THE STATE
versus
REMIGIO MUDZAMBA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI AND MUNGWARI JJ
HARARE, 30 March 2022

**Criminal Review**

**BACHI- MZAWAZI J:** The brief facts are that the accused person was arrested and charged with contravening s 131(1)(a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*], as read with s 131(2)(e). He was convicted on his own plea and sentenced to twenty months, with an effective prison term of twelve months. Six months was suspended on the usual conditions. A further two months was suspended on condition of restitution to the complainant of the sum of ZW $12 000. He is twenty five years old.

It is alleged that on January 2022 he broke into a shop and stole an assortment of goods valued at ZW $19 200 (US$160) that belonged to the complainant of the goods stolen valued at $ZW 7,200($US60) was recovered.

This was a young male first offender who had no criminal record or any brushes with the law. An effective twelve months irrespective of the type of offence is unduly harsh in my view. Non- custodial sentences which are both corrective and rehabilitative should be considered more often in a broken society such as ours, where our youth are faced with countless challenges among them unemployment. Moreso, where part of the stolen goods were recovered compounded by the fact that he was ordered to pay restitution.

The court did not even consider Community service for reasons that he is of no fixed abode. Nowhere in the record did the court enquire from the accused of his residential address. It is an affront to common sense and justice to conclude that a person has no fixed abode on the basis of the mere say so of the state papers without enquiring further from the accused person or the investigating officer. There is no evidence on record that he was a street kid. Even street kids have what is referred colloquially as regular joints. Failure to consider or to pay lip service to

community service has been regarded as a misdirection in several authorities. MATHONSI J, as he then was, emphasized the need to consider community service. In *S* v *Zondo* HB210/17 he highlighted that no matter the gravity of the offence failure to consider community service is a misdirection.

It is not generally the norm or custom of the upper courts to tamper with the lower court's discretion in sentencing. But surely there is a paramount reason why the legislature in its nobility enacted the provisions in s 26 to 29 of the High Court Act [*Chapter 7:06*] and 57 to 58 of the Magistrate Court Act [*Chapter 7:10*].

In the case of – *S* v *Mhondiwa* HB-193-11 at pages 4 – 5, it was stated as follows:

> "The reviewing judge and the trial magistrate are a tag team serving the same purpose namely to ensure that justice is done and accused persons receive fair treatment….. The reviewing judge may decide that the sentence imposed by the magistrate is excessive and should either be quashed or substantially reduced."

Whilst the court is of the view that the conviction was proper as the accused person was convicted on his own guilty plea, concerns arise in relation to the appropriateness of the sentence in view of the youthfulness of the accused person, among other factors.

As has already been stated the court noted that there is nowhere in the record of proceedings that indicates that the court a *quo* made any reference to Community service. Failure by the court to even to mention let alone consider Community service in my view constitutes an irregularity.

In the case of *Silume* v *The State HB* 12-16 MATHONSI and BERE JJ stated that;

> "… failure by a magistrate to enquire into the suitability of community service where he or she settles for effective imprisonment of 24 months or less amounts to a misdirection."

The same was reiterated in, *S v Square Zondo HB210*/17. In this case JUSTICE MATHONSI bemoaned the insensitivity of lower courts in sentencing young first offenders whose circumstances cry out for alternative modes of punishment other than incarceration. Modern, Internationally recognized sentencing patterns are reformative and rehabilitative centric. Community service has been one such recognition of current progressive sentencing patterns. In other jurisdictions, there are open prison systems, parole among others.

The compounded mitigation features in this case should have persuaded the sentencing court to spare the accused person from the rigors of prison.

Guided by the above case I am not in a position to confirm the proceeding as in accordance with real and substantial justice.

I am therefore of the view that it is the interest of justice that the sentence be interfered with.

IT IS ACCORDINGLY ORDERED THAT:

1. The conviction is confirmed
2. The effective 12 months imprisonment is set aside and substituted with the following:
    - The trial court is directed to summon the accused forth with and consider him for community service.

MUNGWARI J Agrees ……