

THE STATE
versus
MOSES KASEKE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 2 February 2015

Review Judgment

MWAYERA J: The matter was brought before me for review. The regional magistrate declined to issue a certificate of confirmation of the proceeding on the basis that he held the view that the sentence imposed was inordinately lenient. I requested the regional magistrate to furnish me with correct citation of a case cited in his scrutiny minute. The record somehow was mislaid as it was posted to Chipinge then Mutare and finally to the regional magistrate Harare. The regional magistrate properly attended to the query and resubmitted the record for review. I must of necessity commend the regional magistrate for his endeavours and I must also apologise on behalf of the institution on the mishap of registry directing the record to Chipinge thus unnecessarily delaying the review process.

The accused was convicted of two criminal offences. Firstly, he was convicted of contravening of s 6 (1) of the Road Traffic Act [*Chapter 13:11*] in that on 4 August 2013 and at around 1800 hours at the 78 km peg along Mutare – Masvingo Road, Moses Kaseke unlawfully drove a motor vehicle namely Toyota Corolla registration number ABX 1754 not being a holder of a driver's licence in respect of such motor vehicle.

Secondly, he was convicted of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 4 August 2013 and at around 1800 hours at the 78 km peg along Mutare – Masvingo Road, Moses Kaseke unlawfully drove a motor vehicle namely a Toyota Corolla ABX 1754 and caused the death of Tinashe Chikumbi either by negligently failing to realise that death might result from his driving conduct or despite realising that death might result from his driving conduct negligently failed to guard against that possibility. The accused was sentenced to pay a fine of \$50-00 or in default of payment 20 days imprisonment for driving without a driver's licence and he was

sentenced for the offence of culpable homicide to pay a fine of \$300-00 or default of payment three months imprisonment. In addition six months imprisonment wholly suspended for three years on the usual conditions of good behaviour.

On the fateful day the accused who was unlicensed drove the Toyota Corolla in question having three passengers on board. The accused who was travelling at an excessive speed lost control of the vehicle which then veered off the road and overturned several times. The accident caused injuries on the accused and the passengers. One of the passengers died from injuries sustained during the accident.

The accused, a 25 year old first offender pleaded guilty to both counts. He regretted the offences as evidenced by his plea of guilty and apologetic stance in mitigation where he accepted he had acted wrongfully by driving without a driver's licence thereby causing the loss of life. He was traumatised by the accident and had assisted the bereaved family in covering funeral expenses and buying the coffin for the deceased. The trial magistrate is commended for carrying a detailed enquiry in mitigation as this enables one to weigh all circumstances and come up with a just sentence. Given the obvious aggravatory circumstances of this case namely that accused drove without a driver's licence. He did not only drive but drove negligently by driving at excessive speed thereby leading to an accident in which precious human life was lost. It is not in dispute that no amount of compensation will bring back the lost precious human life. Further in aggravation is fact that the accident occurred on a straight road when visibility was clear showing the high degree of negligence exhibited by the accused by driving passengers at an excessive speed while not being a holder of a valid driver's licence. It is with this background of the high degree of negligence by a man who lacked the necessary skill that I agree with the regional magistrate's position of not confirming the proceedings on the basis that the sentence imposed is too lenient in the circumstances. It is apparent from the statement of agreed facts when one considers what occurred, that the blameworthiness of the accused is high. It cannot be disputed that driving at excessive speed without the requisite skill safely falls under the ambit of gross negligence and or recklessness.

Having defined the negligence as gross bordering on disregard of safety of others, it follows the sentence of an option of a fine is inappropriate. In passing sentence, it is important to consider the nature of crime, the crime committed, the offender and then seek to strike a balance between the interest of justice and societal interest. Having had due regard to all mitigatory and aggravating factors and of course tempering justice with mercy as is

expected in a civilised society a custodial term with a portion suspended on conditions of good behaviour is considered appropriate. In the case of the *State v Mutizwa* HCH 169/84 REGNOLDS J as he then was upon reviewing the sentence of a fine of \$200-00 where the accused had been convicted of culpable homicide correctly observed, given that the negligence in that matter was ruled as gross negligence the sentence of a fine was disturbingly inappropriate and he withheld his certificate in that case. In the present case where the accused being unlicensed, and lacking the requisite skills drove at excessive speed leading to loss of control of the vehicle causing death of the deceased one cannot help but impute gross negligence.

Accordingly, the sentence of the option of a fine were loss of life has been occasioned by gross negligence is inappropriate.

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