Lusaka

IN THE HIGH COURT FOR ZAMBIA **HPA/48/2014**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

CHARLES VINCENT **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Before the Honourable Mrs. Justice J.Z. Mulongoti

in Open Court on 26th November, 2014

For the Appellant: ***Mr. K. Muzenga – Chief Legal Aid Counsel***

For the Respondent: ***Mrs. M.M. Bah Matandala – Senior State Advocate***

J U D G M E N T

Legislation Referred to:

1. *The Immigration and Deportation Act No. 18 of 2010*

Cases referred to:

1. *Siyauya v. The People (1976) Z.R. 253 (S.C.)*
2. *Veteen fofana Alias Mutambo wa Mutombo v. The People SCZ Judgment No. 8 of 1992*
3. *Musonda v. The People (1996) ZR 215*
4. *January Gringo Nakalonga v. The People (1981) ZR 252*

The appellant, Charles Vincent, was sentenced to three (3) months imprisonment following his conviction of the offence of living outside a refugee camp contrary to sections 31(4) and 56(1) of the Immigration and Deportation Act No. 18 of 2010.

The particulars of the offence were that the appellant a recognised refugee of Rwandese nationality, from 20th July, 2014 to 27th July, 2014 did live outside a refugee settlement namely Maheba refugee camp and allowed himself to be found at Kabwata in the Lusaka District of the Lusaka Province of the Republic of Zambia without any immigration permit or lawful authority.

Facts before the lower court were that on 27th July, 2014 the appellant was apprehended by immigration officers at Free Pentecostal Church in Kabwata in Lusaka. Investigations showed that the appellant was a recognised refugee who entered Zambia on 9th June, 1997 through Nyampande Immigration Control and did not have authority to leave the refugee settlement at the time of his arrest.

At the hearing, the appellant pleaded guilty and accepted the facts as they were read out to him. The proceedings including the charge were translated to Kenyarwanda a language the appellant perfectly understood.

The Court below convicted the appellant upon his admission of guilt and sentenced him to 3 months imprisonment.

The appellant has appealed against the sentence as follows:

The trial magistrate erred both in law and fact when it imposed a custodial sentence on the appellant as he is a first offender who readily pleaded guilty and did not waste court's time.

Learned counsel for the appellant argued that the appellant herein readily pleaded guilty to one count of the offence of living outside a refugee camp without lawful authority and did not waste the court's time. Counsel contended that there were no aggravating circumstances, as such a custodial sentence should not have been imposed.

Siyauya v. The People (1) was cited where the Supreme Court held inter alia that:

> *"where the legislature has prescribed a sentence of a fine or imprisonment or both it is not customary in the case of a first offender to impose a custodial sentence without the option of a fine."*

Also that the Supreme Court when dismissing the appeal in the case of **Vefeen Fofana Alias Mutombo Wa Mutombo v. The People SCZ Judgment No. 8 of 1992 (2)** observed that:

> *"In our considered view, the factors which we have mentioned were aggravating and fully justified the learned trial magistrate in departing from the general principle of imposing a fine where that is permitted."*

Further that the Supreme Court in the case of **Musonda v. The People (1976) ZR 215 (3)**, the Supreme Court held inter alia that:

> *"Where the legislature has seen fit to prescribe a sentence of a fine or imprisonment or both a first offender in a case where there are not aggravating circumstances which would render a fine inappropriate should be sentenced to pay a fine with imprisonment only in default."*

Accordingly, that the appellant having pleaded guilty to the charge and being a first offender should have been treated leniently and as such the imposition of a custodial sentence is misplaced. In any event, that, a perusal of the record discloses no aggravating circumstances. Further, that as can be clearly seen at page 2 of the record, the learned trial court did not address its mind to the principles of law relating to cases which provide for an option of a fine, neither did it direct its mind to whether or not aggravating circumstances existed which could have possibly warranted the imposition of a custodial sentence. Failure to do so was a serious misdirection.

It was the appellant's prayer that this court allows the appeal, sets aside the custodial sentence and impose an appropriate one.

I have perused section 56(1) of the Immigration and Deportation Act under which the appellant was sentenced. It provides that:

> *"Any person who contravenes the provisions of this Act where no specific penalty has been provided is liable upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years or to both..."*

In the case of **Siyauya v. The People**, the Supreme Court held "that the general practice is well recognised that where the

legislature has prescribed a sentence of a fine or imprisonment or both it is not customary in the case of a first offender to impose a custodial sentence without the option of a fine." As ably argued by the appellant's counsel. The record shows that the appellant is a first offender who readily admitted the charge and thus did not waste the court's time. On that premise, the learned trial magistrate should have imposed a fine as opposed to a custodial sentence and there are no aggravating circumstances as argued by his counsel. As such, the circumstances in this case do warrant me to interfere with the sentence.

I, therefore, set aside the sentence of 3 months imprisonment and substitute with a fine of K5,000.00 to be paid within five days and in default, the appellant is to serve five months simple imprisonment. In imposing payment of this fine I am mindful of the fact that the appellant is an unemployed refugee. I am fortified by the holding of the Supreme Court in **January Gringo Nakalonga(4)** that when a court decides to impose a fine and to order imprisonment in default of payment, the fine imposed should not be an amount the effect of which will be to send the offender to prison. I have considered the maximum fine and I fine K5,000 is a fair amount. The appeal against sentence is therefore successful.

Delivered at Lusaka this 26th day of November, 2014.

J. Z. Mulongoti

J. Z. Mulongoti
High Court Judge