OSWELL NDORO

versus

THE STATE

HIGH COURT OF ZIMBABWE

HUNGWE and MAVANGIRA JJ

HARARE, 17 AND 24 MAY AND 19 DECEMBER 2012

**Criminal Appeal**

*C. Daitai,* for the appellant

*A. Masamha,* for the respondent

 MAVANGIRA J: The appellant was arraigned before the magistrate at Chipinge on a charge of culpable homicide. He pleaded not guilty but was convicted after a trial. He was sentenced to 18 months imprisonment of which 6 months was suspended for 5 years on condition of future good conduct. In addition, the appellant was prohibited from driving any class of motor vehicle for the next 6 months.

 The appellant appealed against both conviction and sentence but at the hearing of the matter the appeal against conviction was withdrawn. Mr. *Daitai* for the appellant proceeded to address the court only with regard to the appeal against sentence. The appellant’s grounds of appeal against sentence are stated as follows:

“1. The sentence imposed by the court is manifestly excessive and induces a sense of shock considering all the circumstances of the case thus:-

1. The appellant is a first offender and family man, (*sic*)
2. The appellant showed remorse and assisted in the whole funeral and agreed to compensate family of the deceased. (*sic*)

 2. The Magistrate misdirected himself in holding that the appellant showed a high degree of negligence thereby overlooking the fact that young children were left on their own and had a role to play in the accident.

3. The Magistrate erred in passing sentence when he became more convinced by the notion of imprisonment being a form of deterrence in cases of this nature without considering other forms of punishment, which were appropriate in this case. (*sic*)

4. The Court *a quo* misdirected itself when it failed to impose a fine as an appropriate sentence when in fact it appears from the indictment that it had initially imposed a fine and only reversed the same as an afterthought and imposed a prison term. The appellant avers that even Community Service would have been considered after the Court decided to impose a prison term. (*sic*)”

 The appellant prays for the sentence of imprisonment to be set aside and substituted with “an option to pay a fine and/or alternatively an order for community service.” The respondent opposes the appeal.

 The facts of the matter are that on 13 April 2011 at about 5.30pm at the 134km peg along the Mutare – Masvingo road, the appellant who was driving a motor vehicle, a Toyota Canter with four passengers on board, struck the then three year old child Moses Mangezi who died on the spot. The appellant did not stop his motor vehicle, only doing so after travelling for some eight to ten kilometres from the scene when he then made a U-turn. The sole State witness was the then 12 years old Praise Mangezi. She said that she was walking with four other children on the right side of the road. She was carrying her little sister on her back while Blessing was carrying the deceased on her back. Blessing indicated that she wanted to put the deceased down as she was tired. She did not however see Blessing place the deceased on the ground. She saw the vehicle approaching and alerted the others to move further away from the road. The vehicle was speeding. She then heard a bang and turned back to check. She saw the deceased lying on the ground unconscious.

 It was the respondent’s contention that the appellant was negligent in that he failed to keep a proper lookout and also that he was travelling at an excessive speed under the circumstances. The respondent contended that had the appellant kept a proper lookout and had he been travelling at a speed that was not excessive in the circumstances the accident that resulted in the deceased’s death would have been avoided.

 The respondent’s counsel submitted that whilst a custodial sentence was called for in the circumstances, a sentence of 18 months was unduly severe. He submitted that a sentence of 12 months imprisonment with 4 months suspended coupled with a prohibition order would have met the justice of the case.

 On his own evidence the appellant saw the children when they were about 200 to 300 metres ahead of him. He then reduced his speed to 100km per hour; this being a 120km per hour zone. When he was asked whether 100km per hour was reasonable in circumstances where there were children who were walking by the road side and who by nature are known to be unpredictable, his answer was that he did not expect it on the highway. If the appellant did not expect to see children near the road, the fact, on his own evidence, is that he in fact saw the children when they were some 200 to 300 metres away. This was a group of children, two of whom, including the deceased, were being carried on the backs of other children. As he passed the children while driving at 100km per hour, there was an impact which caused the deceased to fall some 1,5 metres from the edge of the tarmac. There was no contention or evidence that the vehicle left the road before impacting with the deceased. The impact must thus have occurred at the edge of the road. Having seen the children who were walking by the road side there was no reason why the appellant who had the whole breadth of the road at his disposal, did not move more towards the centre if not the left side of the road in order to create as much space between him and the children as possible. The appellant did not see or hear the sound of the impact. The impact also caused the “dispositioning” of the appellant’s vehicle’s “left dip light”.

 The appellant’s evidence appeared to prevaricate between on the one hand a bold statement that in fact the deceased suddenly ran into the road and on the other, a presumption that this is what must have happened

 The magistrate’s finding that the appellant displayed a “high degree of negligence which borders on lack of care and respect for human life” cannot be faulted in the circumstances of this case. For that reason a custodial sentence was unavoidable. In *S v Nyamandi* 1998 (2) ZLR 205 (5) at 208 E, SANDURA JA stated:

 “…In my view, the trial magistrate was correct in finding that the appellant was grossly

 negligent. In the words of McNALLY J (as he then was) in *S v Dzvatu* 1984 (1) ZLR

 136 (H) at 138F:

 “…anyone who drives straight through a ‘give way’ sign at a T- Junction and hits a

 lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly

 negligent.”

 In *casu* the appellant drove at a speed of 100 km per hour after seeing the children from a distance of about 200 to 300 metres. Despite having the full breadth of the road available to him he did not move towards the centre of the road and further away from the children. His high speed and failure to keep a proper lookout disabled him from taking preventive action such as to prevent a reasonably foreseeable occurrence.

SANDURA JA proceeded at 208G:-

 “…As RAMSBOTTOM JA said in *R v Bredell* 1960 (3) SA 558 (a) at 560 G – H:

 ‘…the time has come when it is the duty of judicial officers to exercise greater

 severity in passing sentence in cases of the negligent use of motor vehicles. A motor

 car is a most dangerous instrument if negligently handled, and it may be that the only

 way to remind drivers of their duty to use proper care is for magistrates and judges to

 make more frequent use of the deterrent effect of prison sentences.”

 As already stated, a prison term was called for and in this regard the learned trial magistrate exercised his discretion properly. A fine would be inappropriate on the facts of this matter. Neither would community service suffice. It is however the length of the custodial sentence that is unduly harsh. In *S v Nyamandi (supra*) the appellant who was driving a motor vehicle in the evening failed to give way at an intersection with which he was familiar as it was near his home. His vehicle collided with another one on the major road and a passenger in the other vehicle was killed. He was sentenced to 12 months imprisonment of which 5 were conditionally suspended. On appeal, the sentence was said to be not so severe as to induce a sense of shock and it was therefore upheld.

 It would appear that the appropriate sentence in *casu* would be one in close range to that imposed in the *Nyamandi* case regard being had to the facts of the two cases. A sentence of 12 months with a portion suspended would meet the justice of the case. Sight must not be lost of the mitigatory factors reflected in the record including the fact that the appellant met all the funeral expenses and that he agreed to pay the cultural compensation that he had been charged by the deceased’s guardians. A significant portion of the sentence will therefore be suspended.

 In the result and for the above reasons the appeal against sentence succeeds to the following extent:

 The sentence imposed by the court *a quo* is hereby set aside and substituted with the following:

 “10 months imprisonment of which 6 months is suspended for 5 years on condition that

 the accused does not during that period commit any offence involving a contravention

 of the Road Traffic Act and for which on conviction he is sentenced to imprisonment

 without the option of a fine.

 In addition the accused is prohibited from driving (any??) class of motor vehicle for

 the next 6 months.”

HUNGWE J agrees.