

JESELINE MARE
and
NYASHA SHAVA
and
GOLDEN NYONI
and
WATSON KURUNETA BANDA
and
TAM SNAGA MAVHUNGA
and
JOHN TAVENGWA
and
JOHANE MUZENANGO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 May 2021 & 3 June 2021

Review Judgement

CHITAPI J: The records of proceedings in the above matters were placed before me on review in terms of s 57 of the magistrates court Act, [*Chapter 7:10*]. In all the record of proceedings, the accused persons appeared before the same magistrate for the province of Mashonaland, viz, T.A. Chamisa Esquire. The learned magistrate aforesaid disposed of each of the matters by way of trial of the accused upon the guilty plea procedure. The guilty plea procedure is provided for in terms of sections 271(2)(a) and 271(2)(b) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. In terms of distinction between the provisions of sections 271(2)(a) and 271(2)(b), s 271(2)(a) is utilized for disposal of cases where, if accused person pleads guilty, the sentence which may be imposed does not merit, the imposition of imprisonment without the option of a fine or a fine exceeding level three. Section 271(2)(b) is utilized for disposal of cases where the accused pleads guilty to the

charge and the sentence which may be imposed is imprisonment without the option of a fine or a fine exceeding level three. The proceedings on review in the four records of proceedings herein were purportedly disposed of by way of the guilty plea procedure provided for in s 271(2)(b) as aforesaid.

The provisions of s 271((b) read as follows:

- “271(2)(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; and
 - (ii) enquire from the accused whether he understands the charge and the essential elements of the offence and of the acts or omissions stated in the charge 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;.....
- “271(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 (1) of that paragraph; and
 - (c) the reply by the accused to the enquiry referred to in subparagraph (ii) of that paragraph; and
 - (d) statement made to the court by the accused in connection with the offence to which he has pleaded guilty;
- shall be recorded (own underlining)”

An analysis of the guilty plea procedure as provided for in s 271(2)(b) as quoted shows that s 271(2)(b) is an enabling section which permits the court to adopt the guilty plea procedure as set out therein if the court is of the opinion that the offence charged to which the accused person admits commission thereof merits imprisonment without the option of a fine or a fine exceeding level three. The procedure aforesaid will also be adopted if the prosecutor requests the court that the trial of an accused be dealt with in terms thereof. The section then

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provides for what the court is required to do once it has decided to follow the guilty plea procedure or been requested to do so by the prosecutor. What the court must do is set out in subparagraphs (i) and (ii) of subs (b) of s 271 as I have quoted their contents above.

Section 271(2)(b) is however qualified by subs (3) of the same s 271. The subs lists matters which should specifically be recorded. The requirement to record the matters set out therein is peremptory. A failure to record the matters set out therefore vitiates the guilty plea proceedings for gross irregularity. A provision of an enactment which provides for how a trial ought to be conducted constitutes a fair trial standard which cannot in terms of s 86(3)(e) of the Constitution be limited. That section provides that

“No law may limit inter alia, the accused’s right to a fair trial.”

A failure to follow the procedure set out in s 271 (3) renders the trial irregular and it cannot be said that the accused’s right to a fair trial has not been violated if the procedure has not been followed.

Pertinent to the four records of proceedings under review was my observation that in all of them, there was no written or recorded explanation of the charge as required by the peremptory provisions of s 271(3) aforesaid. I then raised a query with the magistrate and asked for his or her comments in regard to the apparent omission. The query read as follows in material part.

“The magistrate does not appear to have complied with the peremptory provisions of s 271(3)(a) of the Criminal Procedure and Evidence Act, which requires that the magistrate shall explain the charge and essential elements of that charge and shall be recorded. The magistrate recorded the following on record-

“Charge explained to accused person and understood.”

In the case of *S v Banda* KADF 22023/21 the magistrate recorded:

“Charge explained to accused persons and understood.

May the magistrate comment on the query. Further may the magistrate indicate whether he/she is acquainted with the decision of this court in *S v Enock Mangwende* HH 695/20 where the issue of the need for strict compliance with the provisions of s 271 (3) of the Criminal Procedure and Evidence Act is discussed....”

In response to my query in relation to each of the four records, the learned magistrate responded as follows in the response addressed to the Registrar dated 10 May, 2021.

“May you please place the record before the Honourable Judge JUSTICE CHITAPI. I have noted the concerns raised by the Honourable Judge and I am indebted and stand guided.

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After having gone through the case of *S v Enoch Mangwende* HH 695/20 I am now aware that I am in terms of s 271 (3) of the Criminal Procedure and Evidence Act, Chapter 9:23 (*sic*) required to explain the charge and record the explanation so given in content. This is so because the said provision is intended to ensure fairness to the accused by ensuring that the guilty plea is tendered deliberately and knowingly.

I will not repeat the same mistake in future as I am now fully aware of the fact that section 271 (3) provision must be complied with. “

The response by the learned magistrate is candid. One does not entertain any doubt that the learned magistrate has been properly guided for the future.

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 fact of the setting aside of the proceedings as was done in the *Mangwende* case will befall the proceedings in each of the four records under review herein.

The order made on review is therefore as follows:

1. The proceedings in the following cases are quashed and the conviction and sentence set aside.
 - (a) *S v Joseline Mare* CRB KADP 40/21
 - (b) *S v Nyasha Shava & Golden Moyo* CRB KADP 104-5/21
 - (c) *S v John Tavengwa & Johane Muzanago* CRB CHK 4-5/21
 - (d) *S v Watson Kuruneta Banda & Tamsanga Mavhunga* CRB KADP 22-23/21
2. The Prosecutor General retains his discretion to institute fresh trials in respect of each of the quashed proceedings.
3. In the event that a fresh prosecution is instituted by the Prosecutor General, the trials of the accused shall be presided by a different magistrate; and

4. Should the accused be convicted, the accused shall not be sentenced to a greater sentence than the one imposed; and
5. The sentences already served shall be counted as an already served portion of the sentence which may be imposed on retrial.

MUSITHU J agrees.