SIFUNDO DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & MATHONSI J J
BULAWAYO 14 AND 24 NOVEMBER 2011

T Khumalo for the appellant
Ms A Munyeriwa for the respondent

Judgment

NDOU J: After hearing the parties' legal practitioners we ordered that the appeal against sentence should succeed in part and set aside the sentence of 36 months imprisonment (with 6 months suspended) imposed by the trial court. We substituted the sentence with one of US$50 or default of payment one month imprisonment. We indicated that our reasons for doing so will follow in due course. These are our reasons. The salient facts of the case are the following. The appellant was convicted by a Filabusi provincial magistrate of assault as defined in section 89 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It was alleged that on 17 January 2010 at 2000 hours there was a misunderstanding between the complainant and the appellant. The consequence of the quarrel was that the appellant ended up assaulting the complainant with open hands and clenched fists on the face and all over the body. The appellant pleaded guilty and was sentenced as stated above. He noted an appeal against both conviction and sentence. Before we heard the appeal he abandoned the appeal against conviction. This was confirmed by Mr *Khumalo*, for the appellant during the appeal hearing. At the hearing, Ms *Munyeriwa* conceded that an effective custodial sentence was not called for. She suggested that the custodial sentence be suspended on condition of performance of community service by the appellant. The appellant pleaded guilty and this is a mitigatory factor that should have been accorded due weight – *S* v *Bhuka* 1995 (2) ZLR 130 (S) and *S* v *Munechawo* 1998 (1) ZLR 129 (H). This was not done by the trial magistrate. The appellant is a first offender. According to the medical report the degree of force used to inflict injuries on the complainant was "slight". The injuries were not life threatening.

According to the state outline the complainant sustained swollen face, mouth and eyes. In his scant reasons for sentence, the learned provincial magistrate stated, "there are more aggravating factors than mitigating factors in this case." He did not explain why he arrived at

that finding. We agree that the moral blameworthiness of the appellant does not warrant a prison sentence. We accordingly reduce the sentence to a fine indicated above.

Mathonsi J …… I agree

Khumalo & Company, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners