

RUVIMBO HOPE NYANDORO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSHORE JJ
HARARE, 23 February 2016 and 18 January 2017

Criminal Appeal

M K Chigudu, for the applicant
I Muchini, for the respondent

CHATUKUTA J: On 27 July 2013, and at around 1730, the appellant was driving a Toyota Corolla along Samora Machel Road due east. The now deceased was cycling also due east between the yellow carriage marking and the verge of the road. The appellant hit the deceased with her vehicle. The deceased died from injuries sustained in the accident giving rise to a charge of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant pleaded not guilty but was convicted at the end of the trial. She had alleged in her defence that the deceased had suddenly swerved right into her way resulting in a collision within her lane. In other words, she raised the defence of sudden emergency. The trial magistrate found her to have caused the sudden emergency by not keeping a safe distance from the deceased and found her guilty.

Upon conviction the appellant was sentenced to pay a fine of \$500-00 in default of payment 5 months imprisonment. Aggrieved by the conviction, the appellant launched the present appeal. The following is a summary of her grounds of appeal:

1. none of the witnesses who testified on behalf of the state had witnessed the accident. As a result none of the witnesses disputed the appellant's version of events;

2. the state relied on the evidence of an accident evaluator whose value judgment of what transpired was without a basis the evaluation having been conducted almost a year after the accident;
3. the court erred in discounting the appellants defence of sudden emergency; and
4. the court arrived at some of its findings on wrong facts that had not been placed before the court.

In essence, the appellant's appeal was that given the above grounds, the state had failed to prove its case beyond reasonable doubt.

It is trite the onus rests with the state to prove an accused guilty beyond reasonable doubt. In a bid to discharge that onus, the State called two witnesses, Loveness Matono and Chamuka Sloka. The first witness was the police officer who attended the scene of accident on the day the accident occurred. Her evidence was that she arrived at the scene at 1900 hours, about two and a half hours after the accident. The cyclist had already been taken to hospital. She recounted that she recorded the indications made to her by the appellant. The point of impact was in the appellant's lane to the extreme left of the lane. She was able to confirm the appellant's indications as to the point of impact because of marks caused by the deceased's bicycle scratching the road. She observed a cycle track to the extreme left of the road. She could not apportion blame for the accident to either the appellant or the cyclist as the cyclist was not at the scene to give indications.

Sloka Chamuka was employed by the police as an accident evaluator. He had 3 years' experience as an accident evaluator. He visited the scene of the accident on 29 July 2014, just a year after the accident. He recorded indications also from the appellant and one Constable Sata, whom he referred to as the officer who attended the scene of accident soon after the accident. He produced an accident evaluation report on 20 October 2014, three months after attending the scene.

He testified that when he went for the indications, he observed that the road was under construction and had been resurfaced. There were no carriage markings in place. There was no cycle lane on the left side of the road. The point of impact, as indicated to him by the appellant, was at the extreme left in the appellant's lane. He did not dispute the appellant's version of events that the cyclist veered into her front. He however concluded that the appellant did not

leave enough space between the cyclist and herself as she overtook the deceased. He opined that cyclists are susceptible to swerving in any direction and the appellant should have left a safe distance between herself and the deceased to accommodate the swerving. He confirmed under cross-examination that he did not have sight of either the damaged bicycle or the appellant's motor vehicle. He conceded that the damages to the motor vehicle and physical markings on the road were relevant in arriving at proper evaluation of accident. He further confirmed that the sketch plan by the attending detail was also relevant in reconstructing the scene of the accident. He admitted that he did not have sight of the sketch plan when he prepared his report.

The trial magistrate relied on the evidence of Chamuka in arriving at his decision. When a court relies on the evidence of an expert, it must be satisfied that the expert evidence is sound in light of the totality of the evidence before. (See *S v Tendai & Anor (Juveniles)* 1998 (2) ZLR 423 (HC) at 427 -B – C and *Levy v Tune-O-Mizer Centre (Pvt) Ltd* 1993 (2) ZLR 378 (SC) at 380 F- 381 E).

Apart from the appellant's, there was no other meaningful evidence that the trial magistrate could test the soundness of Chamuka's evidence. Given the concessions made by the Chamuka, it is surprising that the court *a quo* convicted the appellant. It is inconceivable that Chamuka could have effectively prepared his report without having had sight of the attending detail's sketch plan, the damaged cycle and appellant's vehicle. This was the best available evidence that Chamuka should have relied on in reconstructing the scene. The importance of this evidence cannot be understated as remarked by PATEL J in *Dururu Transport (Pvt) Ltd v Mutamuko and Another* HH 95/11. PATEL J remarked as follows

“As was aptly cautioned by McNALLY JA in *Ramotale v The State* SC 249/02, credibly in collision case cannot be measured by demeanour, but only by comparing the testimony against the real evidence. To put it differently, the testimony of the witnesses must be tested against the real or extrinsic evidence available i.e the sketch plan of the scene of the accident, the damage occasioned is the motor vehicles involved, and the facts recorded in the Traffic Accident Book.”

The scene of the accident had significantly changed with the resurfacing of the road. The marks created by the deceased's cycle, which had been noted by the attending, detail had been obliterated. The cycle track that had been observed by the attending detail, Loveness Matono when she visited the scene on the evening of the accident, had also vanished. There were no

carriage markings. There was no evidence to establish the previous width of the road neither was there evidence to establish how close the appellant would have been to the yellow line.

When asked why he did not rely on all the other evidence, Chamuka's response was that he was not furnished with the evidence by the state. He conceded that it was not the appellant's responsibility to furnish him with the information he required to arrive at a meaningful reconstruction of the scene of the accident and arrive at a conclusion as to who was liable for the accident. It is the police which had that information. Despite the fact that he was a police officer, he did not consider it prudent to obtain that information and use it. In fact his response was so lame for an evaluator of three years' experience. This put into question his capability as an evaluator and consequentially, his credibility as an expert witness.

The following were the other factors that the court *a quo* overlooked when it relied on the evidence of a clearly unreliable witness. The sketch plan prepared by Chamuka lacked meaningful measurements. The only measurements provided in the plan were:

- a) the width of a reconstructed road;
- b) the distance between the point of impact and the resting position of the deceased;
- c) the distance between the point of impact and the resting position of the appellant's vehicle.

The indications by the appellant were based on the scene of the accident before the reconstruction of the road. A number of relevant questions remained unanswered in view of the reconstruction:

- a) What was the width of the road before the reconstruction and resurfacing?
- b) Where would have been the yellow carriage marking before the resurfacing?
- c) What would have been the distance between the point of impact and the possible yellow carriage marking?
- d) What would have been the distance between the yellow carriage marking and the verge of the road?

In the absence of answers to these questions and the failure to use the best available evidence alluded to earlier, a bigger question remained unanswered - how did Chamuka reconstruct the scene of accident? (See *Guardian Royal Exchange Assurance Rhodesia Limited v Jeti* 1980 ZLR 436). It should not be overlooked that despite all these limitations, it took

Chamuka a good three months to produce the sketch plan. His recollection of what transpired three months earlier was totally unreliable. He testified that he relied on other indications made to him by an attending detail he identified as “Constable Shata”. According to his sketch plan the attending detail was a Constable Chaba. But we now know that the attending detail was in fact Loveness Matono. According to the Accident Summary produced as Exhibit 1, the investigating officer was Sgt Shumba. One wonders where Chamuka got the names he referred to in his evidence and on his sketch plan.

Without detracting from the observations that the attending detail’s plan was importance in coming up with the evaluator’s plan and report, it appears to me that Loveness Matono’s draft plan would have been of limited assistance to Chamuka. It suffered the similar inadequacies as Chamuka’s plan. Despite testifying that there was a yellow carriage marking, no such marking appears on the plan. It is not clear if the line appearing on the left of the appellant’s lane is the yellow carriage marking or the verge of the road. There are no measurements between the critical points. The only measurement on the plan is “50m”. However, there is no indication what the distance relates to. It can relate to the distance between the point of impact and where the deceased’s cycle landed after the accident. It may be the distance between the resting position of the deceased’s cycle and the appellant’s vehicle. It may equally relate to anything and nothing. The marks that Matono said she observed on the road created by the deceased’s cycle and which appear on her draft plan were not measured.

Of even greater concern is that the attending detail recorded names of two possible independent witnesses, Josphat Mucheche and Zimamba of Red Cross in the Accident Summary. The telephone numbers of the two appear against their names yet they were not called as state witnesses. No explanation was given as to why they were not called as witnesses.

The evaluator and the trial magistrate clearly chose to disbelieve the appellant’s version of events without any other evidence to the contrary. In *Gadzikwa and Anor* SC 44/04, GWAUNZA JA cited with approval the observations by GREENBERG J in *R v Dildford* 1937 AD 370 at 373 that:

“No onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, at only that the explanation is improbable, but that beyond any reasonable

doubt it is false. If that is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

The appellant’s explanation of the accident is in our view reasonably possible. Under the circumstances the conviction cannot be sustained. It is accordingly ordered that:

1. The appeal be and is hereby upheld.
2. The conviction by the court be and is hereby quashed.

MUSHORE J: Agrees.....

Moyo & Jera, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners