

THE STATE  
versus  
LOICE MABHENA

HIGH COURT OF ZIMBABWE  
CHITAPI & MUSITHU JJ  
HARARE, 29 September 2021

### **Review judgment**

CHITAPI J: The proceedings in this matter have been placed before me on review. The accused appeared before the learned Provincial Magistrate, S. Zvenyika Esquire. He was charged with the offence of assault as defined in s 89 of the Criminal Law Codification and Reform Act, [Chapter 9:23]. It was alleged that on 30 April, 2021 the accused assaulted the complainant by pouring hot water over the complainant's body after accusing the complainant of stealing her phone. The offence occurred at a house in Hopley Park, Waterfalls, Harare.

The accused pleaded guilty to the offence and was convicted and sentenced to perform community service. I raised a query on initial review as follows in my minute of 14 July, 2021

“There is no indication that the magistrate explained the charge and recorded the explanation of the charge given if any. Please comment after reading *S v Mangwende* HH 695/20.”

The learned provincial magistrate responded as follows in her minute dated 7 September, 2021

“I do concede that I did not record the explanation of the charge in line with the peremptory requirement of section 271 (3) of the Criminal procedure and Evidence Act. It was an oversight on my part and error will not be repeated in future since I have gone through a number of review minutes addressing that issue.”

It is commendable that the learned provincial magistrate has acknowledged her error and undertaken that the same will not be repeated. The proceedings cannot however be allowed to stand because of the gross irregularity in the conduct of trial. Accordingly, the following order is made.

1. The proceedings in case No MBR 2459/21 are quashed and the sentence set aside.

2. The accused is liable for a retrial should the Prosecutor General in his discretion decide upon a fresh prosecution of the accused.
3. In the event of a retrial and the accused is convicted, the trial court in sentencing the accused shall consider the sentence already served as part of the sentence which may be imposed on the accused.

MUSITHU J agrees .....