

THE STATE
versus
MOSES ZUVA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 4 November 2014

CRIMINAL REVIEW

MWAYERA J: The record of proceedings presided over by a Gutu senior magistrate was placed before me for review. The accused was convicted and sentenced for unlawful entry into premises, in aggravating circumstances and malicious damage to property.

The brief facts of the case are that on 23 April 2014 and at Nerupiri Business Centre, the accused unlawfully without permission entered into Nicholas Mabhiza's butchery where he stole and drank 8 pints of beer valued at \$8-00. The accused entered the premises while the complainant was outside and was apprehended and taken to the police station. While at the police station the accused who had partaken the stolen 8 pints of beer became violent and damaged 5 window panes valued at \$15-00.

For count 1 unlawful entry

The accused was sentenced to 12 months imprisonment of which 1 month imprisonment is suspended on condition accused compensates the complainant in the sum of \$9-00 through the Clerk of Court Gutu on or before 30 April 14. A further 2 months is suspended for 3 years on condition the accused does not within that period commit any offence involving unlawful entry and or dishonesty for which he is sentenced to imprisonment without the option of a fine.

Count 2

6 months imprisonment of which 1 month is suspended on condition the accused compensates the complainant in the sum of \$15-00 through the Clerk of Court, Gutu on or before 30 April 2014. Effective 14 months imprisonment.

The accused pleaded guilty to both counts and even disclosed to the trial magistrate that he drank 9 pints of beer which he took from complainant's refrigerator after breaking the

lock to the back door. The accused, a 42 year old first offender with family responsibilities was contrite. Given the plea of guilty, the drunken state of mind, and minimal value of the beer stolen albeit after a break in and the minimal damage to window panes at the police station, the trial court ought to have tempered justice with mercy. The sentence by trial magistrate is alarming. The sentences show clear disregard of sentencing principles and leaves one to wonder if the trial magistrate ever thought of seeking to balance the offence, offender and societal needs. Surely in this day and era where our penal system has moved more towards rehabilitating offenders it is mind intriguing to see a negation of the notion of tempering justice with mercy.

A reading of the record of proceedings does not show why a community service sentence was not considered appropriate. Many a time this court has boldly pointed out that imprisonment is a rigorous form of punishment which should be a preserve for bad cases and which should only be meted out as a last resort. The tendency of a short and sharp imprisonment being imposed in underserving cases serves no purpose but strains the already stretched fiscus which has the duty of providing for inmates.

Unlawful entry is indeed a prevalent and serious offence which requires some form of deterrence. The circumstances of each case ought to be considered. Not all such cases call for imprisonment. The penalty provision actually provides for the option of a fine. This gives the trial court room to properly exercise its sentencing discretion in coming up with an appropriate and just sentence in line with the circumstances of the case.

The following examples of sentences imposed by this court on review are instructive and will be of assistance to the trial magistrate. *S v Truter* HB 47/91 the accused broke into two stores in the course of one night and stole goods worth \$112 026-83 then equivalent to US\$2 000-00 and was sentenced by the trial magistrate to 5 years of which 2 years were suspended on the usual conditions of future good conduct. On appeal the sentence was altered to 18 months of which 12 months were suspended for 5 years on the conditions of good conduct.

See also *S v Chihoka* AD 154/75, *S v Chirara and Ors* HH 170/90 and *S v Kurwa and Ors* HH 250/82. In the Chihoka case, Chihoka and accomplices broke into a factory and stole 191 men's jackets, 83 children's jackets, 69 zip fasteners and 10 bales of cloth. Their sentence of 12 months imprisonment was confirmed on appeal. The circumstances of the cases referred to above show it was unlawful entry in aggravatory circumstance and the property stolen was of much higher value than in the case at hand. The sentencing approach

by this court has moved from heavy handedness and is more inclined to rehabilitative, reformatory and restorative justice. I subscribe to sentiments by UCHENA J in the case of *S v Nerukuru* HH 102-09. The learned judge made a pronouncement on sentence that a judicial officer must be dispassionate and avoid being propelled by emotion into passing ever increasing sentence. He further stated that a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterrent but must match the offence and offender.

We hold the view that the effective imprisonment of 14 months for unlawful entry and theft of beer valued at \$8-00 and the damage of window panes worth \$15-00 is too severe and unjustified.

The sentences by the trial magistrate for both unlawful entry and malicious injury to property are set aside and substituted as follows:-

Count 1

Unlawful entry

2 months imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving unlawful entry and for which he is sentenced to imprisonment without the option of a fine.

Count 2

Malicious damage to property

\$100-00 or in default of payment, 15 days imprisonment. In addition 15 days imprisonment is suspended for 3 years on condition accused does not within that period commit any offence involving malicious damage to property and for which he is sentenced to imprisonment without the option of a fine.

The chief magistrate is directed to give guidance and assistance to the senior magistrate on sentencing methods and also refresh the magistrate's mind on community service. This is more so given that a lot of records from the same magistrate have been reviewed and the trial magistrate appears bent on incarcerating those who appear before him even in undeserving circumstances.

The accused has been in custody since 25 April 2014 and is entitled to his immediate release.

A warrant of his liberation is accordingly issued.

MWAYERA J:.....

MUSAKWA J agrees:.....