LIBERTY MUTETWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA& MANGOTA J
HARARE, 28, January and 9 February, 2015

Criminal Appeal

S A Tawona, for the appellant
Ms *F Kachidza*, for the respondent

MANGOTA J: The appellant was convicted, on his own plea, of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that, on 21 March 2010 and at Paradise Motel Bus Stop, Murambinda, the appellant assaulted one Dunmore Muripo several times upon the face with clenched fists. He also struck the complainant in the face with a bottle and several times on the leg with booted feet.

The court *a quo* sentenced the appellant to 24 months imprisonment, 4 months of which were suspended for 5 years on condition of future good behaviour.

The appellant appealed against the sentence which he said induced a sense of shock. His grounds of appeal were that:

1. the trial court erred in sentencing him to an effective imprisonment term when:
   (a) he was a first offender who
   (b) pleaded guilty and, therefore, did not waste the court's valuable time;
2. the court *a quo* erred in sentencing him to imprisonment in circumstances where the court's policy was aimed at keeping young first offenders away from custodial sentences;
3. the learned magistrate erred when he failed to realise that the complainant had provoked the appellant – and
4. the trial court should have preferred such a punishment as community service.

The relief which the appellant sought was meaningless. It read; "WHEREFORE

Appellant prays that the sentence passed by the Learned Judgment be set aside." Counsel for the appellant successfully applied that the prayer be amended to read: "WHEREFORE Appellant prays that the sentence passed by the learned magistrate be set aside and substituted with a non-custodial sentence."

The respondent put up a stiff opposition to the appeal. It submitted that the sentence which the trial court imposed was appropriate for the crime which the appellant committed. It stated that the sentence was arrived at after a careful analysis of all matters which favoured and militated against the appellant. It insisted that the sentence should not be disturbed as it did not induce a sense of shock.

Mr *Tawona*, for the appellant, made two pertinent concessions. These were that:

(i) the appellant was not a young offender as had, earlier on, been submitted – and

(ii) the appellant's assault of the complainant was an unprovoked attack and was, therefore, not warranted.

The court commends Mr *Tawona* for his candidness. He acted honestly and responsibly. What he did is indeed encouraged to all legal practitioners who argue matters on behalf of those whom they represent in court.

It is trite that a legal practitioner's duty is first and foremost to the court as well as to his or her learned colleague who will be appearing on the other side of the divide in our advesorial system of justice delivery. The legal practitioner's attention to his or her client's case is equally important and must be accorded the weight which it deserves. It should not, however, be allowed to cloud his or her sense of judgment to a point where he or she refuses to see obvious matters which are not favourable to his or her client's case. He should, as *in casu*, make concessions where such are due and, at the same time, advance the cause of those whom he or she represents in a lawsuit or a criminal trial in an effective manner. [(See in this regard *Kawondera* v *Mandebvu*, 2006 (1) ZLR 110 (S))].

There is no doubt that the appellant is a first offender who pleaded guilty to the offence. The question which begs the answer is whether or not he should have been sentenced to community service on the basis of the mentioned mitigatory factors.

It has already been accepted that the assault which the appellant perpetrated on the complainant was without any provocation on the latter's part. The appellant used clenched fists and a bottle to assault his victim. The medical report which the state produced stated that severe force was applied and the injuries which the complainant suffered were serious. The

doctor who examined the complainant remained of the view that the possibility of permanent injuries was likely. He also noted that the complainant suffered internal injuries in addition to those which were visible to the naked eye.

The trial court remained alive to the severity of the injuries which the complainant sustained and the need on its part to pass a deterrent sentence on the appellant. The appellant did not tender any apology directly or indirectly to the complainant for his wayward behaviour. He did not meet the complainant's medical bills as he should have done. His moral turpitude was very high. The conduct which he exhibited when he committed the offence cannot be condoned let alone accepted.

The arguments which the appellant raised were not relevant to the appeal. Case authorities which he cited had no bearing on the appeal which he had placed before the court.

The respondent's submissions, on the other hand, were well made and were supported with relevant case authorities. Its aim which it successfully established was to persuade the court not to interfere with the sentence.

The court was satisfied that the appellant's aggravatory features far outweighed his mitigatory features. He perpetrated a brutal assault on the complainant. He was properly sentenced therefor. That is so as the appellant's conduct was not only vicious but also not warranted. The trial court did not, in our view, misdirect itself at all. The sentence which it imposed does not induce a sense of shock in us. It was properly considered as well as passed.

The court is satisfied that the appellant did not discharge the *onus* which rested upon him. He did not show, on a balance of probabilities, that the sentence which the court *a quo* imposed should be disturbed. The appeal is, in the result, dismissed.

CHATUKUTAJ agrees _____

Chigadza & Associates, appellant's legal practitioners
Criminal Division of the Attorney-General, respondent's legal practitioners