

THE STATE

Versus

VIOLA KAKONO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 OCTOBER 2006

Criminal Review

NDOU J: The accused was charged of culpable homicide (arising from a road traffic accident) before a Hwange Magistrate. She pleaded not guilty and indicated that she did not believe that the road accident was the cause of death of the deceased. The issue raised by the accused could only be resolved by way of medical evidence. The state, however, produced part of the post mortem report by Dr S Pesanai. The doctor opined that the cause of death was:

- “a) Massive pulmonary embolism
- b) Compound fracture of right tibia and fibula
- c) Road Traffic Accident
- d) Diabetes Mellitus”

The doctor made reference to an attached report but it was not produced during the trial. There are no reasons given for the omission. The doctor was not called to testify. Instead, the prosecutor opted for the easy way out and accepted the lesser charge of negligent driving. The accused then accepted the essential elements of the lesser charge and she was convicted. She was sentenced to a fine of \$300 000 or in default thereof 5 months imprisonment. This is a case where the doctor should have been called to explain whether the death arose from the road accident, i.e. the

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nexus between the accident and the death. The state, and indeed the court, should not lightly refrain on the ground of convenience from adducing medical evidence where the evidence may assist the court. In this case, a human life has been lost. The medical evidence was crucial in the determination of whether the accused's negligent driving caused the death of deceased. The medical evidence should have been adduced – *S v Melrose* 1984(2) ZLR 217 (S); *S v Mpofu & Anor* HB-41-03; *Ndlovu v S* HB-59-06.

In the circumstances, I am unable to certify these proceedings as being in accordance with true and substantial justice. Accordingly, I withhold my certificate.