HB 165-18
HCA 45/17
XREF GWERU P 15/6/16

THANDIWE NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 18 JUNE 2018 AND 21 JUNE 2018

Criminal Appeal

T Kamwemba for the appellant
T Muduma for the state

MATHONSI J: The appellant is an English Language teacher at Guinea Fowl High School in Gweru where she had, in her Form 3A[1] class, the 15 year old complainant. She was charged with ill-treatment or neglect of a child in contravention of section 7(1) as read with section 7(2) (c) and (d) of the Children's Act [Chapter 5:06]. Despite her plea of not guilty and protestation of innocence she was convicted by a provincial magistrate at Gweru and on 10 March 2017 sentenced to a fine of $200-00 or 2 months imprisonment. In addition, 6 months imprisonment was suspended for 5 years on condition of future good behaviour.

The facts are that during the period extending from January to June 2016 she had ill-treated the 15 year old girl by chasing her out of her English class, threatened to make her life miserable, segregated her from class discussions and learning groups and refusing to mark her school work. Apparently the complainant had been operated on at Claybank Hospital on 8 January 2016 and required to have her injury dressed at a local clinic in Mkoba on a daily basis. This necessitated her passing through the clinic every morning on her way to school for that purpose as a result of which she arrived late for school. The school authorities, that is the deputy headmaster, had been notified of that state of affairs but the information had not been brought to the attention of the appellant.

When the complainant submitted her English exercise late, the appellant refused to mark it and endorsed on the exercise book "late work". This brought her on a collision course with the complainant's mother who promptly came to the school and lodged a complaint against the appellant. Although the appellant was notified by both the deputy head and the headmaster of the complainant's predicament, she excluded the complainant from her class on at least two occasions and as the conflict between her and the complainant's over-zealous mother escalated, she flatly refused to teach the complainant even after the intervention of both the school head and his deputy.

The appellant has appealed against both conviction and sentence. Against conviction her grounds are that there was insufficient evidence to sustain a conviction of child abuse and that the evidence led by the state was incredible and incomprehensible. In short, the state did not prove her guilt beyond a reasonable doubt. Regarding sentence her gripe is that it is unduly harsh, too severe and manifestly excessive in the circumstances.

The trial court accepted the written evidence as well as the oral evidence of the Deputy Headmaster, Evans Munyaka, and the Head of the English department at the school Christina Chisungwa. In my view it had no reason not to because these are independent witnesses who dispassionately dealt with the impasse between teacher and student and their judgment was not clouded by the dust and emotion of the feud between the appellant, the complainant and her excitable mother, Tariro Mapfumo. According to Chisungwa the appellant had reported to her that she was having problems with the complainant who was submitting her work for marking late. Although she counseled the appellant that the issue was trivial and should be dealt with as a disciplinary one, the appellant insisted she could not do so as the matter had been reported to the deputy headmaster. By then the appellant was already aware that the complainant was submitting her work late because she had to pass through the clinic for dressing.

Chisungwa confirmed that the dispute could not be resolved partly because the appellant became emotional preferring to rather transfer from the school than teach the complainant. In the process the child missed English lessons as the appellant chased her from class. She confirmed further that from the beginning of the second term up to June 2016 she had to take the

child for English lessons herself and mark her work. She confirmed that the child did not have an end of term mark for term one owing to the friction she had with the appellant. The witness made reference to a report she had written to the District Education Officer on 17 May 2016 in which she stated:

> "To my surprise when we opened (for the 2nd term) all things were out of proportion. The matter was reported to the higher offices. This is when I was called together with Miss Ncube to the Headmaster's office. Miss Ncube openly refused (1) to teach the child (2) to be given another class (3) to discuss with Charity's mother."

Evans Munyaka, the Deputy Headmaster told the court that when the child was excluded from class by the appellant, he specifically instructed the appellant in writing to allow the child to learn but the appellant did not comply stating that she was unwilling to teach the child. On two occasions the appellant chased the child from her class. Even on an occasion when the senior woman was tasked to accompany the child to class and ask the appellant to allow her to learn, she still refused.

In light of that evidence I am satisfied that the trial court was correct to conclude that the appellant deliberately did not record the child's first term mark and by so doing she was ill-treating and neglecting the child thereby traumatizing her. It was also entitled to and correctly rejected the appellant's defence that the child was not submitting her work for marking in May 2016 because she had openly told Chisungwa and Munyaka that she was unwilling to teach the child and wanted her to be moved from the science group. The court also correctly concluded that the child was segregated by the appellant because there was enough evidence pointing, not only to her exclusion from class, but also to the appellant's refusal to mark her school work.

In terms of section 7 of the Act:

> "(1) Subject to subsection (4) if any parent or guardian of a child or young person assaults, ill-treats, neglects, abandons, or exposes him or allows, causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or to injure or detrimentally to affect the health or morals or any part or function of his mind or body, he shall be guilty of an offence."

Subsection (2) of section 7 is a deeming provision. A parent or guardian is deemed to have abandoned or neglected a child if he or she failed to provide adequate supervision of the child. In terms of section 7 (5) a person convicted of an offence in terms of that section shall be liable to a fine not exceeding level seven or to imprisonment for a period not exceeding 2 years or to both.

It has not been disputed that as a teacher, the appellant stood in *loco parentis* to or was a guardian of the complainant at school. What the appellant disputes is that her conduct constituted an offence and in doing so she shifted the blame onto the girl for failure to submit her work for marking. What the appellant overlooks is that there is irrefutable evidence not only that she did not mark some of the girl's work but also excluded her from her class. There is evidence which is reliable, that she openly defied both the headmaster and his deputy flatly refusing to teach the child. Clearly that was ill-treatment or an act of neglect. There is therefore no merit in the appeal against conviction.

It is the sentence of the appellant to a fine of $200-00 or 2 months imprisonment and the wholly suspended prison term of 6 months which induces a sense of shock. This is not a case in which the appellant physically harmed the child. In fact all the evidence points to the appellant being a strict disciplinarian who expected certain lofty standards to be met by her pupils. The evidence also shows that what initially triggered the misunderstanding was not of the appellant's making at all. It was the fault of the deputy head who did not communicate to her that the girl had been excused from early attendance at school. Thereafter the child's over-zealous mother soiled the relationship completely by embarking on a campaign to get the appellant to lose her job and to embarrass her in the extreme. Of course the appellant reacted badly by targeting the innocent child but the sentence is completely disproportionate to both the offence and the offender, the appellant having suffered enough by being dragged to court and spending money on legal representation.

In the result, it is ordered that

1. The appeal against conviction is hereby dismissed.

2. The appeal against sentence is upheld.

3. The sentence of the court *a quo* is set aside.

4. The appellant is hereby sentenced to a fine of $60-00 or in default of payment 30 days imprisonment.

Takuva J agrees……..

Tavenhave and Machingauta C/o Dube-Banda, Nzarayapenga, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners