

METHUSELI GUMBO

AND

WELLINGTON GUMBO

AND

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 27 JUNE 2011 AND 30 JUNE 2011

Appellants in person
Mr T Hove for respondent

Criminal Appeal

MATHONSI J: The two appellants pleaded guilty to and were convicted of two counts of armed robbery in contravention of section 126 of the Criminal Law Code, [Chapter 9:23]. They were convicted by the Regional Magistrates Court, Bulawayo on 23 August 2010 and sentenced to 12 years imprisonment on each count. Of the total 24 years imprisonment 3 years was suspended on the usual condition of good behaviour.

The two were granted leave to appeal against sentence only and when they appeared before us in person they appealed for leniency arguing that they now realise the folly of their actions. They stated that the court a quo should have given them the benefit of pleading guilty and reduced their sentence. The second appellant added that he has young children and orphans to look after and that the court should give him a chance to return home to look after them.

The case against the appellants is that in the afternoon of 16 August 2010 the two of them proceeded, in the company of four others, to Tashas Supermarket in Old Magwegwe, Bulawayo in an Isuzu KB200 vehicle which they intended to use as a get away vehicle. The

vehicle which was driven by a colleague of the appellants was parked at a distance away. The two appellants and two others who were armed with pistols proceeded to the supermarket where upon the arrival they fired two shots into the air and ordered people in the supermarket to lie down.

Using threats of violence, they took two tills containing money and ran away towards their get away vehicle. Unfortunately for them, the driver panicked and took off at a high speed leaving them behind.

In count two the case is that on the same afternoon of 16 August 2010, the two appellants, in the company of another person, stopped a Toyota Hiace minibus along Intemba Road in Pumula East, Bulawayo. When the driver stopped they shot him two times on the left thigh before pulling him out of the vehicle which they drove away at high speed in the direction of Gwabalanda.

The police were engaged in a high speed chase with the appellants resulting in the appellants ramming the minibus against a precast wall in Gwabalanda. There was a shooting incident as the appellants resisted arrest and opened fire on the police detectives. They were eventually arrested.

I agree with *Mr Hove* for the respondent that this was a robbery committed in aggravating circumstances. In terms of section 126(3) of the Criminal Law Code a robbery is committed in aggravating circumstances if the convicted person possessed a firearm or a dangerous weapon, or inflicted or threatened to inflict serious bodily injury upon any person; or killed a person in the process of the robbery.

In both counts of robbery the appellants were armed with pistols. At Tashas Supermarket they fired two shots to induce submission and threatened people who were present before making off with the loot. When they robbed the minibus driver they shot him twice in the leg thereby causing him grievous bodily injury. They threw him off his vehicle and left him in pain as they took off in his vehicle.

Subsection (2)(a) of section 126 of the Criminal Law Code provides that where a robbery is committed in aggravating circumstances, the convicted person shall be liable to life imprisonment or any shorter period. It was therefore within the powers of the trial magistrate

to sentence the appellants up to life imprisonment. He opted for an effective 21 years in total for the two counts. The sentence was therefore within his sentencing powers.

In our law, the sentencing court has a discretion in assessing an appropriate sentence. The appeal court does not have a general discretion to modify the sentences of trial courts. *Mkombo v The state* HB 140/10 at page 3.

For the appellate court to interfere with the trial court's sentencing discretion there should be a misdirection on the part of the sentencing court or the sentence imposed should be manifestly excessive: *S v Chiweshe* 1996(1) ZLR 425(H) at 429D; *S v Ramushu* S - 25-93; *S v Nhumwa* S -40-88 at page 5.

In my view, in *casu*, the sentence imposed is not vitiated by any misdirection as none exists and it fell within the sentence that can be imposed for such offence. In fact, considering the serious aggravating factors that exist in this matter, the appellants are very lucky to have gotten away with such a lenient sentence.

It is for the foregoing reasons that the appeal is without merit. It is accordingly dismissed.

Kamocha J agrees.....

Criminal Division, Attorney General's Office, respondent's legal practitioners