

(1) THE STATE

Versus

SHEPHERD NCUBE CRB MAT 02/12

(2) THE STATE

Versus

SOMEMORE MOYO CRB K 158/12

(3) THE STATE

Versus

ZIBONELE MOYO CRB K 63/12

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 14 MARCH 2013

Criminal Review

MUTEMA J: The three records of proceedings were referred for review by the Regional Magistrate for Gwanda with the following minute:

“Please place the above records before a review Judge with the following comments.

The three records were dealt with at Kezi by the late Provincial Magistrate Mr Zvenyika and Mr Mavuna who has since left the service. The records were not for scrutiny because of the sentences passed, however they have been brought to my attention by the Provincial Magistrate in charge Matabeleland South.

A disturbing trend in them is the fact that full trials were carried out, accused persons were convicted, but the judgments were not written. The non-availability of the judgments renders proceedings defective. Also not included are reasons for sentence. As both members are no longer with us matters are forwarded for directions.”

In the case of Shepherd Ncube, he was convicted, following a contested trial, of unlawful entry. He was sentenced on 2 February 2012 to 3 months imprisonment. No mitigation was recorded.

In the case of Somemore Moyo, he was tried and convicted of theft on 10 August, 2012 and sentenced to 3 months imprisonment. No mitigation was recorded.

Zibonile Moyo was tried and convicted of theft on 1 August 2012 and sentenced to 3 months imprisonment wholly suspended for 5 years on condition of future good conduct.

Under normal circumstances in terms of section 57(1) of the Magistrates' Court Act, Chapter 7:10 only a sentence of imprisonment exceeding twelve months or a fine exceeding level six is subject to automatic review. However, section 29(4) of the High Court Act, Chapter 7:06 provides that:

“(4) Subject to rules of court, the powers conferred by subsection (1) and (2) maybe exercised whenever it comes to the notice of the High Court or a Judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the Judge for review.”

Emerging from these cases are the following legal implications:

- I. All of them do not have reasons for judgment neither do they have reasons for the sentences that were imposed. In the first two, no mitigation was ever recorded. In all three matters there is no indication that at least the judgments were delivered *ex tempore*. Even where an *ex tempore* judgment is delivered its reasons must subsequently be recorded.
- II. The fact that the cases did not find their way before me on automatic review in terms of section 57(1) of the Magistrates' Court Act is of no moment. Section 29(4) of the High Court Act bestows review powers on a Judge to review any proceedings of an inferior court however those proceedings come to his/her attention so long as they seem not to be in accordance with real and substantial justice.
- III. Section 5(1) of the Magistrates' Court Act provides that every magistrate court shall be a court of record. According to Wikipedia, the term record means anything which is collected or stored in writing or otherwise for future reference and to record means to give legal status to by making an official public record.

In the instant three cases, by not being complete records of the respective trials for want of reasons for both judgment and sentence and also mitigation in two of them, it is apparent that no legal status was given to those proceedings. The need to keep a record is obvious for in the absence of such record how is a review or appellate court to assess the correctness and validity of any proceedings before it?

In *S v Ndebele* 1988(2) ZLR 249 (HC) it was underscored that all courts are courts of record and are required to keep full and comprehensive records of all proceedings. Failure to do so amounts to gross irregularity.

And in *S v Makawa and Anor* 1991(1) ZLR 142 (SC) it was held that a failure to give reasons for judgment is a gross irregularity. Without such reasons an appellate court is hamstrung in its endeavours to determine if the conviction was justified. I must add here that also failure to ask an accused person to give mitigation and or to record mitigation and give reasons for the sentence imposed amount to a gross irregularity for how can the appellate or review court determine the justification of the sentence that was imposed?

IV. It is unfortunate that the first two accused have since finished their respective sentences of 3 months imprisonment.

In the result, the gross irregularities alluded to in the foregoing paragraphs constrain me not to find that the proceedings in all the three matters were in accordance with real and substantial justice. It therefore behoves me to quash the convictions and set aside the sentence in respect of each case.

Kamocha JI agree