

SINDISO MTEMA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA AND DUBE-BANDA JJ
BULAWAYO 29 MARCH 2021 AND 24 AUGUST 2023

Criminal Appeal

G. Sengweni, for the applicant
E. Chavarika, for the respondent

TAKUVA J:

INTRODUCTION

The appellant appeared before a Magistrate sitting at Kwekwe charged with 4 counts of Fraud in contravention of section 136 of the Criminal Law Codification and Reform Act (Chapter 9:23). He pleaded not guilty but found guilty after a trial. After mitigation he was sentenced as follows;

“All counts treated as one for sentence. 20 months imprisonment of which 8 months imprisonment is suspended on condition accused restitutes the complainant (Creative Credit) in the sum of \$3 215-03 (RTGS) through the Clerk of Court Tredgold on or before 28/06/19. The remaining 12 months imprisonment is suspended as follows;

- (a) 3 months imprisonment is suspended for 5 years on good conditions.
- (b) 9 months imprisonment is suspended on condition the accused completes 315 hours of Community Service at Milton High School ...”

Aggrieved by the conviction and sentence appellant appealed to this court on the following grounds;

“1. **AD CONVICTION**

The court *a quo* erred in arriving at a conviction in the circumstances of the case, when the state case had not been proved beyond a reasonable doubt, more particularly in that:

- (a) On each count the state evidence consisted of single witness testimony which was unsatisfactory to the extent of it being inconsistent with real evidence; and therefore, unsafe for use as a basis for a conviction.
- (b) The court *a quo* erred in arriving at a conviction on the basis of complainant’s credibility assessed other than in the context of the import and thrust of the totality of evidence.
- (c) The court *a quo* misdirected itself in concluding that a fraud had been committed on all counts, yet the evidence placed before the court clearly showed that products purchased had [been] done by the complainants from Creative Credit with an agreement between complainants and the appellant.

AD SENTENCE

The Court *a quo* misdirected itself by coming to a conclusion that a fine was not an appropriate sentence, especially considering that complainant would not have suffered any prejudice had it not brought the appellant to court since appellant was in “an agreement to pay back the alleged victims.”

Appellant prayed for a verdict of Not guilty. As regards sentence, he prayed that he be ordered to pay a fine of RTGS \$400 -00 and retribute complainant.

THE FACTS

The appellant was employed by Zvese Zvakanaka! Creative Credit as a Sales Representative. On four occasions the appellant misrepresented to the complainant Creative Credit that some three (3) customers had purchased certain products from the company, when in actual fact the goods were taken by the appellant. Appellant would forge clients’ signatures on the “Application Form” enabling deductions to be effected.

In count one, the appellant on 17 July 2018 tendered some documentation showing that one Lona Chitsinde had applied to buy a New Star Home System on credit. Later it was realized by the complainant that Lona's signature had been forged and Lona confirmed that fact and that the new home system was not delivered to her but to the appellant.

In count two (2) appellant was alleged to have misrepresented to Creative Credit that Gladson Nkala had applied for credit to purchase a Techno IL7 cellphone whereas to his knowledge he had forged Gladson Nkala's signature and by such misrepresentation appellant caused Creative Credit to act to its financial prejudice.

Count three (3) relates to a similar misrepresentation that the same client had applied to purchase a Infinix Hot 6 Cellphone when in fact appellant had forged Gladson's signature and took possession of the cellphone.

Finally in count 4, the appellant is alleged to have unlawfully and intentionally misrepresented to Creative Credit that Nkosinothando Nleya had applied to purchase a Lenovo Tab 7, whereas he knew that he had forged Nkosinothando Nleya's signature and by such misrepresentation appellant caused complainant to act to its financial prejudice.

A reading of the appellant's defence outline in the court *a quo* reveals the real issue in this appeal is whether or not appellant's conduct amounts to Fraud? The defence outline was narrated to the court *a quo* by appellant's legal practitioner as follows;

"The accused denies the allegations he will state that all products on all four counts were bought on credit from Creative (Pvt) Ltd by the clients on behalf of the accused person. This was after an agreement for payment was agreed (sic) upon by the accused and the account holders who are payslip holders. The accused would then reimburse the clients' money after they would have handed over the products to the accused everything was paid for. No prejudice was caused on the complainant. The clients consented to it. That is all."

Having made such admissions, it would be disingenuous of the appellant to raise grounds of appeal No. 1 and 2. I say so because appellant cannot be allowed to approbate and reprobate at the same time by seeking to raise issues on appeal arising from facts he admitted in the court *a quo*. It is common cause that he received goods purchased from Creative Credit by clients. It is also common cause that he kept this a secret from his employer. It is common cause that he would reimburse the customers. It is also common cause that appellant forged the client's signatures on the Application Forms.

As a result, I find that the first two grounds of appeal have no merit.

In respect of the 3rd ground of appeal, it is contented that no fraud was committed in that the products were purchased by the clients/customers from Creative Credit with an agreement between complainants/customers and the appellant.

Either appellant said this in a moment of lack of candour or a deliberate attempt to mislead the court. To the extent that this raises a point of law it is instructive to examine the relevant principles.

Section 136 of the Criminal Law Codification and Reform Act defines Fraud as follows;

“Any person who makes a misrepresentation –

- a) Intending to deceive another person or realizing that there is real risk or possibility of deceiving another person and
 - b) Intending to cause another person to act upon the misrepresentation to his or her prejudice or realizing that there is real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;
- Shall be guilty of Fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person and be liable to –
- i) A fine not exceeding twice the value of any property obtained by him or her as a result of the crime whichever is the greater; or
 - ii) Imprisonment for a period not exceeding thirty-five years or both.”

By definition, the key requirement is that there must be a misrepresentation. Misrepresentation means a deception by means of a falsehood. See *S v Musendo & Anor* HH 289-17. It is trite that the misrepresentation may be expressed or implied by commission or omission. In addition, the misrepresentation must relate to an existing state of affairs or to some past event although in certain circumstances it is possible to make a fraudulent misrepresentation about some future event. See *R v Persotam* 1938 AD 92.

Secondly, the misrepresentation must cause actual prejudice or be potentially prejudicial to another. The prejudice need not sound in money only; or only patrimonial. Potential prejudice means that the misrepresentation looked at objectively, carries the possibility of prejudice. See *S v Hayne* 1956 (3) SA 604 (A). Importantly, the prejudice need not necessarily be suffered by the person to whom the misrepresentation is directed; it can be to a third party, or even to the state or the community in general. See *S v Myeza* 1985 (4) SA 30 (T). It is unnecessary to require a causal connection between the misrepresentation and prejudice since it is the representation's potential which is the crucial issue. See *S v Isaacs* 1968 (2) SA 187.

Applying these principles to the facts, it becomes apparent that in respect of all the four counts the appellant was convicted of, several examples of misrepresentation are revealed. It was the appellant who completed all the necessary documentation required by the Creative Credit for a successful Higher Purchase transaction to be approved. In each case, the purchase process was commenced and finalised without the involvement of the account holder leading to the release of the property to an unauthorized person. The owner of the goods was misled and deceived. Clearly the release of the property to the appellant was facilitated by the false state of affairs that the documents which appellant presented to the complainant portrayed.

I take the view that there was a clear misrepresentation in each case upon which the complainant acted to its prejudice. Whether the appellant secured the account holder's consent retrospectively or in advance to purchase using their accounts is immaterial provided he did not disclose this to Creative Credits. Put differently, it is neither here nor there that appellant had an agreement with the clients to do what he did. What matters is that he unlawfully and intentionally omitted to inform his employer of the true nature of the four transactions. By withholding that information and creating a misleading impression that the transactions are undertaken by the account holders, the appellant made a misrepresentation. On that basis, the convictions on the four counts of Fraud are unassailable as the four contracts were concluded through deceit.

AD SENTENCE

That sentencing is within the discretion of the trial court is trite. As long as the discretion is exercised judicially, an appeal court should be slow in interfering with that sentence – See *S v Musendo & Anor supra*. *In casu* the Learned Magistrate neither misdirected herself nor acted on a wrong principle. What aggravates the appellant's case is that he was employed by the complainant and was entrusted with handling valuable property. Instead, he betrayed this trust by subverting a system that formed an essential business link between his employer and its clientele. Creative Credit suffered actual prejudice as a result of appellant's fraudulent transactions. In that regard, the appellant's moral blameworthiness is very high. I find that the sentence imposed by the court *a quo* does not induce a sense of shock.

In the result, the appeal against both conviction and sentence be and is hereby dismissed.

Takuva J.....

Dube-Banda J..... I agree

Sengweni Legal Practice, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners