

- (1) STATE CRB MBR 2651/21
versus
LEONARD CHANZENZA
- (2) STATE CRB MBR 2769-70/21
versus
SIMBARASHE MAGOMBEDZE
- (3) STATE CRB MBR 2711/21
versus
ROBERT NYAMUKUSA
- (4) STATE CRB MBR 2789/21
versus
KUDZAI GORITOMA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30th September 2021

Review Judgment

CHITAPI J: The four cases cited above were dealt with by the same learned magistrate E P Chivangu Esquire sitting at Mbare Magistrates Court in the month of May 2021. In all the cases, the accused persons were convicted following the guilty plea procedure which is provided for in terms of the provisions of s 271(2)(b) as read with subs (3) of the same section of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. When the records were first placed before me on review, I raised in respect of each record, a similar query with the learned magistrate on whether in convicting the accused persons, there had been strict compliance with s 271(3) of the Criminal Procedure & Evidence Act. I also referred the learned magistrate to the review judgment of this court in *S v Mangwende* HH 695-20.

The learned magistrate responded to my queries acknowledging that she had not been properly guided. In her responses dated 22 July 2021 which are to the same effect for each case, the learned magistrate stated:

“... I have noted the query raised by the learned judge. I humbly concede that I did not record the details of the explanation of the charge to the accused. By then I had not properly understood that the explanation itself had to be recorded. I was of the mistaken view that it sufficed to indicate that the charge had been explained as I did. After undergoing training on the subject and understanding the import of the sentiments of the court in *S v Mangwende*

HH 695-20, I have since been complying with the provisions of s 271(3) of Criminal Procedure and Evidence. I humbly apologize and undertake to guard against that in future.”

The learned magistrate’s response is refreshing because it shows that she has been properly directed to adopt the right procedure in future. As the reviewing judge, one notes the effectiveness of the review of judgments process if the magistrate who has been corrected acknowledges having seen the light. A review is a legislated quality control procedure in terms of which proceedings by an inferior court or tribunal are subjected to checks to ensure that no irregularities were committed by the inferior court or tribunal. The review judge either corrects the proceedings in ways provided for under s 29 of the High Court or confirms or passes the proceedings as being in accordance with real and substantial justice. Reviews are therefore important because they correct and curb judicial excesses. The review judge should therefore not just rubber stamp review proceedings for expediency. The power of review reposed in the judge is a duty of responsibility to exercise powers to scrutinize proceedings of other courts. For the process to have the desired effect, both the review judge and the judicial officer whose proceedings are on review should appreciate and accept that the beneficiaries in the process are the criminal justice system itself and fair trial rights of the accused which in terms of s 69 as read with s 86(3)(e) of the Constitution are absolute. Therefore, where there has been effective communication and understanding between the review judge and the errant trial magistrate as in this case, the judicial officer must be commended for acknowledging the mistake made and for undertaking that she is directed properly going forward.

The only issue which remains to be addressed is what happens to the proceedings in the light of the properly conceded irregularity in the proceedings. I briefly outline the details of the four cases below:

(a) *S v Leonard Chinzenza* CRB MBR 2651/21

The accused was charged with the offence of theft as defined in s 113(2)(d) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The facts of the matter were that accused received in trust USD\$2 520.00 as proceeds from the sale of complainant’s timber under agreement that after the sale the accused would hand over the proceeds to the complainant. The accused in breach of his duty to handover the proceeds aforesaid, converted them to his own use.

The accused was on 18 May 2021 convicted on his plea of guilty and sentenced to 24 months imprisonment with 4 months suspended on condition of future good behaviour with the remainder suspended on condition that the accused performs community service.

(b) *S v Simbarashe Magomedze & Anor* CRB 2769-20/21

The accused persons were charged with theft as defined in s 113(1)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The accused persons were alleged to have stolen second hand tyres from the complainant's house where they performed casual duties as general hands. Both accused pleaded guilty. They were convicted and sentenced to 18 months imprisonment with portions suspended on conditions of future good behaviour and performance of community service respectively.

(c) *In S v Robert Nyamukusa* CRB MBR 2711/21

The accused was convicted on his guilty plea on a charge of theft as defined in s 113(2)(d) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. The brief facts of the case were that the accused received in trust the complainant's maputi gun machine for purposes of effecting repairs. The accused after receiving the machine and the US\$60.00 converted the machine and the US\$60.00 to his own use. The accused was on 18 May 2021 sentence to 26 months imprisonment with portions thereof suspended on conditions of future good behaviour and performance of community service respectively.

(d) *In S v Kudzai Goritoma* CRB MBR 2789/21

The accused was charged with the offence of unlawful entry into premises in aggravating circumstances as defined in s 131(1)(a) as read with s 131(2)(e) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The brief facts of the case were that on 14 May 2021 the accused unlawfully entered the complainant's dwelling through an unlocked entry door and stole the complainant's 5kg gas cylinder which was fortunately recovered. The accused pleaded guilty to the charge. He was on 17 May 2021 convicted and sentenced to 18 months imprisonment with 6 months suspended on conditions of future good behaviour leaving 12 months imprisonment to be served by the accused.

It is common cause that the learned magistrate did not comply with the provisions of s 271(2)(b) as read with s 271(3) of the Criminal Procedure and Evidence in not recording the explanation of the charge an omission which the learned magistrate readily conceded to. In such circumstances the proceedings cannot be saved. The route followed in *S v Mangwende* will similarly be followed in each of the four cases. The following order is made:

1. The proceedings in the following cases are hereby quashed for procedural irregularity and the convictions and sentences are set aside.
 - (a) *S v Chanzenza Leonard* CRB MBR 2651/21
 - (b) *S v Simbarashe Magombedze and Walter Dzotsa* CRB MBR 2769-70/21
 - (c) *S v Robert Nyamukusa* CRB MBR 2711/21
 - (d) *S v Kudzai Goritoma* CRB MBR 2789/21
2. The Prosecutor General may in his discretion institute fresh prosecutions against the accused, in which case, should the accused be convicted, the convicting court shall take into account the served portions of the sentences set aside in this review as part of an already served portion of any sentence which may be imposed.
3. The accused are liberated from serving the sentences imposed if they are still serving them.

MUSITHU J, agrres:.....