MANDLA MKOMBO **APPELLANT**

AND

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 25 OCTOBER 2010 AND 4 NOVEMBER 2010

B. Dube for appellant
N. Ndlovu for respondent

Criminal Appeal

MATHONSI J: This is an appeal against sentence only the Appellant having been convicted by the magistrates Court sitting at Gweru on 19 September 2008 of theft in contravention of section 113(1) (a) and (b) of the Criminal Law Code and sentenced to 36 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of good behaviour.

Not happy with that sentence the Appellant noted an appeal to this court and the grounds of appeal as appear on the notice of appeal filed on 24 September 2008 are as follows:

"GROUNDS OF APPEAL

1. The learned provincial magistrate misdirected herself in imposing a term of imprisonment with labour of 30 months after suspending 6 months imprisonment with labour.
2. The sentence imposed by the trial court induces a sense of shock.
3. The trial court misdirected itself in failing to give due weight and consideration to the particular circumstances of the Appellant's matter in that after stealing the radio in question, it was recovered from him before he had even left the premises with it.
4. The learned provincial magistrate misdirected herself in that she failed to give due consideration to the highly mitigatory factors that the radio was recovered and

appellant pleaded guilty and thus did not waste the trial court's time and was contrite.

5. The learned provincial magistrate misdirected herself in failing to consider giving the appellant the option of community service.
6. The trial court failed to give due weight to the mitigatory factors that the appellant lost his job as a result of his commission of this offence and did not benefit at all from his misdemeanour.
7. The trial court failed to give due consideration to the fact that appellant is a youthful first offender."

The facts are that the Appellant was employed by Renown Panel Beaters of Gweru as a security guard. He was guarding the employer's premises on the night of 16 September 2008 alone when he broke into a Mazda 323 motor vehicle parked at the premises and stole a Technic car radio which was fitted onto the dashboard of the vehicle. The radio was valued at $400 000-00 (Zimbabwe currency). He put the radio in his bag intending to leave with it at the time he knocked off but was discovered by the other security guard who was relieving him, who promptly arrested him.

At the time of the commission of the offence the Appellant was aged 25, was unmarried and had no children. When he appeared before the magistrates' court, the Appellant pleaded guilty. He was convicted and sentenced as aforesaid.

It was argued on behalf of the Appellant that the sentence imposed induces a sense of shock regard being had to the fact that the Appellant is a young first offender who had pleaded guilty to the charge and therefore should have been given a sentence other than imprisonment. *Mr Dube* for the Appellant suggested that a sentence of imprisonment suspended on condition the Appellant completes hours of community service would meet the justice of the case.

The position of our law is that in sentencing a convicted person, the sentencing court has a discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to interfere with the trial court's sentencing discretion there should be a misdirection see *S v Chiweshe* 1996(1) ZLR 425(H) at 429D; *S v Ramushu* and Others S-25-93.

It is not enough for the Appellant to argue that the sentence imposed is too severe because that alone is not a misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S-40-88 (unreported) at page 5 of the cyclostyled judgment it was stated that:

> "It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court."

See also *S v Mundowa* 1998(2) ZLR 392(H) at 395 B-C and *S v De Jager ad Another* 1965(2) SA 616(A) at 628-9.

As already stated, the court has the sentencing discretion and the appeal court does not have a general discretion to modify the sentences of trial courts. It will only interefere where the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have come up with it.

In the case before us the trial magistrate considered all the factors in mitigation and concluded that they were outweighed by the aggravation namely that the Appellant was employed to guard the employers' property but chose to steal the very same property he was

employed to guard. I do not consider that the effective sentence of 2 ½ yeas is too severe either.

The Appellant has failed to show any irregularity or misdirection as would vitiate the sentence imposed by the trial court.

I therefore come to the conclusion that the appeal is without merit. Accordingly it is dismissed.

Kamocha J agrees.....

Gundu and Dube legal practitioners C/o Danziger and Partners, appellant's legal practitioners
Criminal Division Attorney General's Office, respondent's legal practitioners