



**IN THE HIGH COURT OF ESWATINI
REVIEW JUDGMENT**

HELD IN MBABANE

Review Case No: MF 62/2021

In the matter between:

MVELO ERIC KHUMALO

First Applicant

MFANIVELI MAPHALALA

Second Applicant

Versus

THE KING

Respondent

Neutral Citation: *Mvelo Eric Khumalo and Another vs King*
[MF62/2021] [2023] SZHC 28 (15 February 2023)

Coram: M. S. LANGWENYA J

Heard: 1, 8 February 2023

Delivered: 15 February 2023

Summary: *Criminal Procedure-Review proceeding-failure to inform
accused of right to legal representation irregular-
irregularity fatal-conviction and sentence set aside.*

JUDGMENT

- [1] On 30 April 2021 the first applicant was charged with eight counts of housebreaking and theft while the second applicant was charged with three counts of housebreaking and theft. The Crown alleged that in counts 1, 2 and 3 the applicants acted in furtherance of a common purpose. The applicants were tried and convicted by the Magistrate Court sitting in Manzini. The applicants were sentenced as follows: in count 1 both accused persons were each sentenced to three years imprisonment with the option to pay a fine of Six thousand Emalangeni. For count 2 the accused were each sentenced to one year imprisonment with an option to pay a fine of Two thousand Emalangeni. For count three, the accused were each sentenced to one year imprisonment with an option to pay Two thousand Emalangeni. For count four, the first accused person was sentenced to a term of four years imprisonment with an option to pay a fine of eight thousand Emalangeni; in count five, the first accused was sentenced to a term of imprisonment of two years with an option to pay a fine of two thousand Emalangeni; in count six, the first accused was sentenced to a term of imprisonment of one year with an option to pay a fine of two thousand Emalangeni; in count seven, the first accused was sentenced to a term of imprisonment of one year with an option to pay a fine of two thousand Emalangeni and on count eight, the first accused was sentenced to a term of imprisonment of one year with an option to pay a fine of one thousand Emalangeni.
- [2] The learned Magistrate ordered that in relation to the first accused, the sentences in counts two and seven should run concurrently while the sentences in counts one, three, four, five, six and eight should run consecutively. Put differently, the first accused was ordered to serve a term

of imprisonment totaling thirteen years or an option of a fine amounting to twenty-five thousand Emalangeni. The second accused was ordered to serve a term of imprisonment totaling five years imprisonment or a fine amounting to ten thousand Emalangeni. The second accused paid the fine. The first accused could not pay the fine and is currently serving his sentence of thirteen years imprisonment at Zakhele correctional services.

- [3] It was during the trial of the first accused at the High Court where he was charged with attempted murder, arson and malicious damage to property that the Court learned that the first accused was serving his sentences for different counts of housebreaking and theft. When the first accused was convicted for attempted murder, arson and malicious damage to property, the Crown submitted that the accused had no record of previous convictions while the accused stated that he was currently serving sentence for housebreaking and theft. The Court ordered that the matter be investigated. The Registrar of the High Court was requested to make the court record from the Magistrate Court available so the court could make a proper determination concerning the existence or otherwise first accused's previous convictions.
- [4] The record from the Magistrate court was provided and it confirmed the version of the accused person, namely that he was currently serving a term of imprisonment for various counts of housebreaking and theft. The officials from the correctional services who were accompanying the first accused during the trial at the High court confirmed that he was serving his term of imprisonment for housebreaking and theft.
- [5] The first accused complained that the sentence imposed by the court *a quo* was harsh.

Record of the trial court

- [6] The record before me consists of no warning statements on the rights of the accused persons. There is, on the face of the typed record a certificate of the Clerk of Court certifying that the clerk has compared the typed record with the original record of proceedings and that it is a true and correct copy thereof and that it is in fit condition to be submitted in the court of judicial proceedings to the High Court. Patently however, this certificate does not reflect the name of the clerk of court nor does it bear the signature of the said clerk. Instead, the certificate is signed by the typist.
- [7] The record of the trial court reflects obvious procedural errors. The rights that were explained are indicated with a one sentence entry on the record. The terms in which these rights were explained were not recorded. For instance regarding the right to legal representation, the learned magistrate simply recorded that the 'accused confirm they are ready and still conduct own defence¹.' The explanation of the accused, if any was done, is not recorded. On the record, no entry could be found that the rights of the accused to appeal or review were explained to them.
- [8] The Crown submitted that from the record it appears that the trial was not properly conducted if the accused persons were not informed of their rights. Ms Dlamini, for the Crown submitted that the High court can cure the improper conduct of the trial by the trial court by substituting its finding on conviction and sentence with that of its own to ensure that justice is served.
- [9] The accused were unrepresented in the court *a quo*. The trial court was therefore enjoined to inform the accused persons of all their rights and to

¹ See page 3 of the typed record.

record their responses. Failure by the trial court to inform the accused of their rights is an irregularity.

Failure to inform an unrepresented accused of right to legal representation

[10] The explanation of an unrepresented accused person's right to legal representation is fundamental in as much as it has a constitutional hue. Section 21 of the Constitution Act² states that all persons shall be entitled to be represented by a legal practitioner. The right to legal representation is also a cornerstone of a fair trial. In my view, the starting point in determining the fairness of a trial should always be whether an accused person is informed of his right to legal representation. The accused must be properly informed of his right to legal representation and his answer recorded so that if there is a waiver of such right, it would be an informed one.

[11] In relation to the duty to explain the right to legal representation to an unrepresented accused, it was held in *S v Mabaso and Another*³ as follows:

'Where a general duty rests upon a judicial officer to inform an unrepresented accused that he had a right to be legally represented, the failure to discharge that duty does not inevitably involve the commission of an irregularity in the judicial proceedings involved. Whether or not an irregularity has been committed will always hinge upon the peculiar facts of the case; and it need hardly be said that much depends upon the extent of the accused's own knowledge of his rights.'

[12] From the record, it is unclear why the accused were not informed of their right to legal representation and a pro-forma signed by the accused setting out their response to the explanation. In her written reasons for conviction and sentence however the learned Magistrate states that the accused were

² 1/2005

³ 1990 (3) SA 185(A) at 204C.

fully apprised of their right to legal representation and that they opted to conduct their own defence. The problem with this statement is that the record does not show that the accused were apprised of their right to legal representation and their right to appeal and or review. There is also no explanation why that is so.

[13] The enquiry is whether the failure to inform the accused persons of their right to legal representation in this case is an irregularity so fundamental and serious to the extent that it can be regarded as fatal to the proceeding in which it occurred.

[14] I am of the view that in this case, the failure to explain and record such explanation of the right to legal representation of the accused persons and their choice of what they elect to do taints the conviction and sentences imposed by the trial court and imply that the trial was not in accordance with justice. The learned Magistrate in her reasons for conviction and sentence stated that the accused persons were young. The young age of the accused is more reason care should have been taken to apprise them of their rights during the trial.

[15] I consider the conclusion reached herein dispositive of the matter.

[16] In the result, the conviction and sentence imposed by the court *a quo* against the first and second applicants are set aside.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

First Applicant:

In Person

Second Applicant:

In Person

For the Respondent:

Ms Lomkhosi Dlamini