

STATE  
versus  
ABEL MAPAKO

HIGH COURT OF ZIMBABWE  
MUTEMA J  
HARARE, 13 January 2012

### **Criminal Review**

MUTEMA J: On 28 February, 2011 I wrote the following review query to the trial provincial magistrate Wochiunga esq. who was then stationed at Harare Magistrates Court:

“These proceedings are redolent with irregularities.

1. In respect of count 1, the accused was charged with and convicted of negligent driving in contravention of s 52(2) (presumably (a) since this was not indicated) of the road Traffic Act, [*Cap 13:11*]. The negligent driving in question involved the driving of a commuter omnibus. He hit a pedestrian who fell down and sustained bruises. This was on 10 March 2010. For this offence accused was sentenced to 4 months imprisonment wholly suspended on condition he performs 140 hours of community service at Rugare Police commencing 21 February 2011.
2. Regarding count 2, accused was charged with and convicted of “culpable homicide as defined in s 47”. The charge does not specify s 47 of which statute. I would want to know the statute containing s 47 which defines the culpable homicide. The culpable homicide involved the driving of a commuter omnibus on 10 November, 2010 in which two people, viz Martin Munjeya and Edwin Chigodoma perished following a head-on collision of the commuter omnibus and a Toyota Sprinter as a result of accused’s negligence. Accused was sentenced to 15 months imprisonment of which 5 months was suspended for 3 years on condition he “does not within that period contravene s 49 of the Criminal Law Act...” I am not aware of any Act called the Criminal Law Act. What chapter could it be?

The remaining 10 months imprisonment was suspended on condition accused performed 350 hours of community service at Rugare Police commencing on 21 February 2011- the very same date he was to commence the community service in count 1 above. In both counts, the times and days for the performance of the community service are the same. Since the two sentences were not ordered to run concurrently, one would be excused for not understanding how the accused will manage to perform both these community services. How does the trial magistrate explain away this mix-up?

3. In both instances, the court in sentencing such an accused as *in casu* is mandatorily enjoined to prohibit him from driving a commuter omnibus and a heavy vehicle, in the absence of special circumstances for at least 2 years. This is pursuant to s 52 (4)

(c) and the interpretation gleaned from s 64 (3) (b) (i) of the Road Traffic Act. In the instant case, the enquiry regarding special circumstances was conducted only in respect of count 1 and were not found. The two offences were committed 8 months apart. The additional sentence of prohibition from driving commuter omnibuses and heavy vehicles for 2 years relates therefore only to count 1. It is unknown whether in respect of count 2 accused had special circumstances or not.

The general rule regarding sentences is that they run cumulatively in the absence of an order for them to run concurrently. Why then did the trial magistrate fail to enquire into the aspect of special circumstances regarding count 2 and in their absence, also prohibit the accused from driving commuter omnibuses and heavy vehicles for the 2 years, to run either concurrently with the period in count 1 or cumulatively?

4. While prohibition from driving commuter omnibuses and heavy vehicles in terms of both counts is mandatory, prohibition from driving any other classes of motor vehicles is discretionary. But since *in casu* the accused was not prohibited from driving other classes of vehicles not named in the order, it means therefore that he can obtain a driving licence and drive those unnamed classes of motor vehicles. To this end, did the trial magistrate exercise his discretion judiciously by not prohibiting the accused from driving all classes of motor vehicles for a period he deemed fit in both counts and then named classes for the 2 year period?
5. While 2 people died in respect of count 2, only one post-mortem for Edwin Chigodoma was produced in court. Why was the post-mortem in respect of Martin Manjeya not produced in order to link his death with accused's conduct. What if he did not die? Or if he died, what if the cause of his death had nothing to do with accused's negligence? Why did the trial magistrate not call for that post-mortem?
6. Overall, the sentence imposed in this case offends against my sense of justice. It was too lenient considering these facts:
  - (a) accused was a driver of a public service vehicle;
  - (b) he bumped and injured a pedestrian in count 1;
  - (c) he occasioned two deaths in count 2 – although the trial magistrate did not see it fit to find out whether the deceased were passengers in the accused's commuter omnibus or were occupants of the second vehicle;
  - (d) Proper judicial notice can be taken of the atrocious manner of driving by most commuter omnibus drivers in town;
  - (e) The space of time between the two accidents accused occasioned;
  - (f) The dire consequences occasioned by accused to the families of the deceased in terms both emotional stress and loss of breadwinners (Chigodoma was employed as a security guard!);
  - (g) The imperative need to send a clear signal to all public service vehicle drivers as a deterrence.

It baffles the mind that all the foregoing irregularities were committed by a provincial magistrate!

Could I have the trial magistrate's comments at his earliest convenience."

It was only in December, 2011 that I got the trial magistrate's response couched in these words:

“Kindly place the record of proceedings before the honourable reviewing judge with the following comments:-

Firstly the trial court would like to express its sincere apology for failure to resubmit the record within the stipulated time period. This was necessitated by the fact that the magistrate was transferred from Harare Magistrates Court to Chivhu Magistrates Court with effect from 01 November 2011.

The trial court has also take (sic) note of the issues raised by the honourable reviewing judge. The trial court respectfully concedes to the irregularities as pointed out. The trial court promises never to err in that respect again.

The trial court respectfully stand (sic) guided by the honourable reviewing judge.”

Firstly it does not persuade anyone, the trial magistrate included, that the inordinate delay in responding to the query of 9 months was occasioned “by the fact that the magistrate was transferred from Harare Magistrates Court to Chivhu Magistrates Court with effect from 01 November 2011”. By 1 November, 2011 an 8 month delay had already endured. In the event the reason for the delay proffered by the trial magistrates is fanciful. Magistrates are not expected to lie in judicial correspondence.

Secondly, the peroration that “the trial court respectfully concedes to the irregularities as pointed out (and that) the trial court promises never to err in that respect again” is a decoy. The errors enumerated in the review query are too numerous and too basic to be committed by a provincial magistrate unless of course he is incompetent. I am not persuaded that a judicial officer of the grade of provincial magistrate can be so remiss in the performance of his duties to the point of being incompetent if account is had of the sentence that was meted out in these proceedings. In point 6 of my review query *supra* I stated that the sentence imposed offended against my sense of justice on account of its leniency in view of the factors therein enumerated. I need not repeat those factors here suffice to say that the suspicion seems strong that the level of incompetence displayed *in casu* smells of corruption. I am cognisant of the fact that sometimes there is a fine line between incompetence and corruption. Not only was justice not seen to be done here but its travesty is beyond caevil.

In the result there is no way that it can be even remotely said that these proceedings were in accordance with real and substantial justice.

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Accordingly I withhold my certificate.

MTSHIYA J: Agrees.....