1. STATE CRB NO. HREP 1005/22
   versus
   PHILLIP GONERA

2. STATE CRB NO. HREP 1937/22
   versus
   WEBSTER MANYANGA

3. STATE CRB NO. HREP 1933/22
   versus
   NETSAI KAVIYA

HIGH COURT OF ZIMBABWE
MUCHAWA, MUTEVEDZI & MUNGWARI JJJ
HARARE, 29 July 2022

Criminal Review

MUTEVEDZI J: The three records of proceedings came to the High Court through referral by scrutinising regional magistrates in terms of s 58 (3) of the Magistrates' Court Act [*Chapter 7:10*]. The records were separately placed before two other judges and me. After a discussion, the judges were of the view that the concerns arising from the proceedings were similar. It was therefore prudent to address them in a composite judgment.

The common thread which runs through all the cases is that the accused persons were each convicted on their own pleas of guilty, of contravening s 15(1) as read with subs (6) of the Education Act [*Chapter 25:04*]. Each of them admitted having unlawfully and intentionally established and maintained a school without registering their institutions with the Ministry of Primary and Secondary Education in contravention of the Act. Nothing turns on the convictions which are accordingly confirmed as being in accordance with real and substantial justice. It is the sentences imposed which appeared to cause the regional magistrates some strife. In the cases of *Manyanga* and *Kaviya* the regional magistrate's concerns were phrased as follows:

> "I raised a query with the trial magistrate who sentenced accused to pay a fine or in default of payment a custodial term, yet the penal provisions for the offence the caused was convicted of , that is s15(6) of the Education Act only provides for a fine. I am of the view that the sentence imposed… is not in terms of the law and I could not certify the proceedings as being in accordance with real and substantial justice."

In those cases, the accused had been sentenced to pay fines of:

"$25 000 or in default of payment 4 months imprisonment and $20 000 or in default of payment 6 months imprisonment respectively."

In *Phillip Gonera* the accused was sentenced to pay a fine of:

"**$25 000 or in default of payment 5 months imprisonment."**

It is evident from the queries raised by the regional magistrates that they are of the view that where an enactment simply provides for the payment of a fine, a court cannot impose the fine or in default of payment of that fine stipulate a term of imprisonment.

The genesis of that confusion appears understandable. It possibly stems from the general sentencing options provided in penal provisions of most enactments. Usually statutes allow courts to sentence an accused to a fine or to imprisonment or to both a fine and imprisonment. Broken down, such a provision means that a court has three options of sentencing the accused. Firstly it can sentence him/her to pay a fine. If it chooses not to it can sentence the accused to imprisonment. If it again finds that unsuitable it may opt to sentence the accused to both imprisonment and a fine. As will be illustrated later, these distinctions are not without significance.

Admittedly, s 15(6) of the Education Act is peculiar and is a departure from the norm of how penal provisions are ordinarily drafted. But as will be shown below, it is not the only statute with sentencing provisions couched in that manner. S15 (6) provides that:

"**(6) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six."**

What the above means is that unlike with provisions where a court is granted sentencing options to choose from, s 15(6) is rigid. It does not permit a court to resort to imprisonment or any other sanction apart from a fine as the primary penalty. Put differently in terms of that provision, the court can only sentence an accused to pay a fine. Although it is fraught with challenges when it comes to enforcement as will be demonstrated later in this judgment, it remains lawful for a court to sentence an accused to pay a stipulated amount of money as a fine without more. For example a court may sentence an offender to pay $20 000. To however ascribe to s 15 (6) the interpretation favoured by the regional magistrates that there must not be an alternative of imprisonment where the offender defaults payment is wrong for a number of reasons.

To begin with, punishment in the Zimbabwe criminal justice system connotes judicial imposition of a sanction upon a convicted person. The purposes of punishment are varied but the principle that it must be effective cuts across all such justifications. Against that background, our system is designed in such a way that there must be a mechanism of enforcing every penalty which is imposed on an offender. In other words, every sentence which a court passes must be capable of enforcement otherwise it is rendered *brutum fulmen.* If courts were to simply impose sanctions for the sake of it, the objectives of punishment would be completely negated.

With that understanding, every judicial officer would easily appreciate that sentencing an accused person to the payment of a fine without specifying what would happen if the offender defaults paying the fine is as ineffectual as it may be meaningless. It would mean that where an accused chooses not to pay the fine, the court will have to resort to other complicated mechanisms of enforcing the payment which I will deal with later.

Secondly, in Zimbabwe sentencing is part of the adjectival law. As a result, it is provided for and regulated by the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP & E Act). That enactment is the predominant source of all criminal procedure. The kind of sentences that a court may or may not impose are prescribed under Part XVIII of the CP & E Act particularly in s 336 thereof. The punishments include the sentence of death in the case of the High Court; imprisonment in its different forms like life imprisonment or imprisonment for a determinate period; a fine and community service; Judicial corporal punishment used to be another form of punishment until it was outlawed.

It is therefore important to always bear in mind that the source of the nature of punishments available to judicial officers is not the various statutes which create offences and stipulate penalties but the CP & E Act. To put this into perspective, s 15(6) of the Education Act for instance, simply directs the court that the only available penalty is a fine. It does not create the punishment called a fine. It does not direct a court on how to impose the fine and what should happen where an accused fails to pay the stipulated fine in the same way that no statute other than the CP & E Act creates the sentence of imprisonment or directs that a magistrate may sentence a person to imprisonment but suspend that imprisonment on conditions. As an example, the Maintenance Act [*Chapter 5:09*] provides as follows in s 23:

> **"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."

The above provision like the Education Act, means that only imprisonment can be resorted to as a primary sentence. If however, the approach advocated for in the instant cases were to be adopted it would follow that it is incompetent to suspend the prison term prescribed in s23 on any condition. But as already highlighted above the approach is wrong. It is the CP & E Act which gives guidance on the imposition of both sentences of imprisonment and fines. It provides in s 358 (2) that:

> **"358 Powers of courts as to postponement or suspension of sentences**
> **(1) …**
>
> (2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—
> (*a*) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or
> (*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or
> (*c*) pass sentence of a fine or, in default of payment, imprisonment, but suspend the issue of a warrant for committing the offender to prison in default of payment until the expiry of such period, not exceeding twelve months, as the court may fix for payment, in instalments or otherwise, of the amount of the fine, or until default has been made by the offender in payment of the fine or any such instalment, the amounts of any instalments and the dates of payment thereof being fixed by order of the court, and the court may in respect of the suspension of the issue of the warrant impose such conditions as it may think necessary or advisable in the interests of justice; or "

From the above and contrary to the scrutinising regional magistrates' argument, it is actually competent for a court to pass a sentence of a fine and state the alternative period of imprisonment which the offender must serve if he/she defaults paying the fine. This is so even where a statute such as in s 15 (6) prescribes a fine as the only punishment imposable. All sentences of fines which are provided for in various statutes are by necessity intricately tied to s 358 (2) of the CP & E Act. It is the parent statute when a court is dealing with punishment. Further, without the CP & E Act provision, even the practice of affording time to pay to litigants sentenced to pay fines would be illegal. There is no provision in the Education Act for the concept of time to pay fines. There is no provision in any other enactment which allows a court to grant an accused the opportunity to pay his/her fine in instalments. It is s 358 (2) of the CP

& E Act which provides for the suspension of the warrant of committal in default of payment of a fine until the expiration of the period allowed by a court. It is the same provision which circumscribes the period within which a court can afford a litigant to pay a fine in instalments to not more than 12 months.

If any doubt existed as to the applicability of s 358 (2) in relation to the imposition of imprisonment in default of payment of a fine, the provisions of s 347 serve to remove any such doubt. The section is couched as follows:

> **"347 Imprisonment or community service in default of payment of fine**
> (1) Subject to this section, a court which imposes a sentence of a fine upon an offender may do either or both of the following–
> (*a*) impose, as an alternative punishment to the fine, a sentence of imprisonment of any duration within the limits of the court's punitive jurisdiction;
> (*b*) permit the offender, as an alternative to paying the fine, to render such community service as may be specified by the court.
> (2) The period of any sentence of imprisonment imposed in terms of paragraph (*a*) of subsection (1) shall not, either alone or together with any period of imprisonment imposed on the offender as a direct punishment for the same offence, exceed the longest period of imprisonment prescribed by any enactment as a punishment for the offence.
> (3) Where a court has imposed upon an offender a sentence of a fine without an alternative referred to in paragraph (*a*) or (*b*) of subsection (1) and the fine has not been paid in full or has not been recovered in full by a levy in terms of section *three hundred and forty-eight*, the court may issue a warrant directing that the offender be arrested and brought before the court, which may thereupon impose such sentence of imprisonment and additionally, or alternatively, permit him to render such community service, as is provided in subsection (1).
> (4) Nothing in this section shall be construed as limiting the power of a court under section *three hundred and fifty-eight* to postpone or suspend any sentence."

For the benefit of magistrates it is necessary for this court to break down and simplify s 347. For starters, the section reinforces the finding that it is permissible to impose imprisonment as an alternative to the payment of a fine. In addition, it brings in the new dimension that the payment of a fine can be suspended on performance of community service. What the court must however be alive to is that the alternative period of imprisonment must not exceed the maximum prison term permissible under the statute which the accused is convicted of. As an example, where an enactment prescribes that an offender may be sentenced to a fine not exceeding level 6 or to imprisonment not exceeding 6 months imprisonment, a court where it opts to impose a fine is not allowed to impose anything more than 6 months as the alternative prison term regardless of the amount of the fine.

Section 347 (3) also deals with instances where a court has chosen to impose a fine without an alternative prison term or community service. In such cases and where there is default, the court may issue a warrant for the offender to be arrested and be arraigned before it. Thereafter, it may impose an alternative prison term or permit the offender to render community service. Needless to say, that route is clearly cumbersome. To avoid doing the same work twice, it is advisable to always impose the permissible alternatives to the payment of the fine for purposes of enforcement.

Lastly, to illustrate the overarching principles in s 358, the enactment makes it clear that s 347 does not limit the powers reposed in the courts in relation to suspension or postponement of sentences provided in terms of s 358. That reemphasises the point that it is s 58 which remains as the primary source of punishments in our law.

The conclusion is inevitable. It is competent to prescribe an alternative prison term in case of default where a statute stipulates a fine as the only permissible punishment. In the circumstances the sentences that were imposed by the trial magistrates in all the cases under review were competent. They are accordingly confirmed as being in accordance with real and substantial justice.

Ordinarily, it is not necessary to seek the concurrence of another judge in instances where the proceedings under review are confirmed. Due to the contentious nature of the issue under discussion and the extent of the problem as demonstrated by the number of records of proceedings submitted to the High Court for review, I have sought and obtained the concurrence of my sister judges MUCHAWA and MUNGWARI JJ before whom the other records had been placed.

MUCHAWA J, agrees:…….

MUNGWARI J, agrees: ……..……..

National Prosecuting Authority. State's legal practitioners