IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 41/11

In the matter between:

THE KING

VS

MALUNGISA VILAKATI

CORAM: **OTA, J**

FOR THE CROWN **MR MATHUNJWA**
THE APPELLANT IN PERSON

JUDGMENT

OTA, J

[1] This is an appeal against the sentence of the Manzini Magistrates court, per His Worship S. Ndlela - Kunene . The record demonstrates that the Appellant Malungisa C. Vilakati was arraigned before the court

a quo, on 3 counts of traffic offences. The Rider to the charge sheet reads as follows

[2] <u>Count 1</u>

The said accused is charged with the offence of contravening section 91 (1) as read with section 122 (2) of the road traffic Act 6/2007. In that upon or about 24/09/2010 at about at or near Malkerns along MK 27 public road, in the Manzini District, the accused being the driver of motor vehicle SD 086 PM, did wrongfully and unlawfully drive the said motor vehicle under the influence of an intoxicating liquor or drug with a narcotic effect, thus contravening the Act.

[3] <u>Count 2</u>

The said accused is charged with the offence of contravening section 23 (1) as read with section 122 (7), of the Road Traffic Act 6/2007, that upon or about the 24/09/2010 at or near Malkerns along MR 27 Public road, in the Manzini District, the said accused person being the driver of motor vehicle SD 086 PM, did

wrongfully and unlawfully drive the said motor vehicle along the aforesaid road and failed to produce drivers licence to a police officer 2990 constable Sibandze.

[4] Count 3

The said accused is charged with the offence of contravening Section 50 (1) as read with Section 122 (4) of the Road Traffic Act 6/2007, in that upon the 24/09/2010 at or near Malkerns along MR 27 public road, in the Manzini District, the said accused being the driver of motor vehicle SD 086 PM, did wrongfully and unlawfully drive the said motor vehicle along the said public road while it is in an unroadworthy condition, thus contravening the Act:

[5] PARTICULARS OF UNROADWORTHINESS

1. Defective right head lamp

The record reveals that when the Appellant was arraigned before the court a quo on the 25th of September 2010, that he pleaded guilty to the charge as per all three counts. The crown accepted the plea of guilty without leading further evidence. Whereupon the court a quo found the Appellant guilty of the offence as charged. After mitigation, the court a quo proceeded to sentence the Appellant as follows:

[6] "***SENTENCE***

The court sentences accused to E5, 000.00 fine or four (4) years imprisonment for count 1. E500.00 fine or five (5) months imprisonment for count 2, El 000.00 fine or ten (10) months imprisonment for count 3. Sentences to run concurrently."

[7] It is the foregoing sentence imposed in count 1 of the charge and a dissatisfaction of the same that engendered the Appellant to commence the Appeal instant against same by letter to the Registrar of the High Court dated the 11th of April 2011; wherein he challenged the sentence of 4 years or Fine of E5, 000.00 imposed by the court a

quo as per count 1. The Appellant subsequently filed grounds of Appeal on the 14th of July 2011, wherein he contended that the sentence imposed is irregular in that in terms of Section 238 (1) of the CP 8в E and the proviso thereto, that the court a quo should not have sentenced him to a fine exceeding two thousand Emalangeni, the sentence imposed in the circumstances is unlawful and prayed the court to set it aside. He further contended that in any event he is a first offender and pleaded guilty to the charge.

[8] When this matter served before me for argument on the 5th of August 2011, the Appellant who appeared in person again prayed for a setting aside of the sentence in terms of his grounds of appeal. In response, crown counsel Mr Mathunjwa submitted that there is no way the crown can justify the sentence imposed by the court a quo in the face of Section 238 (1) of the CP&E and the proviso thereof. He prayed the court to uphold the appeal and impose a sentence that is in line with Section 238 (1) of the CP&E.

[9] The position of the law on sentence is that the sentence of any court is always a matter in the discretion of the sentencing court. An Appellate court will only interfere with the sentence if there was a misdirection or that the sentence was wrong in principle or that it is a sentence which induces a sense of shock.

[10] Since both sides urge on me the provision of Section 238 (1) of the CP&E, my first port of call in determining this matter would be to regurgitate that legislation, to ascertain for myself the substantiality of the Appellants cries herein. That legislation provides thus;

> "*S.238 (1) If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence (of which he might be found guilty on the indictment or summons) other than the offence with which he is charged and the prosecutor has accepted such plea, the court may, if it is;*

a) The High Court or a principal magistrate's court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence or,

b) A magistrate's court other than a principal magistrate's court, sentence him for the offence to which he has pleaded guilty upon proof (other than the unconfirmed evidence of the accused) that such offence was actually committed.

Provided that if the offence to which he has pleaded guilty is such that the court is of the opinion that such offence does not merit punishment of imprisonment without the option of a fine or of whipping or a fine exceeding two thousand Emalangeni, it may, if the prosecutor does not tender evidence of the commission of such offence, convict the accused of such offence upon his plea of guilty, without other proof of the commission of such offence, and thereupon impose any competent sentence other than imprisonment or any other form of detention without the option of a fine or whipping or a fine exceeding two thousand Emalangeni, or it may deal with him otherwise in accordance with the law......"

[11] The litera legis of the foregoing legislation puts it beyond disputation, that where an accused person pleads guilty to a charge, and in the opinion of the court the offence does not merit imprisonment or detention without an option of a fine, or whipping or of a fine exceeding two thousand Emalangeni, the court may accept the plea without the necessity of tendering further evidence. In that event the court is required to impose sentence other than imprisonment or detention without the option of a fine, or whipping or a fine exceeding two thousand Emalangeni.

[12] In casu, the Appellant pleaded guilty to the first count of driving under the influence of an intoxicating liquor or drug with a narcotic effect. The prosecution accepted the plea of guilty without tendering any further evidence. By virtue of Section 238 (1) ante, the court a quo was required to impose a sentence other than imprisonment or other form of detention without an option of a fine, or of whipping or of a fine exceeding two thousand Emalangeni. The court however and clearly in contravention of Section 238(1) of the CP&E, imposed a fine of E5, 000.00 in default 4 years imprisonment. I agree entirely with the crown

that it cannot justify such a sentence in the face of such clear words of statute.

[13] In the circumstances this appeal succeeds. The sentence of E5, 000.00 fine or four (4) years imprisonment for count 1, imposed by the court a quo, is hereby set aside. In its place I substitute a sentence of EI, 500.00 or 2 years imprisonment. It is so ordered. Right of Appeal and Review explained.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE.....11th **.....DAY OF** .August**...2011**

OTA J.
JUDGE OF THE HIGH COURT