

RICHARD MASENDEKE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 30 September, 2021

Review Judgment

CHITAPI J: I raised a query on review in this matter, the query was two-fold. I asked the trial magistrate for his comments on whether he had complied with the provisions of ss 163A and 271 (2) (b) as read with 271 (3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The trial magistrate in his response conceded that he did not comply with the provisions. I will deal with the provisions later and the effect of the magistrates' failure to comply therewith later.

The background of the matter is that the accused was arraigned before the trial magistrate to answer to a charge of stock theft as defined in s 114 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:09*]. It was alleged that on 25 June, 2020 at farm 246 Murira, Mutoko, the accused stole a heifer from the farm. The heifer was recovered at the accused's homestead. The accused pleaded guilty to the charge. He was convicted and following a finding that no special circumstances existed to avoid the mandatory minimum sentence of nine years imprisonment, was sentenced to the minimum sentence.

The proceedings are fraught with gross procedural irregularities which the trial magistrate acknowledged. For paper trial purposes I reproduce hereunder the queries I raised with the trial magistrate and his response thereto. The query minute dated 9 September, 2020 reads as follows:

“REVIEW MINUTE: THE STATE V RICHARD MASENDEKE CRB MTK 545/20

The above matter refers.

The application for review was placed before the Honourable CHITAPI J who commented as follows:

Magistrate in question to comment on my observations that:

There is no indication that the provisions of s 163A Criminal Procedure and Evidence Act were followed and complied with as there is nothing recorded to evidence compliance.

Secondly does the magistrate agree that s 271 (2) (b) (i) requires that not only should the charge be explained but that the content of the explanation given' should in terms of s 271 (3) (a) be recorded and that the magistrate did not do so.”

The trial magistrate responded to the query in a minute dated 13 October, 2020 as follows:

“REVIEW MINUTE: S V RICHARD MASENDEKE CRB MTK 545/20

The above matter refers.

I have this the 13th day of October, 2020 been seized with this minute by the Honourable CHITAPI J. My response is as follows:

I totally concede and stand guided by the wisdom of the Honourable Justice. Indeed section 163A of the CPEA provides that the provisions of section 191 of the CPEA must be explained to the accused. I also agree that s 271 (3) (a) requires that the contents of the explanation given to the accused concerning the charge be recorded. Although I can confirm that I indeed explained all these provisions to the accused, I also concede that the explanation was not recorded. I acknowledge the fact that it is not enough to say I explained the provisions because the sections imposed a clear obligation on the Trial Magistrate to record the contents of the explanation, in future I will take time to ensure that all these requirements are met.

I thank the Honourable Justice for guiding me accordingly.”

The record of proceedings shows as admitted by him that the trial magistrate did not make any reference at all to the provisions of s 163A of the Criminal Procedure and Evidence Act. In terms thereof, it is a peremptory requirement that in all trials before a magistrate of whatever level, before the accused is asked to plead to the charge, the presiding magistrate shall inform the accused of his or her right to legal representation as set out in s 191 of the said Act. There have been quite a number of judgments of this court on the need by magistrates to strictly follow and implement the provisions of s 163. In this regard, I quote only a few and call the trial magistrate’s attention and the attention of other magistrates who may not be aware of the judgments to acquaint themselves with the said judgments.

S v Manetaneta 185/20

S v Sakawa HH 262-20

S v Mute and Another HH 328-20

A failure to comply with the provisions of s 163A amounts to a serious irregularity which vitiates the proceedings because the trial in which the peremptory steps that inform a trial in the magistrates court have not been followed creates a species of a trial which is not provided for in the Criminal Procedure & Evidence Act.

Secondly, the trial magistrate as accepted by him did not record the explanation of the charge to the accused as provided for in s 271(2)(b) as read with s 271(3) of the Criminal Procedure & Evidence Act. Again, the failure to comply with the provisions aforesaid constitutes a gross irregularity as already pronounced in judgment of this court. See

S v Mangwende HH 695-20

S v Mutokodzi & 2 Ors HH 299-2021

The effect of the admitted failure by the magistrate to strictly comply with the peremptory procedural provisions for disposing of the trial by way of guilty plea procedure as legislated in ss 163A and 271(2)(b) as read with s 271(3) renders the trial unfair. An unfair trial is unconstitutional and contravenes s 69 of the Constitution. It is not conduct which can be condoned by a law of general application. The provisions of s 29(3) of the High Court Act, [*Chapter 7:06*] do not assist to serve the proceedings. The provision reads as follows:

“29(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge thereof as the case may be considers that a substantial miscarriage of justice has actually occurred.”

The provision cannot sanitize an unfair trial because s 86(3)(e) of the constitution is an entrenched clause which forbids the legislature from passing a law which places limitations on the right to a fair trial. Thus the court cannot allow proceedings where a gross procedural irregularity that renders a trial unfair has occurred to stand on the basis that there has been no substantial miscarriage of justice.

Under the circumstances, the conviction of the accused cannot stand. It must be set aside and in consequence, the sentence imposed. The following order shall issue:

- (i) The conviction and sentence imposed on the accused is quashed.
- (ii) A warrant for the liberation of the accused is issued.
- (iii) The Prosecutor General may in his discretion institute fresh proceedings against the accused before a different magistrate.
- (iv) In the event that the accused is convicted, any sentence imposed on him shall take into account the sentence already served in consequence of the proceedings which have been quashed.

MUSITHU J agrees