GRACIOUS MURWIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 28 September, 2021

Review Judgment

CHITAPI J: The proceedings in this review were subject of scrutiny by the Regional Magistrates and are on review in terms of s 58(3) of the Magistrates Court Act [*Chapter 7.10*] following referral by the Regional Magistrate who on scrutinizing the proceedings considered that the proceedings were not in accordance with real and substantial justice. The background to the matter is summarized below.

The accused aged 24 years old is husband to the complainant. The accused was self-employed whilst the complainant aged 20 years old was not employed. The two stayed at house number 15188 Unit O Seke, Chitungwiza in matrimony. On 27 April, 2021 the complainant asked the accused to assist with the upkeep of the couple's baby. An altercation arose between the accused and the complainant over the issue. The accused in the course of the altercation and out of anger assaulted the complainant with open hands on the face and kicked the complainant once on the stomach. The accused then left the complainant and went away. The complainant was not medically examined nor treated.

Arising from the above facts, the accused was arrested and subsequently taken to court on 7 June, 2021 where he appeared before the learned trial magistrate M.E Mabika Esquire at Chitungwiza Magistrates Court to answer a charge of physical abuse as defined in s 3(1) (a) as read with s 4(1) of the Domestic Violence Act, [*Chapter5:16*]. The accused pleaded guilty to the charge. He was convicted and sentenced to seven (7) months imprisonment with two (2) months imprisonment suspended on condition of future good behaviour. The record of proceedings was duly placed before the learned Regional Magistrate for Northern Division E.G Tsikwa Esquire who queried the severity of the sentence. The learned Regional Magistrate addressed the learned trial magistrate as follows in a minute dated 16 June, 2021.

"**RE: STATE V GRACIOUS MURWIRA CRB CHTP 2188/21**
The accused is a first offender who pleaded to the Charge. He was sentenced to 7 months imprisonment of 2 months were conditionally suspended for 5 yeas. Effective imprisonment of 5 months. The Trial Magistrate indicated that a short and sharp custodial sentence was called for.

1. Is this approach consistent with modern sentencing trends and how to deal with first offenders as guided by the cases such as
   State versus *Shariwa* 2003 (1) ZLR 314 (H)
   State versus *Katsaura* 1997 (1) ZLR 102 (H)
2. Did the trial Magistrate not pay lip service to the plea of guilty?
3. The sentence falls within the Community Service grid i.e below 24 months, the Trial Magistrate not carry out an inquiry into suitability of Community Service as guided by the following case law:
   State vs *Antonio & ors* 1998 (2) ZLR 64 (H)
   State vs Chinzenze & ors 1998 (i) ZLR 470 (H)
   Square Zondo vs *B 210/17*
   May Trial Magistrate Comment."

The learned trial magistrate responded to the query in a minute dated 22 June, 2021. The content of the response reads:

"**REF: STATE V GRACIOUS MURWIRA CHTP 2118/21**
Kindly place the above mentioned record of proceedings before the learned Regional magistrate;

1. It is not consistent but the court was of the view that it was justified.
2. No the plea of guilty was duly noted but the accused was not remorseful as he even continued to insult the complainant who was evidently terrified.
3. Accused kicked the complainant's pregnant tummy knowing fully well that the complainant is with child and thus the intention was to not only cause bodily harm but to cause grievous bodily injury and as such the possibility of getting a lenient sentence the court noted none and decided not to bother considering community service as it appeared too lenient and as if to condone his behaviour as the complainant had left the matrimonial home because of the accused's behaviour and sending him back would provide him with a home that the complainant could not access together with her unborn child who are supposed to be protected.
   The court stands guided accordingly."

The learned regional magistrate was not satisfied with the response by the trial magistrate's response. The learned regional magistrate then referred the record of proceedings under cover of his minute dated 24 June, 2021. Its contents are as follows:

"STATE V GRACIOUS MURWIRA CHTP 2118/21
May the record of proceedings be placed before a Judge of the High Court in Chambers in terms of Section 58 (3) (b) of the Magistrates Court Act.

1. The accused person a 24 year old first offender who pleaded guilty to the Charge was sentenced to 7 months imprisonment 2 of which were conditionally suspended for 5 years.
2. I queried with the trial magistrate why she considered effective imprisonment appropriate. And a short sharp custodial sentence in particular. I also queried whether she did not pay lip service to the fact that the accused is a first offender and a plea of guilty. I referred her

to a number of case law but she did not comment on whether they are distinguishable from the current one.

3. It is my considered view that the trial magistrate erred in the exercise of her sentencing discretion by failing to follow guidelines from Superior Courts on how to deal with first offenders in particular.
   State vs Shariwa 2003 (1) ZLR 314 (H) and
   State vs Katsaura 1997 (1) ZRL 102 (H)
4. The trial magistrate also erred by not considering Community Service and not giving reasons for such a course of action yet the sentence is within the Community Service grid. Let alone the so called short, sharp sentences have got no place in this era where rehabilitation and reform must be emphasized. In this regard I relied on the following cases.
   State vs Zondo HB 210/17
   State vs Antonio & Others 1998 (2) ZLR 470 (H)
5. The trial Magistrate also erred in taking into account the fact that the accused kicked the complainant on her pregnant tummy yet these were not facts before the Court. Let alone the State had accepted the accused's limited plea that the he did not kick complainant with booted feet. It appears the trial magistrate relied on what the complainant told the court. The record does not show who called the complainant to testify but it would appear it's the magistrate. Being a witness called by the court, it is my considered view that both accused and the State were supposed to be afforded an opportunity to cross-examine her.
   May we be guided by the Superior Court."

I have gone through the minute of referral by the learned regional magistrate. I am in total agreement that the learned trial magistrate was misdirected in the ways which are highlighted by the learned regional magistrate in his minute of referral aforesaid. The learned trial magistrate failed to be dispassionate in assessing sentence. For example she argued with the learned regional magistrate that the approach which she took in assessing sentence was inconsistent with modern sentencing trends. She submitted that there was justification for departure. However, no such justification was shown or demonstrated. The learned trial magistrate created her own evidence that complainant was pregnant and that she was kicked on the pregnant tummy. The agreed facts did not encompass this fact nor did the complainant give such evidence.

The learned regional magistrate was also correct in his observation that once the learned trial magistrate had resolved to call the complainant to testify, it was incumbent upon her to advise the unrepresented accused of his right to cross examine the complainant on her evidence. The failure to do so was a gross irregularity which makes it improper to rely on the untested evidence of the complainant. The learned trial magistrate even stated that she did not bother to consider community service as it appeared "too lenient". She however went on to sentence the accused to seven (7) months imprisonment which sentence still fall within the community service grid. It is not permitted for a judicial officer not to "bother" about considering a competent sentence in a case where such sentence is

competent. The correct approach is to consider and for given reasons discount the appropriateness of a competent non-custodial sentence. The learned trial magistrate appeared to have justified the non- suitability of community service on the basis that to impose such sentence would amount to condoning "the accused's behaviour as the complainant had left the matrimonial home because of the accused's behaviour." The learned trial magistrate also reasoned that imposing a non-custodial sentence would result in allowing the accused to have a shelter from which the complainant would not have access to. The learned magistrate reasoning was preposterous and absurd. She took the position that the imposition of community service would amount to condoning the accused's behaviour. It clearly does not. Common sense and logic must clearly dictate the understanding that a sentence connotes punishment. A sentence cannot amount to an act of condonation. Further the learned magistrate was misdirected to reason that a non-custodial sentence would result in the accused person denying the complainant access to a home. The learned trial magistrate could have imposed a condition which would have ensured that the complainant was not ejected from the home. It is clear that the learned trial magistrate resolved to ensure that the accused shall be imprisoned and in that regard failed to approach the assessment of sentence on the accepted tried principle of a consideration of sentence namely, seriousness of the offence and the nature of its commission, the interests of the offender and the interests of society. The learned trial magistrate must be guided by the wisdom of the learned regional magistrate in future.

Having discussed the misdirections committed by the learned trial magistrate, I have noted that the proceeding under review are void for another gross irregularity which the learned regional magistrate should have picked up. The plea proceedings did not comply with the guidelines set in *S* v *Mangwende* HH 695/20 in which this court discussed the correct procedure for disposing of a guilty plea trial in terms of the provisions of s 271 (2) (b) as read with s 271 (3) of the Criminal Procedure and Evidence Act. It is a peremptory requirement that before the accused is called upon to plead to a charge in guilty plea proceedings, the magistrate shall explain the charge and record the content of the explanation as given to the accused and the accused's response to the explanation, whether the accused has understood the explanation or not. The accused should only be called upon to plead to a charge which he or she confirms to have understood after explanation by the magistrate.

In casu, the learned trial magistrate after informing the accused of his right to legal or other representation as provided for in terms of s 163A as read with s 191 of the Criminal Procedure and Evidence Act proceeded as follows:

"Charge read and understood

Q How do you plead

A I admit

There is nothing to indicate that the charge was explained before the accused was called upon to plead, let alone was there a recording of the explanation noted. The failure to comply with guilty plea trial peremptory procedural provisions renders a trial unfair and an unfair trial cannot be condoned as it is unconstitutional as shown upon references to s 69 as read with s 86 (3) (e) of the constitution.

The approach I have taken in this review was to review the proceedings as if they are procedurally regular. I did this to educate the learned trial magistrate on her shortcomings. Having done that I then considered the validity of the proceedings from the procedural misdirection committed by the learned trial magistrate which vitiates the trial. The proceedings being invalid cannot stand. The approach adopted by this court in *S* v *Mangwende* to quash the proceedings and leave it to the Prosecutor General to prosecute the accused afresh will be adopted with modification. The accused would have served the effective sentence or is about to complete serving it. He has suffered enough and there is no justifiability to allow for a fresh trial. The following order will therefore suffice.

1. The proceedings in case No. CHTP 2188/21 are hereby quashed and the conviction and sentence set aside.
2. The accused shall be immediately liberated if he is still serving sentence.

MUSITHU J Agrees.