



IN THE HIGH COURT OF ESWATINI

Review Case No. 68/2019

In the matter between

REX

V

THULANI SHONGWE

Neutral Citation: Rex and Thulani Shongwe
(68/2019) [2019] SZHC 100 (05 June 2019)

Coram : **MAMBA J.**

Considered: **05 JUNE 2019**

Delivered : **05 JUNE 2019**

[1] *Criminal Law – Sentence – Compensation Order in terms of Section 321 (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Principles applicable thereto. Amount of compensation must be either agreed to between the victim and the accused or established by competent evidence.*

[2] *Criminal Law – Sentence – Compensation Order following a conviction for assault – per Section 321 (1) of the Act, can only be made on application by the Crown or the complainant.*

- [1] The accused herein was tried by a Magistrate sitting in Bhunya on 20 September 2019. He was not represented by legal Counsel.
- [2] The charge sheet stated that the accused was guilty of the crime of Assault with intent to cause grievous bodily harm in that on or about 08 August 2018 he had unlawfully and intentionally assaulted Zwelithini Manqoba Magongo 'all over the body with kicks, fists, open hands and further hit him against the bakkie and was also threatened with a gun, and did thereby commit the said offence.'
- [3] He pleaded guilty to the charge which plea was accepted by the Crown. It is perhaps understandable why the crown did so because the complainant could not be traced. The endorsement on the subpoena indicated or stated that he had 'relocated to South Africa' and his whereabouts or contacts in that country were unknown.
- [4] In the result and essentially based on his plea, the accused was found guilty as charged. He was sentenced to pay a fine of E2000.00 failing which to serve a term of imprisonment for 24 months. Surprisingly though, that was not the end of the sentence or penalty, because in addition, the Learned Magistrate ordered that the 'accused must compensate the complainant with E1000.00 before he pays the fine.' There was no application by the crown or any person for such compensation or evidence that the complainant had suffered any financial damages or loss. The issue about compensation was without any motivation or justification by anyone. It was unilaterally and arbitrarily decided by and issued by the presiding Magistrate. That was utterly and totally irregular and a serious misdirection.

[5] Section 321 (1) of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) provides as follows:

‘321 (1) If any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon an application made by or on behalf of the injured party, forthwith award him compensation for such injury, damage or loss ---.’

(The underlining or emphasis has been added by me).

[6] In *Phineas Mcitheni Mvubu V Principal Magistrate Florence Msibi N.O and 3 Others (231/2018) [2018] SZHC 143 (06 July 2018)*, this court made the following pertinent observations which are hereby repeated namely:

‘First, there was no application made in court for the order for compensation, either by the crown or the complainant herself. Secondly, there was no proof or credible or sufficient evidence as to the value of the ox in question.’

And in *R. V Mhlongo and Another (29/2009) [2009] SZHC 142 (30 April 2009)* Masuku J. stated as follows:

‘[5] It is clear from a plain reading of the above Section, particularly Section 321 (1), that the order for compensation can be made by the Court only pursuant to an application made by or on behalf of the injured party. In the instant case, no such application was made and it appears that the Court ordered compensation *suo motu*. This is wrong and it is not inkeeping with the letter and spirit of the above Section.’

- [7] In the result, the order for compensation was irregular and a misdirection by the court and is hereby set aside otherwise the conviction and sentence imposed on the accused is upheld. In the event that the accused has already paid the compensation this has to be refunded to him by the complainant. The trial Magistrate is ordered to reconvene the matter and have this order explained to both the complainant and the accused. Thereafter, the court record is to be re-submitted to the Registrar of this court for further directions.
- [8] This order is to be brought to the attention of the Registrar of this court who is ordered to bring it to the attention of the Learned trial Magistrate within seven (7) days from date hereof.

MAMBA J.