

**IN THE HIGH COURT OF SOUTH AFRICA**  
**EASTERN CAPE LOCAL DIVISION: MTHATHA**

**CASE NO: 369/2019**

In the matter between:

**ZUKILE KILO**

Applicant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**GWALA AJ**

1. This matter came to this court by way of an automatic review. The background is that on 05 February 2019, the Magistrate Court, Cacadu, granted a protection order against the applicant in terms of which he was ordered not to insult, assault or harass the complainant who is apparently his mother. The order was served upon the applicant and he was aware of the court order.
  
2. During June 2019, the applicant was charged for contravening the court order. It was alleged that the contravention took place on 02 June 2019. It was alleged that he insulted the complainant by calling her an “asshole and a witch” which was in contravention of the order previously granted by the court.

3. The applicant appeared in court duly represented by an attorney. He tendered a plea of guilty and was found guilty accordingly. He was sentenced to 12 months imprisonment half of which was suspended for a period of five years on condition that he is not convicted of contravening the protection order dated 05 February 2019. He was also declared unfit to possess a firearm in term of Section 103(1) of the Firearms Control Act 60 of 2000.
4. It appears from the record that the protection order was granted on 05 February 2019. Axiomatically, this was preceded by some or other violence perpetrated by the applicant against the complainant. It does not appear that the applicant appeared in court during February 2019 or any time thereafter prior to the present charge.
5. It appears that when the applicant tendered the plea of guilty, he pleaded to the offence committed on 02 February 2019. The charge sheet did not refer to the offence committed on 02 February 2019.
6. In his statement in terms of section 112 of the Criminal Procedure Act 57 of 1977, the applicant stated thus: -“

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*On the 2<sup>nd</sup> day of February 2019 and at Ezingqolweni Village in the District of Cacadu I did wrongly and unlawfully contravene a prohibition order imposed on me in terms of the protection [order], in that I insulted the complaint by calling her asshole and witch...”*

7. The said statement was read into the record by the applicant's legal representatives. The transcribed record reads as follows:- \

*“...On the 2<sup>nd</sup> day of February 2019 at Ezinxolweni Village in the District of Cacadu I did wrongfully and unlawfully contravened the prohibition that was imposed on me in terms of which I should not insult or harassed the complainant I did so by insulting the complainant by calling her an [arsehole] and a witch...”*

8. As aforesaid the applicant was found guilty on the basis of his plea of guilty. However, the problem that arises is that the applicant pleaded guilty to commission of an offence which according to him occurred on 02 February 2019 whereas the charge-sheet referred to an offence that was committed on 02 June 2019.
9. It would appear that the applicant indeed intended to plead guilty to the commission of an offence which occurred on the 02 February 2019 which ordinarily led to the protection order being granted against him on 05 February 2019. He did not plead to the charge with which he was charged at the time. Nevertheless, his plea of guilty was accepted by the court, *a quo* hence he was found guilty.
10. I am of the view that an irregularity occurred in the proceedings. The applicant pleaded to an incorrect offence, namely, the one that occurred on 02 February 2019 and not to the one with which he was charged. He pleaded guilty to the

offence that resulted in the protection order being granted and not to the contravention of the protection order itself.

11. Accordingly, in view of the irregularity pointed out above, I am of the view that the conviction and sentence be set aside and that the matter be referred back to the court, *a quo* for the proceeding to start *de novo* before another Magistrate. In the circumstances I proposed an order in the following terms:

11.1 The conviction and sentence of the applicant are set aside;

11.2 The matter is referred back to the Magistrate Court for the District of Cacadu for *de novo* hearing before another Magistrate.

11.3 It is directed that the applicant be released from custody pending the finalisation of the matter.

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**M Gwala,**  
**Judge of the High Court of South Africa (Acting),**  
**Eastern Cape Division, Mthatha**

I agree, and it is so ordered.

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**RWN BROOKS**  
**Judge of the High Court of South Africa,**  
**Eastern Cape Division, Mthatha**