

TAFARA JUSTICE KENIAS
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE & MANGOTA JJ
HARARE, 4 and 10 October 2014

Criminal Appeal

M. Ndebele, for the appellant
E. Mavuto, for the State

MANGOTA J: The appellant was convicted, on his own plea, of assault as defined in s 89(1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The State allegations were that, on 1 January 2014 and at Chesvingo Drive which is in First Street, Masvingo, the appellant who had a misunderstanding with one Josphat Gwekwe, head-butted the latter person on the mouth causing him to lose two teeth in the process. The State cited Josphat Gwekwe as the complainant.

The appellant was sentenced to 12 months imprisonment 3 months of which were suspended for 5 years on the usual condition of future good conduct. The appellant was, accordingly, slapped with an effective 9 months prison term. His appeal was against that sentence. He contended that the sentence was not only excessive but it also induced a sense of shock.

The appellant stated in his grounds of appeal as amplified by his Heads of Argument that a non-custodial sentence was called for in the circumstance of the present case. The respondent agreed with the appellant on that aspect of the matter. In his response to the Grounds of Appeal, the trial magistrate conceded that the appellant was a youthful, first offender who should have been sentenced to either a fine or to community service. The court agrees with the views of the parties and the court *a quo*. It is satisfied that the trial court paid lip service to the appellant's mitigatory features which, to all intents and purposes, far

outweighed the aggravating factors of this case. The appellant was 19 years old when he committed the offence. He pleaded guilty and he, therefore, did not waste the court's time or the State's resources. No medical evidence was led to establish the extent of the complainant's injury at the hands of the appellant. What was taken as common cause was that the complainant lost two teeth as a result of the assault. That fact, on its own, is not conclusive evidence which supports the proposition that the assault was severe. The two teeth which the complainant lost may, or may not, have been embedded firmly in the complainant's gums when the latter lost them in the course of the assault. It is, in other words, not certain if the assault was the effective cause of the complainant losing his teeth. The age of the appellant as read with the fact that he pleaded guilty to the charge and other matters which favour him convince the court that this is a proper case for a fine coupled with a wholly suspended term of imprisonment. The appellant, in the court's view, must be deterred from such conduct as he exhibited in the present matter.

The court's attention has been drawn to the fact that the appellant served a two-week prison term before he was admitted to bail pending this appeal. The court will, accordingly, sentence him to a fine for this offence. It will impose an additional sentence of imprisonment which will be suspended for a period of time. That sentence will, in the court's view, fit both the crime which the appellant committed and the appellant himself as an offender.

The court has considered all the circumstances of this case. It is satisfied that the appellant proved, on a balance of probabilities, his case against the respondent.

It is, accordingly, ordered as follows:-

- (1) that the appeal against sentence be and is hereby upheld
- (2) that the sentence which the court *a quo* imposed upon the appellant be and is hereby set aside and substituted with the following:-

The appellant is sentenced to \$150-00 or in default of payment 15 days imprisonment. In addition the appellant is sentenced to 3 months imprisonment the whole of which is suspended for 3 years on condition the appellant does not, within that period, commit any offence of which assault is an element and for which he is sentenced to imprisonment without the option of a fine.

As the appellant has already served the alternative sentence, the appellant will not be required to pay the fine of \$150-00.

BERE J agrees:.....

Mutendi and Shumba, Appellant's Legal Practitioners
National Prosecuting Authority, State's Legal Practitioners