KUDAKWASHE MUVHAMI **APPELLANT**

AND

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 19 JULY 2010 AND 2ND SEPTEMBER 2010

Mr B. Dube for appellant
Mr T. Makoni for respondent

Criminal Appeal

MATHONSI J: The Appellant was charged with two counts of contravening Section 113 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. The first count related to contravening section 113(2)(d) it being alleged that during the period extending from 21 January 2009 to 24 April 2009, whilst employed by the complainant Style Zone (Pvt) Ltd in Gweru as a manager, he had received various sums of money which he held in trust for his employer. During that period he converted various sums of money totalling US$3376-00 to his own use and nothing was recovered.

The second count related to contravening section 113(1)(a) and (b) of the Criminal Code it being alleged that during the same period he had stolen clothing belonging to his employer the total value of which was US$90-00 all of which was recovered.

The Appellant appeared before the Magistrates Court in Gweru and pleaded guilty to both charges and was duly convicted and sentenced, in respect of count 1, to 24 months

imprisonment of which 6 months imprisonment was suspended for 5 years on condition he does not within that period commit a similar offence. A further 10 months was suspended on condition of restitution. In respect of count 2, he was sentenced to 6 months imprisonment which was wholly suspended for 5 years on condition of good behaviour.

The Appellant was then left with an effective sentence of 8 months imprisonment assuming he made restitution. He was aggrieved by that sentence and appealed to this court against sentence only. His grounds of appeal as appear on the notice of appeal dated 22nd May 2009 are as follows:-

"GROUNDS OF APPEAL

The Court a quo erred in meeting (sic) effective 8 months imprisonment for theft by conversion in view of the Applicant's mitigatory circumstances.

(1) The court a quo erred in not considering community service as competent punishment.
(2) The court a quo erred in not considering a fine as punishment
(3) The Court a quo erred in holding imprisonment as the only deterrent punishment.
(4) The Court a quo erred in holding that the case was only committed out of greediness when the Applicant explained the reasons for the committed (sic) of the offence.
(5) The sentence imposed by the Court a quo induces a sense of shock as it is manifestly excessive in the circumstances.
(6) The Court a quo erred in not considering that the Appellant is 21 years of age and capable of correction. WHEREFORE, Appellant prays that the sentence be squashed (sic) and replaced by a non-custodial sentence of a fine or community service."

In advocating for community service as punishment against the Appellant, *Mr Dube* relied heavily on the case of *S v Gumede* 2003(1) ZLR 408. In that case the accused was aged 15 years and was charged with assault with intent to do grievous bodily harm. The Court

reasoned that Courts should regard community service as their first port of call when it comes to sentencing and went on to say:-

> "Our sentencing policy has changed as it is now focusing on non-custodial sentences for less severe crimes. Where a Court contemplates a prison term of less than 24 months imprisonment it should, as a rule, consider community service first."

See also *S v Mabhena* 1996(1) ZLR 134(H)

It was further argued that the Appellant had committed the offence out of immaturity he having stolen in order "to please (his) girlfriend" and that as a youthful first offender he was still capable of correction.

The Appellant is indeed a young first offender who pleaded guilty to the charges. 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 *S v Mpofu* (2) 1985(1) ZLR 285(H)

As pointed out in *S v Madembo and Another* 2003(1) ZLR 137 at 140 B-D;

> "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."

In that case the court went on to say that where a judicial officer has accepted any factor of mitigation he must clearly specify the amount by which he has reduced the sentence on account of that factor.

In cases of theft, as in this particular matter, restitution is also an important component of the sentence. This addresses the concerns of the complainant who has to benefit from the

recovery of the stolen property. *R v Zindoga* 1980 RLR 86 (AD) Society is interested in restitution as the complainant would be content while the accused also attempts to restore his status in society.

In *S v Mabhena* (supra) at 140 C-F ADAM J said:-

> "It must be reiterated that it is of vital importance that all presiding officers should, when dealing with first offenders, initially consider what would be an appropriate sentence in the circumstances of that particular case. Once a magistrate comes to the conclusion that, a sentence of 12 months effective imprisonment or less would be adequate in such a case, he should then, if he is exercising his discretion property under section 358, give due consideration to the options provided under that section. Failure to do so including providing specious reasons will result in this court either altering the sentence of declining to certify the proceedings as being in accordance with real and substantial justice----. This court has on a number of occasions indicated in the past that for first offenders in appropriate cases where a sentence a court imposes (is) 12 months effective imprisonment or less, then community service should be considered and sound reasons given for not imposing it."

In the case before us the magistrate imposed an effective sentence of 8 months imprisonment. No reason whatsoever was given for not imposing community service and there is nothing suggesting that other than paying lip-service to the factors in mitigation referred to above the magistrate took those into account in assessing the sentence. There is therefore no doubt that the magistrate erred on the issue of community service.

Subsequent to the hearing of this matter, the legal practitioners representing the complainant made representations regarding restitution to the effect that Appellant has not made restitution to the complainant as erroneously submitted by counsel. In light of that a portion of the sentence will be suspended on condition of restitution to encourage the Appellant to restitute.

Accordingly the appeal succeeds and the sentence is altered as follows:-

"Count 1-24 months imprisonment of which 6 months imprisonment are suspended for 5 years on condition the accused does not within that period commit an offence of which dishonesty is an element for which, upon conviction, he is sentenced to imprisonment without the option of a fine. A further 10 months imprisonment are suspended on condition the accused makes restitution to the complainant in the sum of US$3376-00 through the Clerk of Court Gweru on or before the 30th September 2010.
The remaining 8 months imprisonment is suspended on condition that he performs 240 hours of community service to be completed within 6 months of the commencement of the community service."

The matter is remitted to the Provincial Magistrate, Gweru for necessary arrangements to be made for the due performance of the community service.

Mathonsi J.....

Cheda J agrees.....

Gundu & Mawarire C/o Danziger & Partners' applicant's legal practitioners
Criminal Division Attorney General' Office respondent' s legal practitioners