JOHN MARUNGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU AND MUREMBA JJ
HARARE, 13 November 2013

Criminal Appeal

D. Chikwangwani, for appellant
E. Mavuto, for *respondent*

TAGU J: On 15 January 2013 the appellant was driving a Nissan Elgrand which is not registered along Zimplats road with one passenger on board. He was stopped by Police Officers who were carrying out an enforcement along the said road. The Officers discovered that the appellant was not a holder of a driver's licence. He was arrested and was convicted by a Kadoma Magistrate on his own plea of guilty to contravening s 6 of the Road Traffic Act [*Cap* 13.11]. He was sentenced to 6 months imprisonment of which 3 months imprisonment was suspended for 5 years on the usual condition of good behaviour. In addition he was prohibited from driving all vehicles falling in the class of light vehicles for 6 months.

Dissatisfied by the custodial sentence imposed, the appellant now appeals to this Honourable court contending that the court *a quo* misdirected itself by:

1. Holding that driving without a driver's licence is a serious offence,
2. Since the appellant denied performing community service, custodial sentence was the appropriate sentence.
3. Not giving due weight to mitigatory factors which outweigh aggravatory factors.
4. Not considering other options of sentence like a fine or community service

The appellant prays for the setting aside of the sentence and its substitution with a fine, or a fine coupled with a wholly suspended prison term. The appellant is currently on bail pending this appeal.

The Respondent is not opposed to the application.

In his well reasoned submissions Mr Mavuto for the respondent stated among other things as follows:-

> "2.2. Respondent is of the view that the learned Magistrate erred and misdirected himself by abandoning a sentence of community service simply because the appellant refused to serve this type of sentence. The learned Magistrate failed to realise that he was obliged to assist the applicant who was unrepresented at the trial. It was his duty to explain to the appellant what community service entails. Also he was duty bound to make a proper enquiry to find out whether or not the appellant was a suitable candidate for this type of sentence. It appears the learned magistrate got emotionally involved when appellant stated that he was not prepared to perform community service. The learned Magistrate did not apply his mind properly. He forgot that he was empowered to impose any sentence, which he deemed appropriate in the circumstances. For him to divert from the type of sentence initially formulated simply because appellant refused is tantamount to allow convicted persons to choose the type of sentence. It is akin to shifting the sentencing discretion to the accused person. This is a gross misdirection which calls for the superior courts to interfere.
> 2.3……..
>
> 2.4 Respondent is of the view that appellant has got a lot of mitigatory factors which outweigh aggravatory factors and a custodial sentence was uncalled for. The appellant was a first offender who pleaded guilty thereby not wasting the court's time. It appeared the learned magistrate did not give due weight to these mitigatory factors. In State v Sidat 1997 ZLR 478 (S) It was held that a plea of guilty must be recognised for what it is a valuable contribution towards the effective and efficient administration of justice. It was held that it must be clear to offenders that a plea of guilty while not absolving them is something which will be rewarded, otherwise, why pleading guilty.
> 2.5…….
> 2.6…….
> 2.7 In the present case it appears the learned magistrate over emphasized accused's moral blameworthiness at the expense of mitigatory factors. In State v Shariwa 2003 (1) ZLR 314 It was held that the over emphasizing of wrongdoers crimes and the underestimation of his person constitutes a misdirection which justifies the substitution of the sentence.
> 2.8……
> 2.9 Appellant is a first offender who was supposed to be treated leniently and spared of the contaminating effect of prison life. In State v Zulu 2003 (1) 529 (H) it was held that over the years our courts have emphasized that a sentence of imprisonment is a severe and rigorous form of punishment, which should be imposed only as last resort, where no other form of punishment will do. It was further held that there have been concerted efforts to shift from the more traditional methods of dealing with crime and the offender towards a more restorative form of justice that takes into account interests of both the society and victim. This is a holistic approach to sentencing in that it punishes the offenders, causes the offender to pay reparation and integrates the offender into society.

> 3. The learned magistrate failed to exercise his discretion judiciously. As a result he imposed a sentence which was excessive. The sentence induces a sense of shock. Respondent is therefore of the view that the sentence is not in accordance with real and substantial justice."

I am in total agreement with the submissions made above by the counsel for the respondent. In this case the magistrate over emphasized the aggravatory factors and over looked the mitigatory factors. The appellant was not involved in any accident and there was nothing untoward in the manner he drove the said vehicle which he had just bought other than that he did not have a licence to drive such a vehicle. A fine was appropriate in this case. The appellant was not a holder of a driver's licence. Nothing turns on the conviction and it is hereby confirmed.

In view of the misdirections pointed above this court is at large to impose an appropriate sentence. The sentence imposed by the cour*t a quo* is hereby set aside and the following sentence is substituted:-

Appellant is to pay a fine of US$ 300.00 in default of payment 30 days imprisonment.

MUREMBA J Agrees……

Messrs Jarvis Palframan, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners