

LOVEMORE JOSHUA MAJOKO
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 4 August 2023

Judgment

Appellant in person
W Badalane, for the respondent

FOROMA J: The appellant is an unrepresented litigant who noted an appeal against the dismissal by the Magistrate’s court of his application to suspend pending appeal a sentence passed against him on 4 July 2023. The sentence *inter alia* required him to serve community service and pay restitution. Appellant noted an appeal against both conviction and sentence by the Magistrate’s court. Because he believed that the sentence should not be executed pending the determination of his appeal he applied for the suspension of the sentence pending appeal which application was dismissed. Dissatisfied with the dismissal of his application, appellant noted an appeal in terms of s 63 of the Magistrate Court Act [*Chapter 7:10*]. His appeal was referred to the Bail Court under case No B 772/23. In his grounds of appeal he highlighted that he had been convicted of the crime of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:24*] by the magistrate’s court which sentenced him as follows:

“24 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that accused does not during that period commit any offence involving an element of dishonesty for which upon conviction he is sentenced to imprisonment without the option of a fine.

“A further 10 months imprisonment is suspended on condition that accused makes restitution to the complainant in the sum of US\$3650.00 through the clerk of court Rotten Row (Harare) Magistrates Court on or before 2 August 2023.”

“The remaining 8 months imprisonment is suspended on condition that accused person performs 280 hours of Community Service at Southerton Police station on the following conditions.....see *Gumisai and Ors v The State* HH 177/12 where MATHONSI J observed as

follows “Community Service is a deprivation of liberty just like imprisonment the bail court is thus the right court to entertain such appeal.”

Dissatisfied with both conviction and sentence and noted an appeal against the whole judgment on 6 July 2023. He was granted leave to prosecute his appeal in person on 27 July 2023.

Immediately after filing, his notice of appeal appellant filed with the trial magistrate what he termed “Application for Suspension of Community Service and Payment of Restitution Pending An Appeal which application was successfully opposed by the prosecution resulting in its dismissal on 13 July 2023. The State opposed the application on the basis that the appeal had no prospects of success a position that was accepted by the presiding magistrate who dismissed the appeal.

It was against the dismissal of the application that the appellant noted an appeal to the High Court as aforesaid. This time around the respondent (State) conceded the appeal. In her brief response (concession) the respondent’s counsel submitted as follows-

“(2) The respondent is not opposed to the appeal being allowed based on the fact that appeals no longer take time to prosecute and since his appeal is pending it is highly likely that the appeal will be heard in the coming term and finalized (3) In the premises the appellant may be granted the opportunity to prosecute his appeal before paying restitution and performing Community Service. (4) The respondent is of the view that if the concession finds favour with the Honourable Court, an Order may be granted in terms of the Draft.”

At the hearing of the appeal I indicated that I did not agree with the concession and dismissed the appeal for reasons I gave in an *ex tempore* judgment. I have considered it prudent and beneficial that I present the reasons in a written judgment which can be accessed by all concerned.

The Criminal Procedure and Evidence Act [*Chapter 9:07*] in Part XVIII deals with punishments under s 336. It provides for punishments that Criminal Courts can competently impose upon a convicted offender and these are listed as follows:

- a)
- b) Imprisonment for life
Imprisonment for a determinate period
- c) extended imprisonment
- d) a fine

- di) community service
- e)
- f)

Section 350A (1) provides as follows (1) “Subject to this section and to regulations made in terms of section three hundred and eighty nine, a court which convicts a person of any offence may instead of sentencing him to imprisonment or a fine, make a community service order requiring him to render service for the benefit of the community or any section of the community for such number of hours as shall be specified in the order.” What this means is that while community service can be passed as a punishment in its own right for any offence in respect of which any person is convicted by a court it can also be imposed as a condition of suspension of a sentence of imprisonment or a fine. This is usually resorted to in order to ameliorate the effect of a sentence of imprisonment. Put differently where a court is satisfied that a convicted offender should be spared the rigors of an effective prison term or a hefty fine in the event of a default (in its payment) it can suspend portion(s) thereof on condition of community service. A distinction should therefore be made between community service as a sentence and as a condition of suspension.

Despite being spared the rigors of a sentence of imprisonment through suspension of portions of the sentence of imprisonment some offenders will feel strongly that they should suffer the prejudice of discharging the conditions of suspension in particular where they believe that they have wrongly been convicted. They will therefore make an effort to have the sentence suspended by immediately noting an appeal against the whole judgment believing/ incorrectly though that the appeal will have the effect of suspending execution of the sentence of imprisonment pending determination of the appeal. Sometimes convicted offenders also get incorrect advice that an appeal suspends the execution of a judgment appealed against pending appeal. This incorrect advice arises from a confusion of the common law and statutory provisions. As will be demonstrated below the noting of an appeal against either conviction or sentence in a judgment of the magistrates court does not suspend the judgment appealed against. Recently in the appeal court some convicted offenders who initially had been saved serving effective prison terms through suspension of the sentence got the shock of their life when they suddenly found themselves incarcerated to serve the suspended portions of the sentence as a

result of incorrect legal advice i.e that the noting of an appeal suspends the execution of judgment/sentence in a criminal case pending determination of the appeal. As a result of such incorrect advice the convicted offender will have failed to comply with the conditions of suspension of the sentence resulting in a breach of the conditions of suspension the sentence. *In casu* appellant who was an unrepresented litigant and for reasons not apparent on the record proceeded on the incorrect belief that the noting of an appeal against conviction and sentence entitled him to apply for the suspension of the execution of the conditions of suspension of the portions of his sentence namely restitution and Community service. Appellant's error appears to have arisen from a misinterpretation of the proviso to s 64(b)(ii) of the Magistrate's Court Act [Chapter 7:10]. He thus filed an application for the suspension of compliance with the restitution and community service pending determination of the appeal against conviction and sentence which application on dismissal regrettably left him still aggrieved resulting in him noting an appeal to the High Court against the said dismissal. On noting the appeal appellant neither took the pre-caution (of complying with the sentence pending determination of the appeal) nor applying for bail pending appeal which was the easy way out as provided in the Magistrate's Court Act.

Section 63 of the Magistrate's Court Act is reproduced below to illustrate its correct interpretation.

“63-The execution of any sentence of imprisonment fine or community service shall not be suspended by (a)(review or scrutiny) or (b) the noting of an appeal referred to in s 60 unless

- (i) In the case of imprisonment or fine bail is granted by a judge or magistrate in terms of s 123 of the Criminal Procedure and Evidence Act [Chapter 9:07] or
- (ii) In the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal.”

The *proviso* to s 63 (b)(ii) has quite surprisingly presented some difficulty not only to appellant *in casu* but to the respondent as is apparent from the concession to appellant's appeal by the respondent aforementioned. This confusion in the interpretation of the phrase community service as it appears in s 63 arises from the failure to appreciate that in s 63 the phrase Community Service is expressly used to denote a substantive punishment (sentence) for a conviction and not as a condition of suspension of a sentence of imprisonment or a fine. For the avoidance of doubt when correctly understood s 63 literally means that a sentence of

imprisonment or fine can only be suspended pending appeal by the grant of bail pending appeal either by a judge or a magistrate while the sentence of Community service (the underlining is for emphasis) can only be suspended pending appeal through the grant by the magistrate of an application to suspend the operation of the sentence pending determination of the appeal. It was therefore not competent for appellant to apply for the suspension of both restitution and Community Service, as conditions of suspension of portions of a sentence of imprisonment neither did the magistrate's court being a creature of statute have authority or power to suspend a condition of suspension of a sentence of imprisonment or fine except through the grant of bail. As a matter of fact the suspension of conditions of suspension would in effect reinstate the suspended sentence thus defeating the purpose of the suspension of the sentence in the first place.

The magistrate *in casu* dismissed applicant's application for suspension of restitution and Community Service (conditions of suspension of a portion of the sentence of imprisonment) on the basis that appellant's appeal had no prospects of success and not because the court had no jurisdiction to suspend same. It is clear that the court *a quo* arrived at the correct result but for the wrong reasons. It was for these reasons that the court dismissed the appellant's appeal.

Appellant in person
National Prosecuting Authority, respondent's legal practitioners