

1. THE STATE
versus
AUSTINE MANDAZA
and

2. THE STATE
versus
JUSTINE KAUPFU

CRB NZV 160-1/20

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 08 November, 2021 & 23 February, 2022

Review judgment

CHITAPI J: the accused aged 23 and 22 years old respectively appeared before the trial magistrate on guilty plea in terms of S 271(2) (b) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. They were charged with stock theft as defined in s 114 (2)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The details of the charge were that on 28 October, 2020 at Mukodzongi village, Chief Negomo, Nzvimbo the two accused unlawfully opened the complainant's cattle pen and drove away one ox and put it out for sale. A prospective buyer alerted the police when the accused persons failed to furnish a stock card to show ownership of the ox. Police arrested the accused persons and charged them for stock theft. They were brought to court on 2 November, 2020 for trial. They were convicted of stock theft as charged and each of them was sentenced to nine years imprisonment, being the mandatory minimum sentence that the court was obliged to impose in the absence of special circumstances which the two accused failed to advance.

When the record was placed before me on automatic review, I queried by minute dated 12 July, 2021 addressed to the Provincial Magistrate wherein I sought a comment from the trial magistrate as follows:

“Did the Magistrate comply with the s 271 (3) of Criminal Procedure and Evidence which requires that charge should be explained and the explanation given recorded: see *State v Mangwende* HH 695/20”

The record was returned to the Registrar undercover of a minute dated 8 October, 2021 by the Provincial Magistrate wherein, he advised that the trial magistrate could not comment because she resigned from service in March, 2021. I must therefore review the proceedings without the benefit of comments by the trial magistrate.

The trial magistrate commenced the trial correctly because the first thing which she did was to comply with s 163A of the Criminal Procedure and Evidence Act by informing the accused of his right to legal representation as enshrined in s 191 of the same Act. Again the trial magistrate correctly advised the accused that the charge he was facing carried a mandatory minimum sentence in the absence of special circumstances.

The trial magistrate then wrote:

“charge read and understood”

Guilty pleas were then recorded or entered by the trial magistrate. Facts were read to the accused whereafter essential elements were canvassed. The accused was convicted and thereafter sentenced.

The proceedings suffer from the irregularity of a non-compliance with the mandatory provisions of s 271(3) of the Criminal Procedure and Evidence Act. The trial magistrate failed to explain the charge nor to record the explanation. In the case of *State v Jeseline Mare and 6 Others* HH 274/21 wherein MUSITHU J concurred, I stated as follows at p 307 of the cyclostyled judgment after extensively interrogating the provisions of s 271 (2) (b) and 271(3) of the Criminal Procedure and Evidence Act and how they related:

“it leaves me to then determine what must be done about the irregular trial. In the *Mangwende* case (*supra*), the irregular proceedings were set aside. The judgment makes it clear that proceedings which are not in accordance with the provisions of s 271 (3) are not certifiable as being in accordance with real and substantial justice. The proceedings are set aside because the omission to comply with the provisions aforesaid violate fair trial standards which can only be achieved upon conducting the proceedings in accordance with the law. The same facts (*sic*) of the setting aside of the proceeding as was done in the *Mangwende* case will befall the proceedings in each of the four records under review herein”

The proceedings were set aside and the Prosecutor General was granted the right to exercise his discretion to prosecute the accused afresh.

In casu, I find no reason nor justification to depart from treating these proceedings as was done in the *Mangwende* case HH 695/20 and quoted judgments (*supra*). A procedurally deficient trial where there has been an omission to comply with peremptory procedural steps render the trial

unfair. An unfair trial cannot be condoned by any law and the court's hands are tied. It is not a trial in terms of the law and must be declared a nullity because the right to a fair trial is absolute in terms of section 86 (3)(e) of the Constitution. The guilty plea trial *in casu* was thus a nullity.

The following order therefore:

1. The proceedings in *State v Austine Mandaza and Justine Kaupfu CRB NZV 160-161/20* are quashed.
2. The convictions and sentences imposed are set aside and the two accused persons must forthwith be released from serving the sentences imposed.
3. The Prosecutor General in his discretion may institute a fresh prosecution of the accused persons.
4. In the event that the accused persons are convicted in a fresh trial, the length of imprisonment already served by them prior to their release by virtue of the setting aside of their convictions and sentences shall be counted as part of an already served portion of any new sentence which may be imposed on them.

MUSITHU J AGREES