

WALTER KAMBUZUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 30 January 2019 and 13 March 2019

Criminal Appeal

R Savanhu, for the appellant
Mrs J Matsikidze, for the respondent

MUZENDA J: On 7 September 2018 the appellant appeared at Nyanga Magistrates Court facing 1 count of the Road Traffic Act and second count of culpable homicide. Count 1: appellant had no driver's licence as defined under s 6 (1) of the Road Traffic Act [*Chapter 13:11*]. It was alleged that on 9 May 2018 and along Chamakowa road 100 m before the main tarred road, Rusape – Nyanga, appellant drove a daff AVM truck, registration number AAH 2186 while not being a holder of a driver's licence issued in terms of the Act, in respect of such class of motor vehicle.

On the second count of culpable homicide as defined under s 49 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], it was alleged that on 9 May 2018 along Chamakowa Road, 100m before main tarred road Rusape – Nyanga appellant drove a Daff AVM truck Registration No. AAH 2186 negligently thereby causing the death of Chimbwanda Charles and caused serious injuries to Mateta Sydney. Accused/appellant resides at Eren Forest, Juliasdale, Nyanga. He is employed as a driver at Everen Forest. He does not have a driver's licence. On 9 May 2018 at around 1020 hours appellant was driving a Daff lorry registration number AAH 2186 along Chamakowa dust road towards Nyanga – Rusape road carrying 6 passengers. Upon approaching 100 metres towards Rusape – Nyanga main road along Chamakowa dust road the accused lost control of the truck, swerved to the right side of the road and threw out the passengers who were on top of the load to the left side of the road. The load then fell on top of the passengers thereby causing the death of Chimbwanda Charles on spot and caused multiple injuries to Sidney Mateta. The particulars of negligence were that appellant failed to stop or act reasonably when an accident or collision seemed imminent; he

failed to keep vehicle under proper control and was travelling at an excessive speed under the circumstances.

Appellant pleaded guilty and was convicted. For count one he was sentenced to 36 months imprisonment of which 12 months was suspended for 5 years on condition accused does not within that period commit any offence involving the driving of a motor vehicle without a valid Zimbabwe driver's licence. In addition appellant was prohibited for life from driving motor vehicles falling under class 2 vehicles. For count 2, appellant was fined \$300-00 in default of payment 90 days imprisonment. He was given time to pay up to 30 November 2018.

On 13 September 2018, a notice of appeal was noted against sentence only. The grounds of appeal that were pursued by the appellant were:

1. That the learned trial Magistrate erred and misdirected herself, such a misdirection amounting to an error at law in failing to explain the meaning of special circumstances to the appellant who was not legally represented.
 2. That the learned trial Magistrate erred and misdirected herself such a misdirection amounting to an error at law in failing to endorse whether special circumstances had been considered and found or rejected in the record of proceedings as part of the court's reasons for sentence. Failure to do so amounts to a misdirection rendering the sentence by the trial court incompetent.
 4. The trial court erred and grossly misdirected itself in that after having convicted the appellant in count 1, it was mandatory for the court *a quo* to have established whether the accused was liable for contravening s 6 (5) and the special penalty provided therein or not among other things, it was necessary to establish the weight of the motor vehicle involved failure to do so renders the sentence incompetent and sentencing without the vital assessment amounts to a serious misdirection.
- (iii) The sentence induces a sense of shock and does not accord to the sentencing trend of this nature.

Appellant's legal practitioner submitted that the court *a quo* failed to explain the meaning of special circumstances to the appellant to such an extent that him being a lay person, appreciated and understood the meaning of such. It was further argued that a reading of the record of proceedings and the reasons for sentence that there is no endorsement of the

explanation of the special circumstances and there is nothing on record that the court had found the existence of such or absence of special circumstances. To the appellant that amounted to a clear misdirection which affects the sentencing of the appellant. Appellant cited the matter of *AG v Jasi and Nharingo S-2-87* and *S v Chaerera* 1988 (2) ZLR 226.

The appellant further submitted that after convicting the appellant on count 1, it was mandatory for the court *a quo* to have established whether or not the appellant was liable for the s 6 (5) special penalty or not among other things. It was necessary to establish the weight of the motor vehicle involved and failure to do so renders the sentence incompetent. Appellant submitted that what determines whether or not the mandatory good term should be imposed is whether or not the motor vehicle in question was a commuter omnibus or a heavy vehicle. What determines whether a motor vehicle is a light or heavy vehicle is its weight.

On the other hand Mrs *J Matsikidze* for the respondent submitted that the trial court explained the special circumstances to the appellant. Indeed the perusal of the record on page 15 shows that the court captured that issue. It then concluded that there were no special circumstances which warranted a departure from the peremptory provisions of s 6 (5) and s 6 (6) of the Road Traffic Act. We agree with the submissions of the state and dismiss that ground of appeal.

However, there is merit on the submission by the appellant on the 4th ground of appeal to the effect that it was mandatory for the court *a quo* to have established whether the accused was liable for the s 6 (5) special penalty or not among other things. It was necessary to establish the weight of the motor vehicle involved. What determines whether or not the mandatory good term should be imposed is whether or not the motor vehicle in question was a commuter omnibus or a heavy vehicle. What then determines whether a motor vehicle is a light, heavy vehicle or not is its weight. In *S v Gabriel Kamuchepa* HMA 23/18 it was held:

“In terms of the definition of ‘motor vehicle’ in 3.2 of the Act, a daff AVM Truck is a motor vehicle. Whether or not it is a heavy vehicle depends on whether or not its net mass exceeds two thousand three hundred kilograms (2.300 kg). The Act says a ‘heavy vehicle’ means a motor vehicle exceeding 2300kg net mass.”

It is apparent from the reading of the proceedings of the court *a quo* that indeed the above aspect of the weight was not considered. Such absence of weight of the motor vehicle is so fundamental and failure to have the weight of the motor vehicle in our view was a misdirection. That misdirection warrants this court to interfere with the sentences passed by

the court *a quo*. It is our view that the weight of the motor vehicle would have had a bearing on the sentence passed by the learned Magistrate. In the absence of the weight of the motor vehicle s 6 (5) would not be applicable in the circumstances and this court is at large on sentence. Appellant pleaded guilty to the charges, he is a first offender, he financially contributed to the deceased's funeral expenses and to the injured's medical bills. He is remorseful. Given the circumstances of this matter the appeal against sentence on count one is upheld and it is ordered as follows:

1. The appeal against sentence is upheld in respect of 1st count.
2. The sentence of the court *a quo* is set aside and substituted with the following:
Accused is sentenced to \$1 000-00 in default of payment 3 months' imprisonment.
In addition 6 months' imprisonment wholly suspended for 3 years on condition accused does not within that period commit any offence involving the driving of a motor vehicle with a valid driver's licence.
3. Accused is prohibited for life from driving motor vehicles falling under class 2 vehicles.

MWAYERA J agrees _____

Zuze Law Chambers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners