

PROSECUTOR GENERAL
versus
CHRISTIAN COMMUNITY LIFE ASSURANCE (PRIVATE) LIMITED
and
WASHINGTON FRERA
and
VINCENT TOM BARIS
and
NORMAN NGOSHI
and
MS GLORIA TAKUNDWA

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 28 March 2022 & 6 June 2022

Criminal Appeal

E Makoto, for the appellant
T L Shaka, for 1st and 2nd respondents
N Chikono, for 3rd and 4th respondents

CHIKOWERO J:

INTRODUCTION

1. This is an appeal brought in terms of s 61 of the Magistrates Courts Act [*Chapter 7:10*]. The appellant contends that the fifth respondent acquitted the first to fourth respondents on a view of the facts which could not reasonably be entertained. He also attacks the judgment on a point of law.

BACKGROUND

2. The first to fourth respondents were arraigned before the Regional Court sitting at Harare facing one count of forgery as defined in s 137 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) and two counts of fraud as defined in s 136 of the same Act.

3. The first respondent is a company duly registered in terms of the laws of this country. The second to fourth respondents are directors of first respondent. The second respondent represented the first respondent at the trial. He produced a resolution to that effect. The fifth respondent is the magistrate who presided at the trial and rendered the judgment appealed against
4. In respect of the first count (forgery) the allegations were that between 9 May 2017 and March 2018 and in the Central Business District, Harare, the first, second, third and fourth respondents one or more of them, with the intention to defraud one Yan Yu and the late Zhaosheng Wu forged the signatures of Yan Yu and the late Zhaosheng Wu on a purported agreement of sale between first respondent and Zhaosheng Wu allegedly witnessed by Yan Yu. In terms of the purported agreement first respondent swapped a gold mining claim in Bindura with Yan Yu and Zhaosheng Wu's 100% shares in Shomet Industrial Holdings (Private) Limited (Shomet), the owner of Lot 358 of Prospect, Waterfalls, Harare.
5. In the second count (fraud) the allegations were that between 9 May 2017 and 21 March 2018 the four respondents, one or more of them unlawfully and with the intention to deceive the Registrar of Companies or realizing that there was a real risk or possibility of deceiving the Registrar of Companies misrepresented to the Registrar of Companies that Yan Yu and Zhaosheng Wu had resigned as directors of Shomet thereby appointing themselves (second to fourth respondents) as directors of Shomet when in fact Yan Yu and Zhaosheng Wu had not resigned and no new directors had been appointed. The allegations are that the first to fourth respondents submitted the forged agreement of sale and a fraudulent CR14 Form to the Registrar of Companies with the intention of not only causing the latter's records to reflect them as the new directors of Shomet but to prejudice the said company itself as it lost control of its 25. 1499 hectares piece of land called Lot 358 of Prospect situate in Waterfalls, Harare valued at \$4 200 000.
6. The allegations in count 3 (fraud) were that in March 2018 and at Harare the first to fourth respondents acting in common purpose unlawfully and with the intention to deceive misrepresented to Fortburry (Private) Limited (represented by Cornillius Muzvongi) that they were the shareholders of Shomet (owner of Lot 358 of Prospect) and that they were

looking for a partner to develop that said land, with such partner required to pay a commitment fee of \$101 000 to them. The state alleged that at the time that they made the misrepresentation the said respondents knew that they were not shareholders of Shomet and that they did not, through that company, have any interest in the land in question.

7. The state sought to establish the following in respect of the first count.
8. Shomet, owner of Lot 358 of Prospect, is in the business of property development. At all material times its directors were Zhaosheng Wu, Yan YU, Jethro Mazenge, Tarisai Hapanyengwi and Chipu Mupambiri. On 9 May 2017 the first respondent (represented by the second) entered into a written loan agreement with Zhaosheng Wu in terms whereof the former lent to the latter the sum of US 2 200 000 payable in eight instalments within the next one hundred and ninety four days. The initial instalment, in the sum of US\$800 000, was to be paid within 14days of 9 May 2017, being the date when the parties signed the loan agreement. In the event that the borrower failed to repay the loan within the agreed time frame, he would forfeit his 100% shares in Shomet. Wu had provided such shares as collateral security. Yan Yu, who was also spouse to Wu, signed the loan agreement as a witness. So did one Banda. The third and fourth respondents, although present at the signing ceremony in their capacities as members of the first respondent, did not append their signatures to the loan agreement. The first respondent failed to honour its contractual obligations. This prompted Yan Yu to exchange emails with the second respondent relative thereto. On 4 June 2017 Zhaosheng Wu died. The second respondent wrote an email to Yan Yu expressing the first respondent, its directors and the staffs condolences and undertaking to visit Yu to attend to the still unpaid initial instalment. The promised visit did not materialize. The entire loan was not availed. Thereafter, the first to fourth respondents ceased communicating with Yan Yu.
9. Unbeknown to Wu and Yu the respondents had, on 10 May 2017 (the very next day after entering into the loan agreement) connived and prepared a false agreement of sale between the first respondent (represented by second respondent) and Wu in terms whereof the latter allegedly swapped his 100% shares in Shomet with Foot 62 Mine registered on 21 January 2011 in the name of Lynate Mukute. The agreement of sale,

reflecting that it superseded the loan agreement, has Wu selling his 100% shares in Shomet to the first respondent with the purchase price being in the form of the mentioned mine. The signatures of Wu (as seller) and Yu (as witness) are forged. This takes us to the second count.

10. On 25 September 2017 and at Harare the first to fourth respondents connived to produce a resolution of a purported Annual General Meeting of the first respondent (attended by the second respondent and one Ms Scholastic Muringai) wherein the members of the first respondent resolved to appoint the second, third and fourth respondents to the board of directors of Shomet. The second, third and fourth respondents shareholding in the equity purportedly acquired in Shomet was 50% and 25% apiece respectively. On 26 September 2017 the first respondents instructed Prime Management Consultants (Pvt) Ltd to regularize the company documents of Shomet to reflect the second, third and fourth respondents as the new directors of Shomet with effect from 25 September 2017, to “resign” Wu and Yu as directors with effect from the same date and to regularize the company’s share register in such a way as to indicate that third and fourth respondents held 5000 shares each in Shomet with the second respondent’s shareholding being 10 000. In penning the letter dated 26 September 2017, it was manifest that the changes to the directorship and shareholding were based on the agreement between first respondent and Wu.
11. Using the false agreement of sale and fraudulent CR14 forms the second to fourth respondents caused the Registrar of Companies to unknowingly issue a fraudulent CR14 form.
12. On 2 November 2017, purporting to represent Shomet, the second respondent applied for a certified copy of Deed of Transfer Registered Number 621/2009 on the basis that he had lost the original. The Registrar of Deeds issued a certified copy thus invalidating the original which was in the custody of CABS Head Office, who held it for Yu on behalf of Shomet.
13. As for count 3 , the State sought to prove that in March 2018 the second to fourth respondents approached a land developer, Fortburry (Private) Limited (represented by Cornillius Muzvongi) looking for a partner to develop what they said was their

company's land in Waterfalls. The company was Shomet. The land was Lot 358 Prospect. Muzvongi's due diligence ultimately took him to Yu, leading to the arrest of the first to fourth respondents and the trial. It was only in March 2018, when approached by Muzvongi, that Yu discovered that the first, second, third and fourth respondents had committed these offences of forgery and fraud.

14. The first and second respondents' defence was that the agreement of sale was genuine, hence everything else that followed was lawful. In short, they contended that they did not commit the crimes of forgery (count1) and fraud (counts 2 and 3)
15. The third and fourth respondents averred that they were not involved when the loan agreement was entered into. They were not involved in the sale agreement. They were told by the second respondent that the first respondent had acquired Shomet through an acquisition of Wu's entire shareholding in exchange for a gold mining claim located in Bindura. They accepted the appointment as directors of Shomet genuinely believing that the acquisition was lawful. Accordingly, they denied conniving with the first and second respondents to forge the agreement of sale (if such document was forged) and also disputed making any misrepresentations to the Registrar of Companies and to Fortburry.
16. The state led evidence from Yu, Muzvongi, the initial investigating officer (Maseruka), Martha Chakanyuka and two Questioned Document Examiners. These were Leonard Nhari and Clara Gombakomba. The second respondent testified on behalf of the first respondent and on his own behalf. The third and fourth respondents were their **own witnesses.**

THE REASONS FOR THE JUDGMENT A QUO

17. The fifth respondent rejected Yu's evidence on the basis that she was not a credible witness. She found that Yu had a change of heart after Wu's demise hence the feeble attempt to disown the agreement of sale. Wu signed that document as the seller, with Yu affixing her signature thereon as a witness. That Yu distanced herself from the documents filed with the Master of the High Court wherein she is the Executrix of Wu's estate demonstrated that she was not a truthful witness.

18. Nhari rendered two conflicting reports after examining documents submitted to him. The one report indicated that the purported signatures of Wu and Yu on the agreement of sale were forged whereas the other spoke to those same signatures as not having been forged.
19. Although Gombakomba's report and evidence tallied with that portion of Nhari's evidence which indicated that the two signatures in question were forged, her testimony was rejected on the basis that she did not produce the primary evidence on which her opinion was based. The diagrams and photographs, although brought to court by the witness, were not produced as exhibits. Had this been done, so reasoned the fifth respondent, then the court could have seen for itself the similarities or differences as the witness took the court through the relevant documents. See *State v Motsi* 2015(1) ZLR 304(H).
20. The court also rejected the evidence of Nhari and Gombakomba on the basis that since they reached different conclusions, the State should have presented original documents to them for examination. The two had examined photocopies. These could have been tampered with.
21. There was no need for the State to call two Questioned Document Examiners if they would have come to the same conclusion. Gombakomba was only called after the State realized that Nhari had produced conflicting reports. She was therefore roped in to cure that anomaly.
22. As for the second count, there was no evidence that the first to fourth respondents made any misrepresentation to the Registrar of Companies. The State failed to show that the respondents either verbally, in writing or by any omission made any misrepresentation to the Registrar of Companies. Martha Chakanyuka only came to the court to testify, for the Registrar of Companies, that there was a CR 14 form filed on 27 September 2017 reflecting the second, third and fourth respondents as the new directors of Shomet. She confirmed that an earlier cancellation of that document by her office had been set aside by the High Court in a civil matter. The High Court reinstated the CR 14 Form. Although Yu had appealed the decision to the Supreme Court (which appeal was pending) the fact was that as things stood the second to fourth respondents were directors of Shomet. The three counts had prematurely been made the subject of a criminal trial. Yu should have

waited until the Supreme Court pronounced itself to avoid the embarrassing situation of the fifth respondent convicting the first to fourth respondents on count two when the Supreme Court may well dismiss the civil appeal pending before it.

23. No misrepresentation to Fortburry (Private) Limited by the first to fourth respondents was proved because the CR 14 for Shomet currently filed at the Registrar of Companies reflects them as directors of Shomet. In light of that fact, it could not be said that they misrepresented to Fortburry (Private) Limited that they were directors of Shomet.
24. Finally, the court found that the only reason why the third and fourth respondents were on trial was that their names were on the CR 14 Form for Shomet. Put differently, the court accepted their defence, to wit, that their involvement came late in the day. They innocently accepted an invitation extended to them in September 2017, for appointment into the board of directors of Shomet. They genuinely believed that the first respondent had lawfully acquired the entire shareholding of Shomet.

THE GROUNDS OF APPEAL

25. The appellant has raised a staggering twelve grounds of appeal. This notwithstanding, the appeal turns on some narrow issues arising from the grounds of appeal. For this reason, it becomes unnecessary to reproduce the grounds of appeal.

THE FUNDAMENTAL ISSUES ON WHICH THE APPEAL IS PREDICATED

26. In essence, appellant contends that the fifth respondent acquitted the first to fourth respondents on a view of the facts which could not reasonably be entertained because:
 - It omitted to deal with some of the evidence.
 - It misunderstood the expert evidence
 - Its finding that YU was not a credible witness defies logic or common sense.
 - Its determination of the first to fourth respondents' criminal culpability in respect of counts 2 and 3 on the basis of a pending civil appeal was wrong at law.
- It failed to analyse the evidence in its totality.

OUR VIEW

27. The appeal succeeds. There was overwhelming evidence against the first, second third and fourth respondents in respect of all the counts. We demonstrate this by traversing the following pieces of evidence, identified in the grounds of appeal.

THE RESOLUTION OF 25 SEPTEMBER 2017 AND LETTER OF 26 SEPTEMBER 2017

28. These documents, produced into evidence by the third respondent as exhibits 29 and 30 respectively, dispose of this appeal.
29. The former is a resolution passed at the Annual General Meeting of the members of the first respondent appointing the second, third and fourth respondents as directors of Shomet with effect from 25 September 2017. The members of the first respondent who were present at that meeting were the second respondent and one Ms Scholastic Muringai, who appended their signatures to the resolution. In addition, these members allotted the shares acquired in Shomet as follows:
- Second respondent: 50%
 - Third respondent: 25%
 - Fourth respondent: 25%
30. Exhibit 30 is a letter on the first respondent's letterhead, dated 26 September 2017, addressed to Prime Management Consultants (Pvt) Ltd. It reads:

“RE: LETTER OF INSTRUCTION TO REGULARIZE COMPANY DOCUMENTS FOR SHOMET INDUSTRIAL HOLDINGS (PRIVATE) LIMITED REGISTRATION NUMBER 4726/2006.

We hereby write to you giving instructions to your company to effect the following changes in Shomet Industrial Holdings (Pvt) Ltd, as our company Christian Community Life Assurance (Pvt) Ltd is now the owner of 100% shareholding in the company.

Below are the changes you are to make:

- (1) Update the company's outstanding annual returns from 31 March 2016
- (2) Resign the current directorship Zhaosheng Wu and Yan Yu with effect from 25 September 2017 and replace them with the following:

- VINCENT TOM-BARIS (Director)
- NORMAN NGOSHI (Director)
- WASHINGTON FRERA (Director)
- WASHINGTON FRERA (Company Secretary)

(3) Effect the CR6 change of address to P.O.Box HR 214, 356 Prospect, Waterfalls, Harare

(4) Regularize the company's share register to reflect the following:

NAME	POSITION	SHAREHOLDING
Washington Frera	Managing Director	10 000 shares
Vincent Tom-Baris	Executive Director	5000 shares
Norman Ngoshi	Executive Director	5000 shares

Your urgent regularization of the above matters is awaited, and we give you the instructions as the bona fide owners of the company Shomet Industrial Holdings (Pvt) Ltd premised on a loan converted into 100% equity in the company which we now exercise.

Regards
(Signed)
Mr Washington Frera
(Director)

(company seal)"



31. Both Ms Shaka and Mr Chikono conceded that the fifth respondent did not deal with these two exhibits at all.
32. These pieces of evidence mean that all the changes to Shomet's directorship and shareholding were effected, according to the first, second, third and fourth respondents' own documents on the basis of the loan agreement entered into as way back as 9 May 2017. Yet the first and second respondents' defence was that the loan agreement was, in their own words, "replaced" or "superseded" by the sale agreement entered into on the very next day, 10 May 2017.

33. The third and fourth respondents' defence was that they accepted directorship into Shomet in September 2017 on being told by the second respondent that first respondent had entered into an agreement of sale with Wu on 10 May 2017 in terms whereof the parties had swapped a gold mining claim for Wu's 100% shareholding in Shomet.
34. The defences tendered by the first, second, third and fourth respondents were, by their own exhibits, proved to be beyond reasonable doubt false. None among them could plausibly explain why the changes of directorship and shareholding were not predicated on the agreement of sale. The loan agreement, according to the first and second respondents, was valid on 9 May 2017 only. That is a single day. The following day (10 May 2017) it was replaced /superseded by the agreement of sale. Almost five months later (25 September 2017) the respondents could not be effecting changes to the directorship and shareholding of Shomet on the basis of a document that had long been dead and buried.
35. The first to fourth respondents scored an own goal. Even without the evidence of the two handwriting experts, it was abundantly clear that the agreement of sale bore the forged signatures of Wu and Yu.
36. We take this view for the following additional reasons. Exhibits 29 and 30 do not advert to the fate of three other directors of Shomet. These are Jethro Mazenge, Tarisai Hapanyengwi and Chipu Mupambiri. Resignation is a unilateral act. It was not possible for the first, second, third and fourth respondents to give lawful instructions to Prime Management Consultants (Pvt) Ltd either on 26 September 2017 or at all to "resign the current directorship Zhaosheng Wu and Yan Yu with effect from the 25th of September 2017". In any event, Zhaosheng Wu had died on 4 June 2017. His death certificate was produced by the appellant at the trial. His passing on terminated his directorship in Shomet. He could not be "resigned" from the directorship of Shomet on 26 September 2017 when his remains were already lying in the grave.

THE IRREGULAR APPOINTMENT OF THE 2ND, 3RD, AND 4TH RESPONDENTS AS DIRECTORS OF SHOMET

37. Martha Chakanyuka confirmed that the CR14 Form dated 27 September 2017 was irregular. This was so, according to the witness, because it caused the three other directors of Shomet who we have already mentioned to “vanish into thin air”. The effect of the filing of this CR 14 Form was to remove the three from the directorship through the back door. That is fraudulent. We have already explained why the supposed resignation of Wu and Yu and the appointments of the second, third and fourth respondents were fraudulent. In reality, the three appointed themselves as directors of an already existing company. That in itself is further evidence of the misrepresentation to the Registrar of Companies. The CR 14 Form in question was presented to the Registrar of Companies for filing by the second respondent. Its cover is exhibit 7 while the form itself is exhibit 8. We pause to record that evidence of common purpose in committing the fraud charged as count three flows from what we have already discussed in respect of exhibits 29, 30 and what we have adverted to in respect of exhibits 7 and 8, among other pieces of evidence. We shall relate to some of the evidence in due course.
38. We agree with Mr Makoto that the fifth respondent misdirected herself on a point of law in refraining from analyzing the evidence in respect of count 2. The High Court order and the pending appeal before the Supreme Court in respect to the cancellation and reinstatement of the 27 September 2017 Shomet CR 14 form had no bearing at all to the criminal proceedings which fifth respondent presided over. See *Kauesa v Minister of Home Affairs and Others* 1996 (4) 965 (NMS) at 973H to 974C.
39. The fifth respondent took the same view in respect of count 3. This was a misdirection at law in light of S278(3) of the Criminal Law Code which provides as follows:
- “civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings.”
40. This provision speaks to concurrent civil and criminal liability in respect of conduct arising out of the same set of facts. The fifth respondent thus misdirected herself at law in not assessing the evidence in respect of counts 2 and 3, in conjunction with all the other

evidence, for the purposes of making findings of fact to enable her to draw inferences from all such facts as she would have found proven.

**THE APPLICATION FOR A CERTIFIED COPY OF DEED OF TRANSFER
REGISTERED NUMBER 621/2009**

41. It was a proved fact that on 2 November 2018 the second respondent, purportedly representing Shomet, applied for a certified copy of Deed of Transfer Registered number 621/2009. In making the application the second respondent lied to the Registrar of Deeds that the original Deed of Transfer was lost.
42. The successful application invalidated the original Deed of Transfer which Yu, on behalf of Shomet, had placed in the custody of CABS Head Office.
43. The fifth respondent neither adverted to nor analysed this evidence at all.
44. We find credence in Mr *Makoto's* submission that the fact that the first and second respondents had to lie to the Registrar of Deeds, on 2 November 2018, so as to obtain access to and control the piece of land owned and held by Shomet under that title deed, proves that the first respondent had not purchased the 100% shareholding in Shomet on 10 May 2017. Put differently, it is ample proof that the first to fourth respondents, who stood to benefit from controlling and using the piece of land in question, were all guilty of counts 1, 2 and 3.
45. If the sale agreement of 10 May 2017 was not a forged document there would have been no reason why Yan Yu was still in possession of the title deed more than a year later (2 November 2018). That the first, second, third and fourth respondents had to resort to falsehoods to obtain a certified copy of the title deed demonstrates that they had not only committed forgery (count 1) but also fraud (count 2) and used the certified title deed, together with the photocopies of the 27 September 2017 CR 14 Form, Memorandum and Articles of Association of Shomet, among other photocopies, to misrepresent to Fortburry (Pvt) Ltd that they were the directors of Shomet with the intention to deceive it into entering into an agreement to develop the land in question (count 3).

THE EMAILS

46. On 29 May 2017 Shomet addressed an email to first respondent, to the attention of the second respondent, warning that the loan agreement would be cancelled if the first

instalment remained unpaid by 7 June 2017. On Friday 9 June 2017 at 3.04 pm the second respondent, on behalf of the first respondent, addressed an email to Shomet in the following words:

“Loan payments date

Dear Yan Yu.

On behalf of Christian Community Life Assurance (Private) Limited Board of Directors, management and staff members I would like to pass our condolences of the passing away of your husband (Zhaosheng Wu), may his soul rest in piece.

We will come on Tuesday with our boss at your residence to pass our condolences in person then conclude on the issue of the loan agreement.

Yours

Frera Washington”

47. Yu handed over these emails to the investigating officer. They were produced as exhibits, with the consent of the first–fourth respondents. Thereafter, the first and second respondents sought to challenge the authenticity thereof. The fifth respondent, in her reasons for judgment, simply stated that the appellant had failed to link the emails to the first and second respondents. That in our view is not a judicious assessment of evidence. The emails are not only detailed but explain their context. It was thus wrong to perfunctorily treat them separately from the rest of the evidence on the record. Evidence is analysed in its totality, suitable findings of fact, if any, made, and then drawing of inferences is conducted. There is no mention of an agreement of sale in the emails. Taken cumulatively with other evidence, we find that the emails are what they present themselves to be, and prove the forgery and the two counts of fraud.

THE HANDWRITING EVIDENCE

48. Gombakomba and Nhari examined the relevant signatures on copies of the undisputed loan agreement, scanned copies of standard documents bearing the undisputed signatures

of Wu and Yu as well as the disputed signatures of Wu and Yu on the questioned document (the agreement of sale). Both deposed to affidavits wherein they concluded that the purported signatures of Wu and Yu were forged.

49. Nhari had also examined copies of a loan agreement and an agreement of sale, furnished to him by the first and second respondents' legal practitioners, and deposed to an affidavit swearing that the signatures attributed to Wu and Yu on the two documents were similar. However, both he and Gombakomba were shown, under cross-examination by counsel for the first and second respondents, another copy of the loan agreement which the legal practitioner said both had examined. Both witnesses immediately pointed out that what was shown to them in court was not a copy of the loan agreement they had received from Yu's legal practitioners and the police. They explained that the contents of copy of the loan agreement shown to them under cross examination were the same as those of the copies of the loan agreement that they had received from Yu's lawyers and the police but the document shown to them under cross examination was different. They explained why this was so. What this shows is that the first and second respondents caused their counsel to forward forged copy of the loan agreement and the already forged agreement of sale to Nhari, hence his second report seemingly conflicted with the first. He satisfactorily explained why there was no conflict between the two reports. The first and second respondents, as we have pointed out, presented forged documents to Nhari for examination. This is evident not only from the foregoing analysis of evidence, but from an analysis of the evidence as a whole. We refer in this regard to all the pieces of evidence we have already analysed. Contrary to the *dicta* in *Manolakakis v Estate Manolakakis and Ors* HCB 105/14, the fifth respondent misdirected herself in not treating the evidence of the handwriting experts together with all the other evidence. That *dicta* is in these words:

“it is evident that the position to be taken by the court where evidence of handwriting experts is concerned is that the court must observe for itself the similarities in the handwritings and then also take into account other relevant circumstantial evidence in the matter. The court must then assess all the evidence before it, including the evidence led from the handwriting experts and satisfy itself indeed the document was authored by the person who is alleged to have authored it”.

50. That the appellant erred in not producing, through Gombakomba, the relevant documents to enable the court *a quo* to see for itself the points of similarity and difference did not matter at the end of the day. This is a matter which did not require the evidence of handwriting experts at all. Even if one were to exclude such testimony, there still remains overwhelming evidence to justify the conviction of the first, second, third and fourth respondents on all the counts

WAS YAN YU A CREDIBLE WITNESS?

51. There can only be one answer, and that in the affirmative.
52. Her evidence is in line with all the other evidence on record, including the exhibits.
53. She was disbelieved on matters immaterial to the offences with which the first to fourth respondents were on trial.
54. During examination-in-chief and under cross-examination she gave detailed evidence linking the first, second, third and fourth respondents to the forgery and hence the two counts of fraud. She was clear that the first, second, third and fourth respondents forged both Wu and her own signature on the purported agreement of sale. This finds corroboration in the proven fact that at all material times she retained possession of the title deed for the land in Waterfalls. Muzvongi (count 3) confirmed that the first to fourth respondents, all of whom he dealt with, failed to produce the originals of the company documents for Shomet yet they pushed him to effect immediate payment of the commitment fee, which prompted him to conduct due diligence. Indeed, if the second to fourth respondents were true and lawful directors of Shomet they should have had in their custody the original company documents for that legal persona including the original Deed of Transfer for that company's immovable property situate in Waterfalls
55. The cross-examination of Yu by the third appellant proceeded as follows:

“Q: How do you link me to the offence?

A: He was there each and every meeting. His name was on that forged CR 14. Himself he came to the land, demolished my site office. He is the one who told my security officer that he is the owner of that land when he is not” (record, p103)

.....

“Q: Witness is it to your knowledge that I was invited by the first and second accused person to be one of the directors and not that I once met you?

A: That is between yourself but to me I saw you at least including the signing day, three times in between April and May 2017. No doubt about it.” (Record, p 106)

“Q: Are you aware witness that I met the first and second accused person in September 2017?

A: I saw you and the first and second accused person in or about April 2017. The other Mr Norman Ngoshi, I saw him on the very day we signed that loan agreement. That is all what I know your worship.

.....

“Q: Witness there is no way you can now say to Honourable Court that you were not part of us, hence you do not want to comment on our behalf yet you have already implicated me on the issue of the signing of the agreement and that you once saw me?

A: That is all what I can confirm. In April you came to my house together with Washington Frera, dressed very smart, I want to emphasize that, very smart. When they came to my house, started negotiating the business of that loan agreement, they were dressed very smart. They told me that they are a foreign Cristian organization, they are based in Mutare, they have a lot of money abroad, they can pay foreign currency. If you can recall I called you “Sekuru”.” (Record, p 107)

56. The cross-examination of the same witness by the fourth respondent proceeded, in relevant part, as follows (pp 111-112, 119):-

“Q: Witness you told this honourable court that you know me. Did we ever meet or did you ever see me?

A: Yes, your Worship.

Q: Where did you see me witness and from where do you know me from?

A: The first time you came to my house on the day we signed the loan agreement.

Q: Witness I am not in agreement with what you are telling this honourable court. I met you for the first time at the police station, what will be your comment?

A: It is different with what I know you. I remember this very clearly. You were sitting on the sofa facing the entrance of my sitting room and you were sitting together with the estate agent. You were talking to my husband and you told me that you once worked together with my husband and I verified with my husband. I said he said he once worked together with you. My husband was showing his confusion and said no I can’t recall. I also tell you that my husband does not speak English. There is no way you have ever working together. That is why I remember that.

Q: If the court so permits the first and second accused should be asked if I was in their company at the time they came to your place of residence?

A: You came together with them on the day that we signed that loan agreement. You didn’t sign that agreement. You were there just to be showing that yourself is one of the members of that company.

Q: My last question to you witness will be I don’t know you, I do not know one Cornelius Muzvongi. What will be your comment.

A: I know you. In 2017 I saw you in my house.

Q: Witness, I will put it to you three, if not more than three agreements, that you entered into and all three lacks my signature, it means that your matter is not that clear before this honourable court.

A: My mind is very clear your Worship. I only signed or witnessed the signing of one agreement, that loan on the 9th of May 2017. Yes, you did not insert your signature there. I told this court, you are there just as an eyewitness to show the capacity of your organization to honour that agreement. Thereafter the only chance I got to know you is that your name has appeared on that fake CR 14, self-generated CR 14 and until today you never declared, you didn't know, legally you are not the director because you never got the authority from the, is what I am here for, simple."

57. In finding that Yu was not a credible witness the learned magistrate did not deal with these detailed answers to questions posed to Yu by the third and fourth respondents under cross examination at all. That was a gross irregularity. The record itself shows that the learned magistrate's finding that Yu was not a credible witness was manifestly wrong. Her evidence was so detailed, has a distinct ring of truth and is in sync with other evidence, both oral and documentary. It speaks to the existence of common purpose among first to fourth respondents in the commission of the offences.
58. In any event, that Yu decided to disown the sale agreement after the passing on of her husband defies logic or common sense. Wu died on 4 June 2017. These offences were detected some nine months later, in March 2018, when Muzvongi approached Yu as part of his due diligence exercise before parting with his company's money pursuant to the property development contract entered into on 16 March 2018 between Fortburry (Private) Limited and the purported Shomet represented by the second – fourth respondents. Muzvongi was clear that he dealt with the second – fourth respondents, who presented themselves as directors of Shomet, the purported owner of the land his company had contracted to develop. We record that both Muzvongi and Yu were credible witness. We therefore interfere with the factual findings which were made by the learned magistrate because they were anchored on the grossly incorrect premise that Yu was not a credible witness. See *S v Soko* SC 118/92; *S v Mlambo* 1994 (2) ZLR 410 (S) at 413 and *S v Mashonganyika* 2018 (1) ZLR 216 (H).
59. The first and second respondents did not proffer any reason why there were still holding on to Lynate Mukute's certificate of registration at the time that their accomplices and

themselves were arrested if Wu had bought the mining claim as way back as 10 May 2017. Under cross-examination, both the first and second respondents admitted that they did not even know the value of that mining claim. The first, second, third and the fourth respondents conceded that they also did not know the value of the shares that they had purportedly acquired from Shomet through Wu. This would mean that there was in fact no basis for the very existence of the purported agreement of sale. It is illogical for business persons to swap assets whose values they do not know. We are talking of a gold mining claim and shares in a company whose sole asset is a piece of land measuring 25, 1499 hectares situated in Prospect, Waterfalls, Harare. The defences tendered could by no stretch of the imagination have led to a reasonable view, taken together with all the other evidence, that the first – fourth respondents were innocent.

DISPOSITION

60. The learned magistrate committed a gross irregularity in omitting to deal with all the evidence placed before her.
61. Her findings of credibility defy logic or common sense.
62. The record itself demonstrates that the factual findings were manifestly wrong
63. She did not give a critique of the evidence.
64. She approached those portions of the evidence that she considered on a piece meal basis, and did not therefore even determine what the proved facts were. Consequently, we are amply satisfied that the inference of innocence, not having been arrived at on the correct facts, was perverse.
65. This appeal satisfies the test set out in *Attorney-General v Paweni Trade Corp (Pvt) Ltd and Ors* 1990 (1) ZLR 24 (SC). There, KORSAN JA, writing for the court, said at 32A

“I am in complete agreement with Mr Chatikobo that it is not every error of fact which entitles the Attorney-General to lodge an appeal. In my view, it is only when the inference drawn from the primary facts is so inconsistent with logic and common sense that the Attorney-General can succeed...”
66. At 32E, His Lordship continued:

“To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused then the

trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it.”

See also Prosecutor General of Zimbabwe v *Shumbayarerwa & Anor* HH 405/15.

ORDER

67. The appeal against the judgment of the Regional Court, Harare in CRB R688-91/19 handed down on 3 March 2020 acquitting the first, second, third and fourth respondents of one count of forgery as defined in section 137 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and two counts of fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] be and is allowed.

2.The verdict of Not Guilty and Acquitted in all the three counts and in respect of all the four respondents be and is set aside and is substituted with the following:-

- “Count 1: Guilty as charged (Accused 1, 2, 3 and 4)
- Count 2: Guilty as charged (Accused 1, 2, 3 and 4)
- Count 3: Guilty as charged (Accused 1, 2, 3 and 4).”

The matter be and is remitted to the court *a quo* for mitigation, aggravation and sentencing.

ZHOU J :Agrees.....

The National Prosecuting Authority, appellant’s legal practitioners
Koto and Company, first and second respondents’ legal practitioners
Moyo Chikono and Gumiro, third and fourth respondents’ legal practitioners