THE STATE **APPLICANT**

AND

ONISMO NYENGE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 30 SEPTEMBER 2010

Review Judgment

MATHONSI J: This matter came before me for review in terms of Section 57 of the Magistrates Court Act [Chapter7:10]. The accused was convicted of theft as defined in section 113(1) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] by the Magistrates Court sitting at Western Commonage, Bulawayo on the 18th June 2010.

He was sentenced to 28 months imprisonment of which 4 months was suspended for 3 years on condition of good behaviour. A further 8 months imprisonment was suspended on condition the accused made restitution of the sum of US$150-00 by the 30th June 2010.

After examining the record, I was of the view that the sentence imposed was excessive in the circumstances especially as the accused had stolen vehicle spares which were resold as scrap metal to someone before the bulk of them were recovered and the Magistrate appeared to have had misgivings about the value but did not investigate it. I also considered that having sentenced the accused to an effective imprisonment term of 12 months the Magistrate should have considered community service.

I then invited the trial Magistrate to justify the sentence that was imposed but was not satisfied with the explanation he subsequently gave. I then ordered the immediate release of

the accused person from prison considering that by then he had been in custody for a period of more than 1 ½ months.

The accused is a youthful person being 21 years old. He is a first offender who pleaded guilty to the offence. He committed the offence because of poverty and told the Court that he wanted to raise money to buy food. The value of the stolen items could not be reliably ascertained and it appeared exaggerated.

Although in his reasons for sentence the trial Magistrate made reference to the mitigating factors; he appears to have only paid lip service. In *S v Madembo and Another* 2003(1) ZLR 137 at 140 B-D it was stated as follows:

> "Judicial officers have often been criticised for failing to take into account factors of mitigation in assessing sentence even where, as in this case, they said that they did so. In some instances, they have been criticised for failing to accord due and appropriate weight to factors of mitigation. In other cases, they have been criticised for paying lip-service to those factors. In *S v Buka* 1995(2) ZLR 130(S) EBRAHIM JA said that judicial officers do not always give sufficient weight to a plea of guilty."

It has been stated before that where the Court has accepted any factor as mitigation, such must be specified and the amount by which it has reduced the sentence must be stated. see *S v Madembo and Another* (supra).

In casu, the main mitigating factors are youthfulness, poverty, guilty plea, meritorious past conduct and restitution.

Young people are more susceptible to making ill-considered and unwise decisions and are not expected to exhibit the same stability, responsibility and indeed self restraint as mature adults. Accordingly more weight should be attached to age in assessing sentence. It is the

policy of the courts to, as much as possible, keep young people out of prison. See *S v Van Jaarsveld* HB 110/90 and *S v Shariwa* HB 37/03; see also *S v Muvhami* HB 89/10 at page 3.

The accused committed the offence because of poverty as he required food and that reason for the offence is quite important see *S v Ngulube* HH 48/02. So is the guilty plea as it goes towards remorse fullness.

In *S v Sidat* 1997(1) ZLR 487 (S) at 493B McNALLY JA said:

> "A plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty."

See also *S v Dhliwayo* 1999(1) ZLR 229(H) at 231B.

Meritorious past conduct is also critical in assessing sentence. The accused is a first offender. I stated in *S v Muvhami* (supra) at page 3 of that cyclostyled report that:

> "Young offenders as well as first offenders should, as much as possible be kept out of prison. In fact it is now generally accepted that imprisonment is a severe punishment which should be considered as a last resort."

The trial magistrate settled for an effective 12 months imprisonment. He was therefore obliged to consider community service. If he was of the view that such would not be appropriate he should have stated his reasons for not doing so. This was clearly pronounced in *S v Mabhena* 1996 (1) ZLR 134(H) at 140 C-F. Failure to do that can only lead to the conclusion that the Magistrate did not properly exercise his discretion.

I therefore come to the conclusion that the appropriate sentence in this matter should have been either a fine or community service. The accused has already serviced more than 1 ½ months imprisonment.

Accordingly it is ordered that:

1. The conviction of the accused stands.

2. The sentence imposed against the accused is hereby quashed and in its place is substituted a sentence of 45 days imprisonment.

3. As the accused has already served that period, he should be released immediately.

Mathonsi J.....

Ndou J agrees.....