IN THE SUPREME COURT OF ESWATINI

JUDGMENT

CRIMINAL APPEAL CASE NO.20/18

HELD AT MBABANE

In the matter between:

MZWANDILE KHETHABAKHE SIYAYA **Appellant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Neutral Citation: *Mzwandile Khethabakhe Siyaya vs The Director of Public Prosecutions - [20/208]SZSC 64 (9th December 2019).*

Coram: M.C.B. MAPHALALA, CJ,

S. K. MATSEBULA, AJA,

J. MAVUSO, AJA

Date Heard: **18th July 2019**

Date delivered: **9th December 2019**

SUMMARY *Criminal Law - Unlawful possession of firearm under the Arms And Ammunition Act 1964 as and contravention of the Immigration Act,1982 - Accused pleads guilty and found guilty in accordance with his plea sentenced increased from two years to five years with our an option of a fine on appeal against refusal to grant an option of a fine, held that appeal should be allowed and appellant given an option of a fine – sentences were ordered to run concurrently from date of arrest. Appeal allowed.*

JUDGMENT

J. Mavuso AJA

[1] Sometime on or about the 18th July 2017 in the Shiselweni region accused a foreign national, was apprehended by members of the eSwatini Royal Police, for being in possession of an unlicensed firearm and ammunition as well as for being in the country illegally.

[2] He was charged and faced three counts under the Arms and Ammunition Act(see paragraph 9 of this judgment) and one count under the Immigration Act 17 of 1982. The charges were as follows:-

(i) On the first count it was alleged that he unlawfully possessed a 9 mm Colt Pistol.

(ii) On the second count it was stated that he unlawfully possessed eighteen live rounds of 9 mm ammunition.

(iii) On the third count he was allegedly charged for being in unlawful possession of a firearm magazine.

(iv) On the fourth and last count he was charged under section 14 (2) of the Immigration Act of 1982, for entering and remaining in the country unlawfully.

[3] Appellant pleaded guilty to all the counts. On count one, he was sentenced to two years imprisonment without an option of a fine. On count two he was sentenced to six (6) months imprisonment without an option of a fine. On count three, he was sentenced to two years imprisonment with an option to pay a fine of E2000.00. On the fourth count, involving the Immigration Act, he was sentenced to five months imprisonment with an option to pay a fine of E500.00.

[4] Appellant was dissatisfied with the sentences imposed by the Hluti Magistrate's Court and proceeded to note an appeal to the High Court of eSwatini, "the court *a quo.*"

[5] The court *a quo,* having heard Appellant's appeal upheld some of his grounds. With respect to count one, it *mero motu* increased the sentence from two (2) years to five years imprisonment without the option of a fine thus rendering his stay in prison even longer.

[6] In refusing to grant Appellant the option of a fine, the court *a quo* opined that:

> *"the trial court did not consider it to be in the public interest that the Appellant, being a foreigner, found in possession of a dangerous weapon should be allowed to pay a fine and released from custody. I therefore do not find anything wrong with the trial Court imposing a sentences without the option of a fine."*

Prior to the above, the court *a quo* at paragraph (8) of its judgment stated that it was:

> **"...not aware of any legal requirement that once a prescribed sentence provides for the option of a fine, the court is compelled to give such option,"**

It went on to state that:-

> **"The trial Court enjoys a wide discretion to determine the type and severity of sentence on a case by case basis. This means that a trial Court has a discretion to decide to impose only a custodial sentence or provide for the option to pay a fine where such is allowed by a statute."**

[7] (a) In support of its position as reflected in paragraph (5) above and at paragraph (6) of its judgment the court, despite numerous local authorities cited hereunder, on the local position, cited and relied on the Namibian case of the **State v Lukas (CC 15 – 2013) [2015] NHCMD 186** as legal authority for the position it took on the matter.

(b)The position taken by Damasel JP in the Lukas case *Supra,* adopted by the court *a quo* was that where a statute's penal provision provides for an option of a fine and for imprisonment, it is competent for the Court to impose a sentence of imprisonment without the option of a fine, much against the local authorities hereunder cited which provide for "imprisonment in default of payment of a fine." as a general rule.

[8] (i) In order to fully comprehend, Appellant's grievance at being denied the option of a fine, it is necessary to also consider the sentence and reason therefore given by the Magistrate of the trial court, in the first instance.

(ii) In trying to reach an appropriate sentence, the trial court, stated as follows:

> **"The Court has considered your statement in mitigation of sentence. Also I have considered in your favour that you are a first offender and relatively a young man of 36 years. The interest of society as well as your personal circumstances have been considered in passing out sentence."**

The trial Court went on further to state as follows:-

"In my view, the interest of society in this case are that you go to jail. However I do not believe a long period of imprisonment is called for in your case. I will issue a sentence that will be blended with mercy. You were co-operative throughout your arrest and during trial. You showed remorse but given the nature of the offence I cannot treat you with soft gloves..."

[9] (i) What is clear from the above is that the Appellant, as an accused before the trial Magistrate's Court, appeared as a first offender.

(ii) What is also noticeable upon reading of the trial Magistrate's Court judgment denying accused the option of a fine is that no reasons where advanced, for the refusal to grant him the option of a fine, notwithstanding the clear provisions of **Section 14 of the Arms and Ammunition Act, 1964**, which provides as follows:-

" (i) Subject to section 17 (1) no person shall unlawfully import, purchase or otherwise acquire or be in possession of an arm of war.

(1) Any person who contravenes this section shall be guilty of an offence and liable on conviction:-

a) to a term of imprisonment not less than (5) years or to a fine not less than E5000.00 in respect of a first offence;

b) to a term of imprisonment not less than ten years or to a fine not less than E10 000.00 in respect of a second or subsequent offence, but in either case no such period of imprisonment shall exceed twenty years or such fine shall exceed E20 000.00."

[10] As a result of the unfavourable attitude of the court *a quo,* towards Appellant's quest for an option of a fine, Appellant after having followed due process of the law, lodged an appeal before this Court.

[11] Appellants grounds of appeal to this Court are as follows:

(i) *That the learned judge* a quo *erred and grossly misdirected himself in law and made a precedent in holding that a trial judge may refuse to grant a fine even if a statute authorises the imposition of same as an alternative to imprisonment.*

(ii) *That the learned judge* a quo *erred in law and in fact did not give - a guide as to the circumstances under which a trial court may refuse to give a fine and gave the impression that the choice is guess work and unguided by any legal principle.*

(iii) *That the learned judge* a quo *erred in law and in fact, in not stating the reasons why, he opted for the most drastic sentence on the facts of the case before him, applicable, specifically to the Appellant, but made a general observation of his power to do so and opted to exercise the power to deny Appellant, the fine just because he has power to do so and Appellant was a foreigner. He did not state if there were any aggravating factors justifying the drastic sentences against Appellant. There was also no evidence that the fire arm had been used in the commission of any crime either in this country or elsewhere.*

(iv) *That the learned judge* a quo *erred in law and in fact in denying Appellant an option of a fine on the newly imposed sentences of five years imprisonment, in as much as Appellant was a first offender and had pleaded guilty to the charge of possession of a firearm. There was no evidence of previous convictions against Appellant neither from eSwatini and from South African courts. The learned judge* a quo *failed to apply the intention and spirit of Section 138 of the Criminal Procedure and Evidence Act of 1938 which does not encourage the denial of a fine, on a plea of guilty.*

(v) *That the court* a quo *erred in increasing the sentence on count one* mero mutu *and without a justification on the evidence and that there are aggravating factors justifying an increase of the sentence."*

[12] The court notes that the grounds of appeal are tautological and without any injustice being occasioned to Appellant's case, can best be summarized into three grounds of appeal as follows, :that:-

(i) The court *a quo* erred in law by not granting Appellant an option to pay a fine.

(ii) The Learned Judge *a quo* failed to apply the intention and spirit of section 138 of the Criminal Procedure and Evidence Act of 1938 which does not encourage the denial of a fine, on a plea of guilty.

(iii) There was no legal justification for the court *a quo* to increase the sentence on count one from two years to five years as the honourable court did.

[13] Section 14 of the Arms and Ammunition Act 1964 stipulates a mandatory minimum sentence to be observed by the Court in sentencing. In the case of imprisonment, it stipulates a mandatory minimum sentence of five (5) years. In the case of an option to pay a fine it stipulates a mandatory minimum fine of E5000.00 in the case of a first offender.

[14] The principles governing sentencing under the Arms and Ammunition Act have been set out in the cases **of R v Masseme, Tom 1987 – 1995** SLR Vol 3 Page 72 (which this Court cites with approval) and in the Supreme Court case of **Vika Velabo Dlamini v The King** Criminal Appeal Case No, 1920/11.

[15] In **R v Masseme Tom** (Supra) Rooney J (as he then was) commenting on section 14 (2) of the Arms and Ammunition Act, stated as follows:-

"Many Magistrates appear to be under the impression that when the minimum fine of E5000.00 is imposed for the possession of a weapon under the Act, it is likewise obligatory to stipulate a five (5) year sentence in default of payment. The Act does not so provide. The duration of the sentence in default is a matter within the discretion of the Court passing the sentence, and the only consideration in determining the length of the sentence in default is securing the payment of the fine."

[16] (i) To help understand the concept of ordering the payment of a fine first, where a statutory provision provides for the payment of same or imprisonment is the case of **Vika VelaboDlamini v The King, Criminal Appeal Case No, 19/2011 (Supreme Court) at paragraph 29 where the court stated that-**

"As a general rule in this jurisdiction, first offenders should normally be afforded the opportunity to pay a fine... The fine imposed must also be within the capacity of the offender to pay. This is a salutary rule aimed at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offenders are recidivists"

There are also earlier local Court decisions in support of the above.

[17] Where there is a deviation from the general rule stated in the Vika Velabo Dlamini case (*Supra)* it is important to give reasons therefore. In the case of **Mokela v The State [2011]** ZASCA where Bosiele JA, at paragraph 12 of the court's unanimous judgment, on the importance of judicial officers giving reasons for their decisions, stated as follows:

"This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reason why a Court has taken a particular decision,

particularly where such a decision has adverse consequences for such an accused person."

The Court went on further to state that-

"The giving of reasons becomes even more critical if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it unjudicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reason therefore"

Similar to the above case, is the case of **R v Phiri 1982 – 1986** SLR at page 509, cited with approval in the matter of **Philile Dlamini and Another/ The Senior Magistrate Criminal Appeal Case No. 4345/2007** (High Court) at Paragraph 13, his Lordship Hannah CJ (as he then was) stated that;

"depending on the circumstances of each case, a Court would still be perfectly within its sentencing powers in imposing the maximum sentence stipulated in the Act or even ordering a first offender to undergo to a custodial sentence without the option of paying a fine. <u>There must be compelling reasons for doing so and the trial Court as noted above must set out these reasons".</u> (the underling is mine for emphasis).

Under normal circumstances, where the accused is a first offender under the Act and there is no need to deviate from the general rule as stated in the case of **Vika Velabo Dlamini** (*Supra),* the Court may in appropriate circumstances use its discretion to suspend a portion of the sentence in terms of Section 313 of the Criminal Procedure and Evidence Act Section 313 (2) of the Criminal Procedure and Evidence Act states that:

"if a person is convicted before the High Court or any Magistrate's Court of any offence other than one specified in the Third Schedule, it may pass sentence, but order that the operation of the whole or any part of such sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with subsection (4) and (5) respectively".

Section 313 (2) of the Criminal Procedure and Evidence Act, allows the court to order sentences to run concurrently the Court has a discretion to ameliorate any sentence it has issued under this section.

[18] In the case of **Muzikayise Khumalo v Rex** Criminal Appeal Case No, 19/2013 (Supreme Court) delivered on the 30th May 2014 where accused was charged with contravening of Section 11 (2) as read with Section 11 (8) (a) of the Arms and Ammunition Act of 1964 as (amended). In this case accused was sentenced to 5 years imprisonment or to pay E5000-00 fine. What is significant about the aforegoing is that the Supreme Court confirmed the sentences notwithstanding the fact that the firearm in question had also been used to commit a robbery.

[19](i) When the trial Magistrate sentenced the Appellant to 2 years imprisonment with no option of a fine he did not give any reasons for his decision. All that he said was that;

" You have been tried and convicted of very serious offences. This Court wonders what the purpose of you carrying this firearm around was. I also hope no crime was committed before your arrest using the firearm. In my view, the interest of society in this case are that you go to jail. However I do not believe a long period of imprisonment is called for in your case. I will issue a sentence that will be blended with mercy ..."

When the matter came up on appeal before the court *a quo*, the learned Judge had to speculate on the reason why the trial Court Magistrate did not grant Appellant the option of a fine. He opined that-

> **"In *casu* the trial Court did not consider it to be in the public interest that the Appellant being a foreigner, found in possession of a dangerous weapon should be allowed to pay a fine and released from custody. I therefore do not find anything wrong with the trial Court imposing a sentence without the option of a fine."**

The trial Court and the court *a quo* did not give any compelling reasons let along reasons for denying Appellant the option to pay a fine, despite the fact that the penal provisions of the Arms and Ammunition Act 1988 as amended, stipulates a minimum period of imprisonment or a minimum fine and he was also a first offender. In total this Court finds that the court *a quo* erred in law by failing to grant Appellant an option of a fine, and his appeal on this ground is accordingly upheld.

(ii)Appellant's second ground of appeal as per the summarized grounds and more particularly paragraph 4 of his grounds is that;

> **"The Learned Judge *a quo*failed to apply the intention and spirit of section 138 of the Criminal Procedure and Evidence Act of 1938 which does not encourage the denial of a fine on a plea of guilty".**

Section 138 of the Criminal Procedure and Evidence Act of 1938 is headed.

> **"Such prisoners not brought to trial at second session after commitment entitled to discharge from imprisonment".**

The provisions of Section 138 (1) state as follows:-

> **"If a case has been removed for trial elsewhere and the accused is in custody, the Court granting the order of removal shall issue a**

warrant directing his transmission forthwith to the goal of the district to which such case has been removed."

Section 138 (2) states that:-

"The accused shall be brought to trial at the next criminal session of the Court to which the case has been removed, or otherwise shall be discharged from his imprisonment for the offence for which he was transmitted for trial".

The above clearly has no bearing in this appeal as the Appellant has been tried, convicted and sentenced. His primary grievance now is that the Court did not grant him the option of a fine.

"This Court has no alternative but to dismiss this ground. Such, has previously never been argued before the trial court or before the court a quo and more importantly it is of no relevance to this matter as it deals with "prisoner not brought to trial".

(iii) The Appellant's third ground of appeal as summarised is that;

There was no legal justification for the court *a quo* to increase the sentence on count one from two years to five years as the Honourable Court did. In specific terms, Appellant's ground of appeal (at paragraph 5 of the notice of appeal dated the 6th November 2018) is couched as follows:-

"The court *a quo* erred in increasing the sentence on count one *mero motu* and without a justification on the evidence that there are aggravating factors justifying the increase of the sentence".

By increasing the sentence from two years imprisonment to five years imprisonment in the words of **Rooney J** in **R. v Masseme, Tom (Supra),** whilst not obligatory was lawful. The sentence was increased in order to comply with the *"statutory minimum sentence"* prescribed by the Arms and Ammunition Act 1964 more particularly Section 14 Subsection 2 (a) which

states that, any person who contravenes this section shall be guilty of an offence and liable on conviction "to a term of imprisonment not less than (5) years or to a fine not less than E5000-00 in respect of a first offence. The appeal on this ground fails. Interestingly according to the record of proceedings in the court *a quo,* Appellant's legal representative actually consented to the step taken by the honourable Court, to increase sentence.

[20] It is a settled principle of Criminal Law that sentencing is predominantly a matter for the discretion of the trial court. In the Supreme Court case of Chicco Fanyana Iddi and Others v Rex Criminal Appeal Case No. 3/2010, the Court held that;

> *"It is Trite Law that the imposition of sentence lies within the discretion of the trial court, and that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting in a miscarriage of justice..."*

It goes on to state that:

> *"A court of appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in favour passed by the trial court and the sentence which the court of appeal would itself have passed..."*

[21] There is a striking disparity between the sentence passed by the trial Court and the sentence which this Court would itself have passed. Evidence of this is that the trial Court refused Appellant the option to pay a fine whilst this Court would have granted same subject to the above local authorities and more particularly as a first offender, in terms of the Arms and Ammunition Act.

[22] In coming to this conclusion I have considered the following factors in favour of the Appellant:

(i) He is a first offender.

(ii) From the onset of this case he pleaded guilty to the charge and did not waste the court's time.

(iii) There is no evidence that he committed an offence using the firearm in issue.

[23] Accordingly the decision of the count a quo is set aside and substituted with the following order.

1.1 On count one, the appellants sentenced to pay a fine of E5000.00 (Five Thousand Emalangeni) and in default of payment of same he is sentenced to a period of five years imprisonment.

1.2 On count two, the accused is sentenced to a fine of E400.00 (Four Hundred Emalangeni) and in default of payment of same he is sentenced to a period of four months imprisonment.

1.3 On count three the accused is sentenced to a fine of E500.00 (Five Hundred Emalangeni) and in default of payment thereof to five months imprisonment.

1.4 All the sentences are to run concurrently from the date of Appellant's arrest and detention on the 18th July 2017.

J. M MAVUSO

ACTING JUSTICE OF APPEAL

I agree

M.C.B MAPHALALA

CHIEF JUSTICE

I agree

S.K MATSEBULA

ACTING JUSTICE OF APPEAL

For the Appellant : **Z.J Dlamini**

For the Respondent : **P.B Mkhatshwa**