

**STATE**

**Versus**

**DOUBT MNCEDISI NKOMO**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 19 AND 26 MAY 2022

**Criminal Review**

**MAKONESE J:** The accused was arraigned before a Magistrate at Plumtree on the 27<sup>th</sup> of March 2022 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 (Chapter 13:11).

The accused pleaded guilty and was convicted and sentenced to pay a fine of RTGS \$25 000 in default of payment 6 months imprisonment. In addition 6 months imprisonment was wholly suspended for 5 years on condition accused did not within that period commit any offence involving the negligent killing of another for which upon conviction he is sentenced to imprisonment without the option of a fine.

The Scrutinising Regional Magistrate raised a query with the trial Magistrate pointing out that the Magistrate did not comply with the provisions of section 64 (3) of the Road Traffic Act in that he failed to determine the degree of negligence before sentencing the

accused. The learned Magistrate in the court *a quo* did not order that the driver's licence be endorsed with the particulars of negligence in terms of section 66 (4) of the Act.

In response to the query, the trial Magistrate indicated that:-

*"It was my understanding that in my reasons for sentence I had indeed dedicated a section of same towards making that determination and made a ruling on it. I indicated that:*

*" ... neither should an assessment of negligence be based on an arm- chair approach. The question therefore is, is it every driver, despite what the Highway Code says, that disembarks his vehicle and checks around said vehicle before driving off? From a cold start, yes, in a sensitive environment like a school area yes, however after, the stop described in the state papers not all would have disembarked though all should have confirmed with passengers before driving off. Ergo, the degree of negligence is deemed to be ordinary."*

It is clear from the reasoning of the Magistrate in the court *a quo* that he made a conclusion that the degree of negligence was ordinary without complying with the mandatory provisions of the Act. This the magistrate could not do. A number of cases in the jurisdiction have emphasized the need for Magistrates to enquire into the degree of negligence and make a finding in cases of this nature. 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).

The background leading to the conviction as narrated in the outline of the state case is that accused was the driver of a Toyota Hilux motor vehicle registration number ABT 6938. The motor vehicle was being driven along the Plumtree-Maitengwe road due north.

They were three passengers on board. Upon reaching the 92 km peg along the said road the accused stopped the vehicle to jump start another vehicle. The accused did not realise that his passengers Nkosinathi Nyathi and the deceased had not got on to the vehicle. The deceased who was untying barbed wire was dragged by the moving motor vehicle. The wire hooked the deceased who was dragged for about 120 metres. As a result of the accident the deceased sustained serious head injuries and bruises all over his body. The post mortem report reflected that the cause of death was hemorrhagic shock and multiple bruises.

The learned trial Magistrate did concede that he did not conduct an inquiry into the degree of negligence and did not endorse the driver's licence with the particulars of negligence required by law.

There is need for remedial action in this matter. From the evidence in the record and the facts surrounding this offence there is no doubt that the guilt of the accused was established. The conviction cannot be assailed. I accordingly confirm the conviction. I however set aside the sentence and refer the matter to the trial 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.....