

**THE STATE**

**Versus**

**KENNIAS MLAMBO**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAY 26 JUNE 2003

Criminal Review

**CHEDA J:** The accused was charged with contravening section 51(1) of the Road Traffic Act [Chapter 13:11] commonly referred to as “Driving without due care and attention’. He pleaded not guilty. In his defence he advised the court that he had been made to pay an admission of guilty fine as a result of misrepresentations made by the police.

At his trial accused gave the following as his defence-

“I was driving along the mentioned road and I was just about to speed considering I was approaching a give way. I heard a bang on the rear of my vehicle by the vehicle which was following. After I had been hit I stopped there. After I had stopped I sat of board after applying my hand brakes. I went to the other party, the complainant in the company of another, alighted from my vehicle and approached me. I asked the complainant why he had collided with me. Initially he apologised, when we continued talking he change his story to say I was reversing my vehicle. The person who was in that car indicated that he also saw me reversing. He pin pointed to have been a person who was in that car. We called the police and Sgt Nelson attended the scene. We were then taken for a breath test. I left my vehicle at the scene and my passenger. This person who has indicated that he was an independent witness, he followed driving the complainant’s car behind the police truck. At Emakhandeni robots he picked another police officer.

After the Emakhandeni robots the police stopped the car and told us it was late and we were to report on Monday to traffic West. On Monday I went to Mpopoma, I saw an officer who was on duty. After having given them my story they pulled out some papers which they indicated that I was the accused. They asked me to deposit a fine of \$180. I told them I had \$150 only. They went to talk to their boss and I was asked to pay the \$150.

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I asked them why I was paying the fine since I was the one who had been hit. They said the person who had attended the accident said I was the one who was wrong. I denied but they persuaded me to pay. During that time I was going for an external operation. I paid the deposit fine. Then I went for the operation. I came back on time off.

I found the letter from an insurance company which was claiming \$15 000 I was surprised. I went back to the police. I queried why they had ..... that once I paid the fine it was the end of the matter yet they knew I was supposed to pay the damages.

I then requested to see the officer in charge because I had been forced to pay the fine yet I was not wrong. He then asked them to pull out the traffic accident book. After perusing the TAB he saw I was innocent. He asked to make an affidavit putting all the details pertaining to the matter. I have the affidavit statement and I brought it to court. I was then informed to go and hand-over the affidavit to the insurance company.”

On hearing this explanation, the learned trial magistrate referred the matter to me for directions. It is trite law that if an accused admits his guilty he is allowed to pay a fine. However, this procedure applies to certain offences as stipulated by the relevant law and in the present case the said offence is one of them. The said fine is assessed by a designated officer only. Nothing turns on this procedure.

The question before me is whether the admission made by the accused to the police was a proper admission to an extent that he should be regarded as having pleaded guilty to the offence in question or not. An admission of guilty should be made after an accused person has been properly informed of what he is being charged with. In the event that he gives an explanation which casts reasonable doubt on his admission of guilty such admission should no doubt be viewed with suspicion and therefore he should be given the benefit of a full trial. It is an accused person's right to be tried fairly by a competent court. In other word wherever there is reasonable doubt, irrespective of its magnitude such doubt should be to the accused' benefit to use until the state proves beyond reasonable doubt that he is indeed guilty. In S v

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*Ruiter & Ors* 1962 (1) SA 161 (O) the court although it did not set aside the conviction it however emphasised the need to lean in favour of the accused where there is likelihood of a miscarriage of justice. The court that did not set the conviction aside as it held that “that in all probability a miscarriage of justice had occurred.” In a similar case *R v Coetzee* 1954 SA 571 (O) the court held that it could not set aside the conviction as there was no irregularity in the proceedings and that even on the merits there was nothing before the court to show that accused should not have been convicted.

The approach therefore, in my view, should be that an accused seeking to set aside a conviction should show on the merits that the facts point out that he should not have been convicted due to doubt occasioned either by misrepresentation or misunderstanding. In *R v Cowan* 1969(1) RLR 18 at 21 A DAVIES J stated –

“In my view, the test applied in *Coetzee’s* case is preferable. Where a conviction has followed a plea of guilty which is not genuine, then it seems to me that, in the interest of justice, such conviction should be set aside if the court is satisfied that there is a reasonable possibility that the accused was wrongly convicted.”

In the present case, accused was made to pay a fine under circumstances which are not convincing. It is clear that he paid a fine because of the coercion and/or persuasion by the police and that coupled with the fact that he was due for a medical operation, render such admission of guilty not genuine.

In my view it will not be in the interest of justice to hold that the admission of guilt was made when he avers that there was coercion or persuasion by the police. It seems accused did not exercise his free will in admitting this offence.

The following order is therefore made:-

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1. The admission of guilty made by the accused on 5 September 2000 made on ticket number 185904 is cancelled and the amount of \$150,00 should be refunded to accused.
2. The matter is referred back to the same magistrate for the continuation of the trial and in the event that he is convicted the trial court should not sentence him to a fine exceeding \$150,00.

Ndou J ..... I agree