

THE STATE
versus
ROSE ELESON

HIGH COURT OF ZIMBABWE
FOROMA AND CHAREWA JJ
HARARE, 9 September 2021

Review Judgement

FOROMA J: This is an automatic review of the proceedings before a magistrate. The learned magistrate in response to a query why the record of proceedings did not reflect that the court had explained to the accused her right to cross examine State witnesses and the consequences of failing to cross examine the witnesses on aspects of the witness evidence which the accused did not agree with or putting to the witness accused's version of the events that the State relied upon for the contention that accused had committed an offence responded as follows: "the right of the accused to cross-examination were orally explained to the accused and fully understood. It is unfortunate that the said explanation was not noted in the proceedings. The omission is noted and will not be repeated in future."

The Magistrates' court is a court of record. It is for good reason that the legislature declared it to be so as without a complete and comprehensive record, proceedings of the inferior court would be extremely difficult to review and miscarriages of justice would dismissively be explained away as omissions to record salutary procedures.

Accused's right to a fair trial especially where the court is dealing with unrepresented accused persons must jealously be guarded. Such right is a constitutionally guaranteed right in terms of s 69(1) as read with s 70(1)(H) of the Constitution of Zimbabwe Amendment (No. 2) Act 2013.

When the record of proceedings omits to record that accused has been afforded the aforesaid right to cross examine witnesses, the accused's right to have the case reviewed by a higher court in terms of s 70(5)(a) is stultified.

A reviewing court should and will consider such omission as a fundamental non-compliance and a deprivation of accused's fundamental Constitutional right. A failure to afford

an accused person such fundamental right renders proceedings *null* and *void*. See *The State v Enock Mangwende* HH 695/20.

In the circumstances these proceedings cannot pass as being in accordance with real and substantial justice. Both conviction and sentence are *null* and *void* and are hereby quashed and set aside. The accused is liberated forthwith.

Should the Prosecutor General opt to exercise his right to re-charge accused then trial should be before a different Magistrate and any resultant sentence should not be more severe than the one set aside.

FOROMA J.....

CHAREWA J Agrees.....