THE STATE
versus
EDWARD MABAYI

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 27 September 2021

Review judgment

CHITAPI J: The accused person appeared before the learned trial Provincial Magistrate J. Taruvinga Esquire on 13 January, 2021 at Harare to answer to a charge of unlawful entry in aggravating circumstances as defined in s 131 (2)of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged against the accused that on 24 and 30 December, 2020 at 172 Enterprise Road, Chisipite, Harare, the accused unlawfully entered the premises aforesaid by forcing open the kitchen door whereupon the accused stole various household goods as listed in the charge sheet. I hasten to comment that the charge of unlawful entry is created in s 131 (1) and not 131 (2) of the Criminal Code. The latter section sets out instances in which an unlawful entry is deemed to have been committed in aggravating circumstances. The correct citation of the charge of unlawful entry in aggravating circumstances is fully canvassed in the judgment of this court in *S* v *Winston Shayawabaya* HH 615/2018. The learned trial magistrate's attention is brought to this judgment for posterity. The other matter that has not escaped my attention is that the accused committed the offence on two separate occasions but was not charged with two counts. It is not for the court to decide for the Prosecutor General how many charges to bring against the accused and no blame or criticism falls on the learned trial magistrate.

The crux of this review is that the learned magistrate did not comply with the provisions of section 271 (2) (b) as read with s 271 (3) when she disposed of the trial against the accused by way of guilty plea procedure. The record shows that the trial proceeded as follows on 13 January, 2020 (*sic*). The correct citation of the year should be "2021" not 2020. Such errors of wrong citation of dates are common. They do not prejudice the accused upon correction. They must however be avoided.

" Plea recording
PP: The docket is ready now.
Ct: Charge read to accused and understood.
Q. How do you plead?
A. I admit.
Ct : Plea of guilty
- 271 (2) (b)
- Facts read and understood
Essential elements
……"

The accused was convicted on his guilty plea and sentenced to 5 years imprisonment with 1 year suspended on conditions of future good behavior and a further 1 year on condition of restitution. The effective sentence was therefore 3 years imprisonment.

I addressed a query to the learned magistrate as follows in material part as follows-

"It does not appear that the magistrate dealing with this case in terms of s 271 (2) (6) (*sic*). [It should be 271 (2) (b)] paid regard to the provisions of s 271 (3) (a) which requires that the magistrate shall explain the charge to the accused and record the explanation given to the accused. What appears on record is-

'Ct – charge read to accused and understood.

May magistrate comment on the observation I have made. Secondly may magistrate advise whether she is acquainted with the case of *S* v *Enock Mangwende* HH 695/20…"

The learned trial magistrate responded as follows-

"……I refer to the above query. I have also acquainted myself with the precedent *S* v *Enock Mangwende* HH 695/20.
I, in my proceedings did not write expressly the explanation I gave the accused. I apologies for same and will not repeat it in future.

I have also noted that section 271 (2) (6) of the Criminal Procedure and Evidence Act quoted which I have not found in the Act. I am using the last sub-section 5. May I be guided on that one."

The correct citation is of course s 271 (2) (b) as read with s 271 (3) (a).

It is apparent that the learned magistrate did not comply with the peremptory requirement that in proceeding on guilty plea under s 271 (2) (b) of the Criminal Procedure and Evidence Act, the magistrate shall explain the charge to the accused and record the content of the explanation given. It was held in the *Mangwende* case that a failure to strictly comply with the procedural trial provisions rendered the trial invalid. It is so determined in this review.

There is also a further issue of procedural irregularity which I have picked up on writing this judgment and upon a further consideration of the proceedings. The learned trial magistrate did not comply with the peremptory provisions of s 163A of the Criminal Procedure and Evidence

which provides that before an accused is called upon to plea to any charge the magistrate shall inform the accused of the rights to legal or other representation set out in s 191 of the same Act. The record shows the learned magistrate adverted to s 163A upon the initial appearance of the accused for remand but did not do so when the accused appeared for trial subsequent to the initial remand. It is trite that every trial in the magistrates court where the accused is a self-actor commences by the magistrate informing the accused of the right to legal and other representation as aforesaid and the recording of the fact that the explanation has been given and the accused's confirmation that he or she has understood the explanation. The judgment of this court in *S* v *Manetaneta* HH 185/20 is instructive in discussing the requirements of s 163 A and the attention of the learned trial magistrate is called to the case.

Having determined that the proceedings were afflicted with gross misdirections of procedure, it is not possible to save them. The following order is made

IT IS ORDERED THAT:

1. The proceedings in case No CRB HRE P 366/21 are quashed and the conviction and sentence imposed on the accused Edward Mabayi are set aside.
2. Accused shall forthwith be liberated.
3. The Prosecutor retains his discretion to institute a fresh prosecution of the accused.
4. In the event that the accused is prosecuted afresh, should he be convicted, the trial court shall take into account the period of imprisonment already served by the accused by virtue of the quashed proceedings as part of an already served portion of the new sentence which may be imposed.

MUSITHU J AGREES …….