FUNGISAI NYAMBUYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA & TAGU JJ
HARARE, 22 and 27 October 2014

Criminal Appeal

Appellant in default
E. Makoto, for the State

MANGOTA J: The appellant, a 72 year old, first offender was convicted, on his own plea, of contravening s 156 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The State allegations were that on 28 November, 2011 and at Mufudza Village which is in Chief Marange's area, Mutare, the appellant was found to have cultivated eleven (11) plants of dagga in his two gardens. The dagga, the State claimed, measured 25cm and 70cm in height.

The appellant was sentenced to 24 months imprisonment 6 months of which were suspended for 5 years on condition of future good conduct. He was effectively slapped with an 18 months jail term. The appellant's appeal is against the sentence which the trial court imposed upon him. He contended that the sentence was so excessive that no reasonable court could have imposed it. The respondent agreed with the appellant on this matter.

There is no doubt, in the court's mind, that a number of factors operated in favour of the appellant in this case. He was, at the time of the trial, 72 years of age. He maintained an unblemished record for the stated period of time. He pleaded guilty and, therefore, did not waste the court's time or the State's resources. He did not benefit from the offence which he committed. In *S* v *Kambarami,* HH 13/82, DUMBUTSHENA J (as he then was) encourages courts which come face - to - face with the likes of persons of the age of the appellant to lean more on the lenient side than otherwise. The learned judge remarked:-

> "When considering sentencing a person of an advanced age or an elderly person the court should, depending on the circumstances of the case, rather err on the side of leniency."

The trial magistrate was not alive to the abovementioned words of wisdom when he prepared his reasons for sentence which he eventually imposed. The court is satisfied that the sentence which the court *a quo* imposed was very harsh. It did not suit the offender of the age of the appellant. The offence which the appellant committed is serious. However, his mitigatory factors far outweighed the aggravatory circumstances of this case. The appellant is, in the court's view, a proper candidate for such sentencing options as a fine or community service or a wholly suspended term of imprisonment.

The court has considered all the circumstances of this case. It is satisfied that the appellant proved, on a balance of probabilities, that he is entitled to a less rigorous form of punishment than the one which the court *a quo* imposed on him. His appeal succeeds to that extent. It is, accordingly, ordered as follows:-

(1) that the sentence which was imposed on the appellant be and is hereby set aside.

(2) that the following sentence be and is hereby substituted:-

"The appellant is sentenced to $200-00 or in default of payment 2 months imprisonment. In addition, the appellant is sentenced to 3 months imprisonment the whole of which is suspended for 5 years on condition he does not, within that period, commit any offence involving unlawful dealing in dangerous drugs for which he is sentenced to imprisonment without the option of a fine.

TAGU J agrees:……

Chibaya & Partners, Appellant's Legal Practitioners
National Prosecuting Authority., State's Legal Practitioners