

THE STATE  
versus  
RUTENDO KATSIGA

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 2 March, 2022

### **Review Judgment**

CHITAPI J: The accused was charged with the crime of theft of Trust property as defined in s 113(2) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The details of the charge are that on 23 April 2021 at Gulf Complex Harare, the accused was in terms of a trust agreement between him and the complainant required to hold in trust on behalf of the complainant USD\$1 900.00 for purposes of purchasing six television sets of varying sizes. The accused contrary to the agreement converted USD1 710.00 of the trust money to his own use thus failing to hand the money over to the complainant on demand. The accused was brought to court for trial. He was convicted after a contested trial and was sentenced to 15 months imprisonment with portions thereof suspended on conditions of future good behaviour and restitution.

The record of proceedings was brought on review. On 12 July 2021, I raised a query that it did not appear that the learned trial magistrate had explained the charge to the accused person and recorded such explanation as required in terms of s 271(2)(b) as read with s 271(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and the guidelines given in the case of *S v Mangwende* HH 695-20.

The learned trial magistrate by way of a minute in response stated as follows in material particulars:

“... I have noted the query raised by the Honourable Judge and wish to respond as follows. It was an oversight on my part not to explain the requirements of s 271(3) I was under the impression that s 271(3) does apply to a plea of guilty only. I will safeguard against such omissions in future...”

I have gone through the record and satisfied myself that indeed the proceedings were conducted as a contested trial. I could not explain why I endorsed a query on the record that the learned trial magistrate should comment on why she did not follow the guidelines in the

*Mangwende case.* I assume that I must have endorsed a query intended for a different review record where proceedings were conducted by way of guilty plea in terms of s 271(2) (b) as read with s 271(3). The reason for my undeserved query aside, the learned trial magistrate is correct in how she conducted the contested trial proceedings. Although she stated that she acted under a misapprehension that she was not required to comply with s 271(3) in contested trial, she in fact was not misapprehended. She was correct because the provisions of s 271(2) (b) as read with subs (3) thereof relate to trials where the accused pleads guilty to the charge on appearing in court for trial.

Contested trials are dealt with in terms of ss 180, 188 and 189 of the Criminal Procedure and Evidence Act. Section 180(1) obliges the accused to plead to the charge unless the accused objects that he or she was not served with the charge or has applied for the quashing of the charge. In terms thereof there is no legislated obligation placed upon the magistrate to explain the charge. Section 182 of the same enactment is relevant. It reads as follows:

**“182. Accused refusing to plead**

If the accused, when called upon to plead to an indictment, summons or charge will not plead or answer directly thereto, the court may, if it thinks fit, order a plea of not guilty to be entered on behalf of the accused, and a plea so entered shall have the same effect as if it had been actually pleaded.”

Once a not guilty plea is entered the trial motions set out in terms of ss 188 and 189 come into play. Without making the sections points of interrogation, they simply set out steps in a contested trial after a guilty plea has been entered. The prosecutor is required to make a statement of the State case and outline material fact on which the State case is based. The accused, subject to his right to remain silent at his election will also outline his or her defence and set out material facts on which reliance is made to support the defence. The provisions also provide that the accused’s statement may be taken into account in deciding on the accused’s guilt and that the withholding of material or relevant facts when making the statement may result in adverse inferences being made by the court against the accused.”

I however need to address the purport of s 182. There is no requirement therein that the charge should be explained to the accused. Equally there is nothing expressed therein or implied to suggest that the charge should not be explained. The provisions thereof recognize that the court may be faced with an accused who will not plead to the charge or is evasive. In such a situation I suggest that the magistrate must ensure that the accused understands the charge and should therefore explain it because it may well be that the refusal to plead or evasiveness arises from a failure to understand or a misunderstanding of the charge. The charge should in my view be explained in all instances where the accused is unrepresented and unsophisticated. It may well be that upon a proper explanation of the charge being given to the accused, the accused may alter his or her plea to one of guilty. The process of explaining the

charge where the accused is unrepresented is therefore part of the general duty of the court to assist unrepresented accused persons so that they are not victims of their ignorances of the substantive and procedural law. See generally *S v Sawaka* HH 262-20. The unrepresented accused is not entitled to any special treatment or advantage. The court’s duty is to ensure that the accused is provided with any information that assures a fair trial. The obligation to assist the accused is admittedly onerous yet courts being institutions of justice, must ensure that the accused is not at a disadvantage because of lack of knowledge of the law and procedures. How far the court can go in assisting the accused depends on the needs of each accused, the complexity of the case and the sophistication of the accused to be able to understand substantive and procedural law.

It follows in my view that once it is accepted that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law as set out in s 165(1)© of the Constitution, then it becomes clear that the duty to ensure that an accused does not become a victim of his or her own ignorance of the law and procedures resonates with the promotion of the right to fairness and/or a fair trial which is an absolute right given in s 69 as read with s 89(3)(e) of the Constitution.

Therefore, in conclusion, I would suggest that in contested trials and the accused is unrepresented, the magistrate must ascertain that the accused understands the charge. This achieved by the process of the charge and thus achieved by the process of the magistrate explaining the charge. If the charge is explained, the accused does not run the risk of failing to make an informed statement in his defence. Accordingly, I would suggest that the practice of explaining the charge is followed in contested trial where the accused is unrepresented, of little or no knowledge of substantive and procedural law or is in any event unsophisticated. However, because it is not a legislative imperative for the magistrate to explain the charge to the unrepresented accused in a contested trial, the learned trial magistrate did not commit any irregularity in the proceedings and I hereby confirm them and issue my certificate.

CHITAPI J.....