HUMBULANI PRINCE MULAUZI
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 13 JUNE AND 16 JUNE 2016

Criminal Appeal

S. S. Mlaudzi for the appellant
T. Hove for the state

MATHONSI J: The appellant was arraigned before a magistrate at Beitbridge on 30 December 2015 facing a charge of assisting a person to depart from Zimbabwe in contravention of s36 (1)(c) as read with s36(1) (j) of the Immigration Act [Chapter 4:02]. He pleaded guilty and upon conviction he was sentenced to 12 months imprisonment of which 6 months imprisonment was suspended for 3 years on condition he does not, within that period, commit an offence for which assisting a person enter or depart from the country without a valid travel document for which he is sentenced to imprisonment without the option of a fine, is an element.

In mitigation, the court *a quo* recorded that the appellant was a 40 year old married man with three children. He is self-employed and had savings of R2000-00 and a sum of R400-00 on his person. In addition he had four head of cattle, a house and other valuable assets.

The facts are that the appellant had tried to proceed to South Africa with two of his sister's children aged 12 and 9 years who did not have valid travel documents. His luck ran out when he was intercepted by police detectives who were on duty at the exist gate.

In arriving at the sentence that it imposed, the court *a quo* reasoned as follows:

> "The accused was treated as a first offender and pleaded guilty to the offence he was charged with. In mitigation he told the court that he wanted to travel back to South Africa with his sister's children.

> However as a responsible adult the accused should have made sure that all travelling documents for the children were in perfect order before proceeding with them out of the country. These are children we are talking about and because of the prevalence of child trafficking cases the courts have to take sterner measures to ensure that people do not just bring or take out of the country children without proper procedures being done. A custodial sentence was seen as the most deterrent form of punishment in this case."

The trial court must have been seeing things none of us can see. For a start, the appellant was not assisting the children to depart for a fee. These were his own relatives that he was travelling with. Granted, what he did was an offence hence the reason why he was brought to court for him to be punished in accordance with the law, not in accordance with some other considerations whether real or imagined.

In terms of s36 (1):

> "A person who assists any person, whether or not such person is *doli capax*, to enter, remain in or depart from Zimbabwe in contravention of this Act shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

Where a statute provides for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration first and foremost to a fine. See *S* v *Chawanda* 1996 (2) ZLR 8(H) 10 C –G; *S* v *Zuwa* 2014 (1) ZLR 15 (H) 18 A-C. This is particularly so when the accused person is a first offender who has pleaded guilty to the charge. Imprisonment should be reserved for repeat offenders and the most serious of such cases.

The court *a quo* only said that imprisonment was more attractive to it. It did not explain why it saw it necessary to depart from that celebrated sentencing policy of the courts in this jurisdiction.

The appellant has appealed against the sentence imposed by the court *a quo* on the grounds, *inter alia* that the court *a quo* misdirected itself by not considering other sentencing options and in not considering the mitigating circumstances of the accused person. I have already alluded to the misdirection in the sentence and with that glaringly obvious misidrecton, *Mr Hove* for the respondent conceded that the sentence imposed was inappropriate.

In fact the sentence preferred by the court *a quo* cannot be sustained at all and for one other reason. It is that the moment the court settled for a sentence of 12 months imprisonment

and an effective imprisonment term of 6 months it was obliged to inquire into the suitability of community service. See *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140E; *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H) 260D. If the court came to the conclusion, following the inquiry, that community service was inappropriate, it was required to give proper reasons for doing so which should appear on the record. They cannot be stored in the mind of the court. See *S* v *Antonio and Others* 1998(2) ZLR 64 (H); *S* v *Chinzenze and Others* 1998 (1) ZLR 470 (H); *S* v *Silume* HB 12/16.

The fact that the court *a quo* did not inquire into the suitability of community service was yet another misdirection. Clearly therefore the sentence cannot stand.

Mr Mlaudzi who appeared for the appellant submitted that the appellant had been in custody for 21 days after sentence before he was admitted to bail.

Mr Hove did not dispute that assertion which we therefore accepted. In our view, considering that the appellant should have received a sentence of a fine, the period of 21 days which he served atones for whatever sentence of a fine he would have received.

In the result, it is ordered that:

1. The appeal against sentence is hereby upheld.

2. The sentence of the court *a quo* is hereby set aside and in its place is substituted the sentence of 21 days imprisonment, which the appellant has served.

3. As the appellant has already served that sentence, he is entitled to continue enjoying his freedom.

Samp Mlauzi and Partners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners

Bere J agrees……