GIVEN NYATHI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MAKONESE JJ
BULAWAYO 18 FEBRUARY 2013 AND 11 JULY 2013

Mr *Malinga* for the applicant
Mrs *Ndlovu* for the respondent

Refusal to perform community service

CHEDA J: Appellant noted an appeal against sentence which was imposed on him on the 22 September 2011 by a magistrate court sitting in Bulawayo.

He was charged with contravening section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Fraud). He pleaded guilty to the said charge and was duly convicted. He was sentenced as follows:

> "18 months imprisonment of which (a) 3 is suspended for 3 years on condition accused is not within that period convicted of an offence which involves fraud as an element which upon conviction will be sentenced to imprisonment without the option of a fine (b) 3 is suspended on condition he resitutes the complainant by 30 September 2011".

He now appeals against that sentence. The thrust of this appeal is that the court *a quo* misdirected itself by not sentencing appellant to a non-custodial sentence other than community service. My understanding of this approach is that appellant would have preferred to be sentenced to a fine.

The court has a wide discretion in deciding what sentence to impose on an accused. The discretion is entirely its own. The said discretion, however should be exercised judicially. In addition, thereto in the exercise of that discretion the court is aided by the legally recognised principles amongst which are:

(1) the personal circumstances of the accused;

(2) the gravity of the offence;
(3) the view's of society towards the offence;
(4) the prevalence of the offence;
(5) the circumstances under which it was committed, etc.

The list is inexhaustible. In *S v Raux* 1975 (3) SA 190, the court emphasised the need for the court to consider accused's personal circumstances. However, in my opinion none of the case authorities cited by both appellant's and respondent's legal representatives seem to suggest that in determining a sentence to be imposed the court should impose a sentence stipulated by an accused. An accused person placed before a court, having been convicted can only plead for mercy in as far as sentence is concerned. In as much as an accused is entitled to request for a particular sentence, the sentence which the court finally imposes is for that court's discretion. Failure by the court to accede to an accused's request to impose what he perceives to be a suitable sentence is not in my view a misdirection. If this approach was to be followed the courts would be powerless in as far as punishment is concerned. Such a situation would not only lead to absurdity but to judicial chaos.

In other words, the type of sentence still remain as the sole discretion of the judicial officer who is trained to take into account all relevant factors before imposing a suitable sentence. To impose a sentence which is demanded, requested or determined by an accused person, is in my view tantamount to an accused person sentencing himself. The principle of punishment would lose its sting.

When asked whether he would like to perform community service appellant's response was that he did not want to do so. He did not plead ignorance of community service, which means that he knew what it entailed, but, stubbornly rejected it.

Such type of conduct on the part of the accused brings into sharp focus the question of his contrition towards the offence. Despite his offence he was still of the view that his appearance in court was not humiliation enough to a point of continually detecting what he believes is a suitable sentence for himself, thereby casting aside the need for punishment

by the court. Such behaviour should be discouraged as it is a brazen disregard for authority.

The respondent, through Mr *Makoni* had conceded to this appeal. I do not agree with his submissions that appellant did not know what community service was all about. If that was the case, he would have asked for clarification from the court. Appellant is a 57 year old man, urbanised and a business man, for that matter. It is not reasonable to conclude that he did not know what community service is all about, a term or jargon which is now as common as the word "prison".

The appeal is dismissed.

Makonese J ……agrees

Job and Sibanda and Associates, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners