

**SHEPHERD SAKHALA**

**And**

**MKHOKHELI NDLOVU**

**Versus**

**ROSEMARY DUBE N.O.**

**And**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 16 & 24 SEPTEMBER 2015

**Review Judgment**

**KAMOCHA J:** The applicants in this matter are seeking for an order in the following terms:-

“It is ordered that:-

- (1) The sentencing proceedings in the court *a quo* be and are hereby declared not to have been in accordance with real and substantial justice.
- (2) The sentence imposed by the court *a quo* be and is hereby set aside.
- (3) The matter be and is hereby referred back to the magistrates’ court for sentencing only before a different magistrate.
- (4) The sentencing magistrate be and is hereby directed to consider the community service recommendations made by the community service officer on the 26<sup>th</sup> of October, 2012.
- (5) There shall be no order as to costs.”

The two applicants were jointly charged with theft of a pumping element from an atlas copco compressor and a gear box from a DAF lorry on 1 May 2011 which were in the lawful custody of one Jim Dhembba. They both tendered pleas of not guilty but were both convicted at the end of the trial. The convictions appear to be proper and nothing turns of them.

The \$18 148,63 value of the stolen property was by no means small albeit that it was all recovered.

Each accused was sentenced to 3 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of future good behaviour leaving an effective sentence of one year imprisonment.

The applicants brought this matter for review on the basis that there was gross irregularity in the manner that the sentence was imposed. Firstly, that the trial court failed to record its reasons for the sentence it passed. The second irregularity was that the trial court failed to consider the community service recommendations made by the community service officer when the court itself had referred the applicants for assessment.

Applicants alleged that the irregularities stemmed from the fact that the trial magistrate was in a hurry to deal with all her partly heard matters in Bulawayo so that she did not get inconvenienced by having to return from Hwange to deal with them.

In brief the trial magistrate was too much in a hurry to get back to her new station that is why she failed to give written reasons for sentencing the applicants the way she did.

The trial magistrate conceded that she had erred by not writing the reasons for the sentence she imposed on the applicants. Further, that the alleged failure to consider

recommendations made by the community service officer automatically stemmed from the failure to record reasons for sentence.

This court is therefore at liberty to set aside the sentence imposed by the trial court. This court, however, is not going to accede to the request that the matter be referred to the magistrates' court to be dealt with by a different magistrate when the magistrate who dealt with the matter is still available but only stationed at a different station. She was said to have been transferred from Bulawayo to Hwange.

Her errors as alluded to *supra* were that she failed to consider community service recommendations made by the community service officer. She should consider them and in the event that she does not agree with them, she must record her reasons for rejecting them.

Similarly she ought also to record the reasons for the sentence which she is going to impose. The magistrate should be allowed to go back to Bulawayo to deal with the matter.

In the result the order of this court is as follows:

It is ordered that:-

The sentence imposed by the court *a quo* be and is hereby set aside.

The matter be and is hereby referred back to the trial magistrate to consider the community service recommendations made by the community service officer on 26 October 2012.

Thereafter, the trial magistrate sentence the applicants *de novo* and the sentence imposed should not be more severe than the one that this court has set aside.

Takuva J agrees .....

HB 181/15  
HCR 533-34/12  
HCAR 3155/12  
CRB 1598-9/11

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