

THE STATE

Versus

DAVID JACOB GWANDU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 2 DECEMBER 2004

Criminal Review

NDOU J: The matter was referred for review by the learned scrutinising Regional Magistrate, Western Division, with a minute which reads:

“The accused was convicted on his plea of guilt for stealing a 45 metre hosepipe. The conviction is proper.

However, the magistrate misdirected himself on sentence. He has conceded the error. The magistrate first imposed a two months’ imprisonment which he suspended wholly on condition of good behaviour.

Then he imposed another four months’ imprisonment which he suspended on condition the accused completes 140 hours of community services at Mabambeni Primary School.

The proper sentence should have been six months’ imprisonment of which two months imprisonment was to be suspended on conditions. The remaining 4 months were to be suspended on condition the accused performed 140 hours of community service at this school.”

Although the scrutinising Regional Magistrate has not specified authority for his stance I am convinced that he had the provision of section 358 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] in mind. This section provides –

- “(2) when a person is convicted by any court for any offence other than an offence specified in the Eight Schedule, it may –
- (a) ...
 - (b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order ...”

HB 133/04

I do not wish to prescribe any particular formulation or wording of the suspended sentence. What is, however, important to bear in mind is that this enabling provision does not empower the sentencing court to impose two sentences for one offence. The sentence for an offence remains one, which is either wholly or partially suspended on appropriate conditions. *S v Musakwa* HH-239-83; *S v Msakasa* HH-302-83; *S v Chipxere* HH-314-83; *S v Kangachepe* HH-433-84 and *S v Danda* HB-21-83. In this case the intended sentence was one of six months imprisonment, all of which to be suspended on conditions of good behaviour and performance of community service – *S v Kapswara* HB-68-00.

Accordingly, the conviction is confirmed but the sentence imposed by the trial court is set aside and substituted as follows:

“6 months imprisonment all of which is suspended as follows: 2 months imprisonment is suspended for 3 years on condition the accused in that period is not convicted of any offence of which dishonesty is an element committed within that period for which he is sentenced to imprisonment without the option of a fine and the remaining 4 months imprisonment is suspended on condition the accused completes 140 hours of community service at Mabambeni Primary School on the following conditions: The community service starts on 7 June 2004 and must be completed within 4 weeks of that date. The community service must be performed between 0800 hours to 1300 hours and 1400 hours to 1600 hours each Monday to Friday which is not a public holiday to the satisfaction of the person in charge or his/her delegation (who will also supervise) at the said institution who may on good cause grant accused leave of absence on a particular day or days during certain hours. Ant such leave of absence shall not count as part of community service to be completed.”

Cheda JI agree