THE STATE
versus
KUDAKWASHE JASINA
and
MUNYARADZI DANFORD SANYIKA

HIGH COURT OF ZIMBABWE
MUTEVEDZI & MUNGWARI JJ
HARARE, 23 November 2022

Criminal Review

MUTEVEDZI J: The above two records of proceedings were forwarded to me by the scrutinizing regional magistrate for review. The two accused persons were separately convicted of theft by a magistrate at Marondera. They were sentenced as will be shown below. The convictions were proper and raise no issues. The records of proceedings were send for scrutiny as required by law. The regional magistrate noted irregularities in regards the sentences passed. She raised alarm and directed that the proceedings be placed before a judge for review. Her comments were that she had noted in the case of *Munyaradzi Danford Sanyika* that part of the sentence read:

> "Further accused should restitute *Nhamo Sithole* of 1 Hanga Street, Rujeko the sum of $5 400 through the Clerk of Court Marondera. Time to pay 3 June 2022."

The same comment was made in relation to the proceedings in the case of *Kudakwashe Jasina* that.

> "Accused to restitute *Godwin Mudzingwa* of 515 Nyameni Township Macheke the sum of $9 600. Time to pay 5 June 2022."

What is clear from the sentences imposed in the two cases is that both the provincial magistrate and the regional magistrate at Marondera must urgently meet the trial magistrate. She is mistaken to think that payment of restitution to a complainant is a sentence. It is not. The sentences which the Magistrates Court can impose are specified in Part XVIII of the Criminal Procedure and Evidence Act [*Chapter 9:07]* in Part B thereof. They are:

Imprisonment, fine and community service.

Although they have numerous variations they remain the major direct forms of punishment available. There is under segment C of the same Part XVIII provisions relating to the punishment of juvenile offenders. The most dominant form of punishment for juveniles was corporal punishment until judicial corporal punishment was outlawed. See *State* v *Willard Chikumba* CCZ 10/19

Restitution is not a sentence. It is a condition which a court can resort to in suspension of sentences. That position is made apparent by the fact that restitution is provided for outside the sections which deal with punishments. It falls under Part XIX of the code under the heading "**compensation and restitution**." That fact emphasizes the reality that restitution is synonymous with compensation. As MAFUSIRE J put it in *S* v *Maxwell Mutetwa* HH 374/15, the argument that compensation is not restitution is "a distinction without a difference". Whilst there are two distinct methods of awarding restitution, what is undoubted is that restitution which ever method a court chooses to use is not a sentence. The first method is in terms of s 358(2) (b) as read with subsection (3) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07]*. It states that a court which has convicted a person of an offence other than an offence specified in the 8th Schedule, may suspend the operation of the whole or portion of the sentence for a period not exceeding five years on condition the accused pays compensation for damage or pecuniary loss caused by the offence.

As is clear from that provision, restitution is not a sentence but a condition of suspension of sentence. It needs no explanation therefore that if it is a condition of suspension of sentence, it cannot be awarded directly like the trial magistrates did in these cases. It must be preceded by the sentence which is suspended. If follows that if the restitution in these cases was awarded pursuant to s 358(2) (b), the awards are incompetent for want of compliance with that section.

The second method for awarding restitution is provided for under Part XIX of the code. It is also found outside the provisions relating to punishments. It is titled "Compensation and Restitution." That again serves to show that it is not envisaged to operate as a criminal penalty but as a civil award. By making the award, the court will be exercising a special form of civil jurisdiction. The award is not conditional upon the suspension of a

sentence. It can be awarded directly like the trial magistrates did in these cases. The catch however is that both trial magistrates cannot purport to have resorted to Part XIX because s368 of the CP&E A prescribes that:

> (1) "A court shall not make an award in terms of this part unless the injured part or the prosecutor acting on behalf of the injured part applies for such an award or order."

There is no indication in the record of proceedings that such an application was made or that the order was made in terms of Part XIX. In any case, it would have been incompetent for the trial courts to make such an order in the absence of that application.

It is against the above omissions that I am unable to certify the sentences in both cases as being in accordance with real and substantial justice. I therefore order that:

1) The sentence imposed in the case of *S v Kudakwashe Jasina* on CRB No. 556/22 be and is hereby set aside
2) The case is remitted to the trial magistrate for her to recall the accused and sentence him afresh taking into account the guidelines given herein
3) The sentence imposed in the case of *S v Munyaradzi Denford Sanyika* on CRB No. 543/22 be and sis hereby set aside
4) The case is remitted back to the trial magistrate to recall the accused and sentence him afresh taking into account the guidelines given in this judgment.

MUTEVEDZI J ……..

MUNGWARI J ……..Agrees