

MATHEW MASANGO
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 4 SEPTEMBER 2014 & 27 SEPTEMBER 2017

Criminal Appeal

T. Kabasa for appellant
T. Mapfuwa for respondent

BERE J: The appellant in this case was charged and convicted of assault as defined in section 89 (1) (a) of the Criminal Law Codification and Reform) Act [Chapter 9:23]. Upon his conviction he was sentenced to 12 months imprisonment of which 4 months imprisonment were suspended for 5 years on the usual condition of future good conduct.

Initially the appellant had noted an appeal against both conviction and sentence but when the matter was subsequently argued in court the appeal against conviction was abandoned leaving the court to deal with the issue of sentence only which I will now focus on in this case.

Both counsels were agreed and indeed it was common cause that the court *a quo* had omitted to provide reasons for sentence and we were urged to use our review powers in terms of section 29 (2) (b) (iii) of the High Court Act [Chapter 7:09].

It is elementary knowledge that the Magistrates' Court is a court of record¹. It was therefore a serious omission on the part of the court *a quo* not to record reasons for sentence and in the absence of such reasons, the sentence had to be revisited by the court sitting as a review court.

The facts of this case which led to the charge and conviction against the appellant stemmed from a misunderstanding between the appellant and the complainant over the latter's cattle which had strayed into the appellant's field.

Infuriated by the complainant the appellant attacked and assaulted the complainant with a log on the mouth and at the same time letting his dogs on the complainant. The appellant also used his catapult handle to assault the complainant.

On examination, the doctor noted that the complainant had sustained multiple lacerations on both legs and that he had lost one central incisor tooth due to the assault. The doctor also administered anti-rabies injection on the complainant. The conclusion was that the injuries were serious and that there was the possibility of permanent injuries to the complainant.

There can be no doubt that this was a serious assault as evidenced by the medical report. The fact that the complainant's cattle had strayed into the appellant's fields must obviously operate to mitigate the conduct of the appellant.

Under normal circumstances this matter would have been remitted to the court *a quo* to deal with the sentence afresh. However, in view of the time lapse in this case, this court is not seriously handicapped as to be unable to consider an appropriate sentence.

¹ Section 5 of Magistrates' Court Chapter 7:10

In the case of *S v Mugwenhi and Another*² EBRAHIM JA (as he then was) had to deal with a gang assault case where the complainant had sustained “a cut on the forehead above the left eye, subconjunctival haemorrhage and contusions on the right elbow and right angle.”

The court imposed a fine of \$250 coupled with two months imprisonment wholly suspended on future good conduct.

The approach by EBRAHIM JA was subsequently followed by ROBINSON J (as he then was) in the later case of *Timothy Chirove and 3 Ors v The State*³ which was also a gang assault case where the complainant had sustained the following injuries:

- “(1) Laceration 1cm right scalp on the head
- (2) Multiple bruises at the back; and
- (3) Fracture on the right ulna”

Taking into account the circumstances of this case, the sentence of the court *a quo* is set aside and substituted by the following sentence:

The accused is sentenced to pay a fine of \$300 or in default of payment to 2 months imprisonment. In addition 5 months imprisonment is set aside for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction he shall be sentenced to a term of imprisonment without the option of a fine.

Hungwe J I agree

² 1991 (2) ZLR 66 (SC) at p 70

³ HH-208-91

HH 638 /17
CA 58/13
CRB H 326/12

Messrs Chiwanza & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners