STATE
versus
KUDAKWASHE NYAWERA
and
JOSEPH KASEKE
and
FRANCIS MUCHAMBA
and
STANLEY SHONHIWA
and
FARAI MAVHUNDU

HIGH COURT OF ZIMBABWE
MUTEMA J:
HARARE, 28 September, 2010

Criminal Review

MUTEMA J: The trial magistrate who dealt with all the above matters was discharged from the service before, in some cases, responding to the queries raised by the scrutinising Regional Magistrate. The records pertaining to these cases were retrieved from the trial magistrate's office drawer in a plastic bag. The scrutinising Regional Magistrate has forwarded the records in question for remedial action on review.

Re: State v Kudakwashe Nyawera

The accused pleaded guilty to 2 counts of malicious damage to property and to 1 count of theft. The trial magistrate indicated that she proceeded with those guilty pleas in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act. However, nowhere does it reflect that that procedure was followed through for the essential elements of the 3 counts were never canvassed to the accused.

As regards the fourth count of malicious damage to property, the accused pleaded not guilty and a trial followed. However, in her written judgment, the trial magistrate did not complete the judgment. The judgment does not allude to any verdict at all and the last sentence of it is incomplete. The verdict portion at the back of the charge sheet simply says "guilty as charged" without stating in respect of which counts.

The sentence merely says "all counts as 1 for sentence" without stating which counts since accused was not convicted of the 4th count he pleaded not guilty to.

What this all boils down to is that in respect of the 3 counts accused pleaded guilty to, he was wrongly sentenced for want of the trial magistrate's failure to proceed in terms of s 271(2)(b) of the relevant Act. The sentence meted out is therefore incompetent. Regarding the 4th count it seems accused was also sentenced in respect of it yet he judgment had not convicted him of it. This slipshod and slapdash way of performing judicial work constitutes a grave irregularity fatal to both conviction and sentence as regards all the 4 counts.

The accused was sentenced on 6 July, 2009 to six months imprisonment portions of which were suspended on certain conditions of good behaviour and restitution, leaving him with an effective 2 months imprisonment. He has long served that.

In the event it behoves me to hold that I cannot certify that the proceedings were in accordance with real and substantial justice. Accordingly the purported conviction and the sentence in respect of all the counts are quashed and set aside.

Re: State v Joseph Kaseke

The learned scrutinising Regional Magistrate queried why the sentence on the scrutiny cover differed from the one in the record and whether the trial magistrate ever bothered checking her work prior to submitting it for scrutiny. The sentence as reflected on the scrutiny cover reads:

> "9 months imprisonment of which 4 months imprisonment is suspended 2 months is suspended on condition accused pays a fine of US$50 on or before 30/04/09. 3 months is suspended on condition accused performs 105 hours of community service at Chembira Primary School. Community service shall commence on 08/04/09".

The sentence in the record is complete and somewhat adequately worded as reflected on what is termed Community Service Sentence Formular 'A' as follows:

> "9 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition ..(of good behaviour). The remainder of 3 months imprisonment is suspended on condition… (of community service). A further 2 months imprisonment is suspended on condition accused pays a fine of US$50 on or before 30/04/09 through the Clerk of Court Mbare by 4 p.m."

It certainly reveals that the trial magistrate did not exhibit the required diligence when she forwarded the record for scrutiny without ensuring that the sentences captured above were in tandem. However, the sentence as reflected in the record seems to be the actual one that was imposed and its wording is clear enough. I would have been minded to correct the one on the scrutiny cover to match the one in the record had that been the sole irregularity.

The accused was charged with and pleaded guilty to C/S4 as read with s 3(i)(a) of the Domestic Violence Act, [*Cap 5:16*} in that he had assaulted his wife with a sjambok on 11/February 2009 for refusing to give him "money to pay for his child's fees" and the wife sustained "cuts and whips all over her body". Thereafter accused went away and came back on 14 February at around 21.20 hours. When complainant asked him where he had been, accused again assaulted her with the same sjambok and she sustained cuts on the hands, face and back. No medical report was obtained because the complainant did not go to hospital.

Out of this series of events the accused was charge with only one count instead of two and no explanation therefor was proferred. It was incumbent upon the trial magistrate to raise this issue with the prosecutor in the interests of justice. She did not.

A miscarriage of justice transpired. As for the absence of the medical report, perhaps by the 7th of April, 2009 when the accused was arraigned, it was too late to obtain one. But the investigating officer and the set down prosecutor slept on duty by not being alive to timeously ensure that one was obtained.

Over and above the foregoing irregularities, and most importantly is this one committed by the trial magistrate. She indicated that following the plea of guilty, she proceeded in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act. However, the record of proceedings has nothing showing that that procedure was ever embarked upon. The only notes present are ones pertaining to reasons for sentence. No explanation of the facts and the essential elements of the offence and no mitigation was recorded. In the result, the purported conviction and sentence are incompetent. It is surprising that the scrutinising Regional Magistrate missed this material irregularity, only managing to detect the peripheral one alluded to above. The accused has long finished serving the sentence. This is like closing the stable door after the horse has bolted. The conviction and sentence which are patently

incompetent cannot be allowed to stand. In the event, both are quashed and set aside. If the accused paid the $50 fine, he is entitled to its refund.

Re: State v Francis Muchamba

Accused was charged with assault. The charge appearing on the summary jurisdiction states:

> "assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]".

On the scrutiny cover it reads:

> "assault as defined in s 80 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]"

This constitutes the first irregularity. Section 89 has three subsections some of which have paragraphs. To simply prefer a charge of contravening that section without specifying the offence- creating subsection and paragraph is not only vague but wrong. The correct charge should read contravening s 89(1)(a) of the Act in question – the offence- creating provision. As for the s 80 which was quoted on the scrutiny case cover, it has nothing to do with assault at all. It deals with "sentence for certain crimes where accused is infected with HIV". This exposes lack of diligence and thoroughness on the part of the trial magistrate.

Accused therein pleaded not guilty to assaulting the female complainant. The alleged assault emanated from an altercation over the cellphone charger complainant had given the accused to use and return and he had failed to give it back. Complainant lost an incissor tooth as a result of the assault. Following a contested trial, accused was convicted. The plea, verdict and sentence were written on the face of the summary jurisdiction at the bottom. The sentence reads,

> "9 months imprisonment 3 months imprisonment wholly suspended for 5 years on condition of good behaviour. 6 months imprisonment suspended on condition accused pays a fine of US$50"

The trial magistrate's signature was endorsed thereon but no date is given.

On the scrutiny case cover the sentence was allegedly passed on 19 March, 2009 and reads,

> "4 months imprisonment wholly suspended for 5 years on condition accused completes 140 hours of Community Service at Waterfalls Police Station during midweek between 08.00-13-00 and 14.00 16.00…., Community Service to commence on 21 March, 2009 and to be completed within 3 weeks of that date" (my emphasis).

When the matter went for scrutiny the Regional Magistrate queried the difference between the sentence on the charge sheet and that on the scrutiny cover. While the trial magistrate conceded the error, the sentence on the face of the summary jurisdiction cited above was crossed out. The papers do not ventilate as to when that was done. However, at the back of the summary jurisdiction appears this sentence seemingly written on 21/03/09:

> "4 months imprisonment wholly suspended for 5 years on condition accused perform (*sic*) 140 hours of c/s at Waterfalls Police Station. c/s to be performed on Saturday and Sunday between the hours of 8 a.m.-1 p.m -2 p.m-4 pm excluding public holidays. c/s to be performed to the satisc. C/s to commence on 21/03/09" signed Ruwona, 21/03/09. (my emphasis).

The foregoing gives testimony of a maze of confusion as regards the exact sentence that was meted out. The deleted sentence is totally different from the other two sentences and those other two are also materially different from each other if one compares the underlined words and or phrases. For instance the sentence on the scrutiny case cover was passed on 19 March, 2009 while that at the back of the summary jurisdiction was passed on 21 March, 2009. In the former, the community service was to be performed during midweek (whatever that means) whilst in the latter it was to be performed on Saturday and Sunday. In the former, passed on 19 March, the community service was to commence on 21 March whilst in the latter, passed on 21 March, it was to commence on the same date. In both the 4 months were "wholly suspended for 5 years on condition accused performed 140 hours of community service". Such a condition of suspension of a sentence is glaringly incompetent. If accused worked Saturdays and Sundays doing 7 hours a day, in 3 weeks he would only have done 42 hours and not 140 hours.

In view of the countless elementary and material mistakes that are observed on review regarding sentencing, the office of the Chief Magistrate is urgently called upon to do something to ameliorate this disturbing trend whereby quite a substantial number of magistrates are clueless on these aspects of sentencing.

In the instant case the conviction of the University of Zimbabwe student seems proper and is confirmed, and the community service having been long completed, it behoves me to adopt and correct the sentence at the back of the summary jurisdiction to read as follows:

> "4 months imprisonment wholly suspended on condition accused completes 140 hours of community service at Waterfalls Police Station. The community service shall be performed on Saturday and Sunday excluding public holidays and between the hours of 8 a.m and 1p.m and 2 p.m and 4 p.m to the satisfaction of the person in charge at the institution. The community service shall commence on 21 March, 2009 and must be completed within 11 weeks of that date".

Re: State v Stanely Shonhiwa

The scrutinising Regional Magistrate took issue with the wording of the sentence. That sentence reads:-

> "6 months imprisonment wholly suspended for 5 years on condition accused restitutes complainant Gerald Kanoyanga in the sum of US$448-58 on or before 31/05/09 through clerk of court Mbare".

The phrase "….for 5 years …" also appears in the sentence in the case of Francis Muchamba *supra* where I did point out that it does not make sense. Such period of suspension is usually imposed where a portion of sentence is suspended on condition of good behaviour and not wherein restitution should be paid. Trial magistrates are reminded and urged to diligently apply their mind to their work as expected of judicial officers. As no prejudice will result to anyone, the sentence is corrected by the deletion of the words "for 5 years" to read:

> "6 months imprisonment wholly suspended on condition accused restitutes complainant Gerald Kanoyanga in the sum of US$448-58 on or before 31/05/09 through clerk of court Mbare".

With this amendment, the proceedings in this matter are confirmed.

Re: State v Farai Mavhundu

In this case the scrutinising Regional Magistrate opined that the accused's guilty plea ought to have been altered to one of not guilty. The charge is one of assault and during the canvassing of the essential elements, the accused was asked "what was your intention?" and his response was, "I was defending my wife".

Ordinarily, such an answer gives rise to a triable issue of defence of a third party. In the instant case however, I am not persuaded that there was such a defence open to the accused in view of the common cause facts of this case. If an accused person's wife has an altercation with a complainant in the absence of the accused and the accused later comes home and is appraised of the altercation then approaches the complainant and assaults him with fists and booted feet several times with severe force occasioning a severely bruised neck and face (as per the medical report), I cannot comprehend existence of such a defence especially where the accused also says he assaulted the complainant because he was insulting his wife. The requirements for such a defence are absent because the accused emerged on the scene much later after the event. There was no longer any imminent threat/danger of attack to the wife by the complainant which would have entitled the accused to act in defence of his wife. In the event, the trial magistrate was not obliged to alter the accused's plea to not guilty.

In the result, the proceedings in this case are certified to have been in accordance with real and substantial justice.

MUTEMA J: ……

MTSHIYA J: agrees: ……..