THE STATE
versus
NYASHA MAREGA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 2 August 2021

Review Judgment

CHITAPI J: The record of proceedings in this matter was referred to the Registrar to place before a judge for review. The review referral was initiated at the instance of the Regional Magistrate who noted on scrutiny of the proceedings an irregularity in the sentence imposed upon the accused on scrutiny. Section 58(3)(b) of the Magistrates Court Act, [*Chapter 7:10*], provides for the following powers of the scrutinizing Regional Magistrate when scrutinizing proceedings presided by subordinate magistrates which under s 58(1) of the same enactment are not subject of review.

> "58(b) If it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:10*]."

The accused, a female adult of house number 3627, Unit D, Seke at Chitungwiza appeared before a magistrates on 27 April 2021 on a charge of assault as defined in s 89(a) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. It was alleged that on 24 March 2021 the accused unlawfully assaulted the complainant, a 25 year old female adult who is the accused's neighbour, at the complainant's house at house number 3706 in the same suburb. The accused poured boiling water over the complainant's body thereby causing superficial-burn injuries on the complainant's right breast and right forearm. The complainant was treated with antibiotics and dressing of the wounds. The wounds were described in the medical report produced by consent at the trial as consisting in "one attack" which resulted in moderate injuries with no possibility of permanent injury.

The accused pleaded not guilty. The state case was that the accused had performed some piece work for the complainant. She had not been paid for her services. The complainant had promised to pay the accused upon the return of the complainant's husband from work. The accused followed up on her money on the same day with the complainant.

The two quarrelled since the complainant did not have the money. Her husband had not yet returned from work. The accused allegedly picked up a pot with boiling water which was on a gas stove and poured the hot water on the complainant. The accused gave a different account and averred that the pot with hot water accidentally fell off the stove and the complainant as well as the accused were accidentally burnt by the hot water. The accused person despite her protestations was convicted as charged. I did not find any irregularity or misdirection in the manner that the trial was conducted.

In regard to sentence, the magistrate properly considered the circumstances of the case, the offence itself, the offender and the public interest. This approach was correct. The magistrate as he was entitled to do in the exercise of his discretion on sentencing considered that the interests of justice would be served by the imposition of community service as the condition of suspension of the imprisonment term. The accused was sentenced to 12 months imprisonment of which 4 months imprisonment was suspended on the usual conditions of future good behaviour. The remaining 8 months imprisonment were suspended on conditions that the accused performs community service of 310 hours at the local primary school. The community service was ordered to be completed within 9 weeks from the 14 June 2021.

It is in relation to sentence that the magistrate was misdirected in the calculation of the number of hours which would equate to 8 months imprisonment. The scrutinizing Regional Magistrate picked up the anomaly. The anomaly was that in accordance with the grid which sets out imprisonment terms against the number of hours of community service to be served in lieu of effective imprisonment, the 8 months if suspended is equated to 280 hours as opposed to the 310 hours which the magistrate imposed. The trial magistrate upon being asked by the scrutinizing regional magistrate to comment on the perceived error admitted that he committed an error. He agreed that the correct number of hours should be 280 hours. The sentence must therefore be corrected by the deletion of 310 hours and substituting same with 280 hours.

The community service grid provides that 1 month imprisonment equates to 35 hours of community service. The magistrate did not explain how he came to impose 310 hours because even if one divides 310 hours by 35 hours, the number of months one gets is 8.86 months. Whatever caused the magistrate to make the error, his attention is drawn to the need for a strict adherence to the community service grid to be observed. With lawyers being generally known as not being comfortable with figures, it is necessary for every court that

imposes community services to cross check that the calculation of community service hours in lieu of the suspended term of imprisonment is correct. The magistrate in this case, by his admission of his error is hopefully sufficiently informed not to commit the same error.

The magistrate suggested in his response to the query that he would immediately advise the community service officer to correct the error by ensuring that the accused serves 280 hours and not 310 hours. The scrutinizing regional magistrate correctly noted that it was unlawful for the magistrate to proceed in that manner because the magistrate was now *functus officio*. *Functus officio* is a legal principle which provides that once the judicial officer has given a decision and finalized the case before him or her, he or she would have discharged his or her function and cannot revisit or change the decision. The re-visitation can only apply in relation to comments that the judicial officer, in the case of a magistrate, may make in answer to queries on review or commenting on the grounds of appeal. Again such comments are explanatory of how the magistrate conducted the proceedings. The comments cannot alter the decision made even if the magistrate concedes to having errored. The correction is done by a judge of the High Court on review or the Appeal Court as the case maybe. In the case of *Chawira & 130 Ors v Minister of Justice, Legal & Parliamentary Affairs & 2 Ors* CCZ 03/17 at p 9 of the cyclostyled judgment, BHUNU CCJ (as he then was) stated in relation to the doctrine of *functus officio* as follows:

> "Once a court has completed a case, it washes its hands and moves forward without looking back. The time honoured *functus officio* and *res judicata* doctrines militate against the same court revisiting the same completed case except in exceptional circumstances…"

On the basis of the above authority which sets out the trite position on the disqualification of the judicial officer to revisit his or her decision, any instruction given to the community service officer to reduce the number of hours as suggested by the magistrate is illegal.

Under the circumstance, the following order is made to dispose of the review of the proceedings:

(a) The conviction of the accused is hereby confirmed as being in accordance with real and substantial justice.

(b) The sentence imposed on the accused is corrected by the deletion of 310 hours and the substitution thereof with 280 hours. The accused must be informed of the change.

(c) Upon effecting the correction of the number of hours as aforesaid, the sentence as corrected is deemed as confirmed.

MUSITHU J agrees:……