

STATE  
versus  
JOSEPH JAMBO

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 11 April 2022

### **Review Judgment**

CHITAPI J: The accused was convicted by the magistrate sitting at Mutoko on 18 August 2021 on two counts of the offence of deliberately supplying false information to Public Authority as defined in s 180 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. It was alleged against the accused that on 3 and 16 August 2021 respectively and at Mutoko Police Station the accused having been arrested as a suspect in a case of theft and unlawful entry respectively gave police false names when he knew that his name was Joseph Jambo. The false name which he respectively gave in both instances was Nyasha Katsande.

When the record was placed before me on automatic review, I was not satisfied that the accused who pleaded guilty to the two counts aforesaid had been properly convicted regard being had to the provisions of s 271(2)(b) of the Criminal Procedure and Evidence Act as read with subs. (3) para (a) of the same section. I raised a query with the trial magistrate whom I requested to comment on whether he followed the provisions aforesaid as discussed in the cases *S v Mangwende* HH 695/20 and *S v Mutokodzi* HH 299/21. The Provincial Magistrate of Mutoko Court has returned the record for continuation of review with a comment that the magistrate concerned has since resigned from service.

I must therefore proceed to review the record without the magistrate's comment. The record shows that the magistrate did not explain the charge before the accused was called upon to answer or plead to the charge. The failure to do so and to record the explanation, assuming that one was given vitiates the proceedings as stated in the two cases referred to and many other cases where guidelines have been given. It is refreshing to note that the bulk of the magistracy has I think passed the test on the proper procedure to follow in disposing of guilty pleas. One hardly comes across a record wherein the procedure is not followed.

*In casu*, the magistrate simply recorded:

“... charge put

- Q. Do you understand  
A. Yes  
Q. How do you plead count 1 and 2  
A. Plea: I admit ....”

The correct procedure requires that the charge be explained to the accused before he is called upon to plead. The explanation given to the accused must be recorded. This procedure is intended to assist the accused who is unrepresented to understand the charge before he pleads guilty. The right to a fair trial exists to cater for the accused who pleads guilty much the same way that it exists to cater for the accused who is subjected to a full trial. A failure to follow a legislated procedure is fatal to the proceedings where the procedure has not been followed. The court has no discretion to adopt a different procedure from the legislated one.

To the extent that the procedure used by the Magistrate was in breach of the legislated procedure the proceedings must be quashed for gross procedural irregularity. It has already been noted in decided authorities including the two quoted herein that a fair trial is guaranteed as an absolute right which enjoys protection in terms of s 86(3)(e) of the Constitution.

The irregularity committed by the Magistrate did not end with a failure to comply with the plea procedure aforesaid. The accused was sentenced on each count to 13 months imprisonment with 6 months suspended leaving him to serve 7 months imprisonment per count, a total of 14 months in all. The maximum sentence provided for the offence of contravening s 180 of the Criminal Law (Codification & Reform) Act, is a fine not exceeding level five or imprisonment not exceeding 6 months or both. The Magistrate passed an incompetent sentence. The accused must be immediately released from custody if he is still serving and not be reliable to a further prosecution. It is important that a judicial officer dealing with any case acquaint himself or herself with the provisions of the law that creates that offence to avoid what may be perceived as abuse of power. Such errors must be avoided.

The following order will thus be made:

1. The proceedings in *S v Joseph Jambo* CRB MTK 618/21 are set aside for procedural irregularity.
2. The accused shall be forthwith released from custody if he is still serving sentence.

KWENDA J, I agree:.....