MTULISI ALBERT MLAMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MUSAKWA JJ
HARARE, 7 November 2016 & 29 May 2017

Criminal Appeal

E. Mangezi, for the appellant
E. Makoto, for the respondent

MUSAKWA J: In this case, we quashed the conviction and sentence on account of the poor state of the record of proceedings. I now proceed to give the full reasons.

The appellant was convicted of culpable homicide arising from a driving incident which occurred on 30 October 2015. This happened along Robert Mugabe Way, Harare. As he drove a commuter omnibus along the inner lane, and having crossed Chinhoyi Street, the appellant struck a pedestrian who was crossing the road. The pedestrian struck the windscreen before falling on the edge of the road on the right side. The pedestrian was taken to Parirenyatwa Hospital where he was certified dead.

At the trial the appellant tendered a plea of guilty. However, the plea was altered to not guilty during the canvassing of the essential elements. This entailed that the matter should have proceeded to trial. This is in accordance with s 272 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides that-

> "If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—
> (*a*) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
> (*b*) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
> (*c*) is not satisfied that the accused has no valid defence to the charge;
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial:
> Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3)

> of section *two hundred and seventy-one* shall be sufficient proof in any court of that element or act or omission."

Apart from recording that the plea of not guilty had been altered to not guilty, the next thing to be recorded by the trial court was a certificate of previous convictions being tendered before sentence. There is no evidence of any trial having taken place.

Surprisingly, when the notice of appeal was filed with the trial court, the trial magistrate commented on the grounds of appeal. The comment on the grounds of appeal is unsigned although it was made in the name of the clerk of court. It must be noted that in terms of rule 23 (1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, 1979 it is the trial magistrate who should comment on the notice of appeal.

It boggles the mind how the original certification of the record of proceedings had been done in the circumstances. A certificate of inspection and confirmation of preparation of the record of proceedings was signed by the trial magistrate, trial prosecutor and the appellant's counsel on 22 April 2016. The certificate was also signed by the appeals duty magistrate and provincial magistrate. I must observe that certification is not a routine exercise of simply appending signatures without physically inspecting each page of the record. It is also surprising that even the appellant's counsel somehow missed the errors.

Other glaring deficiencies are also evident. The record of proceedings has a caption- "Judgment" but there is not a single sentence on that. There is even a wrong verdict. This is because the trial court recorded that: "Guilty as pleaded". This could not have been the case as a plea of not guilty had been entered. The next is a recording of mitigation, an inquiry and ruling on special circumstances and a pronouncement on sentence.

Despite the matter being removed from the roll in order for the record of proceedings to be rectified, it was re-set with the same deficiencies. There is nothing to show that an attempt at rectification was ever made. A Magistrates Court is a court of record. In this respect see s 5 (1) of the Magistrates Court Act [*Chapter 7:10*]. Failure to maintain a comprehensive record of proceedings amounts to gross irregularity. This was aptly expressed by GUBBAY CJ in *S* v *Davy* 1988 (1) ZLR 386 (S) at 393 where he had this to say-

> "Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R* v *Sikumba* 1955 (3) SA 125 (E) at 128E-F; S v K 1974 (3) SA 857 (C) at 858H. A failure to comply with

> this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction."

The deficiencies in the record of proceedings in the present matter were self-evident and the prosecution did not dispute them. That is why the prosecution was not able to file its heads of argument. The need for rectification was raised by this court on its own accord as the appellant's counsel had been stoic on the issue. The case of *S* v *Davy supra* is also authority on the correct procedure for the rectification of a deficient record of proceedings. However, we did not find it worthwhile to order rectification of the record for the second time.

It was for these reasons that the conviction and sentence was quashed.

CHATUKUTA J agrees

Mangezi & Partners, appellant's legal practitioners
National Prosecuting Authority, legal practitioners for the state