

THE PEOPLE v BENSON CHIBAWE (1979) Z.R. 150 (H.C.)

HIGH COURT  
MUWO, J. JUNE, 1979  
18TH HPR/89/79

Flynote  
Sentence - Felony - Imposition of fine only - Impropriety.

Headnote  
The accused was constricted of unlawfully doing grievous harm contrary to s. 229 of the Penal Code, Cap. 146. He was sentenced to a fine of K30 or one month's simple imprisonment in default of payment of the fine.

p151

**Held:**

Section 26 (3) of the Penal Code requires the imposition of imprisonment in addition to a fine where the offence is a felony. A sentence of a fine only should not have been imposed.

**Cases referred to:**

- (1) R. v Chalwe Musense, IV N.R.L.R. 84.
- (2) R. v Mufunda, V N.R.L.R. 712.

**Legislation referred to.**

Penal Code, Cap. 146, ss. 26 (3) and 229.

For the accused: G. Chilupe, Legal Aid Counsel.  
For the People: R. Balachandran, State Advocate.

---

Judgment

**MUWO, J.:** The accused was convicted of unlawfully doing grievous harm contrary to s. 229 of the Penal Code, Cap. 146, and was sentenced to a fine of K30 or one month's simple imprisonment in default of payment of the fine. The magistrate ordered that the whole amount of K30 be paid to the complainant as compensation, which he probably did under the provisions of s. 177 (1) (b) of the Criminal Procedure Code, Cap. 160.

When the case was brought to the attention of the High Court Registrar he thought the trial magistrate was wrong in law to impose a sentence of a fine only without the additional sentence of imprisonment as is required by law when the offence is in felony as is provided under s. 26 (3) of the Penal Code. The Registrar drew my attention to the case of *R. v Chalwe Musense* (1), where the provisions of s. 26 (3) of the old Penal Code, Cap. 6, were construed by Palmer, A. J.

Section 26 (3) of the present Penal Code, Cap. 146, which has not been altered reads:

"26 (3). A person convicted of a felony, other than manslaughter, may be sentenced to pay a fine in addition to imprisonment."

The case of *R. v Chalwe* (1) was one of them by servant contrary to ss. 243 and 249 of the Penal Code. The accused was sentenced to a fine of 15s or two weeks' imprisonment with hard labour in default of payment of the fine. On review Palmer, A.J., held:

"As the accused in this case has been convicted of a felony (other than manslaughter) he cannot be sentenced only to a fine or imprisonment in default . . ."

The learned acting judge referred to s. 26 (3) of the Penal Code and to para. 79 of the now obsolete book "Instructions to Magistrates". The acting judge amended the sentence to one of one day's imprisonment with hard labour and 15s fine or two weeks' imprisonment with hard labour in default of payment of the fine. (It should be noted that when a person is fined and imprisonment is stated to be the alternative in the event of default of payment, the imprisonment should be stated to be "simple imprisonment" and not "imprisonment with hard labour" *R. v Mufunda* (2).)

p152

The provisions of s. 26 (3) of the Penal Code, Cap. 146, have not changed since the case of *R. v Chalwe Musense* (1) was decided in 1947.

I will, therefore, amend the sentence which will now read:

One day's imprisonment with hard labour and K30 fine or one month's simple imprisonment. The whole amount of fine to be paid to the complainant as compensation.

Sentence amended

---