

STATE

Versus

SILAS NYABADZA

MUZOFA J

Chinhoyi, 13 July 2023

Review Judgment

MUZOFA J: This matter was referred for review by the Regional Magistrate who, after considering the facts of the case on scrutiny was of the view that the accused's degree of negligence was not slight.

The accused was convicted on a charge of culpable homicide arising from a road traffic accident in contravention of s49 (a) of the Criminal Law Code. He was sentenced to pay a fine of \$30 000 in default of payment 60 days imprisonment. In addition 6 months imprisonment was conditionally suspended for 5 years. In addition the accused was prohibited from driving all classes of vehicles for 2 years.

The accused drove a Freightliner truck towing a trailer loaded with 30 tonnes of polythene bags of maize. Four passengers were on board sitting on the polythene bags. The deceased was one of the passengers. Along the way the deceased fell off the bags. He was immediately ran over by the left rear wheels of the trailer.

Having raised the issue on the degree of negligence after considering the facts I also raised issue with the charge particularly the particulars of negligence whether the conviction was based on the accused's driving.

The way the particulars of negligence were set out is very broad. They did not spell out what exactly in accused's bad driving that led to the deceased's death. I inquired from the learned Magistrate if allowing a passenger to sit on the polythene bags was driving. My enquiry was premised on the definition of driver. A driver is defined in the Road traffic Act (Chapter 13:11) as a,

- 'person having control of the steering apparatus of a vehicle and includes, in respect of—
- (a) a motor cycle or pedal cycle, the rider thereof; and
 - (b) a trailer, the person driving the motor vehicle by which the trailer is being drawn; and

(c) an animal-drawn vehicle, the person in charge thereof;

According to that definition a driver is someone in control of the steering wheel. The charge preferred against the accused is that he drove negligently. In my view there must be something intrinsic in the way the accused controlled the steering that led to the accident for instance over speeding, failing to stop where an accident was imminent and so forth.

In this case the charge was badly drafted and the State Outline did not save the situation. This anomaly escaped both the prosecution and the trial Magistrate.

The charge and the particulars of negligence were set out as follows:

‘The accused is charged with culpable homicide as defined in section 49 (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) as read with s64 of the Road Traffic Act (Chapter 13:11).

In that on the 7th day of September 2022 and at 43km peg along Zvipani-Chiedza Road, Silas Nyabanga unlawfully and negligently drove a Freightliner truck registration number AFQ 1588 towing a trailer AEZ 4618 and caused the death of Farai Munuwa realizing that death may result from his driving conduct and negligently failing to guard against such death.

Particulars of negligence

(a) Failure to keep a proper lookout under the circumstances.’

Only one broad particular of negligence was set out. There was nothing to show how the accused failed to keep a proper look out. In fact the particular of negligence becomes completely meaningless if it is not accompanied by further details on the specific driving conduct by the accused. It becomes worse if the State Outline does not even set out how the accused failed to keep a proper look out in its narration of what transpired on the day. The state outline simply narrated what transpired and from the facts nothing alludes to the accused’s driving conduct.

As already stated I inquired with the Magistrate if allowing a passenger to sit on the load is driving. A concession was made that it may not be driving. Indeed it is negligent for a driver to allow a passenger to sit in a precarious position in the vehicle. As was stated in *The State v Kamuchepa HMA 23/18* the court commented that the accused was negligent to allow the deceased to sit on the mudguard since he is in charge of the vehicle. In that case there were other particulars of negligence relating to the accused’s driving conduct. It is my considered view that allowing a passenger to sit in a dangerous position cannot be a particular of negligence on its own there must be something more.

The particulars of negligence must be framed with precision so that the accused appreciates what he is facing. This cannot be overemphasized and a number of judgments have been written on this issue. I refer to the case of *The State v Chitepo HMA 3/17* where a number

of infractions both in the charge and the proceedings were under review. One of the issues was the drafting of the particulars of negligence the review Judge strongly underscored the need for proper drafting of charges in criminal matters. I cite the relevant part for its precision in expression,

“I caution in passing that great care and precision should always be taken and exhibited in the drafting of criminal charges and the handling of criminal matters. Criminal proceedings affect some of the fundamental human rights and freedoms enshrined in the Constitution, namely the right to liberty, and even the right to life’.

In this case the trial Magistrate canvassed the essential elements based on the opinion given by the road traffic accident evaluator who re constructed the scene. He opined that the accused was negligent by allowing the deceased to sit on the bags. He supported his opinion as follows;

‘Furthermore , being a driver of goods public service(sic), he was only entitled to carry passengers who were in (sic) of his work, in this scenario, the loaders .He was only to carry them at the horse. Having illegally ferried the passengers in the trailer, the driver had a duty to make sure they were not seated on top of the load. Thus the driver failed to keep a proper look out under the circumstance’

The Magistrate canvassed the essential elements based on this expert opinion. Had the Magistrate considered what a driver is, he could have dealt with the matter differently. Strictly speaking what the charge alleged had nothing to do with driving. Although the decision by the accused was negligent, that as a stand-alone particular of negligence is not enough it is totally inadequate. There must be additional information in respect of the driving conduct.

I address the issue raised by the Regional Magistrate. The trial court properly canvassed the degree of negligence as set out in a plethora of cases such as *The State v Muchairi HB 41/06* and concluded that the degree of negligence was slight. The Regional Magistrate was of a different view that it was more than that in view of the fact that the accused was an experienced driver and had acted contrary to his duties when he carried the passengers. The observations are correct but in my considered view that must have been considered in aggravation.

The difficulty arises from the poorly drafted particulars of negligence. My view is that since nothing was placed before the trial court in respect of the accused’s driving conduct, the court cannot be impugned for coming to that conclusion. I say this because the deceased also took a risk and sat on the bags. Despite that observation, the sentence was too lenient. This is a case of death due to negligence, a life was lost. For the accused to get away with a fine is not in tandem with the loss. Section 51 of the Road Traffic Act that the accused could have been charged with provides for a fine or 6 months imprisonment.

The Regional Magistrate also raised the issue whether it was appropriate to cancel the accused's driver's licence in the circumstances. From the sentence imposed the accused's licence was not cancelled.

Having considered the facts and the irregularities, it appears that the irregularities do not vitiate the proceedings. In terms of s29 (3) of the High Court Act (Chapter 7:06) a Judge shall quash or set aside a conviction or sentence where the Judge is of the opinion that the irregularity has resulted in a substantial miscarriage of justice. In this case the irregularities did not lead to substantial miscarriage of justice they do not warrant the quashing of the charge or the sentence. I can only withhold my certificate so that in future the trial Magistrate will seriously consider the charges and the particulars of negligence in such matter.

Accordingly I withhold my certification, the proceedings were not in accordance with real and substantial justice.