

TAFADZWAPPAUL MUTASA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 24 APRIL 2014

M. Ncube, for the applicant

IN CHAMBERS

KAMOCHA J: The applicant in this matter filed an application for condonation of late filing of notice of appeal on 17 March 2014 which was dismissed on 24 April 2014.

He has now requested written reasons for the dismissal. These are they.

The background information giving rise to this case is as follows:

Sometime during the month of October 2012 the applicant and one Perfidia Nkomo agreed that applicant would sell the latter's Sumsang S4 Galaxy mobile phone worth US\$900,00, on her behalf.

The applicant received the phone and went on to sell it and converted the proceeds to his own use.

The applicant evaded the complainant from October 2012 until the complainant fortuitously spotted him in town in January 2014 and caused his arrest. He had been on the run for 1 year 4 months.

The applicant was taken to court on 30 January 2014 where on arraignment he pleaded guilty to a charge of having sold the mobile phone valued at US\$900 and converted the proceeds to his own use. He agreed with the facts as outlined by the state *in toto*. He also accepted the essential elements of the charge he was facing and went on to agree that his plea was a genuine admission of the charge, facts and essential elements as put to him.

The court then proceeded to find him guilty as charged. He was sentenced to undergo 18 months imprisonment of which 5 months imprisonment was suspended for 5 years on the customary conditions of future good behaviour. A further 7 months imprisonment was suspended on condition that he restituted the complainant in the sum of \$900,00 through the clerk of court on or before 31 March 2014. That left him with an effective sentence of 6 months imprisonment.

He now wishes to file an appeal against both conviction and sentence out of time and seeks his late filing of appeal condoned.

He contends that although he had been denying the charge and disputing the facts as outlined by the state the public prosecutor misled him by advising him to plead guilty and serve the court time and that would make the court happy. He said because that was his first time to appear in a court of law he took the ill advice of the public prosecutor. He went to plead guilty and accepted the facts and essential elements.

This is clearly untenable and unacceptable in the light of the fact that he was on the run after taking the mobile phone for 1 year 4 months. He also complains against the sentence imposed against him. He alleged that the trial court did not take into account his personal circumstances. There is no truth in that assertion either because the court had this to say: "accused is a first offender who was contrite by pleading guilty to the offence so he did not waste the court's invaluable time".

He also contended that the trial court failed to consider community service which was fatal to the proceedings in light of the sentence imposed on him. The magistrate reasoned that in a bid not to trivialize the offence he felt that the only appropriate sentence was a custodial sentence to act as a deterrent to the accused in future and others with like minds. Hence there was no need in his view to consider other forms of punishment including community service.

Although the court did not specifically regurgitate that it had considered that it had considered community service and the option of a fine it felt that the only appropriate sentence was imprisonment in the circumstances.

It seems to me the sentence imposed is not out of step with the sentence normally imposed in cases of this nature were a fine and community service are held to be inappropriate forms of sentence.

There are no prospects of success on appeal and the application was dismissed *ipso facto*.

Cheda & Partners applicant's legal practitioners