

THE STATE

Versus

MALUNGA ISHEMUNYORO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 OCTOBER 2012

Review Judgment

CHEDA J: This is a review judgment.

Accused was charged with driving a motor vehicle without a drivers' licence and also for negligent driving.

He pleaded guilty to the charges and was sentenced as follows:

"15 months imprisonment of which 7 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of which contravening section 6(1) (a) and contravening section 52(2) of the Road Traffic Act [Chapter 13:11] is an element and for which upon conviction will be sentenced to imprisonment without the option of a fine.

A further 8 months imprisonment is suspended on condition accused completes 280 hours of community service at Zvishavane Magistrates Court on the following conditions: The community service starts on 25 June 2012 and must be completed within 8 weeks. The community service shall be performed every Monday to Friday which is not a public holiday between 8am to 1pm and 2pm to 4pm, to the satisfaction of the person in charge of the said institution who may for good cause shown grant accused leave to be absent on certain days or during certain hours. Such leave of absence shall not count as part of the community service to be performed."

The facts of the case are that on 19 March 2012 along Donnington Road in Zvishavane he unlawfully drove a Nissan Sunny Registration Number AAB-6855 without a valid driver's licence and negligently hit a pedestrian resulting in him fracturing a lower limb.

There is no issue with regards to conviction in this matter. The only issue relates to sentence.

In count 1 the sentence passed is incompetent as the magistrate's jurisdiction is limited to \$300-00 or 12 months imprisonment or both such imprisonment and a fine, see section 6(5) of the Road Traffic Act [Chapter 13:11].

With regards to count 2, again the sentence passed is incompetent as section 5(2)(ii) provides for a sentence of a fine not exceeding level seven or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. The learned trial magistrate made an error of treating the two counts as one for the purposes of sentence. These are two distinctively different offences which call for different sentences as the legislature provided.

There has been a miscarriage of justice in this matter.

Order

- (1) The conviction is confirmed but the sentence is set aside and the matter is referred back to the same magistrate for the passing of a proper sentence.
- (2) The sentence passed should not exceed the period accused has already served.

Cheda J.....

Ndou J agrees.....