

**THE STATE**

**VERSUS**

**INKEN NYAMAHA**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 11 OCTOBER 2010 AND 21 OCTOBER 2010

Review Judgment

**CHEDA J:** This is a review judgment.

Accused is a 50 year old man, was charged with two counts of contravening section 113 (1) (a) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and two counts of contravening section 113 (1) of the Criminal Law (codification and Reform) Act [Chapter 9:23].

During the month of April 2009, accused committed these four offences against two different complainants. The stolen goods were valued at US\$69 and nothing was recovered. He was arraigned before the courts, he pleaded guilty, was duly convicted and sentenced as follows:

“sentenced to 24 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of which dishonesty is an element and for which upon conviction is sentenced to imprisonment without the option of a fine. A further 18 months imprisonment is suspended on condition accused completes 630 hours of community service at Gweru Magistrates Court on the following conditions:

*The community service starts on 3 June 2010 and must be completed within 19 weeks. The community service shall be performed every Monday to Friday which is not a public holiday between 8am to 1pm and 2pm to 4pm, to the satisfaction of the person in charge of the said institution who may for good cause shown grant accused leave to be absent on certain days or during certain hours. Such leave of absence shall not count as*

*part of the Community service to be performed. The remaining 2 months imprisonment is suspended on condition accused pays restitution to the complainant in the sum of \$69-00 through the Clerk of Court, Gweru on or before the 15<sup>th</sup> July 2010."*

The sentence appeared lenient and I sought the learned trial magistrate's justification for such a sentence. His response is that and he wanted to rehabilitate the accused and avoid him being hardened by criminals in prison.

The learned trial magistrate reasoning defies logic. The accused on two different occasions set out to break into complainants' premises, stole goods and nothing was recovered. These facts on their own are enough to sentence the accused to an effective imprisonment without an option of a fine even if it would have been for a short prison term.

To sentence the accused to a non-custodial sentence is to say the least injustice. The courts have always regarded housebreaking as a very serious offence, which, by and large attracts a custodial sentence, a court should have a good and sufficient reason for departing from this time honoured legal principle.

While sentencing is the most difficult aspect of a trial, judicial officers should always bear in mind the need to balance the interest of society against those of the accused. Many a time, interests of society will always far much outweigh those of an individual.

The learned magistrates' reason that his sentence was out to rehabilitate the accused lacks merit as he could have been rehabilitated by a suspension of part of the sentence. This is a case where the trial court should have followed case authorities and imposed a just sentence. In my opinion, there has been a miscarriage of justice as far as sentence is concerned.

In light of the above I withhold my certificate.