

PATRICK NYEMBA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BEFORE MUTEMA & MOYO JJ
BULAWAYO 11 NOVEMBER 2013 AND 16 JANUARY 2014

B. Dube, for the Appellant
T. Makoni, for the Respondent

Criminal Appeal

MOYO J: The appellant was charged with and convicted of culpable homicide in contravention of section 49 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He was sentenced to 2 years imprisonment. In addition he was prohibited from driving for a period of 2 years and his drivers' licence was cancelled. The allegations were that on the 24th of June 2012 and at the 244 km peg along the Harare - Gweru road, the appellant was driving a FAW ZUPCO bus registration number ACF 4202 from Kwekwe towards Gweru.

On that same date Mdzengi Lisias, was driving a Dong feng lorry registration number ABE 2247, had a breakdown along the Harare – Gweru highway resulting in him parking it off the road, but encroaching into the left lane with the rear right side wheels. There were some rods of steel that the lorry was loaded with at its back. The appellant's bus drove onto the stationary truck and struck the iron rods which were then forced into the bus. The bus veered off the road and stopped about 108 metres from the truck. A total of 7 people died on the spot, 2 others died on admission at Gweru General Hospital and 3 others died at Parirenyatwa Hospital, bringing the total number of deaths to 12.

The appellant dissatisfied with both conviction and sentence, then appealed to this court. Mr *Dube* for the appellant, conceded that the particulars of negligence are apparent in the circumstances of this case and therefore sought to address the court on the sentence. He contended that there are special circumstances in this case in that the other road user (the truck driver) contributed to the accident in question and that that should be treated as an exceptional feature warranting interference with the sentence. He further submitted that the trial magistrate should have been guided by section 52 of the Road Traffic Act Chapter 13:11 in sentencing the appellant and not section 53 of the same Act. Section 53 is for those traffic offences that border on recklessness on the part of the driver hence the heavier penalty. Section 52(2) (Negligent or dangerous driving) of the Road Traffic Act Chapter 13:11 provides as

follows:-

A person who drives a vehicle on a road –

- a) negligently, or
 - b) at a speed in a manner dangerous to the public, regard being had to,
 - i) all the circumstances of the case, including the condition, nature and use of the road; and
 - ii) the amount of traffic which is actually, or which might reasonably be expected to be, at the time on the road;
- shall be guilty of an offence and liable -
- i) where the vehicle was a commuter omnibus or a heavy vehicle, to a fine not exceeding level ten or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Section 53 of the Road Traffic Act Chapter 13:11 deals with reckless driving and it is apparent that there is no indication of recklessness in the manner in which the Appellant drove. Section 52(2) is thus the relevant section in this case.

In terms of section 52 (4) (c) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, the court shall prohibit the person from driving for a period of not less than 2 years unless special circumstances are shown. There are no such special circumstances that were shown in this case. The conviction is upheld. In terms of Section 52(2), the sentence imposed by the Magistrate is excessive in the circumstances as the maximum penalty for negligent driving is one year. The sentence imposed by the Magistrate is accordingly set aside and substituted as follows:-

The accused person is sentenced to 12 months imprisonment, of which 3 months imprisonment is suspended for 2 years on condition the accused does not within that period, commit any offence involving culpable homicide or the negligent driving of a motor vehicle and for which he will be sentenced to imprisonment without the option of a fine. In addition, the accused is prohibited from driving for a period of 2 years and his drivers' licence is hereby cancelled.

Mutema J: I agree

Gundu & Dube, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners