HARDWORK MASAITI
and
SIMON CHAYA
and
WEDZERAI GWENZI
and
MEKI MAKUYANA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 22 February 2012

Criminal Appeal

T Maanda, for the appellants
A Masamha, for the respondent

HUNGWE J: The Attorney-General gave notice in terms of s 35 of the High Court Act, [*Cap 7:06*] that he did not support the conviction of all four appellants in this matter. The record shows that the appeal had previously been set down for hearing on 5 May 2011. It could not be heard because the record of proceedings, i.e. the original and the transcribed copies were unintelligible. It appears that a directive was given at that point to the relevant authorities to rectify the record in order to afford the appellants an opportunity to have their appeal dealt with on the merits. In that regard Principal Law Officer in the office of the Attorney-General, Mr *Masamha*, accordingly wrote to the Chief Magistrate in an effort to ensure that the directive of this court was complied with. His letter reads:

> "**RE: STATE vs HARDWORK MASAITI AND OTHERS: CA753-6/O9: KIDNAPPING**
>
> The above appeal is pending before the High Court and is supposed to be heard on 2 February 2012. The following are urgent issues of concern.

> Previously the appeal was postponed to have the record attended to as it was in a shambolic state. The transcript was not certified, the trial magistrate had not responded to the notice of appeal, the application for discharge at the close of the state case and the bail ruling were not attached to the record. Further the record itself is so disjointed in terms of the proceedings therein such that no sense can be made of it.
>
> On 12 August 2011 we wrote to the Criminal Registrar, High Court, sounding our observations. See copy of the correspondence attached.
>
> We, however, later learnt that the issues we raised could not be adequately attended to, the handicap being that the trial magistrate Mr. Zuze is now late.
>
> It has since been ordered by the Appeals Court that a formal correspondence be made for record purposes.
>
> We are therefore humbly requesting that you formally update us on the issue of the trial magistrate's death."

On 1 February 2012 of the office of the Chief Magistrate addressed correspondence to the Registrar of this court confirming that indeed Mr Zuze, the trial magistrate, passed away on 12 January 2012 at Chipinge.

On the same day, 1 February 2012, Mr *Masamha,* for the Attorney-General, gave the notice aforesaid.

In the notice he gave a background of this matter. He pointed out that both counsel for the State and defence were agreed, from the outset, that the numerous shortcomings of the record of proceedings presented a serious handicap to the appeal court as it could not be said with any certainty what it was that transpired during trial. Counsel for the appellants recited several case authorities for the proposition that such material discrepancies as existed on the record of proceedings constituted such a serious irregularity as to necessitate a quashing of the proceedings.

See *R* v *Neto* 1965 RLR 656 (A); *S* v *Marais* 1966 (2) SA 514 (T) @516G-H; *S* v *Jenkins* 1985 (2) ZLR 193 (SC)**;** *S* **v** *Manera* 1989(3) ZLR 92(S**)** @ 93; *S* v *Davy* 1988 (1) ZLR 386(S); *S* v *Ndebele* 1988 (2) ZLR 249 (H); *S* v *Duri* HH 89/91; *S* v *Nyamupanda* HH 101/91; *Chidavaenzi* **v** The *State* HH113/08.

It is a correct observation that the record of proceedings does not make any sense. To cite but one example, take the following section recording cross-examination (a sample representative of the general tenor of the record):

"Q: When do you say behind the case before the court today?

A: I suspect my revival- Mr E Porusingazi and the people too also.

Q: You admit your councellor to address the meeting?

A: Yes that is true.

Q: From the meeting on 3/12/09 we have the alleges

A: Yes

Q: At Chisuma we had two meetings

A: Yes that is true the other meeting was only a counter."

In *S v* Curle *2001 (2) ZLR 323 (H)* the entire evidence and submissions in mitigation and aggravation was missing from the record. Confronted with such an irregularity BLACKIE J stated:

> "The evidence missing from the record is the entire evidence and submissions in mitigation and aggravation. The absence of such evidence and addresses means that there is, in principle, a material deficiency in the record, more especially so, as in this case, the accused is appealing against sentence.
>
> '.....all pleas of mitigation, where defending counsel outlines the facts to the court must form part of the record, and they must be transcribed by official shorthand writers and included in the record should the record subsequently come on appeal.' See *S* v *Neto* 1965 RLR 656 (A). The effect of a material deficiency in the record is that the proceedings must be set aside. The accused is seriously prejudiced through no fault of his own. He is just entitled to have his case considered on appeal or review and for that purpose he is entitled to a copy of the record certified as correct. If he does not receive that he is frustrated in his basic right of appeal or review."

In light of these shortcomings regarding the record of proceedings, I was satisfied that the concession by the Attorney-General was proper. The present proceedings are incapable of

rectification due to the death of the presiding trial magistrate. The only course open to afford justice to the appellants is indicated in the authorities cited by counsel for both the state and defence. In the result therefore I quash the conviction in respect of all the appellants and set aside the sentences imposed upon such conviction.

MAVANGIRA J: I agree ……

Maunga Maanda and Associates, appellants' legal practitioners
Criminal Division of the Attorney-General's Office, respondent's legal practitioners