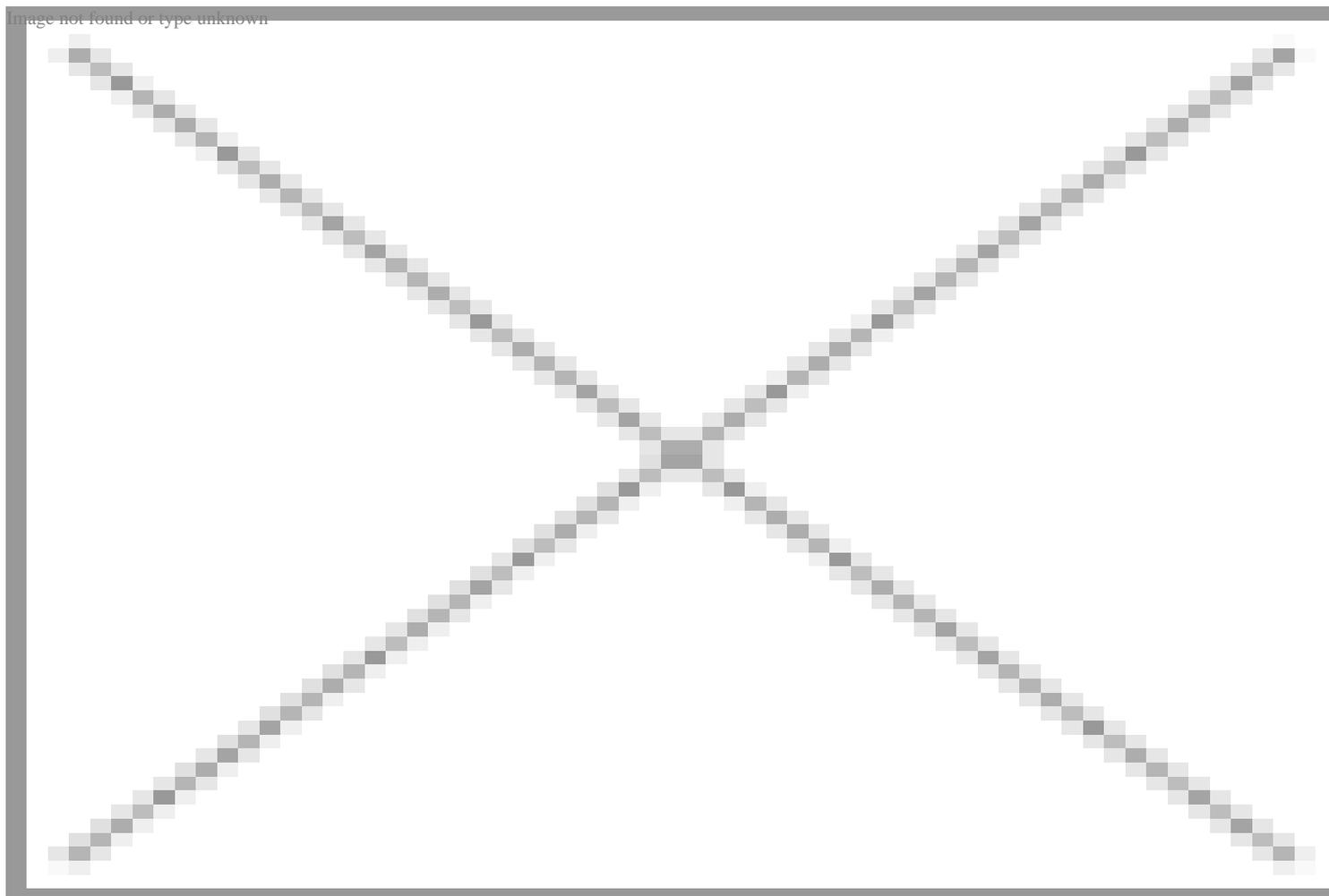


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## Newspaper report leads to judge's intervention

By Carmel Rickard

POLITICAL leaders often refuse to act on the basis of “mere” newspaper reports. But not Zimbabwean judge Alphas Chitakunye. He spotted a story in the media about a magistrates court trial and immediately asked for the record in the case as he feared an injustice had been done.



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THE story that caught the eye of Judge Alphas Chitakunye concerned trainee nurse, Elizabeth Kalenga. The young woman had begged the court for mercy when she stood trial in connection with using forged papers to gain entrance to the training course. She pleaded with the Harare magistrate who heard her case not to impose a jail sentence as she has two young children.

But when the magistrate handed down a 15-month sentence (with five months suspended), the shocked woman “wept uncontrollably”, the newspaper reported. Her mother, who was also deeply shocked at the outcome, had to be helped from court.

Judge Chitakunye would later freely explain how he came to be involved in the matter: the case “came to my attention through a newspaper article headlined, ‘Student Nurse jailed for using forged papers’. The article informed everyone who cared to read that a woman who used false documents to secure admission as a trainee nurse was jailed for 15 months.”

He continued, “My concern was with the effective jail term of 10 months” imposed, which he thought was possibly out of line, given the “nature of the offence alleged”.

He said he, therefore, acted in terms of s 29 (4) of the High Court Act and asked for the record of the proceedings. This section states that “whenever it comes to the notice” of a judge that “any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice”, the judge may exercise his or her powers even if the matter was neither the subject of a high court application nor had been submitted for review.

When the record arrived for review “my view of the sentence was confirmed”, he said, and he intervened.

The facts were that the woman was charged with fraud in that she submitted a “fake Ordinary Level Certificate” showing she had passed seven subjects with a grade C or better. The certificate was submitted to get admission as a trainee nurse at the Parirenyatwa School of Nursing. It was accepted and she was enrolled.

Zimbabwe’s anti-corruption officers were then tipped off, and they arrested her. In their subsequent investigations, they discovered that the certificate was not authentic and the candidate number belonged to someone completely different – someone who had not passed the exams.

At trial, she pleaded guilty, and her conviction was “proper”, said the judge.

She was then sentenced to 15 months of which five were suspended leaving her to spend 10 months in jail. But in the view of Judge Chitakunye that effective sentence was shocking and out of line with sentences in similar cases. Though normally within a trial court’s discretion, sentence in this particular case was “disturbingly inappropriate” considering developments in approaches to sentencing as outlined by the high court.

“This court has on numerous occasions pointed out that effective imprisonment must only be used as a last resort, where court is satisfied that there is no other non-custodial sentence that would be suitable.”

In passing sentence, the magistrate had said that the facts suggested “prior planning” and the existence of a “disturbing syndicate producing fake certificates”. She also added, “I shudder to imagine the implications of a nurse who is responsible for human life but is unqualified,” and that the personal circumstances of the woman were outweighed by the circumstances of the commission of the offence.

None of reasons for sentence given by the magistrate showed any serious attempt by the magistrate to apply her mind to the option of a non-custodial sentence. If she had “cared to examine other cases” involving fake certificates she could not have found any aggravating circumstances warranting imprisonment and she could easily have opted to impose community service.

It was a “serious misdirection” for the magistrate to “pontificate” about what would have happened in the future had the fraud not been detected, and there was no indication that, had she been given training, the accused would have failed to perform.

With the agreement of his colleague, Judge Joseph Musakwa, who sat to review the case with him, Judge Chitakunye set aside the initial sentence and imposed a fine of \$200 or one month's imprisonment. He said the accused should pay the fine proportionate to the outstanding period of imprisonment and was to be released immediately.

Spared nearly a year in prison, Elizabeth Kalenga will surely always be grateful that this particular judge is a reader of newspapers – and that he was motivated to take action when he noticed something that did not accord with his idea of justice.

[S v Kalenga \(HH 416-18, CRB 7800/18\) \[2018\] ZWHHC 416 \(13 July 2018\);](#) [2]

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