

THE STATE  
versus  
CLEMENCE MUGONIWA

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 23 February 2022

### **Review Judgment**

CHITAPI J: The accused was convicted on 4 counts of unlawful entry into premises as defined in s 131(1) as read with (2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by the learned trial magistrate sitting at Chivhu Magistrates Court on 9 June 2021. The accused was sentenced on all counts taken as one to 48 months imprisonment with 10 months of that sentence suspended for 5 years on the usual terms of good behaviour. A further 7 months were suspended on conditions of restitution of varying amounts of money to three of the complainants. The effective imprisonment was therefore 31 months.

The charges against the accused were that in the first charge, the accused on 17<sup>th</sup> May 2021 unlawfully entered into the complainants' spare bedroom by breaking the door lock at the Muvavarirwa Village, Chivhu. The accused stole various household property valued at \$25 000.00 of which property worth \$14 500.00 was recovered. In the second charge the accused was said to have unlawfully entered the home of the complainant again on 17 May 2021. The accused broke the burglar bar to the complainant's grass thatched house at the same village as in the first count. The accused then stole complainant's personal property valued at \$47 800.00 of which property valued at \$21 800.00 was recovered. In the third charge, the accused allegedly unlawfully entered the complainant's house by breaking a padlock and opening the door on 22 December 2021. The complainant's home is in the same village as in the first and second counts. The accused stole household and personal property worth \$18 500.00 of which property worth \$5 000.00 was recovered. In the fourth charge, the accused allegedly unlawfully entered the complainant's house at Masocha Village, Chivhu on an unknown date but during the month of January 2021. The accused was alleged to have broken a padlock to the complainants bedroom, opened the door and entered the bedroom. The accused stole

various personal property of the complainant valued at \$6 375.00. All the property was recovered.

The proceedings were referred for review to a judge of the High Court as per procedure. The record of proceedings was placed before me. On perusal of the record, it did not appear that the learned trial magistrate had complied with the provisions of s 271(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides *inter-alia* that the magistrate who disposes of a trial in terms of the guilty plea procedure as set out in s 271(2) (b) should explain the charge to the accused and record the explanation so given. I also noted that there was nothing recorded to indicate that the charges had been read to the accused. I invited the learned magistrate for his comments on my observations. The learned magistrate responded by minute dated 4 October 2021 as follows:

**“REVIEW MINUTE: STATE VS CLEMENCE MUGONIWA CRB CHVPC 118/21**

The above matter refers.

This is my response to the issues raised by the Honourable Chitapi J in a minute dated 25 August 2021.

1. I concede that I did not do as I was required to do by Section 271 (2) (b) (i) and (ii) as read with Section 271(3) of the Criminal and Procedure and Evidence Act. I submit that I sentenced the accused person on the 9<sup>th</sup> of June 2021 before I was provided with the cases of *Kenmore Sign and Another vs The State* HH 336/21 and *Joshua Alfred Lourens vs The State* HH 331/21. Since the 12<sup>th</sup> of July 2021 which is the day I received these cases I am now religiously following the requirements of the above said provisions I stand guided.
2. Charges were indeed put to the accused person. I indicated that charges read and understood on the line above the one I asked if accused has any complaints against police. I concede that for chronology purpose I ought to have indicated that just above the pleas. I stand corrected.

Yours faithfully

B. Madzingira  
**TRIAL MAGISTRATE**”

The learned trial magistrate conceded that he did not follow the procedure as required and quoted judgments which he has since read is accordingly guided by. I would commend the case of *S v Mangwende* HH 695-20 decided in October 2020 to the trial magistrate. The learned trial magistrate was most probably unaware of that decision at the time that he disposed of the accused trial by guilty plea procedure.

In his response in para 2 of the minute aforesaid, the learned trial magistrate stated that he in fact indicated on record that the charges were read and understood followed by questioning the accused whether he had complaints against the police. The learned magistrate

conceded that the chronology which he followed was wrong because he ought to have had charges read followed by entering of pleas tendered. The record shows the following material recording:

“Charges: read and understood.

Q. Do you have any complaints against the police.

A. No.

Q. It is your constitutional right to be represented by a lawyer of your choice if you can afford. Do you intend to engage one.

A. No.

Pleas: Count 1: G 271 (2) (b)

Count 2: G 271 (2) (b)

Count 3: G 271 (2) (b)

Count 4: G 271 (2) (b)

31/05/21

Facts for count 1 and 2 .....”

The procedure adopted does not comply with the procedural law which ought to have been adopted. The accused person who is brought to court on guilty plea is to be treated as a person appearing before the court for trial. The rights accorded to an accused who is before the court in a contested trial must *mutatis mutandis* be accorded the accused who comes before the court on a plea of guilty in terms of s 271(2)(a) or 271(2) (b) as the case maybe. The rights of an accused person who is brought before the court accused of committing an offence are set out in s 70(1) of the Constitution. The learned trial magistrate was alive to the requirements of s 70(1) (f) of the Constitution wherein the accused must promptly be informed of his right to legal representation at his or her own expense or at the State’s expense where substantial injustice would result if legal representation is not provided to the accused. Amongst the many rights outlined in the aforesaid constitutional provision, is the right to remain silent and not give self-incriminating evidence. Where the accused remains silent, the case should be dealt with as a contested trial.

In respect to the procedure to be followed, it appears to me that the accused who is brought to court on trial on a guilty plea must be informed of the right to legal representation first even before he is asked whether he has any complaints against the police and before the charges are read out to him. Section 163A of the Criminal Procedure and Evidence Act [Chapter 9:07] provides as follows:

**“163A Accused in Magistrates Court to be informed of Section 191 rights**

(1) At the commencement of any trial in a magistrates’ court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.

- (2) The magistrate shall record the fact that the accused has been given the information referred to in subsection (1); and the accused's response to it."

Section 191 lists the persons who are qualified or have *locus standi* to represent the accused person. The persons qualified to represent an accused person are a legal practitioner, a parent or guardian where the accused is aged 16 years or under or any person permitted by the court to do so in circumstances where the court considers that the accused requires the services of another person.

*In casu*, the learned trial magistrate had the charges read out to the accused and enquired of him whether he had complaints against the police. The learned magistrate then advised the accused of his right to legal representation before asking the accused to plead to the counts. The accused must at first instance be informed upon the matter against the accused being called out of the right to legal representation. This is important because the need for the protection of the accused in trial proceedings arises before trial motions commence. Therefore only after the accused person has been informed of the rights to legal or other representation as provided for in s 191 aforesaid and the accused's response is recorded should trial motions begin. If this is not done and the accused's right to legal representation is given after trial motions have begun like reading out the charges and soliciting the accused response, the accused will have been subjected to trial before being given the opportunity to engage legal representation. The learned trial magistrate erred in this regard and he and others who may not be clear on the procedure discussed should be guided accordingly.

Reverting to the essential elements, the record indicates:

"Facts for count 1 and 2 read and understood."

The accused admitted the facts to be correct. The essential elements which were explained to the accused person related to the first and second counts. There is nothing on record to show that the third and fourth counts were dealt with in so far as explaining the essential elements or reading facts to the accused was concerned. For reasons not apparent from the record nor explained by the learned trial magistrate, the accused was convicted "on all 4 counts". This was a serious and unremediable misdirection in that the accused was convicted on the third and fourth charges without a trial in the terms provided for in s 271(2)(b) for disposals of guilty plea trials. To compound the misdirection, the accused was sentenced on all four counts.

The proceedings in this matter cannot be confirmed because the accused was not accorded a fair hearing on account of serious procedural omissions and commissions

committed by the learned trial magistrate as I have outlined them. The failure to comply with s 271(2) (b) as read with s 271(3) of the Criminal Procedure has been held on the authority of the judgment in *S v Mangwende (supra)* and the judgments cited by the learned trial magistrate in his response to the query I raised, to be incapable of cure because the failure offends fair trial dictates which are protected as absolute rights by s 86(3) (e) of the Constitution. The proceedings must therefore be set aside and the Prosecutor-General granted the right to in his discretion institute a fresh trial against the accused on the four charges.

An order is made as follows:

1. The convictions and sentences imposed on the accused in Case No. CRB CHVP C118/21 dated 9 June, 2021 be and are hereby set aside for procedural irregularity.
2. The accused must be released forthwith from serving the sentence which has been set aside.
3. The Prosecutor-General in his discretion is permitted to institute a fresh prosecution of the accused before a different magistrate on the same charges on which the accused was unprocedurally convicted and sentenced.
4. In the event of a fresh prosecution being instituted by the Prosecutor-General and the accused is convicted, the trial magistrate shall in assessing sentence take into account and factor into the new sentence to be imposed the period of imprisonment already served by the accused including any restitution which the accused may have paid.

WAMAMBO J, agrees:.....

*National Prosecuting Authority*, applicant's legal practitioners