

STATE  
versus  
KENNETH KAJOKOTO

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE

### **Criminal Review**

GOWORA J: The accused was convicted of one count of contravening s 52(2) of the Road Traffic Act [*Chapter 13:11*].

The allegations against the accused were that the accused was travelling north along Second Street. A cyclist then entered the road and attempted to cross in front of the accused. He was struck by the accused before he could cross the road. He fell down on the tarmac sustaining injuries from which he died on arrival at the hospital.

The motor vehicle being driven by the accused did not stop after the impact. Instead, it reared to the right in the path of oncoming traffic and collided with the cyclist who sustained serious injuries as a result.

It was alleged against the accused that he had driven at an excessive speed in the circumstances and had failed to stop or act reasonably when a collision seemed imminent. He had also allegedly failed to keep a proper lookout, sound a horn, keep the vehicle under proper control and keep in the correct lane after an impact. He was also alleged to have turned across the path of an oncoming vehicle.

When the charge was put to the accused, he tendered a plea of not guilty. He was then requested to outline the basis of his defence and he duly complied. Thereafter the prosecution made an application for admissions and the application was granted. The prosecutor then proceeded to cross-examine the accused. In his response to the prosecutor the accused made certain admissions. At the end of the cross-examination the accused was found guilty of the offence.

Although the prosecutor did not make reference to a particular section of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the section relating to admissions is s 314. Subsection (2) of the Act provides:

"2) "If he considers it desirable for the purposes of clarifying the facts in issue or for obviating the adduction of evidence or on facts which do not appear to be

in dispute, the judge or magistrate may, during the course of a trial or a preparatory examination and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor as the case may be, whether any fact relevant to the issue is admitted in terms of this section."

The trial court did not comply with the provisions of the section. The magistrate should have ascertained from the prosecutor what facts it was intended to be sought as admissions. It was the duty of the magistrate, not the prosecutor to ask the accused person if he was willing to admit the facts concerned in order to obviate the need to adduce evidence. The admissions envisaged by the section are for purposes of clarifying the facts in issue or those facts which do not appear to be in dispute. It is not intended under this section to give the prosecutor an opportunity to cross-examine the accused and force him to make admissions in the absence of any evidence from the State.

Once the accused had tendered a plea of not guilty to the charge, the State should have adduced evidence to establish the guilt of the accused beyond a reasonable doubt. The admissions wrung from the accused person as a result of the questions put to him by the prosecutor cannot and do not constitute an unequivocal admission of the offence and all the essential elements.

In his defence outline the accused had put across a defence and it was incumbent upon the State, in order to establish the guilt of the accused to call evidence in support of the charge.

Subsection (3) of s 314 obliges the judicial officer conducting the trial to warn an unrepresented accused that he was not obliged to make any admissions. In this case no such warning was given to the accused person.

The conviction in any view is unsafe and should be quashed.

The scrutinising Regional Magistrate in his comments, stated that the accused has been tried separately for the death of the cyclist. I agree that this would cause extreme prejudice to the accused especially as regards the issue of sentence. The charges arose out of the alleged negligent driving on the part of the accused and two people were injured one fatally with the other sustaining serious injuries. In his reasons for sentence the magistrate stated that the accused had admitted causing the death of the cyclist. Although the accused had not been tried of culpable homicide,

the death of the cyclist was a factor taken into account in deciding on the sentence.  
The prejudice to the accused is clearly obvious.

In the result I make the following order:

It is ordered that the conviction of the accused is hereby quashed and the sentence is set aside.

KAMOCHA J agrees:.....