Judgment No. HB 51/13
Case No. HCR 247/1
Xref No. CRB 1079/12

TAFADZWA RAWURA

AND

GLORIA TAKUNDWA N.O

AND

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 FEBRUARY 2013

Review Judgment

MAKONESE J: The applicant, an adult male aged 22 was convicted and sentenced on his own plea of guilty at Beitbridge magistrates' court by the first Respondent on the 24th July 2012. He faced one count of unlawful entry and a further count of theft and was duly sentenced to three years imprisonment for both counts, with one year suspended for five years on condition he did not commit an offence involving dishonesty and for which he is sentenced to a term of imprisonment without the option of a fine.

On the 8th October 2012 the applicant who was not legally represented at the trial engaged a legal practitioner who filed an Application for Review against the judgment of the first Respondent. The Application for Review was filed on the grounds that there were gross irregularities in the conduct of the proceedings, particularly that:-

"1. The magistrate proceeded to record a plea from the applicant when the charge sheet was fatally defective by reason of its failure to cite or recite the statutory provisions which Applicant allegedly contravened.
2. Having elected to proceed in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07) the magistrate failed to comply with subparagraph (i) and (ii) of 271(2)(b).
3. If the magistrate complied with subpagraph (i) and (ii) of section 271(2)(b) she failed to record her explanations and Applicant's reply or statements in terms of section 271(3) of the Criminal Procedure and Evidence Act [Chapter 9:07]."

The Applicant has sought an order in the following terms:-

"IT IS ORDERED THAT:

1. Applicant's conviction and sentence by the Beitbridge Magistrates Court Takundwa *Esq*, be and are hereby set aside.
2. Applicant be tried *de novo* before another magistrate."

On the 21st December 2012 I addressed a letter to the First Respondent in the following terms:

"The above record has been placed before me for review.

I have directed that a copy of the application for review, a copy of the charge sheet, state outline and the rest of the record, as well as the comments of the Attorney General's office be photocopied and sent to you.

I request you to comment on the allegations being raised in the review application and kindly shed light on the matters raised in the review.

Your prompt response in this matter will be appreciated.

I have further directed the Registrar (Criminal) to retain the rest of the papers pending your response."

I note that on the 5th November 2012 the Attorney General's Office, filed a response to the Application for Review as follows:

"Be pleased to take notice that the second respondent is not opposed to the application being granted in terms of the Draft order.

Reasons(s)

1. A perusal of the record reflects that the plea recording was not done in accordance with the requirements of section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The court *a quo* did not explain the charge and essential elements to the applicant. The court *a quo* did not inquire from the applicant whether he understood the charge."
   (signed)
   T Hove
   Respondent Counsel"

On the 16th January 2013 the learned magistrate in the court *a quo* filed her written response to matters raised in the Review Application. Her response is as follows:

"Kindly place the record before the Honourable Mr Justice Makonese with the following comments:

1. the charges were read to the accused and he understood. He pleaded guilty to both counts.
2. the facts were read to the accused and he understood. He further agreed to the facts and had nothing to add or subtract.
3. The essential elements for the 2 counts were put to the accused as reflected on the record of proceedings attached. After enquiring through the essential elements the court was satisfied that the accused's plea of guilty was genuine. The court convicted the accused and took down the mitigation and proceeded to pass sentence.
4. On the 24th July 2012 the court dealt with several plea cases. The proceedings for this record were however misplaced in another record. It is only at the time of arranging records for review that I noted the proceedings had been placed in another record. At the time the Defence Counsel had not copied the misplaced record of proceedings. It is not correct that the notes were made after conviction and sentence.
5. The application for review should be dismissed accordingly."

The Applicant states in his Founding Affidavit that the learned magistrate misdirected herself in that the charge sheet is fatally defective by reason of its failure to recite the section of the Act which he allegedly contravened.

The charge sheet is couched as follows:

"Count one: unlawfully entry

In that on the 26th day of June 2012 and at house number 89 Dulibadzimu, Beitbridge, Tafadzwa Rawura, without permission or authority from Qinisela Kamusikiri, the lawful occupier of house 89 Dulibadzimu, Beitbridge unlawfully entered into the said premise……

Count two: theft

In that on the 26th June 2012 and at house number 89 Dulibadzimu, Beitbridge Tafadzwa Rawura, took property capable of being stolen namely ZAR 1500 and US$80 and knowing that Qinisela Kamusikiri was entitled to own, possess or control or realising that there was a real risk or possibility that Qinisela Kamusikiri was so entitled and intending to deprive her permanently or temporarily of his ownership, possession or control of the said property."

The first issue I must determine is whether the failure to recite the sections on counts one and two above renders the charge sheet fatally defective. It is common cause that the

respective sections are 131 and 113 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. The offence in count one ought to have been recited as follows in the charge sheet:-

> "Contravening section 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] Unlawfully Entry."

It is clear that the charge sheet presented to the court *a quo* did not have a proper recital of the section but the particulars of the allegations are clearly and properly framed and set out in respect of both counts. The particulars in the charge sheet read to the applicant contained sufficient detail to inform the applicant the nature of the allegations against him. From the record that has now been produced by the magistrate the essentials of the charge were explained to the applicant in terms of section 271(2(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. If indeed the charge was put to the applicant and he pleaded thereto the question to be decided is whether the failure to recite the particular provision contravened renders the proceedings defective. It is my view that the mere failure to recite the section violated by the applicant is not fatal for these reasons.

(a) the charge sheet refers to the offence, that it unlawful entry, and theft respectively.

(b) the charge sheet gives particulars of the offence in sufficient detail.

The critical test therefore, is whether when the charge was put to the applicant he understood the charge, and if so whether, when he tendered the plea he did so understanding what he was admitting to. The explanation given by the magistrate is that her notes were misplaced in another record. This explanation cannot be discounted considering that magistrates often, but not always work under pressure and the probability of mixing up records is usually, but not always likely.

See the case of *Godfrey Dvairo and others v the state* HH 2/06.

In the above matter PATEL J, had this to say at page 5 of the cyclostyled judgment:

> "As regards the recited of the information concerned as it appears in the charge and in the statement of agreed facts, the details set out in the latter are an elaboration of what is contained in the former. I am unable to discern any material difference in the two documents and regard them as being generally *ad idem*.
> With respect to the essential elements of the offence charged, first applicant clearly admitted to having supplied unauthorised persons with information obtained by him in his official capacity. I take the view that the requisite elements of the offence were

adequately canvassed by the trial magistrate and that there was no irregularity in this respect."

In *casu*, the applicant whilst alleging the irregularity in the failure in the charge to recite the contravened section, does not argue that he did not appreciate nor or understand the nature of the allegations he was facing. I am not convinced that the failure to recite the section of the Act which was allegedly violated on its own renders the charge defective. The charge sheet contained sufficient detail to inform the applicant the nature of the allegations he was facing. It must be noted that in his review application the applicant has not proffered any defence to the charges against him. He only chose to dwell on the irregularity in the framing of the charges against him without stating whether he has a defence to the allegations. If indeed, he has no defence on the two counts one wonders what purpose the order to have a trial *de novo* would achieve.

The second issue that I must decide is whether the recording of the plea was not done in accordance with the requirements of section 271(2)(b) of the Criminal Procedure and Evidence Act. The Applicant contends that the court *a quo* did not explain the charge and the essential elements to the applicant and further that the court did not inquire whether he understood the charge. It would seem apparent that at the time the legal practitioner for the applicant photocopied the record some of the pages of the record were missing. I tend to be persuaded by the explanation given by the trial magistrate as being reasonably possibly true. I am fortified in that view because the applicant has not tendered any possible defence to the charge. The application is premised on the alleged irregularity and nothing further. If the applicant had raised a defence at his trial he would most certainly have canvassed such defence in his application for review.

I am satisfied that on the record before me the court *a quo* complied with the provisions of section 271(2)(b) the Criminal Procedure and Evidence Act. This case, however, serves as a reminder to all trial magistrates to ensure that a complete and accurate record of all the information presented in court is captured and preserved in the record. All information recorded in a trial must be available immediately after the proceedings to dispel the usually

held notion that some trial magistrates only compile a full record of proceedings after judgment has already been handled down.

In the case before me, I am unable to grant the application prayed for by the applicant for the reasons stated above.

I accordingly dismiss the application.

Makonese J.....