

**THE STATE**

**Versus**

**SIMILO MZIZI**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 11 OCTOBER 2007

*E Moyo*, for the state  
*B Ndove*, for the accused

Criminal Review

**NDOU J:** The accused was properly convicted by a Victoria Falls magistrate of four (4) counts of fraud in contravention of section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Nothing turns on the convictions and the accused does not protest her conviction in these proceedings. The accused was sentenced to ten (10) months imprisonment with five (5) suspended on conditions of good future behaviour and restitution. The accused initially appealed against sentence but later withdrew the appeal and brought the matter before this court by way of review [she said in her application that she is seeking directions of this court]. I have decided to deal with this matter by way of review as both parties have made submissions. The accused has embodied a written statement on review. The use of such review procedure to attack the sentence is sanctioned by section 57(1)(b)(ii) and (2) of the Magistrates' Court Act [Chapter 7:10] – *R v Pio & Anor* 1967(1) RLR (G) at 107H; *S v Runganga* 1995(2) ZLR 303 (H) at 306G-307E; *R v Chidongo* 1939 SR 210; *S v Nyathi* HB-90-03; *S v Class* HB-43-04; *S v Fikizolo* HB-131-04 and *S v Nkata & Ors* HB-11-06.

*In casu*, the accused was legally represented by her erstwhile legal practitioner during the trial. Through her legal practitioner, she turned down an option to do

community service thus rendering her an unreliable risk to perform community service. Having declined to perform community service the learned trial magistrate was right in avoiding this option – *S v Matara* HH-31-95; *S v Mukomo* HH-161-96 and *S v Fikizolo (supra)*. In her founding affidavit supporting this matter, the accused rightly concedes that there was no misdirection on the part of the sentencing magistrate. In the absence of such misdirection or irregularity I cannot interfere with the trial magistrate’s discretion. The sentence is not disturbingly inappropriate. The question of sentence is pre-eminently the province of the trial court. The reviewing judges should be careful not to erode such discretion – *Ramushu & Ors v S* SC-25-93; *S v Matanhire* HH-18-02; *Mavhundwa v S* HH-91-02; *Musindo & Ors v S* HH-25-02 and *S v Ndlovu* HB-66-03. The sentence imposed is on the severe side but not disturbingly inappropriate to warrant my interference. The accused, aged 30 was employed as travel consultant by Air Zimbabwe. In the course of her duties she defrauded her employer the sum of \$1 484 000,00 and none was recovered. She abused a position of trust. It was therefore, foolhardy for her to decline to perform community service in light of her serious conduct. This application for review is largely premised on the suggestion that her erstwhile legal practitioner did not handle the matter competently as was expected of him. As rightly pointed out by CHEDA J, in *Zengeya & Ors v S* HB-96-02:

“A client chooses a legal practitioner for whatever reason and as such he unfortunately has to suffer for his legal practitioner’s actions.”

While courts are reluctant to visit the client with sins of his/her legal practitioner but there has to be a limit beyond which the client cannot escape the results of his/her legal practitioner’s lack of diligence – *Hepworths Ltd v Thornloe and Clarkson Ltd* 1922 TRD 336; *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E; *S v McNab* 1986 (2) ZLR 280 SC; *Bishi v Secretary for Education* 1989 (2) ZLR 240 (HC) at 243G-244F and *Khumalo v Mafurirano* HB-11-04. This is a case where the accused has unfortunately, to be visited by the “sins” of her erstwhile legal practitioner.

Accordingly, I confirm these proceedings as being in accordance with true and substantial justice.

Bere J ..... I agree

*Criminal Division, Attorney-General’s Office*, applicant’s legal practitioners  
*Maronedze, Mukuku, Ndove & Partners*, respondent’s legal practitioners