# IN THE HIGH COURT OF SWAZILAND

Case No. 86/2011

In the matter between:-

**COLISILE MKHONTA** **Appellant**

and

**REX** **Respondent**

**Neutral citation:** *Colisile Mkhonta v Rex* (86/11) [2012] SZHC255 (16th November 2012)

**Coram:** HLOPHE J

**For the Appellant:** Mr. S. Khoza

**For the Respondent:** Miss Masuku

**Heard:** 8th October 2012

**Delivered:** 16th November 2012

## JUDGMENT

[1] The Appellant was convicted by the learned Magistrate Ndlela of theft and sentenced to three years imprisonment. No portion of the said sentence was suspended nor was she given an option of a fine.

[2] It is common cause that at the time of her conviction, the Appellant was a first offender. Otherwise the offence or charge for which the accused was convicted and sentenced entailed the theft of goods or items valued at E6 380.00 from the complainant who was her employer. The Appellant had pleaded guilty to the charges, hence this appeal being confined only against the sentence imposed.

[3] The Appellant's appeal was based on the following grounds:-

1. That the *court a quo* erred both in fact and in law by sentencing the Appellant to a custodial sentence when in fact she is a first offender.

2. That the *court a quo* erred in law by convicting (sic sentencing?) the Appellant to a custodial sentence when the offence with which she was charged with had a fine (option).

3. That the *court a quo* erred in fact by not taking into account the fact that the Appellant is a first offender and had pleaded guilty to the offence.

4. That the sentence is too severe in the circumstances and induces a sense of shock.

[4] When trial commenced, it is not in dispute that the Appellant, then the accused, pleaded guilty to the charges preferred against her. It is for this reason that I regard what appears on the face of the Notice of Appeal to the effect or suggesting that the Appellant was also appealing against a conviction to be a mistake. I am fortified in my belief in this regard by the fact that the Appellant in his heads of argument only dealt with the sentence imposed and did not challenge the conviction at all. This was also confirmed to be the position by Appellant's counsel during the hearing of the appeal.

[5] The background to the appeal is that; the Appellant, then the accused, stole from the complainant, her employer, goods or items belonging to the latter totaling the sum of E6 380-00. Some of the goods were recovered whilst others were not. Otherwise the Appellant was up to the day she was arrested and charged with the theft of the complainant's items aforesaid, employed by the latter as a maid.

[6] As indicated above the Appellant pleaded guilty to committing the offence concerned. After considering argument as concerned mitigation and aggravation of sentence, the *court a quo* sentenced the Appellant to three years imprisonment, with neither a portion thereof being suspended nor an option of a fine being granted.

[7] It was in response to the said sentence that the Appellant lodged the appeal to this court on the grounds mentioned above.

[8] Sentencing is a matter preserved for the trial court's discretion. The law is settled that the appeal court will interfere therewith only in very limited instances. This will be where the trial court is shown as not having exercised its discretion judicially or where it is shown that the sentence imposed is so severe that it induces a sense of shock.

[9] A discretion would not be judicially or juciously exercised by the court, where its exercise is vitiated by an irregularity or misdirection. On the other hand a sentence induces a sense of shock where it is so severe that the appeal court would not have meted out the same sentence but would have meted out a lesser one. The case of ***Ndusha Themba Zwane vs Rex 1970 - 76 SLRR 106 at 108*** and the unreported case of ***John Shilombo v Rex case no. 65/2011*** are instructive in this regard.

[10] In ***S v De Jager and Another 1965 (2) SA 616 at 629*** Holmes JA put the position in the following words;

> "*It is the trial court which has the discretion and a Court of Appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say there is a striking disparity between the sentence passed and that which the Court of Appeal would have imposed*".

[11] What sentence the Court of Appeal would have imposed is determined by the Court of Appeal considering all the relevant circumstances and the

nature of the offence and the accused person and then deciding what it considers to be an appropriate sentence. If the sentence it finds appropriate has a serious disparity with that imposed by the *court a quo*, then the initial sentence induces a sense of shock and should be interfered with. This was put as follows by Rumpff JA in ***S v Anderson 1964 (3) SA 494 (A) at page 495 G – H***:-

> "*The Court of Appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of Appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with*".

[12] It was submitted on behalf of the accused that as a first offender she should not have been sentenced to a custodial sentence. It was contended as well, that the accused should not have been sentenced to imprisonment when considering that the offence of which she was convicted had the option of a fine. The *court a quo*, it was further argued, should have considered the fact that the accused was a first offender who had pleaded guilty and therefore should not have given him a custodial sentence.

[13] It was argued on behalf of the crown that the sentencing of the Appellant, the then accused, to a custodial sentence was unavoidable when considering that she had stolen from her employer and had violated the trust reposed on her by the said employer. It was contended by the crown this is the position in this jurisdiction as concerns the sentencing

of an accused person convicted of stealing from his or her employer. Accordingly I was referred to the cases of ***R v Mandla Homeboy Dlamini 1982 - 86 (1) SLR 391*** as well as that of ***Rex v Sipho Magalela Nkomonde criminal case no. 71/2008***.

[14] I agree with Miss Masuku for the crown that the position is now settled in this jurisdiction that an employee who steals from her employer is punishable through the imposition of a custodial sentence as a mark of disapproval by the court to the violation of the trust reposed on the accused by the employer.

[15] This position was articulated in the following words in ***R v Mandla Homeboy Dlamini 1982 -1986 (1) SLR 391 B – C***.

> "*Theft by an employee has to be regarded in a very serious light as it involves a breach of the trust reposed in the employee by his employer…In* ***S V Mphofu 1985 (4) SA 322****, Reynolds J cited, at 325 C – D, the following passage from Ashworth sentencing and Penal Policy at 194*: "*Positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very characteristics. Society operates in certain spheres largely on the basis of trust, and one of the burdens of a position of trust is an undertaking of incorruptibility. The individual who puts himself forward as trustworthy, is trusted by the others and if he then takes advantage of this power for his own personal ends, he can be said to offend in two ways; not only does he commit the crime charged, (be it theft, false accounting or sexual offence), but in addition he breaches the trust placed in him by society and the victims of the particular offence*". *In my respectful opinion this passage sums up the position most aptly and contain the essential reason why the courts will*

*normally feel bound to pass a sentence of imprisonment and in some cases very long sentences of imprisonment*."

[16] Whilst I accept the equally well established principle of our law to the effect that a first offender would not ordinarily be sentenced to a custodial term, there are instances where the latter principle should in my view give way to the principle that theft from an employer should be punished through a custodial sentence irrespective of the offender committing such an offence for the first time in view of the violated trust in such a case.

[17] I have considered what the cases of ***S v Chirara, S v Hwengwa and others, S v Pisaunga and S v Muzonda and others 1990 (2) SACR 356 (ZH)***, say which is to emphasize that a young offender should, unless it is an unusual case, be given a fully or partially suspended sentence as opposed to a full term custodial sentence. I am however convinced that it should not be treated as a rule of thumb that a first offender should never be subjected to imprisonment. Indeed the above case does not rule out this possibility when it puts the position as follows:-

> "*It has to be stressed that there is no rule of practice in Zimbabwe requiring that part or all of a custodial sentence passed on a young offender should always be suspended, but much more often than not, I would suggest, such a form of sentence is both desirable and appropriate. I would even go so far as to say that it would be a most unusual case where such measures would not be adhered to*."

[18] I agree that in the present case the Appellant is not only a first offender but is also a young one. This being the case I am of the view that this

should find expression in the sentence to be considered appropriate by this court. This of course must be within reason and must be in appreciation of the fact that the case against the Appellant is an unusual one in as much as it concerns theft from an employer which as stated above has the effect of violating the trust reposed on such an employee. This it seems to me, emphasises the necessary deterrence by other would be offenders.

[19] Going back to the test whether the discretion entailed in the sentence was judicially exercised. I am convinced that there was no irregularity or misdirection in its imposition. This leaves me with a need to determine whether it induces a sense of shock. I am of the view that the sentence that this court would have imposed would have had some aspects of it suspended even if it was not necessarily too severe in its original form, given the age of the offender and her record. It seems to me that the difference between the sentence imposed by the *court a quo* and that which this court would have imposed is material in its effect even if it was for the same length of time. The difference it seems to me would have been on the part of such a sentence being suspended as I agree it cannot be suspended in whole given its being a theft from an employer.

[20] Having considered all the circumstances of the matter including the submissions by both counsel I have come to the conclusion that the Appellant's appeal succeeds to the extent expressed in the following order:-

20.1 The sentence imposed by the learned Magistrate be and is hereby varied to read as follows:-

20.1.1 The accused be and is hereby sentenced to three years imprisonment.

20.1.2 Half of the said sentence is suspended for a period of three years on condition she is not convicted of an offence in which dishonesty is an element.

20.1.3 Computation of the accused's sentence shall commence from the date of her arrest.

**Delivered in open Court on this the ……day of November 2012.**

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**N. J. HLOPHE**

**JUDGE**