STEPHEN MAPANGISANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MANGOTA JJ
HARARE, 2 November 2015 & 24 February 2016

Criminal Review

C. Daitai, for the appellant
E. Makoto, for the respondent

MANGOTA J: The appellant was convicted, on his own guilty plea, of contravening s 23 (1) of the Maintenance Act [*Chapter 5:06*] ("the Act"). He was sentenced to 3 months imprisonment all of which were suspended on the following two conditions:

(i) 2 months imprisonment were suspended for 5 years on condition of future good conduct – and
(ii) 1 month imprisonment was suspended on condition he paid arrear maintenance of $240.00 to the mother of his minor child on or before 31 March, 2015.

The suspended sentence of 3 months imprisonment which was imposed on him on 4 March, 2014 under case number CRB 142/14 was brought into operation.

The State allegations were that on 2 November, 2011 and at Chipinge Magistrates Court, the appellant was ordered to pay a monthly sum of $40 as maintenance for his minor child. The payment was with effect from 30 December, 2011. From 30 August to 30 December, 2014 the appellant failed to, or did not, pay the monthly sum of $40 for the upkeep of his minor child. He was, therefore, in arrears of $240.00.

The appellant appealed against sentence. He submitted that the effective sentence of 3 months imprisonment was not only severe but was also excessive. He stated, as his grounds of appeal, that the magistrate erred:

(a) in deciding that an option to pay a fine was not appropriate for the offence which he committed;

(b) in bringing into operation the previously suspended sentence of 3 months imprisonment when he gave an explanation for his failure to pay maintenance which was then due;

He submitted that:

(c) the court *a quo* should have taken account of his strong mitigatory factors and, on the strength of them, it should have further suspended the sentence of 3 months imprisonment which fell under CRB number 142/14 – and

(d) the effective sentence of 3 months imprisonment was prejudicial to the minor children in that he risked losing employment and, therefore, the means with which he would support them.

He moved the court to set aside the sentence and substitute it with that of a fine or performance of community service. He prayed that the sentence of 3 months imprisonment which was suspended under CRB number 142/14 be further suspended for 5 years on condition of future good conduct.

The respondent opposed the appeal. It stated that the trial magistrate exercised his sentencing discretion properly. It insisted that the sentence which was imposed on the appellant did not induce a sense of shock. It submitted that the appellant was not able to satisfy the court *a quo* why the suspended sentence of 3 months imprisonment should not have been brought into operation. It moved the court to dismiss the appeal.

The appellant's first line of argument was that his strong mitigatory circumstances should have persuaded the court *a quo* to impose the sentence of a fine upon him. He cited the following as having been such factors:

(a) that he was an elderly person of 51 years of age;

(b) that he was prepared to, and he did actually, pay the arrear maintenance – and

(c) that he pleaded guilty to the charge.

The respondent did not meaningfully address the appellant's concerns in the abovementioned regard. It submitted that the court *a quo* did not impose a custodial sentence for the offence which the appellant was convicted of.

Whatever its comments were meant to convey no one else but the respondent can tell. The fact is that the court *a quo* imposed a custodial sentence on the appellant. That sentence was, however, suspended in full and on conditions.

The penalty section of the Act under which the appellant was convicted did, in our view, persuade the court *a quo* to impose the sentence which it did. The section does not offer

a discretion to a court which convicts a person who contravenes it to be sentenced to anything other than to a term of imprisonment. It reads, in part, as follows:

> "23 Criminal offence for failing to comply with maintenance order.
>
> (1) Subject to subsection (1), any person against whom an order to which this section applies has been made who fails to make any particular payment in terms of the order shall be guilty of an offence and liable to imprisonment for a period not exceeding one year". (emphasis added).

The court's hands were, no doubt, tied. Its sentencing discretion was fettered. It could not impose a fine under the circumstances of the case. It, in our view, appreciated the appellant's mitigatory factors and imposed upon him a wholly suspended term of imprisonment. It had no option but to comply with the law. It, in that regard, tempered justice with mercy.

The suspended sentence of 3 months imprisonment which it imposed on the appellant for the offence was, accordingly, above board. It cannot be disturbed.

The appellant's second and third grounds of appeal relate to one matter. He raised the concern that the suspended sentence of 3 months imprisonment which fell under case number CRB 142/14 should not have been brought into operation. He argued, in his fourth ground, that the bringing into effect of the suspended sentence spelt doom for his two minor children and him. He said his incarceration would cause him to lose his job and, by that fact alone, he would be deprived of his salary with which he was able to support his children and him.

The respondent's position on the above matter was that s 358 (7) of the Criminal Procedure And Evidence Act [*Chapter 9:07*] conferred a discretion on the court to bring into effect a suspended sentence. It submitted that, *in casu*, the appellant could not show good cause why the court *a quo* should not have brought the suspended sentence into operation.

We mention, in passing, that on 4 March 2014 and under case number CRB 142/14, Chipinge Magistrates' Court convicted the appellant of contravening s 23 (1) of the Maintenance Act. It sentenced him to 6 months imprisonment. Three (3) months of that sentence were suspended for 5 years on condition that he did not, within the mentioned period, commit any offence which involved a contravention of s 23 (1) of the Act for which he was sentenced to imprisonment without the option of a fine.

It is observed that, exactly one year after the above sentence was imposed on him, the appellant was yet again convicted of contravening s 23 (1) of the Maintenance Act. He was

convicted on 11 March, 2015 and under CRB 158/15. The court *a quo*'s discretion having been fettered by operation of the law, it sentenced him to a term of imprisonment which was wholly suspended on two conditions which have already been made mention of.

Because the appellant had apparently breached the condition upon which the suspended sentence of 3 months imprisonment rested, the court *a quo* had to conduct some inquiry. The object of the inquiry was to ascertain if the appellant's reasons for defaulting in the payment of maintenance for his minor child were, or were not, valid.

The inquiry which was taken down at the plea recording stage of the court *a quo*'s proceedings appears at p 9 of the record. It runs in the following order:

"X Is it correct you were ordered by this court to pay $40.00 for your minor child.

- Yes

X Have you been paying

- Not consistently

X Any lawful right to default

- None

X You are in arrears of $240

- Yes

X Why were you failing to comply with the order

- I was seriously ill from that time and I was admitted in hospital. Doctor gave me time off for 3 months

X Where are you employed

- Ministry of Education

X So your money was not coming

- It was but I have arrears at boarding school for the other child".

The answers which the appellant gave to the questions which were being posed satisfied the court *a quo* that the appellant breached the condition upon which the suspended sentence of 3 months imprisonment rested. The sentence of 3 months imprisonment was couched in such a manner that, for a period of 5 years from 4 March 2014, the appellant should not have been convicted of contravening s 23 (1) of the Maintenance Act for which he was sentenced to a term of imprisonment.

The appellant's submission which was to the effect that he could not pay maintenance for his minor child because he was hospitalised for three months could not hold. He admitted that he was receiving his monthly salary whilst he remained in hospital. There was, therefore, nothing which prevented him from continuing to pay the monthly sum of $40.00 which the

court *a quo* ordered him to pay. His statement which was to the effect that he had arrears for his other minor child who was at boarding school compounded his guilt. The long and short of it was that he had arrears for both his children. That stated fact placed the appellant in very bad light. He gave the distinct impression of a father who did not want to honour his obligations towards the children whom he caused to be brought onto this world. He did not explain what compelled him to provide for his child who was at boarding school and deny day to day maintenance to the child who was the subject of this appeal. It was for the observed reasons, if for no other, that the court *a quo* deemed it fit to bring into operation the suspended sentence of 3 months imprisonment. That sentence could not be further suspended without bringing into disrepute the country's system of justice delivery.

Court orders are what they are. They should be complied with by all persons without fail. A person who makes up his mind to breach the condition(s) upon which a suspended sentence rests has only himself to blame when, because of his conduct, that sentence is brought into operation.

The appellant falls into the category of people who have no regard for the law. He breached the condition(s) upon which the suspended sentence of 3 months imprisonment rested. He did so within one year of its imposition upon him. He could not show any good cause for the breach. He cannot, therefore, be heard to cry foul when the law descends upon him as it did.

The suspended sentence of 3 months imprisonment was, in our view, properly brought into operation. It could not be further suspended as the appellant prayed. It could only have been so further suspended if the appellant had advanced good cause for his failure to meet his obligation as the court *a quo* ordered him to.

We considered all the circumstances of this case. We were satisfied that the appeal lacked merit. It is, accordingly, dismissed.

CHATUKUTA J: agrees ……

Mhungu & Associates, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners