

THE STATE

VERSUS

NDABENKULU MLILO

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 OCTOBER 2010 AND 28 OCTOBER 2010

Review Judgment

MATHONSI J: The accused was convicted of two counts of contravening sections of the Road Traffic Act, [Chapter 13:11] (the Act) by the Magistrates Court sitting at Western Commonage, Bulawayo. In the first count he was convicted of driving without due care and attention in contravention of section 51(1) of the Act,. He was sentenced to 6 months imprisonment of which 3 months imprisonment was suspended for 5 years on conditions.

In the second count, he was convicted of driving without a valid licence in contravention of section 6(1) of the Act and the magistrate having found no special circumstances as would entitle the accused to a sentence other than the mandatory one provided for in the proviso to subsection (5) of section 6 of the Act, sentenced the accused to 9 months imprisonment of which 3 months imprisonment was suspended for 5 years on conditions. She ordered the sentences to run concurrently which meant that the accused had to serve an effective 6 months imprisonment.

Section 51(1) of the Act provides:

“A person who drives a vehicle on a road without due care and attention or reasonable consideration for other persons using the road shall be guilty of an offence and liable to

a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.”

In this particular case, the court a quo opted for the alternative sentence of imprisonment without consideration to a fine. No reason whatsoever was proffered for rejecting the sentence of a fine. It is trite law that where a statute provides for a sentence of a fine and imprisonment the court must give consideration to the sentence of a fine in the first instance. Imprisonment must be reserved for the extreme situations for instance where the accused is a habitual offender.

Section 6 of the Act prohibits driving a motor vehicle without a licence. Subsection (5) of section 6 provides:

“A person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Provided that, if the motor vehicle he was driving in contravention of that subsection was a commuter omnibus or a heavy vehicle, he shall be liable to imprisonment for a period not exceeding five years and not less than six months unless he satisfies the court that-

- (a) ---
- (b) ---
- (c) ---

or unless he satisfies the court, in terms of section 88A; that there are special reasons in the case why that penalty should not be imposed on him.”

Clearly therefore the court will inquire into the existence of special reasons, if it is required to impose the mandatory sentence and that arises if the accused drives either a commuter omnibus or a heavy vehicle without a licence.

In this case, the allegations against the accused are that on 9 August 2010, on an unnamed road in Nkulumane Suburb Bulawayo, he drove a Toyota Hiace motor vehicle

registration number 747-410B which vehicle he rammed against a security fence at a car park. It was not alleged on behalf of the state that the said vehicle was a commuter omnibus or was a heavy vehicle as defined in section 2 of the Act.

That notwithstanding the trial magistrate, having convicted the accused of both counts, proceeded to inquire into the existence of special circumstances. She may have assumed that because the vehicle was a Toyota Hiace, it must have been a commuter omnibus when no such allegation was made. The accused responded that he wanted to learn how to drive and had earlier told the court that he had asked someone to teach him how to drive. Finding no special circumstances, the court sentenced the accused the way it did.

In my view, the magistrate fell in error in that regard. Considering that the magistrate did not give reasons for rejecting the sentence of a fine, it can safely be said that she may have had her view clouded by the wrong assumption that the vehicle driven by the accused was a commuter omnibus.

The result was that she came up with a disproportionate sentence. She has conceded that point. Considering all the circumstances of the offence, including the fact that the accused is a young first offender who pleaded guilty to the charge and that he did not endanger lives, this was good territory for a sentence of a fine in both counts.

The accused has been in custody for a period of more than 2 ½ months. He is entitled to his immediate release. Nothing will be gained by imposing a further penalty of a fine.

Accordingly, it is ordered that:-

- (1) The conviction of the accused on both counts is confirmed.

- (2) The sentence imposed against the accused is hereby quashed and in its place is substituted a sentence of 70 days imprisonment.
- (3) As the accused has already served that period, he should be released immediately.

Mathonsi J.....

Ndou J agrees.....