

LODWICK BAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 16 June & 17 July 2023

Criminal Appeal

C Nhemwa, for the appellant
K H Kunaka, for the State

KWENDA J: On 17 July 2023 we dismissed the appellant's appeal against conviction and sentence and gave our reasons *ex tempore*. We have prepared this written judgment at the request of the Registrar. It is important, however, to front the fact that the appellant's counsel conceded, the following, at the hearing of the appeal; firstly, that the appeal against conviction lacked merit and secondly that the appeal against sentence did not comply with rule 95 (10) of the High Court Rules, 2021 in that it did not have a prayer.

The background to this case is that the appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegation was that the appellant induced one Lawrence Ronald Bamba, who was selling his residential Stand namely Number 7436 Manyame Park, Chitungwiza measuring 2 000m² for US\$20 000 to enter into an agreement in terms of which the complainant accepted the appellant's Ford Courier Registration Number ABK 4297 *in lieu* of the full purchase price without disclosing to the complainant, the fact the Ford Courier vehicle had been fraudulently registered in Zimbabwe and that the appellant, had not paid customs duty for the vehicle intending the said Lawrence Ronald Bamba to act on the nondisclosure. The complainant acted on the misrepresentation and accepted the irregularly registered vehicle to his prejudice in exchange for the stand which complainant transferred to the appellant. The Ford Courier vehicle was subsequently impounded by the Zimbabwe Revenue Authority and forfeited to the State causing the complainant actual prejudice in the sum of US\$20 000 being the agreed value of the complainant's residential stand.

The appellant pleaded not guilty and in his defence he averred that he did not make the alleged misrepresentation. He claimed that the vehicle was imported by Tinashe Chiwara and the complainant wanted to buy it from the said Tinashe Chiwara. The complainant did not have the money but was selling his stand to raise money. Meanwhile, the appellant had money which, coincidentally, he wanted to use to buy a residential stand. Appellant and complainant proceeded to enter into an arrangement, in terms of which the appellant paid the purchase price for the vehicle to Tinashe Chiwara and gave the complainant some cash on top of what he had paid for the car. He further averred, that the complainant knew that duty had not been paid for the car. He said one Lindiwe Gwata and the seller Tinashe Chiwara were in a position to confirm that the complainant had such knowledge and that the complainant had accepted the responsibility to pay the customs duty and register the vehicle. The complainant neglected to pay the duty, hence the seizure of the vehicle by the Zimbabwe Revenue Authority (ZIMRA) was his fault.

At the trial the State called two witnesses. The first witness was the complainant. He testified that the appellant is his younger brother. They are full siblings. Sometime in the year 2009 he advertised his stand for sale. The appellant approached him and expressed interest. During the discussion the complainant disclosed that he wanted to use the purchase price to buy a vehicle suitable for use at his farm. After a week the appellant brought the Ford courier vehicle which the complainant found to be in good condition and offered it to him in exchange for the stand. The vehicle had no number plates. The appellant was running a car sale. The complainant agreed to exchange the vehicle for the stand on the condition that the appellant would facilitate change of ownership by having the vehicle registered in the complainant's name. In turn the complainant would facilitate change of ownership of the stand into the appellants' name. Sometime later the appellant brought the vehicle fitted with number plates and a registration book in complainant's name after which complainant attended to the change of ownership of the stand into appellant's name. The complainant had used the vehicle for 9 to 10 months when he was accosted by one Tinashe Chiwara at an intersection of Prince Edward and Hebert Chitepo roads. Tinashe claimed that the vehicle belonged to him and he had been looking for it. The complainant and Tinashe went to the police post at Fife Avenue Shopping Centre where the vehicle was impounded and the complainant was immediately detained. The complainant telephoned the appellant and advised him of the development. The appellant attended at the Police Post and submitted to arrest in place of the complainant. This took place in 2011. The complainant had no full details of what the problem between the appellant and

Tinashe Chiwara was. All he was privy to, was that the vehicle was later returned to him after a sum of US\$2 500 had been paid to Tinashe Chiwara through the police. After three months law enforcement personnel, who included the police and ZIMRA officials approached the complainant at his place of work and asked for the documents for the importation of the car. The complainant telephoned the appellant again who promised to bring the documents. The police allowed the complainant to use the vehicle under restrictions while waiting for the papers. In 2014 the appellant had not brought the vehicle importation documents, whereupon the law enforcement agents seized and impounded the vehicle again which was later auctioned on 28 January 2015 causing the complainant actual loss in the sum of US\$20 000 being the value of the stand. The complainant was subjected to lengthy cross examination but the substance of his testimony was not dislodged. He was steadfast that he had not dealt with the said Tinashe Chiwara at the time of receiving the vehicle. He only met him for the first time at the aforementioned intersection. The appellant had misled him to believe that he had personally imported the vehicle and that he had properly registered it in the complainant's name. The appellant did not tell him that duty had not been paid. The appellant withheld the vital information from him. Had he become aware of the fact that the appellant was not the owner and that duty had not been paid he would not have accepted the vehicle. The appellant had not been honest with him. The second State witness was Wonder Chakuma, a police officer. He was the investigating officer. He confirmed that the vehicle was impounded by ZIMRA for non-payment of customs duty and later forfeited to the State. He said the appellant admitted to him that he knew that duty had not been paid for the vehicle. The appellant said the complainant was supposed to pay. He confirmed that the stand swapped with the car was already registered in the appellant's name. After this witness, the State closed its case.

The appellant testified in his defence. He said the complainant agreed that the appellant could bring a vehicle to exchange with a stand. He (the appellant) then bought the vehicle from one Luke Rwambiwa who was selling it on behalf of Tinashe Chiwara. As it later turned out Luke Rwambiwa did not hand over the full purchase price hence the seizure of the vehicle by the Police at the behest of Tinashe Chiwara. He said, it was true that the complainant had to pay the sum of US\$2 500 when the vehicle was impounded. He said the complainant was aware that duty had not been paid and that he was supposed to pay but he later admitted, under cross-examination, that when complainant told him that duty had not been paid, he (the appellant) offered to pay but failed to raise the money. He confirmed that, indeed, the stand was still registered in his name. When challenged by the State to make Tinashe Chiwara available to

confirm his story, he said he did not know him well. When questioned under cross-examination why his evidence under oath was materially different from his defence outline, he said the defence outline was inaccurate as a result of errors made by his lawyer. Immediately, after making that admission, the appellant's defence counsel at the trial, advised the court that he and his client (the appellant) were abandoning the defence outline. The appellant called one Lindiwe Gwata as a defence witness. She had no personal knowledge of the transactions save to confirm that at the time that the complainant told her that he was not aware that duty had not been paid for his vehicle.

At the end of the trial the appellant was convicted and sentenced to imprisonment for 24 months of which 3 months were suspended for 5 years on condition of good behaviour. 12 months were suspended on condition that the appellant paid restitution in the sum of US\$20 000 to the complainant. The remainder of 9 months were suspended on condition that he performed community service.

The appellant noted appeal in this court against both conviction and sentence. As regards conviction, he relied on two grounds; the first ground being that the trial court misdirected itself in finding the appellant guilty without establishing whether the appellant was at fault either through negligence or intention. The ground of appeal was clear in terms of what was being said but clearly ill-conceived because negligence was irrelevant to the nature of crime for which the appellant had been convicted. The second ground of appeal against conviction was that the trial court erred in finding the appellant guilty in the absence of proof of any misrepresentation by the appellant. It was however clear to us that the misrepresentation alleged by the State was that of material non-disclosure of facts, which the complainant acted upon to his prejudice. Misrepresentation is defined in s 135(b) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] as including silence on the part of a person who has a duty to speak, knowing that another person has been or will be misled by the silence.

As against sentence the appellant relied on only one ground, which was that the trial court misdirected itself in ordering restitution in the sum of US\$20 000 which was a figure it plucked from the air and was not supported by any material evidence. The appeal against sentence did not contain any prayer or suggestion as to what would have been the appropriate sentence.

The whole appeal was opposed by the State. The State submitted that the appellant misrepresented to the complainant that the vehicle was his and that it had been properly registered. The complainant acted on the misrepresentation to his prejudice. The State averred

that the appeal against sentence was invalid because it had no prayer. Alternatively, on the merits, regarding sentence, the State submitted that it was common cause that the stand which the complainant lost was by agreement valued at US\$20 000. The trial court had therefore, not misdirected itself.

When the appeal was argued it was clear that the complainant withheld vital information concerning the car. The appellant had not told the truth in his defence outline, which he later abandoned, that he and the complainant had dealt with Tinashe Chiwara. In his evidence in chief he introduced a new seller not mentioned in his defence outline. He could not say how he managed to have the vehicle registered in the name of the complainant. The trial court could not therefore be faulted for believing the complainant who stated from the beginning that he never dealt with Tinashe Chiwara at the time of his acquisition of the vehicle. The trial court could also not be faulted for rejecting the appellant's defence in view the inconsistencies in his defence. It was clear that the appellant cheated the complainant whom he made to part with his stand believing that all was well with the car yet the appellant had issues with Tinashe Chiwara and the Zimbabwe Revenue Authority. The issues were not disclosed to the complainant. Faced with the weight of evidence, the appellant's counsel conceded that the appeal against conviction lacked merit. In our view the concession was properly made.

As regards the appeal against sentence, in terms of the proviso to r 95(10) of the new High Court Rules, 2021, the appellant's appeal was not automatically invalidated by the fact that it lacked a prayer. The proviso permitted this court, in the exercise of appellate jurisdiction, for good reason shown, to condone the failure to comply with the rules. Mr *Nhemwa* submitted that the appellant had returned the stand to the complainant and he required time to prove that. We condoned the non-compliance with rule 95 of this court's rules because his request was not opposed by the State and we found it in the interests of justice to allow him to place such evidence before us. We postponed the hearing to give him an opportunity to place the necessary papers before us. In terms of the supplementary powers given to this court on appeal in s 41(a) of the High Court Act [*Chapter 7:06*] this court, in the exercise of appellate jurisdiction, may, if it thinks it is necessary or expedient in the interests of justice, order the production of any document connected with the case, whose production is necessary for the just determination of the matter before it. Mr *Nhemwa* never returned to court even after submitting written a request for extension of time. Later the appellant submitted that Mr *Nhemwa* was unwell without submitting proof. After a long wait, we disposed of the appeal on 17 July 2023, in the absence

of Mr *Nhemwa*, dismissing the entire appeal.

KWENDA J:.....

FOROMA J:Agrees

C Nhemwa & Associates Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, State's legal practitioners