

THE STATE  
**versus**  
JOSHUA MACHINGA

HIGH COURT OF ZIMBABWE  
CHITAPI AND MUSITHU JJ  
HARARE 17 September 2021 and 14 March 2022

### **Criminal Review**

**MUSITHU J:** The accused was convicted of stock theft as defined in s114 (2) (a) of the Criminal Law Codification and Reform Act<sup>1</sup>, by the trial Magistrate at Mutoko Magistrates. On 15 February 2021, he was sentenced to:

“12 years imprisonment of which 3 years is suspended on condition that the accused retribute the complainant in the sum of \$24 300 through the Clerk of Court Mutoko on or before 01/03/2021 at 16.00 hrs. Of the remaining 9 years accused to serve an effective prison term.”

The accused person was convicted following his plea of guilty.

The circumstances of the offence were that on 27 December 2020, and at Nyahondo Village, Chief Nechombo, Mudzi, the accused stole 9 beasts belonging to the complainant, one Michel Kamonere. Seven of the beasts were recovered, but two were not.

The record of proceedings was placed before me for review in May 2021. I requested that it be transcribed as the handwritten portions were not readable. The transcribed record was only availed in September 2021. On 17 September 2021, I raised the following queries for the trial Magistrate’s attention:

1. Did the Court properly record its own explanation of special circumstances in this case. See *S v Chaerera* 1988 (2) ZLR 229 (SC); *S v Ziyadhuma* HH 303/15; *S v Manase* HH 110/15.
2. The court’s explanation for imposing the ultimate sentence is not clear, in light of the willingness to retribute, “In the same breath the accused is willing to retribute the complainant the value of the 2 missing beasts.  
May the learned magistrate please comment.”

---

<sup>1</sup> [Chapter 9:23]

The response to my query only came sometime around 28 January 2022, from the resident Magistrate who advised that the trial Magistrate had since resigned from service. The queries were thus not attended to.

The queries raised aside, a perusal of the record of proceedings revealed more grievous defects which afflicted the trial proceedings. The trial Magistrate did not follow the guilty plea procedure set out in s 271(2) and (3) of the Criminal Procedure and Evidence Act<sup>2</sup> (the Code). The section provides as follows:

**“271 Procedure on plea of guilty**

(1) .....

(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—

(a) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than—

(i) imprisonment without the option of a fine; or

(ii) a fine exceeding level three;

or deal with the accused otherwise in accordance with the law;

(b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—

(i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and

(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;

and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

.....

(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)—

(a) the explanation of the charge and the essential elements of the offence; and

(b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and

(c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and

(d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty;

shall be recorded.” (Underlining for emphasis).

The record shows that the court proceeded as follows after advising the accused of his rights to legal representation.

“Q. How do you plead?

---

<sup>2</sup> [Chapter 9:07]

- A. Plea – I admit.  
S 271 (2)(b) CP&E Act.  
Q. Do you understand.  
A. Yes.....”

It is clear from the above that the learned magistrate did not record the explanation of the charge and the essential elements of the offence as required by s 271(3) of the Code. The significance of s 271(3) of the Code was explained by CHITAPI J in *S v Mangwende*<sup>3</sup>, where at p 6 of the judgment the learned judge said:

“In *casu* the learned regional magistrate recorded that “charges – Put to accused and understood”. That is not what the learned regional magistrate was supposed to do. He was in terms of the provisions of s 271 (3) required to *inter alia* explain the charge to the accused and record the explanation so given in content. This and other requirements in s 271 (3) aforesaid make the plea procedure cumbersome and involved. The rationale is understandable. The accused would by his admission essentially be convicting himself and relieving the State of the burden to prove the charge against the accused beyond a reasonable doubt. The provisions of subs (3) of s 271 aforesaid are intended to ensure fairness to the accused by ensuring that the guilty plea is tendered deliberately and knowingly.

Further down on the same page, the learned judge made the following pertinent remarks.

“The failure to comply with section 271 (3) of the Criminal Procedure and Evidence Act have again further rendered the trial unfair because it cannot without the charge having been explained to him, be held that the accused understood what the charge entailed since no explanation as required in terms of section 271 (3) was recorded as having been given to the accused.”

I agree with the observations of the learned judge. A trial that fails to comply with the mandatory provisions of the law governing the trial process cannot be certified as being in accordance with real and substantial justice. The trial does not measure up to the standard of a fair trial as set out in s 69 as read with s 86(3) of the Constitution of Zimbabwe. Regrettably, such a trial cannot be salvaged notwithstanding the seriousness of the offence committed. In *S v Masendeke*<sup>4</sup>, a review judgment which I concurred with, CHITAPI J held as follows:

“The effect of the admitted failure by the magistrate to strictly comply with the preemptory procedural provisions for disposing of the trial by way of guilty plea procedure as legislated in ss 163 and 271(2)(b) as read with section 271(3) renders the trial unfair. An unfair trial is unconstitutional and contravenes s 69 of the Constitution. The provisions of ssection 29(3) of the High Court Act, [*Chapter 7:06*] do not assist to serve the proceedings. The provision reads as follows:

‘29(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court

---

<sup>3</sup> HH 695/20

<sup>4</sup> HH 577/21

or a judge thereof as the case may be considers that a substantial miscarriage of justice has actually occurred.”

This court cannot allow such proceedings to stand as doing so will be tantamount to a gross miscarriage of justice. This court has already expressed itself in a number of case law authority on the same point<sup>5</sup>. Magistrates are urged to familiarise themselves with judgments of the superior courts in order to preserve the integrity of the justice delivery system by avoiding making mistakes which will result in criminals being released from lengthy prison terms because of such avoidable errors.

Accordingly, it is ordered as follows:

1. The proceedings in case No. CRB MTK103/21 are not in accordance with real and substantial justice and are hereby quashed.
2. The conviction and sentence imposed on the accused person are set aside.
3. The Prosecutor General retains his discretion to institute a fresh prosecution against the accused person provided that in the event that the accused is convicted, the sentence which may be imposed upon such a conviction shall take into account the period of imprisonment already served by the accused.
4. The Registrar shall serve a copy of this judgment on the Prosecutor General
5. The accused person shall be liberated forthwith.

**CHITAPI J agrees:** .....

---

<sup>5</sup> See also *S v Nhamburo* HH557/20; *S v Mudzviti* HH 55/22; *S v Marimo and S v Mandaza* HH 58/22