

TINASHE USAVI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 22 May and 6 June 2019

Criminal Appeal

Appellant in person
T Katsiru, for the Respondent

MUZENDA J: The appellant was charged and convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and was sentenced to 20 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition accused does not during that period commit any offence involving dishonesty of which he is sentenced to imprisonment without the option of a fine. Of the remaining 16 months imprisonment, 8 months imprisonment was suspended on condition of restitution.

The appellant noted an appeal against the above sentence setting out 2 grounds of appeal:

- “1. the learned Magistrate misdirected herself in sentencing the appellant to serve an effective prison term of 8 months without the option of a fine or community service as alternative forms of sentence.
2. the learned Magistrate misdirected herself in sentencing the appellant to serve a prison terms without taking into account the appellant’s mitigatory factors.”

Appellant is aged 40 years, married and has 6 children, he earns \$700-00 per month and owns a residential Stand 8189 Natview Park, valued at \$35 000-00. In July 2017, appellant was introduced to Patience Kwaramba concerning Stand No. 8324 Natview Park, Mutare, complainant paid a deposit of ZAR 20,000-00. On 25 September 2017, complainant made a further payment of ZAR 45 000-00. When complainant visited the Stand intending to develop it, she found someone already developing it, in actual fact one Godwin Dambudzo was the registered owner. The amount of prejudice was ZAR 65 000-00 and US\$20-00 nothing was recovered.

In reasons for sentence, the court *a quo* highlighted the following:

- “(a) the appellant was a repeat offender.
- (b) the money was not recovered
- (c) premeditation and scheming
- (d) appellant took advantage of someone who was desperate to acquire a residential stand as a form of investment and shelter.”

The court *a quo* also alluded to the need to adopt a rational approach towards sentencing. It also considered community service as an alternative form of punishment but justified why it was not ideal for the appellant more particularly when the accused is a repeat offender. The court *a quo* also considered the moral blameworthiness of the appellant and clarion call for rehabilitation of such an offender and need for protection of the public at large. The learned Magistrate concluded that a custodial sentence was the only appropriate sentence befitting the offender.

The appellant prepared written heads of argument and ably articulated his appeal seeking to prove that a custodial sentence was not proper in the circumstances. The critical analysis of the grounds of appeal *vis-à-vis* the reasons for sentence advanced by the sentencing court does not reveal any misdirection by the court *a quo* which would justify interference by this court.¹

It is our considered view that the court *a quo* did not err at all. The sentence given does not induce a sense of shock as propounded by the appellant and to the contrary the sentence given by the court is rather lenient given the circumstances of this matter. Obviously community service could not have been applicable where appellant had a relevant previous conviction relating to fraud and the *modus operandi* was the same involving residential stands.

The appellant also argued that the time given to him to retribute was too short, appellant can approach the sentencing court and apply for an extension to get the restitution and pay the complainant. We see no misdirection on the issue of restitution. We find no legal basis for this court to interfere with the sentence imposed.

Accordingly, the appeal against sentence is dismissed.

¹ S v Sidat 1997 (1) ZLR 487 (s)
Anthony Jacob Gondo V S HH 136/00
S v Berliner 1969 (2) SA 193 (AD)
S v Nemapare (2) ZLR 430 (S)

MWAYERA J agrees _____

National Prosecuting Authority, respondent's legal practitioners