

STATE

Versus

QALANI NCUBE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 18 & 26 MAY 2022

Criminal Review

MAKONESE J: There have been numerous judgments of this court which have reiterated that when judicial officers decide upon the appropriate sentences in cases involving culpable homicide arising out of road traffic accidents, regard must be had to the provisions of section 52 of the Road Traffic Act (Chapter 13:11).

In this matter, that same issue has arisen. The accused appeared before a Provincial Magistrate sitting at Plumtree facing one count of culpable homicide as defined in section 49 of the Criminal Law (Codification Reform) Act (Chapter 9:23) as read with section 52 of the Road Traffic Act. The accused was convicted on his own plea of guilty and sentenced to pay a fine of RTGS \$30 000 in default of payment 5 months imprisonment. Accused was prohibited from driving all classes of motor vehicles for a period of 6 months.

The Scrutinising Regional Magistrate raised a query with the trial Magistrate and raised the following issues:

1. whether the provisions of section 64 (3) of the Road Traffic Act were adhered to.
2. whether the trial Magistrate held an inquiry with regard to the issue of negligence so as to come up with a finding on the degree of negligence.

3. whether the accused was given a chance to make submissions on special circumstances considering that he was prohibited from driving.

In response, the trial Magistrate conceded that no proper inquiry had been made on the circumstances surrounding the degree of negligence. Further, the trial Magistrate conceded that accused was not given the chance to make submissions relating to special circumstances before the prohibition was ordered.

The brief facts of the matter are that on the 5th of September 2021 at around 1530 hours the accused was driving a Toyota Hiace registration number ABQ 0034. The vehicle was towing an unregistered trailer along the Bulawayo-Tsholotsho road. There were 15 passengers on board the vehicle, a commuter omnibus. On reaching the 38 km peg along the same road, Kwanele Moyo who was the conductor asked for a recess. The driver stopped the vehicle. The conductor disembarked from the vehicle together with two other passengers. After the recess the trio decided to board the trailer instead of the vehicle. The driver took off. After travelling for a short distance, and at the 48 km peg the tow- hitch broke. The trailer was disconnected from the motor vehicle. The trailer swerved sideways and the three persons in the trailer were thrown onto the tarmac. Kwanele Moyo died as a result of injuries sustained when he hit the road surface. The other two passengers suffered serious injuries and were referred for treatment.

In his reasons for sentence the learned Magistrate in the court *a quo* held that:-

“The court is alive to the fact that the offence was not intentional. It has assessed the degree of negligence in this matter. Accused should not have driven the vehicle with passengers aboard a towing trailer. Again, when he approached the grid, he should have exercised caution by slowing down to negotiate the grid and also visibility was good since it was during the day. As such the court is satisfied that he drove the vehicle negligently and as such a fine for a first offender coupled with a prohibition from driving all classes of motor vehicles for a certain period will meet the justice of the case.”

It is clear that the learned Magistrate assessed the degree of negligence without complying with the mandatory provisions of the Act, which requires that an inquiry be made.

The learned Magistrate went on to conclude that prohibition from driving all classes of motor vehicles was called for without asking the accused to make submissions on special circumstances. That approach led the Magistrate to fall into a misdirection. The learned trial Magistrate did not consider that the motor vehicle involved was a commuter omnibus. The penalty for reckless driving under section 52 (2) of the Road Traffic Act is as follows:

“.....

- (a) “ subject to section eighty-eight A, where the vehicle concerned was a commuter omnibus or a heavy vehicle to a fine not exceeding level ten or to imprisonment for a period not exceeding fifteen years and not less than two years; or
- (b) in any other case, to a fine not exceeding fifty thousand dollars or to imprisonment not exceeding five years or to both such fine and such imprisonment.”

A number of cases in this jurisdiction have emphasized the need for Magistrates handling culpable homicide cases arising from road traffic accidents to enquire into the degree of negligence as required by law. Regrettably, inspite of available case law that should guide judicial officers the same mistakes are made. Reference is made to; *State v Chirwa* HB 124-04, *State v Chaita & Ors* 1998 (1) ZLR 213 H; and *State v Mapeka & Anor* 2001 (2) ZLR 90 (H).

There is need for remedial action in this matter. From the evidence on record and the facts surrounding this offence there is no doubt that the guilt of the accused was established. The conviction is safe and cannot be assailed. I accordingly confirm the conviction. I however, set aside the sentence and refer the matter back to the Magistrate for a proper inquiry in compliance with the mandatory provisions of sections 64 (3) and 66 (4) of the Road Traffic Act. The trial Magistrate is directed to re-sentence the accused in accordance with the law.

Makonese J.....

Takuva J concurs.....