

THE STATE

versus

1. CONFIDENCE KAMUCHARARI

THE STATE

versus

2. TREVOR PIKINI

THE STATE

versus

3. PROUD TICHABAIWA

### **Criminal Review**

HIGH COURT OF ZIMBABWE  
DEME & MUNGWARI JJ  
Harare; 19 June 2024

**MUNGWARI J:** The above matters were heard by different magistrates at Epworth Magistrates Court. A worrying pattern runs across all of them. The problems in all of them relate to the imposition of the sentence of community service. They include the key considerations which must be taken into account, the procedural prerequisites, the calculation of community service hours and the period within which the offender should perform it. The records were referred to this court on automatic review. As a result, I have decided to address the three matters in a composite review judgment.

### ***S v Confidence Kamucharari CRB EPW397/24***

[1] The 19 year old offender was convicted on his own plea of guilty of “Having sexual intercourse with a young person as defined in s 70(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as read with SI 2/24 of the Presidential Powers”. The state alleged that from August 2022 right through to 17 September 2023, he engaged in consensual sexual intercourse with a 15-year-old complainant. Nothing turns on the

conviction except, as will be shown later, that the charges relating to contravening s 70 were not properly cited.

[2] At sentencing stage, the community service officer in a brief report recommended that, because the offender is of a fixed abode and is employed as a general hand at a farm, he be sentenced to perform community service on weekends. Clearly the trial magistrate was not persuaded by the recommendation because he/she subsequently sentenced the offender to:

“36 months imprisonment of which 12 months is suspended for 5 years on condition accused does not within that period commit any offence involving having consensual sexual intercourse with a young person for which he is sentenced to imprisonment without the option of a fine. The remaining 24 months is suspended on condition accused completes 840 hours of community service at Epworth Police station on the following conditions:

- a) Community service starts on 9/03/24 and must be completed within 53 weeks of that date

Community service shall be performed between the hours of 8am to 1pm and 2pm to 4pm on Mondays to Fridays which are not public holidays and to the satisfaction of the person in charge of that institution whom the court has granted authority to grant the accused leave of absence on a particular day(s) or during certain hours for good cause shown (my emphasis)

- b) Any such leave shall not count as part of the community service performed (my underlining for emphasis)

[3] Concerned about the number of community service hours imposed and the duration provided for the offender to complete this service, I generated a query which read in part as follows:

- “1. Section 12 of the community service regulations makes it mandatory for the trial court to conduct an inquiry into the suitability of the accused to perform community service. Was this done?
2. Which grid did the trial magistrate then go on to use in arriving at the computation of 840 hours of community service. The community service guidelines put a cap on the maximum number of hours to be imposed at 630hours
3. Where is the logic behind giving the offender a lengthy time within which to perform community service.53 weeks is in excess of a year. Again, how was that computation arrived at? What were the average hours calculated per day by the trial magistrate .I noted that a recommendation was made by the community service officer that the probationer performs the community service during the weekends. The trial court was not swayed by this recommendation as it then ordered that the accused should perform community service every Monday to Friday.”

[4] The trial magistrate said the following in response:

“The inquiry on whether the offender wanted to do community service was done in court. The offender was then sent for vetting where the provisions were explained and the inquiry was also done however omitted to write and file my inquiry in the record. I profusely apologize for any miscarriage of justice that may have resulted from this omission. The court should have imposed a maximum of 630 hours and not 840 hours

The offender was sentenced to perform community service during weekends which explains why the court granted him more time. 840 hours of community service will be completed in 52 weeks. The court then added an extra week in case the offender does not finish in 52 weeks. There was a typo which I should have noted before sending the record for review. I apologize for the typo.

I profusely apologize for the omission and the typos” *sic*

[5] In my view the trial magistrate’s response indicates a lack of understanding regarding the necessary inquiries to undertake before imposing a community service sentence. The trial magistrate delved into unrelated matters and failed to address the specific concerns raised. As of now, I am only aware of the typographical errors that I noted in the magistrate’s response to my query and any additional errors are unknown to me making it difficult to determine their relevance to the issues raised.

[6] Section 5(1) of the Magistrates Court Act [*Chapter 7:10*] stipulates that every magistrate’s court is a court of record. That mandates every trial magistrate to meticulously record proceedings before him /her. There is therefore no substance in the trial magistrate’s excuse of conducting an inquiry but failing to document it. In the case of *S v Sailos Ndlovu* HH 219/2003 UCHENA J (as he then was) provided guidance emphasizing the importance of contemporaneous and accurate recording of proceedings by judicial officers. Any deviation from this standard constitutes a serious irregularity that undermines the integrity of the proceedings. Therefore, in the absence of proof showing that the inquiry was held, the trial magistrate’s response implies a complete failure to do so.

***S v Trevor Pikini CRB EPW754/24***

[7] Trevor Pikini was convicted on his own plea of guilty to contravening s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Code). The state alleged that he assaulted the complainant who owed him USD 1.00 with a fan belt and a wooden plank on his back and right arm. The complainant was however not medically examined. The plea is a genuine plea and as a result, nothing turns on the conviction. It is the sentence however that raises concern.

[8] Despite Pikini being unemployed and relying on occasional jobs for survival, the community service officer recommended that he performs community service on Wednesday, Thursday and Fridays so that he could look for part time work and fend for his child on the remaining days. The trial magistrate without questioning the feasibility of this recommendation sentenced Pikini on 9 May 2024 to 18 months imprisonment of which 5 months was suspended on condition of future good behavior and the remaining 13 months was suspended on condition he performed 455 hours of community service within 38 weeks. The community service would commence on 10 May 2024 and would be performed only on Wednesdays to Fridays.

[9] I raised a query with the trial magistrate who acknowledged an error in ordering completion of the service within 38 weeks. She stated that she should have imposed 35 weeks as the period for performance calculated at a rate of 7 hours per day.

***S v Proud Tichabaiwa CRB EPW766/24***

[10] The offender Proud Tichabaiwa pleaded guilty and was convicted on a charge of contravening “Section 70 of the Criminal Law Codification and Reform Act Chapter 9:23 ARW SI 2/24 of the Presidential Powers”. He confirmed that he had consensual sexual intercourse with the complainant, a 13-year-old girl on 27 April 2024. He asserted that he was aware of her age but proceeded due to their mutual feelings of love. The essential elements of the offence were properly addressed and as in all the matters discussed above, I do not take issue with the conviction.

[11] The sentence however is cause for concern. During the pre-sentencing hearing the offender claimed to be employed at a bottle store earning USD150 per month, unmarried and without children. However the community service officer assessing the offender contradicted this information stating that he is a single father. The officer recommended community service for the offender and in four very unhelpful sentences said the following:

“The accused is a 22year old single man with one child. He is still young and deserves a second chance in life. He is of a fixed abode and has a good traceable reference. He is willing to do community service on Monday –Wednesday.”

[12] Based on this report and without conducting any further inquiries on why the offender would elect to perform community service on Mondays to Wednesdays only the court

sentenced the offender to a custodial sentence of 30 months of which 15 months were suspended on condition of good behavior. The remaining 15 months were suspended on condition the offender performs 525 hours of community service only on Monday to Wednesday with the community service starting on the 13 May 2024 and being completed within 40 weeks of the starting date.

[13] Once again, I raised a query with the trial magistrate and in her response she acknowledged her error in directing the offender to complete the community service within 40 weeks. She recognized that this time frame was disproportionate and in a document dated 30 May 2024 stated that she should have instead directed completion within 38 weeks. In another document letter dated 7 June 2024 she reduced the period further to 26 weeks. In that Minute of 7 June 2024, she said the following:

“The court noticed that it gave the accused too much time and that defeats the fact that community service is a form of punishment as the accused will be at liberty to choose when to go for community service because of the longer period that was ordered by the court. On the issue of the charge I erred failing to recognize that there is no need of citing the SI 2 of 2024 as part of the charge because it repealed the old s 70(1) and replaced it”*sic*

[14] I could not understand both responses. A worrying observation from the varying responses is the apparent lack of knowledge of the procedure to be followed when imposing community service on the part of the magistrate. The responses demonstrate the use of guesswork by the trial court.

### **Citation of the charges**

[15] As already stated in the matters of *Confidence Kamucharari* and *S v Proud Tichabaiwa* the charge was cited as ‘charged with having sexual intercourse with a young person as defined in section 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] as read with SI 2/24 of the Presidential Powers. This court has already pronounced itself on this improper citation of offences. I will therefore not belabor that aspect as it does not detract from the correctness of the conviction except to emphasize that the correct citation of the charge should have simply been Contravening section 70 of the Code. See the case of *State v Bernice Chitsedza* HH 258-24

### **Community service.**

[16] Where a trial court decides to impose a sentence of community service on an offender, it must adhere to the guidelines set forth in the Criminal Procedure and Evidence (Community Service) Regulations 1998, SI 12/98(referred to as “the Community Service Regulations”). These regulations formalize the community service framework and its procedures. Perhaps the starting point is to highlight that where the trial court considers that the circumstances surrounding the offence call for the imposition of a community service sentence the court must conduct an inquiry into this. Section 12 of the Community service regulations make it mandatory for the court to conduct such an inquiry. It says the following:

- Preliminary requirements to making an order
12. Before making a community service order the court shall –
- (a) undertake an enquiry as to the general suitability of the offender for community service;
  - (b) explain the following to the offender –
    - (i)the aims and objectives of a community service order;
    - (ii) the duties of the offender under the order;
    - (iii) the right of the offender to apply to a court for variation or revocation of the order;
    - (iv)the consequences of any failure to comply with the order.
  - (c ) Ascertain whether or not the offender is willing to render community service and shall have regard to his attitude in determining whether or not to impose the order;
  - (d)Ascertain whether a suitable institution or place is available for the reception and supervision of the offender in respect of the proposed community service.

[17] Clearly the form that the inquiry must take is prescribed. It is mandatory for the trial court to first assess the suitability of the offender to do community service. Thereafter, the court must provide an explanation of the essence of community service, what it entails, the rights of the offender, and the consequences of non-compliance. In addition, it is incumbent upon the court to confirm whether the offender is willing to engage in community service, thereby requiring informed consent. In other words, the consent of the accused person must be sought. Should the offender decline to participate in community service even after a thorough explanation by the court, this sentencing option must not be enforced. Finally, the court must verify the availability of a suitable institution for the placement of the offender to perform community service.

### **Suitability of the offender**

[18] A court wishing to impose community service on an offender must carry out a full enquiry, on the offender's general suitability. That inquiry is conducted through a pre-sentencing hearing. Sources of pre-sentence information are the usual sources such as information from the offender, the victim impact statements, evidence adduced during mitigation and aggravation, information from the prosecutor or the legal practitioner if the offender is represented. In the process of determining the necessity of community service as a sentence, the trial court should evaluate various factors, including the offender's fixed residential address, age, criminal history, and employment status. When referencing employment, it encompasses both formal and informal work, with the requirement of providing substantial evidence to support this claim. It is important to differentiate between meaningful employment and marginal work opportunities. Inadequate part-time employment should not qualify as grounds for evading community service obligations. Additionally, individuals employed in varying roles, such as a labourer on a farm or a worker in a liquor store, must undergo thorough examination to confirm their current employment status. Verification of ongoing employment is crucial to prevent misuse of this factor. Blindly accepting unsubstantiated claims can lead to disorderly outcomes, underscoring the vital role of the court in conducting a comprehensive inquiry into the offender's circumstances. Once employment status is established, the court should consider scheduling community service hours outside of the individual's work commitments to ensure compliance with the sentencing order.

[19] In the event that there is a community service officer stationed at the court, the court can then refer the accused to the community service officer whose responsibility it is to provide on request, reports on suitability of the offender. What this means is that the community service officer like all other sources of information for pre-sentence information may contribute to a proper inquiry into the suitability of the offender. He/she cannot however usurp the powers of the court and be the only source of information without the court checking this against and merging it with that from other sources. For instance, where the community service officer said the offender has a child and yet the same offender had informed the court that he did not, it is the duty of the

court to conduct further inquiries to reconcile such conflicting statements. That an offender lied either to the court or to the community service officer is a red flag that he/she may be a dishonest character casting doubt on his suitability to perform community service. Ultimately after the community service officer has finished vetting and prepared a report on the suitability or otherwise of the offender the record and the offender are brought back before the court for further consideration. Where there are contradictions in what the offender told the court during mitigation and aggravation the court will seek further clarification. Where there are none and the court is satisfied on the suitability of the offender to perform community service as part of the offender's sentence the court arrives at a proper decision based on adequate information before it.

[20] The court's decision-making process should encompass queries such as determining the adequate time required to reform the accused and foster a sense of responsibility, ensuring that the punishment fits both the individual and the offense committed. Factors like the nature of the crime, the accused's circumstances, the nature of available community service tasks, and their convenience or potential hardship on the offender must be carefully weighed. Based on these considerations, the court must ascertain a sentence whose duration is fair and just.

[21] Where the trial court decides to impose community service to be conducted outside of regular working hours or on weekends, it must bear in mind that community service is not designed as an easy way out for offenders. It is essential that the sentencing judgment articulates an explanation for the chosen days and time frames to uphold transparency in the process. It is not a thumb-suck.

### **Community service grid**

[22] As a general rule the recommended community service grid that is provided for in the guidelines should be applied to ensure uniformity of sentences where community service has been imposed. The community service guidelines include a structured grid to aid judicial officers in accurately determining the number of hours to be served. These hours are not arbitrarily assigned but are meticulously calculated within the parameters of the grid. The designated range of community service hours typically spans from a minimum of 35 hours to a maximum of 6.30 hours. The court must evaluate what duration of imprisonment would be appropriate if community service



was not imposed and align the community service hours with the grid accordingly, considering an average workday of 7 hours. Quite clearly a court cannot as it were, toss a coin in the air and without any rational basis choose hours or a time frame within which to perform the community service.

[23] Emphasizing the importance of maintaining a comprehensive record is essential. All submissions, reports from the community service officer, questions posed to the accused, and their responses must be diligently documented. It is imperative that the decision-making process leading to the imposition of community service is well-documented and transparent.

[24] Having said the above, I now return to the individual matters forming the subject of this review. Despite the mandatory requirement under section 12 of the regulations to conduct an inquiry, I observed that none of the three records before me indicated that this had been fully carried out. In these instances, the trial magistrates did not personally perform the required inquiry, instead they all delegated that responsibility to the community service officer. The offenders were not informed by the courts what community service entails. Their informed consent was not sought and obtained. It is the court's responsibility, not the community service officer's, to educate the offender and secure their consent. While community service officers play a crucial role in providing comprehensive reports on an offender's suitability for placement during presentencing hearings, their role does not replace that of the court. Unfortunately, the community service officers in all three matters also attended to the report perfunctorily, resulting in a lack of meaningful and relevant information being obtained.

[25] In the case of *Confidence Kamucharari*, the community service officer noted that the offender was employed as a general hand at Southern Roses farm and recommended weekend community service, considering his work commitments. Despite this, the court ordered community service to be performed Monday to Friday. The court did not provide reasons for rejecting the officer's suggestion. Magistrates should neither dismiss recommendations from community service officers without justification, nor should they blindly accept them. In *S v Banda* 2004(1) ZLR 493(H) this court pointed out that community service officers are trained officers of the court whose main function is to assess the suitability of a candidate for community service upon the

court's request. Their recommendation must not be disregarded without good cause. If a recommendation is not accepted, it is essential that the trial court shows that it considered the recommendation and why it ignored it. Failure to do so is a misdirection.

[26] Furthermore, the hours imposed should not have exceeded 630 as any hours in excess of that go against the dictates of the community service grid. The timeframe within which to perform should not have exceeded between 18 -19 weeks. An order of 840 hours of community service to be completed within 53 weeks is unreasonable and borders on the absurd. It has no place in our sentencing framework. Fifty-three weeks is in excess of a year and it undermines the purpose of the sentence. In fact, it is unlawful. Consequently, the sentence cannot be allowed to stand.

[27] In the matter of *Trevor Pikini*, besides the omission to undertake the mandatory inquiry, it is worth noting that Trevor is not employed but rather relies on odd jobs for a living. Surprisingly he was permitted to carry out community service on Wednesday, Thursday and Friday without a reason provided for this arrangement. Additionally, he was given 38 weeks to complete 455 hours of community service. The decision cannot be justified as the sentence should have been ordered to be performed from Monday to Friday. The question would be what happens to him on days where the odd jobs do not come up? He cannot be on holiday surely. An offender who survives on odd jobs is an unemployed person and must be considered as such. Community service is a punishment which ought not be performed at the pleasure of the convicted person. In the circumstances, the offender must have completed the community service within 13 weeks. Completing community service sooner rather than later must not be viewed as a disadvantage in all instances. Where an offender is unemployed the sooner, he gets done with his punishment the better. It frees him/her up to move on with his/ her life.

[28] In the case of *Proud Tichabaiwa*, although both the court and the community service officer confirmed his employment at the bottle store, the reason why he opted to perform community service on Monday to Wednesday remains unclear. It is uncertain whether these were his days off or he just chose those days because he was allowed to. Without a proper inquiry, one cannot be certain of the rationale behind that decision. Furthermore, the imposition of a 40-week deadline to fulfil 525 hours of community

service appears unreasonable and bordering on uncalled for benevolence by the court. Because of those material misdirections, I am unable to uphold the sentence.

**Disposition**

[29] With the lengthy time frames within which the offenders were granted to perform community service the offenders would by now have barely embarked on their sentences. In any case, whatever hours have been recorded as partial fulfilment of the sentence will always be factored in the subsequent sentence imposed if I were to vacate the trial magistrates' sentences. I opt to take that route. In the premises, IT IS ORDERED THAT:

- a. The convictions in the three cases are confirmed as being in accordance with real and substantial justice
- b. The sentences imposed on the offenders in all the three cases are set aside
- c. The matters are remitted to the trial magistrates to resentence the offenders in accordance with the guidelines given.

**MUNGWARI J:**.....

**DEME J:** ..... AGREES