

THE STATE
versus
THUBELIHLE NCUBE
and
THE STATE
versus
BRYNNER NCUBE

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 OCTOBER 2015

Criminal Review

MAKONESE J: A judgment is the end product of any court proceedings. It is not the length of the judgment that matters but whether the judgment is well structured to reflect the charge faced by the accused person; a concise statement accused's defence; a summary of the evidence led in court; a brief analysis of the evidence placed before the court; a statement on the law and the reasons for the conviction and sentence. The judgment must be well written and clear without compromising on the quality of the judgment.

The scrutinizing Regional magistrate has placed these two matters for review. His view is that the judgments both from Western Commonage magistrates court are so scant in detail to the extent that that they fall far short of being "standard judgments."

The scrutinizing Regional magistrate addressed a memorandum to the trial magistrate in the following terms:

"These two records of proceedings touch on the same concern, the way the judgments were written. I caused the two judgments to be typed as I was worried that the shortness of the judgments would not come clearly as the handwritten ones.

The handwritten judgments are one paragraph each of continuous prose of one and half page each. The typed versions came out as just over half a page.

I am of the grave view that these two judgments by the trial magistrate do not meet the "standard" criteria.

The judgments are just devoid of any judicial processes in my view. No names of the parties are mentioned. No analysis of evidence brought before the court.

In our judicial system which is adversarial, the duty of the trial magistrate is not to “gather evidence”, but to analyse that evidence. In any event there appears to be no “evidence gathered” in these two records.

The guidelines in judgment writing by MALABA (DCJ) contained in CM/Circular No. 1/14 dated 25 June 2014 and the review judgment of the *State v Olaushe John Maimba* HH 293/14 by MAWADZE J distributed through the Provincial Heads on 24 June 2014 were not read by the trial magistrate. Apposite are pages 6-7 of the *Maimba* judgment. It is also clear that the guidelines by MALABA (DCJ) are clear:

- 1) Set out the particulars of the charge
- 2) Set out as your guide notes the essential elements of the crime.
- 3) Decide which facts are admitted concentrating on those facts that are relevant to the determination.
- 4) Evaluate the evidence regarding the facts in dispute
- 5) Explain the relevant law or legal principles applicable to the case.
- 6) Apply the law to the facts found as proved.
- 7) Decide whether there is proof of guilt.

I am not convinced that the trial magistrate went through this process in the two judgments. The two judgments do not show that. May the trial magistrate comment on these views.”

In response to the query by the Regional magistrate, the trial magistrate stated as follows:

“In response to the Regional magistrate’s query, the trial magistrate will respond as follows:

1. The judgments were short because the trials were also very short. One of the trials had one state witness and no defence witnesses therefore she could not come up with a long judgment.
2. The trial magistrate thought that if there was any need to know the witnesses names, one would refer to the record for she had clearly indicated the witnesses in their order that they had testified.
3. The trial magistrate is of the view that these were very simple cases and the evidence gathered was analysed properly. For example in *State v Brynner Ncube’s* case, all state witnesses and the defence witness testified against the accused person thereby making the case very simple.
4. In our last seminar with Honourable MALABA (DCJ) he said:

- (i) We could not have the same style of writing
- (ii) Simple cases should be treated as such

Also Honourable CHEDA J in one of the seminars mentioned that judgments should be simple.

5. The trial magistrate has also noted that the judgments were wrongly typed thereby causing them to lose meaning.

In conclusion the trial magistrate will say that she managed to clear all the facts in dispute and wrote the judgment her own style which she thought was very simple.

However the trial magistrate stands guided.”

I will first deal with the case of *State v Thubelihle Ncube* (CRB W/C 562/15)

The brief facts of the matter are that accused was facing a charge of contravening section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], that is fraud. It was alleged that on 25 April 2015 the accused made a misrepresentation to Fortune Munatsi to the effect that he had two rooms to rent. As a result of the misrepresentation the complainant gave accused the sum of \$100 causing him financial prejudice. Accused did not have the two rooms to rent. A report was made to the police leading to the arrest of the accused. After a brief trial accused was convicted of fraud and sentenced to an effective four months imprisonment.

The trial magistrate’s judgment is couched in the following terms:

“Judgment

The accused person pleaded not guilty to the charges of fraud. He said he was in charge of the house in question and had offered two rooms to the complainant. He said the complainant paid him \$100 and later on came back demanding his money back alleging some problems. He said he never ran away from the complainant and was surprised when the complainant told him that the key he had given him could not unlock the rooms. He said he could not help to open the doors for the complainant because the complainant did not give him back the keys. The complainant said he was offered accommodation by the accused person and paid \$100. He said when he decided to move in he realized that the key he had been given could not unlock the doors. He said he went looking for the accused but could not find him and when he found him, the accused was not helpful so he reported the matter. He said the accused said he was going to give him the keys but he did not. From the evidence gathered, I am convinced that the accused had no intentions of giving the complainant accommodation. If he was genuine he was going to give complainant the right keys for the rooms. If it was a mistake, he was a going to help him find the right keys or look for a locksmith who would unlock the doors for him. In this

case the accused person took advantage of a desperate person who was in need of accommodation and offered him a room he did not have and took his money and spent it. His failure to explain why he failed to open the door shows that he had the intentions of defrauding the complainant. In this case the accused has no defence at all and is therefore found guilty as charged.”

It is my view that this judgment does not comply with the requirements of a standard judgment. The trial magistrate does not state what charge the accused is facing and what his defence is. The magistrate does not attempt to provide a brief synopsis of the evidence led from the witnesses. A judgment must always have a clear recital of the facts of the case and an analysis of the evidence adduced in court. The facts must come from the record and not from abstract brief statements made without any connection to the evidence. The judgment must answer questions as to how, when, where and what transpired. There must be an attempt, albeit in brief of a statement on the law. There must be a conclusion based on an analysis of the facts and the law. In this particular case there is no reasoned explanation why the accused’s defence was rejected. In criminal cases, it is trite that the accused has no onus to prove his innocence, but rather the burden on lies on the state to prove its case beyond reasonable doubt.

In its present form, the trial magistrate’s judgment is a rumbling statement with a conclusion. The magistrate did not obviously apply her mind to the requirements and guidelines on judgment writing. It has often be said that the soul of the judgment are the reasons for the judgment. It is not sufficient for the magistrate to say that the accused intended to defraud the complainant. The reasons for the decision can only derive from a clear and concise analysis of the evidence.

See the case of *State v Maimba* HH 293/14 and *State v Muza* HB 195/15.

I will now proceed to deal with the second matter under review, namely: *State vs Brynner Ncube* (CRB W/C 605/15).

The brief facts of this matter are that accused was charged with a contravention of section 10 (7) of the Domestic Violence Act [Chapter 5:16], in that on 6 May 2015 accused unlawfully and intentionally failed to comply with a Protection Order issued by the court. It was alleged that accused assaulted the complainant by striking him with a clenched fist on the neck and insulting him in English by saying

“Bull-shit”, “Fuck off ...I will shoot you.”

Following a brief trial accused was convicted and sentenced to 10 months imprisonment of which 2 months was suspended on condition of good behavior. The remaining 8 months was suspended on condition accused performed 280 hours of community service.

The trial magistrate's judgment which is the subject of this review is in the following terms:

“Judgment

The accused person pleaded not guilty to charges of violating a protection order. He said he never talked to the complainant and that he had not assaulted him. He said on the day in question he was talking to the complainant's brother about the fights they were always having with the complainant. The complainant said there is a protection order which was issued against the accused person, protecting from being abused by the accused. He said the accused person violated that order because he had insulted and assaulted him with a clenched fist. The second witness said he was complainant's brother. He said the accused person insulted the complainant using obscene language. He said he struck him with a fist while he was sleeping once and he reprimanded (*sic*). A defence witness was called and she said she was the accused's mother. She said on the day in question the accused person insulted the complainant but said she did not see him assaulting the complainant because it happened when they were in their bedroom. From the evidence gathered, I am convinced that the accused person insulted and assaulted the complainant thereby violating the protection order because the evidence of the complainant was corroborated by the second witness. Even the accused's defence witness confessed that the accused person had insulted the complainant in her presence. In this case the accused has no defence at all and is therefore guilty as charged.”

Once again as in the previous case, the trial magistrate's judgment does not, in my view, meet the minimum standards of judgment. The hallmarks of good judgment writing are brevity, simplicity and clarity. A judgment need not be lengthy but it ought to be clear. The judgment must set out the charge and the brief synopsis of the allegations. There is absolute necessity to record briefly the evidence led from each witness, and thereafter an analysis of such evidence. The trial magistrate must explain why the evidence of the witness is being accepted or rejected. The evidence presented by the state witnesses must be weighed against the accused person's defence. In criminal matters where the accused person's defence is reasonably possibly true, it is trite that the accused will be given the benefit of the doubt and acquitted. The trial court must record its findings on probabilities and state in clear and unambiguous language why the conviction of an accused person is supported by the facts. In the instant case the trial magistrate

boldly states that from the evidence “gathered”, she is convinced that the accused person is guilty of the offence charged. There is no indication what the evidence presented before the court is. Its form and content is not set out. The reasons for the decision to convict are not articulated.

I am aware that there are various styles of judicial writing, but a judgment ceases to be a judgment if it fails to meet the basic requirements as set out in the various guidelines handed to magistrates in various forums. The scrutinizing Regional magistrate referred to seminars conducted for magistrates. I tend to agree that the two judgments under review are too scant in detail. The judgment has no value and purpose if it is not reasoned and is not well structured. I have recently commented in the case of *State v Muza* HB 195/15 that it is generally recognized that the purpose of a judgment is as follows:

- “(a) provide a brief synopsis of the evidence presented in court
- (b) set out the facts found as proven
- (c) provide a brief statement of the law relevant to the case.
- (d) explain to the parties the proceedings the reasons for the decision.”

In the first case under review, I observe that an effective sentence of four months for a fraud involving \$100 is excessive and induces a sense of shock in all the circumstances of the case. It is regretted that at the time of the preparation of this judgment, the accused has probably served his sentence. I have therefore not seen it fit to interfere with the sentence imposed. In that matter nothing turns on the conviction. In the second matter under review both conviction and sentence are proper.

In the circumstances, and for the reasons given above, both judgments do not, in my view, meet the minimum expected standards. Trial magistrates must endeavour to produce well written and well structured judgments. I must underline that a brief judgment can still meet the expected minimum standards. See the cases of *S v Makava and Another* 1991 (1) ZLR 142 (S) and *S v Ncube and Others* 2003 (1) ZLR 581.

I accordingly decline to certify the proceedings as being in accordance with real and substantial justice and accordingly withhold my certificate.

Makonese, J.....