560,00 was recovered.

The accused appeared before a magistrate and pleaded guilty to both counts. He was duly convicted. The conviction is proper and I hereby confirm it. However, the same cannot be said about the sentence. After considering mitigating and aggravating factors, the court *a quo* sentenced accused as follows:

“Count 1: 18 months imprisonment
Count 2: 24 months imprisonment of which 4 months are suspended on condition accused restitutes Nzane Muchengeti \$66,00 through the clerk of court by 30 January 2016 at 4pm. Effective 38 months.

On 2nd March 2016 I addressed a query to the magistrate in the following terms; “Why were the two counts not treated as one for purposes of sentence?” The magistrate responded as follows: “I refer to the above matter and wish to apologize for an oversight on my part. After also going through *S v Chidziva* 2009 (2) ZLR 82 I appreciate my error.

May I be guided accordingly.”

It is my fervent hope that the magistrate has not only read but has understood the principles set out in that case. However, I am perturbed by the fact that the court *a quo* cited the accused’s name as *Chidziva* instead of *Chirindo & Ors*. Be that as it may, the trial court concedes her error. Unfortunately this is not the only error she made. Firstly, she misdirected herself when she found as an aggravating factor that the accused “was in a position of trust,” because he “knew what happened at the premises and therefore his moral blameworthiness is high.”

I am not sure I understand what this means. I suspect however that this finding is anchored on the erroneous fact that accused and complainant reside at the same place or at the very least that accused knew the set up at complainant’s home. Assuming this to be the case, it does not put the accused in a position of trust legally speaking as he does not owe complainant a

duty of care. The facts reveal that the two are not related and one wonders on what legal basis, accused would be said to be in a position of trust *vis-à-vis* complainant's proprietary interests? This finding is a clear misdirection in my view.

Secondly, the court *a quo* found again as an aggravating factor that the accused "broke the locks" to gain entry. This is incorrect in that the facts as outlined in the statement of agreed facts indicate that the "accused unlawfully entered the complainant's house through unlocked door without authority." (my emphasis). This is the other misdirection.

The effect of these misdirections is that the court *a quo* sentenced the accused on wrong facts and wrong legal principles. While it is appreciated that magistrates in most cases deal with many "plea" cases hurriedly, sight should not be lost of the care and attention they should devote to the question of assessing an appropriate penalty in each case.

In casu, I am at large as regards sentence in view of the misdirections alluded to *supra*. In assessing an appropriate sentence, I will consider the following mitigating factors;

- (a) the accused is a 26 year old family man with two children aged 7 and 2 years respectively;
- (b) he is employed as a miner earning \$20,00 per tonne of chrome;
- (c) he has no savings nor valuable assets;
- (d) he pleaded guilty to both counts;
- (e) of the total value of stolen property, only property valued at \$66,00 was not recovered;
- (f) the accused is a first offender.

As against these mitigating factors, I find the following aggravating circumstances;

- (a) unlawful entry is inherently a serious crime as it violates citizens' privacy and proprietary rights.
- (b) the offence is aggravated where theft is then committed in the process like *in casu*.

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At the end of this weighing process, I come to the conclusion that imprisonment is warranted.

In line with the legal principle in the *Chirindo* case, I will sentence the accused as follows:

The sentence imposed by the court *a quo* be and is hereby set aside and substituted with the following sentence;

Both counts as one for sentence - 15 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused is not convicted of unlawful entry or dishonesty and for which accused will be sentenced to a term of imprisonment without the option of a fine. A further 4 months imprisonment is suspended on condition accused restitutes Nzane Muchengeti the sum of \$66,00 through the clerk of court by 31st May 2016. Effective 5 months imprisonment.

The court *a quo* is directed to recall the accused and explain this sentence to him.

Moyo J agrees