

THE STATE
versus
JOSEPH PHIRI
and
TINASHE GUMBO

HIGH COURT OF ZIMBABWE
FOROMA & CHINAMORA JJ
HARARE, 15 July 2021

Criminal Review

FOROMA J: This matter came before me on automatic review on 19 December 2019 and I returned it for typing as I had difficulties reading the magistrate's hand. On 2 October 2020 the record was returned still not typed and I requested that it be typed and so I returned it to the magistrate court.

With some difficulty and owing to the trial magistrates unco-operative attitude the record came back only about 18 March 2021 this time typed.

After going through the record I noted that

- a) There were no reasons for judgment or sentence
- b) The report by the community service officer in respect of the pre-sentence inquiry related to one Edgar Zuze and C Zuze under CRB 4217/18 clearly not relevant to the record under review. I returned the record to the Registrar with my observations that the record was not in order. The Registrar returned the record to me confirming that it appears the magistrate did not maintain a proper record of proceedings hence the record was being referred to the High Court for directions.

Initially I was disinclined to conduct a review of a patently incomplete record but in light of the Registrar's response I will do my best in the circumstances. A perusal of the record of trial shows that both accused persons were not represented at the trial where they were charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The record shows that they both appeared in person.

The first apparent error I observed is that the court did not inform the accused of their rights to legal representation by a legal practitioner of their choice at their expense a salutary requirement in terms of s 163A (2) as read with s 191 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The record does not reflect the compliance as it should. The law requires that such information is done before the trial commences and commencement refers to the putting of the charge to the accused person and asking him to plead. On the authority of *S v Portifa Sawaka* HH 262/20 a failure to observe this salutary rule of trial practice (informing the unrepresented accused of his rights to legal representation) renders the entire proceedings null and void. These proceedings are for the same reason a nullity and I accordingly quash the conviction and set aside the sentence in respect of both accused persons. Should the Prosecutor General exercise his right to re-charge the accused (which is not likely as the accused more likely than not have completed serving their sentences) then in the event the accused ought not be sentenced to a harsher penalty than that set aside on review.

FOROMA J

CHINAMORA J agrees.....