



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Criminal Case No. 241/12

REX

And

THULI MKHONTA

ACCUSED

Neutral citation: *Rex v Thuli Mkhonta (241/12) [2014] SZHC 43*

Coram: OTA J.

Heard : 13 MARCH 2014

Delivered: 21 MARCH 2014

Summary: **Criminal procedure: Sentencing: The Accused was convicted for the offences of Fraud and Forgery; The offences were committed at the Master's office; courts have a constitutional duty to disable these sort of offences in the Public Services; sentence of 2 years imposed in count 1; half of the sentence is suspended for 12 months; Sentence of 1 year imposed in count 2. The sentences are ordered to run concurrently.**

JUDGMENT

OTA. J

- [1] On 13 March 2014, I convicted the Accused on two counts of offences namely count 1 Fraud and count 2(a) Forgery.
- [2] Learned Crown Counsel Mr Magagula thereafter informed the court that the Accused is a first offender.
- [3] In mitigation of sentence, Learned Defence Counsel Mr Gama urged the following factors.
1. The Accused is 46 years old.
 2. She got married two (2) years ago and has a minor child of three (3) years from the union.
 3. She has five (5) other children from other relationships. The youngest of these is ten (10) years. The fathers of these other five children are since deceased. They are thus wholly and solely dependant on the Accused for subsistence.
 4. The Accused has worked for the Government of Swaziland since around 1994 or 1995 and has been working at the Master's office since 2005.
 5. She is employed at the Master's office as a switch board operator and not a clerk.

6. The court should consider the motivation in committing the offence. Though this was a case of Fraud, it bothers on both an administrative and criminal offence, in that it was intended to benefit a beneficiary, who is also the executrix of the estate (PW5) and not other people who are not beneficiaries in the estate.
7. The offence was noble in the sense that it was orchestrated to allay PW5's fears that the money was going to be stolen from the Master's office. The offence was a short cut of giving the money to PW5 who it would have and most probably, has already gone to. The Accused merely assisted a beneficiary to get the money.
8. The Accused did not benefit from the subsequent transaction. Even if it can be inferred that it was the benefit of E5,000=00 that she got from the previous transaction that motivated her to embark on the offence, the court should treat the Accused as an unsophisticated person who committed an offence for a meager sum of E5,000=00.
9. The Master would not have lost anything because the money was taken by the executrix who would have had to account for it at the end of the day.
10. The full amount of E40,000=00 was returned to the Master's office
11. The Accused was not actually arrested and thus not under any bail conditions yet she has of her own volition been attending court religiously without any form of recognizance up until the judgment date.
12. The Accused is educated only up to form 3.
13. With the conviction the Accused will automatically lose her employment as a civil servant as well as her gratuity. This, on its own, is severe punishment. She will have no source of income as from the date of conviction onwards.

[4] Based on all the above stated facts, Mr Gama urged the court to treat this case as different from a case of Fraud simpliciter and impose a wholly suspended sentence on the Accused rather than a custodial sentence.

[5] In answer, Mr Magagula submitted the following factors on behalf of the Crown.

1. As a public servant the Accused abused the trust and authority reposed in her in respect of the estate of the deceased.
2. The action of the Accused has contributed to the public perceptions that money and files disappear at the Master's office. These perceptions in the mind of the public have to be put to rest with a sentence that has sufficient deterrent effect.
3. The motivation of the Accused was not necessarily helping the executrix but what she was getting out of giving the assistance.
4. There is no evidence that she has returned the E5,000=00 she was given in the first transaction or at best made an undertaking to return it. Therefore, from the whole circumstances she benefited.

[6] Thuli Mkhonta, in passing sentence on you, I have duly considered your personal circumstances as urged in mitigation of your sentence. I sympathize with the fact that you have (6) children, five of whom are wholly dependant on you having lost their biological fathers. However, these are factors you ought to have considered before you embarked on this whole fraudulent enterprise. The same goes for your very young marriage of only two (2) years.

[7] There is no doubt that the fact of your conviction spells your automatic loss of employment as a civil servant, as well as, its attendant gratuity. I agree that these factors with their concomitant stigmatization, are already a kind of punishment. You are also a woman of 46 years old who is still in the prime of her life, and must be given an opportunity to retrace your steps, amend your ways and pursue a better life. I say this in appreciation of the fact that you are a first offender. You are not a hardened criminal or a reprobate. I am also mindful of the fact that you have a very low educational exposure. You schooled only up to form 3. This factor to my mind makes you susceptible to this kind of offence since your opportunities in life are limited by this unfortunate circumstance. It is not surprising therefore that motivated by the reward of a meager sum of E5,000=00, which you received in the previous transaction, you embarked upon the subsequent fraudulent transaction and in the process jeopardized your entire future, your job, your freedom as well as the joy, happiness and stability of your family. As correctly submitted by Mr Gama, this clearly shows your lack of sophistication and exposure. It is also an established fact that the whole sum of E40,000=00 which was paid to PW5 from the deceased estate due to your fraudulent activities, was returned to the Master. You were not offered nor did you receive any reward from this amount. You have also shown a degree of remorse by attending court without any form of recognizance. I agree with Mr Gama that these factors should weigh in mitigation of your sentence.

[8] Thuli Mkhonta, having duly applied my mind to the foregoing factors, I cannot however shut my eyes to the fact that you committed very serious offences. The incident of the offences of Fraud and Forgery is fast becoming common place in Swaziland. The prevalence of these offences stare us in the face. What is most unfortunate is that the Public Service appears to be the worst victim of these crimes orchestrated by its own employees. I agree that the Master's office appears

to be a front liner amongst the victimized offices. This is what has created the inglorious public perception, which is common cause *in casu*, that money and files get lost as of course at the Master's office. The courts thus have a constitutional duty to combat this trend and redeem the fledging glory and sanctity of not only the Master's office, but the Public Service at large.

[9] Your Defence Counsel has made a passionate plea as to your intentions being noble. Granted, you assisted the executrix who is also a beneficiary in the deceased estate in getting the money. This in my view does not however detract from your dishonest and fraudulent activities. From the evidence the executrix didn't know what to do. You showed her the way. To achieve this you came to the office though you were then officially on leave. You gave her a prospectus belonging to a beneficiary in another estate and instructed her to alter the prospectus by deleting the name of the rightful owner therefrom and inserting her son's name in its place. With the forged prospectus in the file, you set the machinery in motion in processing the claim by forwarding the file to an unsuspecting PW2, who is another clerk in the Master's office. You concealed from both PW2 and the Assistant Master that you had in an earlier transaction assisted the executrix to withdraw the sum of E50,000=00 from the same deceased estate. By your fraudulent activities the executrix and her three (3) children were to benefit more than their fair share in the deceased estate to the obvious prejudice of both the Master and the other six (6) beneficiaries. You were helping the executrix to short change the other beneficiaries. Your venture, in my view, cannot be tagged as noble.

[10] Thuli Mkhonta, learned Crown Counsel Mr Magagula has told us that you not only violated your authority but you also breached the trust reposed in you as a public officer by the Swazi populace. I agree entirely with him. You also undermined a public trust put in place to protect vulnerable members of the society, such as orphans, widows and the fatherless. Furthermore, the fact that offences like this committed by an employee against his employer in the course of the employment, is treated as particularly aggravated, is no stranger to our jurisprudence. I need not belabor it. Be that as it may, one issue that has however agitated my mind in this whole saga is that you were not employed at the Master's office as a clerk. You were employed as a switch board operator. You had no business, in my view, doing any kind of clerical work which requires a wholistic training in all areas especially on the question of the requisite standard of ethics. There is no evidence before me to show that you underwent the requisite training. Not that this should excuse your fraudulent actions. It should, however, in my view, operate to ameliorate it. Yet, inspite of these handicaps you were allowed as of course to do clerical duties. Obviously sanctioned by the Master. As it became evident during the proceedings this sort of arrangement where employees who are not clerks are allowed to do clerical work is the norm rather than the exception at the Master's office. Little wonder then the level of Corruption and Fraud breeding in that office. This has informed the negative public perception of the office. This case should thus serve as a red flag for the powers that be to set the machinery in motion to revamp that office in the interest of posterity.

[11] Thuli Mkhonta, for the above stated reasons and being fully cognizant of the apposite dictum of **Addleson J**, ably captured by My Learned brother **M. S. Simelane J**, in his maiden judgment in the case of **Rex v Johannes Lomgcabula Mhlongo Criminal Case No. 142/03 para [11]** with reference to **S v Harrison 1970 (3) SA 684 (A) at 686**, to wit **“Justice must be done, but mercy, not a**

sledge – hammer is its concomitant”, I will impose on you sentences that I deem condign for the offences committed. I do not however think that the wholly suspended sentence you contend for will serve the deterrent purpose requisite for these sort of serious and prevalent offences.

[12] In the light of the totality of the foregoing, I sentence you as follows:-

COUNT 1

(1) Two (2) years imprisonment without the option of a fine. One (1) year of this sentence is suspended for 12 months on condition that you do not, during the period of suspension, commit any offence of which Fraud is an element.

(2) COUNT 2(a)

One (1) year imprisonment without the option of a fine.

(3) The sentences are to run concurrently.

(4) The period of eight (8) days you spent incarcerated between 13 March 2014 date of your conviction and 21 March 2014 date of sentence, are to be deducted from your sentence.

IT IS SO ORDERED.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE DAY OF2014

OTA J.

JUDGE OF THE HIGH COURT

For the Crown

**B. Magagula
(Crown Counsel)**

For the Accused

L. Gama

