

EMMANUEL MUSHATA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHIKOWERO & KWENDA JJ  
HARARE, 21 & 29 March 2023

### **Criminal Appeal**

*C T Mutsvangi*, for the appellant  
*R Chikosha*, for the respondent

#### **CHIKOWERO J:**

1. This is an appeal against both conviction and sentence.
2. It is pursuant to the appellant's conviction on a charge of criminal abuse of duty as a public officer as defined in s 174(1) of the (Criminal Law (Codification and Reform ) Act [*Chapter 9:28*] and the sentence of thirty months imprisonment of which six months were suspended on the condition of good behaviour.
3. The trial court found that the appellant, an Acting Works Manager in the employ of Chitungwiza Municipality, acted contrary to or inconsistent with his duty by unlawfully approving a site plan in favour of Zengeza West Constituency Development Fund Committee for the construction of a people's market. His approval of the site plan was signified by the appellant affixing his signature to the layout plan in question. That conduct was unlawful because it was done without the knowledge and approval of Council. The land in question had not been surveyed and subdivided. There was no diagrams signed by the Surveyor General identifying and describing the relevant piece of land. In fact, the land was just an open space measuring about 3000 square metres situated at Zengeza 2 Shopping Centre in Chitungwiza.
4. The open space, from nowhere, was described in the layout plan as stand number 6888.
5. The appellant chose not to mount any defence to the charge. At the trial, he decided to divert the court's attention by effectively creating his own charge sheet by tendering a

defence outline wherein he averred that he had been authorized by his superior to sign a certain letter authorizing the Committee to build a people's market at the open space in question. In other words, the defence was that it was not him who had unlawfully allocated the piece of land to the Committee but that he had simply signed the letter, dated 16 November 2018, on the instructions of his superior. That was irrelevant. The charge was not that he had criminally abused his duty as a public officer by unlawfully allocating the land to the Committee. Whether he signed the letter of 16 November 2018 on his own account or on the instructions of his superior was of no consequence. We reiterate that the charge was that he had criminally abused his duty as a public officer by approving the layout plan without council's approval and that this was for the purpose of showing favour to the Committee. The appellant did not dispute that he signed the layout plan without Council's approval. He did not dispute that he was not acting on behalf of Council in signing the layout plan. At the end of the day, we proceed on the basis that he did not have any defence to the charge because he did not place any before the trial court, choosing instead to fall back on the decoy of "defending" that which was never the charge preferred against him.

6. In the circumstances, whether the open space was unlawfully allocated to the Committee by the appellant or somebody else should not have been the trial court's concern. It certainly cannot be an issue before us.
7. Since the appellant never defended the charge the appeal against conviction has no leg to stand on. He did not raise any issue necessitating any findings of fact, law or mixed fact and law with which he can be aggrieved. The trial court proceeded on the basis that it was common cause that the appellant signed the site plan without Council's approval. In doing so, it found that he showed favour to the Committee.
8. At the hearing the appellant abandoned the first ground of appeal. That ground had sought to impugn the finding that Zengeza West Constituency Development Fund Committee was a person within the context of s 174(1) of the Criminal Law Code.
9. The appellant also abandoned the third ground of appeal. In that ground, the appellant had sought to take issue with the admission into evidence of the letter of 16 November 2018.

10. The fourth, fifth and sixth grounds of appeal all miss the point. They do not relate to the charge. Instead, they advert to the court's "findings" that the letter of 16 November 2018 constituted an offer of land to the Committee, failing to find that the Committee did not occupy the land on the basis of the said letter and that the court erred in finding that the letter was sent to Parliament because nobody testified that Parliament received the letter. The grounds are misplaced because they speak to issues divorced from the charge and the basis of the appellant's conviction. They do not merit any further attention.
11. Similarly, the second ground of appeal, in relation to which oral argument was attempted before the Court intervened, is irrelevant. The ground reads:

"2. The court *a quo* erred at law in making a finding that the appellant showed favour to a 'person' by allocating stand Number 6888, Hombarume Road, Chitungwiza, to Zengeza West Constituency Development Fund when no evidence was placed on record showing that he allocated land to anyone."

The charge was not that the appellant contravened s 174(1) of the Criminal Law Code by allocating land to the Committee, or to anyone for that matter. For that reason we simply ignore the second ground of appeal in disposing of this matter.

12. In respect of the appeal against the conviction, we are now left with the seventh ground of appeal. We think it necessary to set it out. It reads:

"7. The court *a quo* erred at law in making a finding that the mere signing of a layout plan by appellant constituted criminal abuse of office, when such a conduct, in the absence of appellant's corrupt motive, does not amount to any criminal offence."

To begin with, motive is not an element of the offence with which the appellant was charged. In any event, the ground reflects a deliberate misreading of the evidence on record. Proper procedures were not followed in the allocation of that open space to the Committee. Neither an offer letter, lease agreement nor agreement of sale was written pursuant to such allocation. Yet the appellant signed the letter dated 16 November 2018 informing Parliament that Council had "granted" the Committee land for building of a people's market at Zengeza 2 Shopping center next to Council's

offices. Whether he signed the letter on his own behalf or for his superior is immaterial for our purposes. This is so because his involvement in the shady dealing in Council land is manifest in the charge, to which he proffered no defence. He signed the layout plan in favour of the Committee. We have already pointed out that this was without Council's knowledge and approval. The presumption that he signed the layout plan to favour the Committee arose. He did not even begin to rebut that presumption at the trial. If the appellant thought that lack of corrupt motive in signing the layout plan amounted to a defence to the charge, that is what he should have set out in his defence outline. If that had been done, the trial would have been conducted on that basis and the issue would be properly before us. As things stand, this supposed ground of appeal is unique in that it is not such but is a defence outline. We cannot engage with a defence not raised at the trial simply because it has been given the tag of a ground of appeal. We strike it out. We prefer to dismiss it. This we do.

13. The trial court did not gloss over the mitigation. A sentence of a fine was clearly inappropriate. The sentence imposed does not shock us. The court properly balanced the factors of aggravation against the mitigation. In the exercise of its discretion it was persuaded by the gravity of the offence, its prevalence in our local authorities and the need for individual and general deterrence to impose the sentence that it did. In matters of corruption the correct sentencing approach is to impose a custodial term unless there are cogent reasons to the contrary. The need for individual and general deterrence as well as public indignation predominate over factors personal to the offender. See *State v Chogugudza* 1996 (1) ZLR 28 (S).
14. The appellant, an Acting Works Manager in the employ of Chitungwiza Municipality at the material time, was sentenced to thirty months imprisonment of which six months were suspended for five years on the condition of good behaviour. The maximum sentence for contravening s 174(1) of the Criminal Law Code is fine not exceeding level thirteen or imprisonment not exceeding fifteen years, or both. What was imposed was nowhere near the maximum imprisonment term statutorily provided for. The sentence meted out was neither vitiated by any misdirection nor does it induce a sense of shock. The appeal against sentence is without any merit.

15. In the result, the appeal be and is dismissed in its entirety.

CHIKOWERO J:.....

KWENDA J:.....

I agree

*Shava Law Chambers, appellant's legal practitioners*  
*The National Prosecuting Authority, respondent's legal practitioners*