WELLINGTON MUCHIRAHONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 17 and 1 April 2021

Criminal Appeal

J Fusire, for the appellant
Ms *T. L Katsiru*, for the state

MWAYERA J: On 18 September 2020 the appellant was convicted of the offence of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was duly sentenced to 12 months imprisonment of which 3 months imprisonment were suspended for 5 years on condition the appellant does not commit any offence involving assault for which he is sentenced to imprisonment without the option of a fine. Effective 9 months imprisonment. His co-accused both minors both had passing of sentence postponed. Dissatisfied with the sentence only the appellant lodged the present appeal with this court. The appellant raised 2 pronged grounds of appeal which can be summarised as follows:

1. That the court *a quo* erred by imposing an unduly harsh and excessive sentence considering the mitigatory circumstances.
2. That the court *a quo* erred by holding that a custodial sentence was ideal sentence when community service or a fine would have been appropriate.

The brief facts of the matter are as follows: the accused is an uncle to the complainant one Lewis Muchirahondo. The complainant at the time of the commission of the offence was 18 and mentally handicapped. The complainant ordered the accused to sit down in the open ground. The accused then proceeded to fetch a bucket of boiling water. With the help of his co-accused the accused had the complainant pinned down and he poured the boiling water all over the complaint's body. The complainant was further subjected to assault by switches. As a result of the burns and assault the complainant sustained injuries, bruises and boils on the neck, shoulder, stomach, back and genitalia. The matter was reported to the police and complainant was medically examined. The medical report which was tendered as an exhibit

in the court *a quo* revealed that the complainant sustained ±30% burns on the face, trunk and back. The injuries were described as serious and force used also described as severe.

In the reasons for sentence it is apparent the trial court assessed the circumstances of the matter, mitigatory and aggravatory factors. That the court ought to match the offence to the offender is evident from the reasoning and manner of sentencing. The juvenile offenders' blameworthiness was held to be lower than that of the appellant. In fact the trial court was of the view that the juveniles were working under instructions from the appellant an adult who fetched and poured boiling water. The trial court was alive to the fact that the appellant is a first offender and reflected that by suspending a portion of the prison term on conditions of good behaviour. A close look at the reasons for sentence reveals that the trial court considered the option of a fine and community service and held that such options were not appropriate. This is considering the circumstances of the seriousness of physical assault by a gang against a youthful 18 year old and vulnerable mentally challenged boy. The court *a quo* ruled that such sentences of a fine or community service would minimise and trivialise an otherwise serious physical abuse matter. I am alive to the fact that the penalty provisions s 89 (1) provides for the option of a fine. It states:

> "Shall be guilty of assault and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both."

However, it is settled that assessment of sentence is pre-eminently the discretion of the trial court. The question is clearly not whether or not the sentence is wrong both whether or not the sentencing discretion was properly and judiciously exercised. See *S v Mungwende* 1991 (2) ZLR 66 and also *Muhomba v S* SC 57/13, the Supreme Court once more commented on sentencing discretion and stresses the point as follows:

> "… it has been said time and time again that sentencing is a matter for the exercise of the discretion of the trial court."

The appellate court will not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as the trial court. There has to be evidence of serious misdirection in assessment of sentence by the trial court for the appellate court to interfere with sentence and assess it afresh. See also *S v Sidat* 1997 (1) ZLR 487. It is clear from the reasons for sentence that the trial court engaged in a well-reasoned thought process and meted a separate sentence for the appellant and then the 2 juveniles. Considering that sentence is a discretionary matter the appellate court should not lightly interfere with the sentence of the trial court in a manner that denotes taking away the

sentencing discretion. That would be tantamount to suggesting that if the appellate court was the trial court it would have sentenced differently. In the absence of the improper exercise of sentencing discretion and absence of misdirection then there is no justification in interfering with the sentence of the trial court. In the case if *Antony Jacob Gondo v S* HH 136/00 misdirection is defined to mean any error committed by the court in determining or applying facts for assessing an appropriate sentence. If I am to go along with the same definition which I do, certainly I cannot say considering the facts of the matter at hand, that the trial court misdirected itself. The trial court was faced with an adult man, a father and also uncle to the complainant who was inhumane to a mentally challenged 18 year old boy who looked up to him and other relatives for care and protection. The complainant simply asked accused to sit down and that triggered fetching a bucket of boiling water to pour and injure the complainant. The appellant exhibited a high degree of cruelity and wickedness in the manner he assaulted the complainant. The trial court cannot be said to have improperly assessed the facts to come up with an appropriate sentence. As pointed out in *S v Mundowa* 1998 (2) ZLR 392 this court held that a superior court will not lightly interfere with a court's sentence unless the discretion for the sentence was not judiciously exercised.

It is correct the sentence of 12 months falls in the grid of community service but it does not follow that every case in which sentence falls within the community service grid, community service must be imposed. What is important is that the court considered community service and ruled it out as inappropriate as it would not only trivialise the offence but undermine any otherwise noble form of punishment meant for minor offences. Assault is minor if it is not grave in nature and if it does not cause severe and permanent injuries. In the present case the nature of assault and extend of injuries disqualified the matter to be considered for community service. It is assault in aggravated circumstances. In the case of *S v Tafadzwa Ndanga* HH 407/18 CHITAPI J commenting on sentence for assault made pertinent remarks when he stated:

> "…a court when sentencing should consider the provisions of s 89 (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which stipulate that when courts are considering sentencing an accused who will be convicted of assault they consider the age of the complainant. If a weapon was used, the injuries that the complainant sustained and if the person who committed the assault was in a place of authority over the complainant."

In this case complainant an 18 year old mentally challenged youth was viciously assaulted by an uncle to whom he would look up for protection. Further in a dehumanising

manner after the assault the complainant was not immediately taken to hospital but in an unorthodox manner had peanut butter spread all over the body on the injuries.

The sentence of 12 months with 3 months suspended on conditions of good behaviour in the circumstances is not severe neither does it induce a sense of shock. This is a case where the option of a fine would not qualify in matching the offence to the offender. Equally this is a case in which the general rule for imposition of community service would not qualify. (See *Elizabeth Tanderayi v Mudyiradima* HB 100/12), the court held that the rule that community service had to be considered for cases where imprisonment does not exceed 24 months is a general rule. It should not be regarded as an absolute rule. There are exceptions to this rule. It is apparent from circumstances of the present case that it qualifies under the exception. I must however, comment that the trial magistrate considered community service and discarded it, with reasons. What is not absolute is the imposition of community service simply because the sentence falls within the grid. The trial court still has the sentencing discretion and it is within its parameters to then give reasons for not imposing community service as it did in this case.

A holistic reading of the reasons for sentence and circumstances of the matter shows a properly assessed sentence. The court considered all factors inclusive of the circumstances of the offence, mitigatory and aggravatory factors, the nature of the offence and the offender. The court then weighed the sentencing options and with reasons imposed the appropriate sentence.

The grounds of appeal raised cannot be sustained since the sentencing discretion was properly exercised. The appeal has no merit.

Accordingly the appeal is dismissed.

MUZENDA J agrees _____

Masunga & Associates, appellant's legal practitioner
National Prosecuting Authority, respondent's legal practitioners