

(1) **THE STATE**

Versus

VICTOR MHURI – CRB KK 503/22

(2) **THE STATE**

Versus

NOBERT MAGANDA – CRB KK 723/22

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 JUNE 2023

Review Judgment

TAKUVA J: The two records were referred to the Registrar by the learned Regional Magistrate, Gokwe with the following comments:

“The above cited two cases were brought before me for scrutiny and I raised the same query on both records. The accused appeared before the trial magistrate in Kwekwe and both accused pleaded guilty and were convicted on their own plea of guilty. During mitigation accused seemed to be giving a defence.

In the case *The State versus Victor Mhuri* accused appeared facing allegations of indecent assault as defined in section 67 of the Criminal Law (Codification and Reform) Act Chapter 9:23. Accused pleaded guilty to the allegations and was convicted on his own plea of guilty. During mitigation accused was asked why he committed the offence and he responded as follows:

Q: Why did you commit the offence?

A: I wanted to grab her hand and mistakenly hit her buttocks ...

Section 67 of the Act criminalises the commission of physical conduct by male person upon a female person of an act that may be regarded as indecent by a reasonable person. That must be accompanied by an indecent intent in the above case the accused told the court that he did not

intend to hit the complainant's buttocks but it was a mistake. The response given by the accused seems to me to be a defence calling for a full trial as opposed to a truncated trial.

In the case of the *State vs Nobert Maganda*, the accused appeared before the trial court facing two counts of assault as defined in section 89 of the Act. The accused pleaded guilty to both counts and was convicted on his own plea. During mitigation the following conversation was recorded:

“Q - Why did you commit the offence?

A - I was underground working when some people attacked me with the intention to take my stones. They took my torch so I used the things I had to throw at them.”

Accused told the court that he was attacked by the complainants. He acted because of an attack, which is provided for in Part XIII of the Act. The trial magistrate ought to have altered the plea to that of not guilty and proceeded to trial so as to find out whether the accused's actions were in line with the requirements of self defence requirements which are listed in section 253 of the Act ...”

I entirely agree with the Regional Magistrate that the proper procedure that was to be followed was to alter the plea to that of “Not guilty” and proceeded to a full trial in both cases. See *S v Samson Phiri* HB-133-17 where the court held that:

“It is a misdirection and fatal miscarriage of justice for the trial magistrate to convict an accused person on a plea of guilty in circumstances where an accused has raised a valid defence to the charge.”

Section 272 of the Code provides the correct procedure that should be followed in such cases. It provides:

“If the court at any stage of the proceedings and in terms of section two hundred and seventy-one and before sentence is passed—

- (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
- (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

- (c) is not satisfied that the accused has no valid defence to the charge; the court shall record a plea of not guilty and require the prosecution to proceed with the trial ...” (the emphasis is mine)

In casu, the court *a quo* failed to comply with section 272. This is an irregularity. The proceedings have been initiated by this irregularity and cannot be permitted to stand.

In the result, it is ordered that:

1. The proceedings under CRB KK 503/22 be and are hereby quashed.
2. The proceedings under CRB KK 723/22 be and are hereby quashed.
3. The two matters under CRB KK 503/22 and CRB KK 723/22 be and are hereby remitted to the court *a quo* for trials *de novo* before a different magistrate.

Takuva J

Moyo J agrees