

KENMORE SIGN
and
BLESSING KUTYAURIPO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 June 2021

Review Judgment

CHITAPI J: The two records of proceedings suffer from the same procedural irregularity in relation to the disposal of the cases by way of trial on a guilty plea procedure as provided for in terms of s 271(2)(b) as read with s 271(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The cases were dealt with by the same Magistrate at Mount Darwin Magistrates' Court.

In the case of Kenmore Sign, CRB MTD 877/20, the accused was convicted of robbery as defined in s 126(1)(a) of the Criminal Law Code [*Chapter 9:23*]. It was alleged that on 20 September 2020 at Mukarachi panning site, Mt Darwin, the accused in the company of accomplices tripped the complainant who fell to the ground. The accused and his accomplices then forcibly took from the complainant a cell phone handset, and cash of ZW\$210 and USD \$575.

In the case of Blessing Kutyaauripo CRB MTD 1246/20. The accused was convicted of assault as defined in s 89 of the Criminal Code. It was alleged against him that on 12 December 2020 at a house in Mupfuri Heights in Mount Darwin, the accused assaulted the complainant with a wooden plank thereby causing injuries to the complainant or realizing that bodily harm could result. The accused was sentenced to 24 months imprisonment with 6 months suspended on conditions of future good behaviour.

Both cases were unprocedurally dealt with in that the peremptory requirement that the explanation of the charge be given to the accused before he is called upon to plead as provided for in s 271(3)(a) of the Criminal Procedure and Evidence Act, were not complied with. The magistrate in response to my query whether or not he was properly directed to the

provisions of s 27(3)(a) as aforesaid responded as follows in a reply minute dated 6 May 2021.

“I have gone through the issues raised and wish to apologise for the error of omission in not recording the explanation of the charge to the accused person.

My humble apology, that error of omission will not be repeated in the near future.

I stand guided and to be corrected.”

The position taken by the review court where such an omission has occurred was set out in the judgment in *S v Enock Mangwende* HH 695/20. It was held that the provisions of s 271(3) were intended to ensure fairness to the accused by ensuring that the accused tenders a guilty plea deliberately and knowingly. In other words a failure to comply with the provisions of s 271(3) results in an unfair trial. An unfair trial cannot be condoned and no law may in terms of s 86(3)(e) of the constitution limit the accused’s right to a fair trial. In the *Mangwende* case (*supra*) the conviction and sentence was set aside. That course will similarly be adopted herein since the proceedings under review are not certifiable as being in accordance with real and substantial justice. The magistrate’s attention is also brought to the case of *S v Tamiriraishe Moyo* HH 697/20.

Resultantly the following order is made:

1. The proceedings in case *S v Kenmore Sign* CRB MTD 877/20 and *S v Blessing Kutyaauripo* CRB MTD 1246/20 are set aside and the convictions as well as sentences which were imposed.
2. The accused persons shall be forthwith released from custody.
3. The Prosecutor General retains his discretion to prosecute the accused persons afresh.
4. In the event of a fresh prosecution being instituted the case shall be dealt with by a different magistrate and in the event of a conviction the accused shall not be sentenced to a more severe sentence than that imposed in the quashed proceedings and the sentence already served shall be considered as an already served portion of the sentence which the court may impose on retrial.
5. This judgment disposes of both CRBs MTD 877/20 and MTD 1246/20 and the Registrar shall ensure that a copy of the judgment is assigned to each record.

MUSITH JAgrees