

SALATIEL MOYO  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI AND MOYO JJ  
BULAWAYO 18 JULY 2016 AND 28 JULY 2016

### **Criminal Appeal**

*D Charamba* for the appellant  
*T Hove* for the respondent

**MATHONSI J:** On 7 March 2014 the appellant unlawfully entered into Calabash Restaurant office and stole a Nokia Asha 309 cellphone which was on the table and is valued at \$180-00. The cellphone was recovered following the appellant's arrest.

For his troubles he was charged with unlawful entry in contravention of s131 and theft in contravention of s113 of the Criminal Law Code [Chapter 9:23]. When he appeared before a magistrate at Zvishavane on 11 March 2014 he pleaded guilty and was accordingly convicted on both counts.

The counts were treated as one for sentence and he was sentenced to 12 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition of future good behavior. This left the appellant with an effective imprisonment period of 8 months.

He has appealed against sentence only on the grounds, *inter alia* that the court *a quo* misdirected itself, having settled for an effective 8 months imprisonment period, not to consider community service as an option. We agree.

Nowhere in the record does the trial magistrate even mention community service, let alone inquire into its suitability as a sentencing option. This was a serious misdirection. This court has repeatedly stated that where the sentencer settles for an effective imprisonment sentence of less than 24 months, he or she is obliged to inquire into the suitability of community service. Having failed to do so, the appeal court is at liberty to interfere with the sentence.

In the result, it is ordered that:

- 1) The appeal is upheld.
- 2) The sentence of the court *a quo* is set aside and substituted with the sentence that the appellant shall pay a fine of \$100-00 or in default of payment 30 days imprisonment.

Moyo J agrees.....

*Mutendi and Shumba legal practitioners C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners*  
*National Prosecuting Authority, respondent's legal practitioners*