

GODFREY TANYANYIWA  
versus  
STATE

HIGH COURT OF ZIMBABWE  
CHATUKUTA & KWENDA JJ  
HARARE 17 February, 2020 & 1 September 2021

*TTG Musarurwa*, for the appellant  
A. *Bosha*, for the respondent

KWENDA J: The appellant was tried in the Regional Magistrates Court for the Eastern Division sitting at Harare charged with eight counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*] (the Criminal Code), one count of corruptly, concealing personal interest in transaction from his principal as defined 173 (a) of the Criminal Code and one count of defeating or obstructing the course of justice as defined in 184 (1) of the Code.

The facts giving rise to the eight fraud charges were that on divers occasions during the period extending from 30 September, 2010 to 15 February, 2011 the appellant who was employed by Chitungwiza Municipality as a Town Clerk, connived with other employees of the Municipality namely Joshua Manyepa, Omega Mugumbate and Alfred Chikerema, to fraudulently use funds belonging to Chitungwiza to pay for the purchase of an immovable property situated at stand no. 115 Chisipite, Harare which he, the appellant was buying for himself. They misappropriated various sums adding up to USD 165 000 which went towards the purchase of his personal property, being an immovable property situate at stand no. 115 Chisipite, Harare while falsifying the payments in council records as payments to certain named service providers of the Municipality.

The ninth charge being corruptly concealing personal interest in transaction from his principal arose from the allegation that during the same period of his employment by the Chitungwiza Municipality as a Town Clerk, he sneakily entered into an agreement in terms of which he leased his aforementioned immovable property to the Municipality for use by its Director of Urban Planning Services, Conrad Muchesa, at a monthly rental of USD \$1300-00. The appellant

corruptly concealed his interest in that transaction. As a way of concealing his interest he caused a lease agreement to be drawn and signed between the Municipality and one Peter Ndiyamba as the ostensible owner of the property.

In count ten, which is obstructing the course of justice, the State alleged that in October 2011, and still as an employee of the Municipality he took a cash acquittal book for the Chitungwiza Municipality from the Chief Internal Auditor and either concealed it or destroyed it at the time the Police and the Anti-Corruption Commission were investigating the fraud and corruption charges.

The appellant pleaded not guilty to all the charges and the matter proceeded to trial. For the reason that the appellant was acquitted of counts 2 to 8 I will not summarise his defence with respect to those counts. The appellant abandoned his appeal with respect to count 9. I will therefore not dwell further on that count too.

The appellant's defence with respect to counts 1 and 10 was as follows:

*Count 1*

The appellant applied in writing to the Finance Director of Chitungwiza Municipality for a loan in the sum of USD \$ 80 000 in order to pay for the stand aforementioned offering to pay back by 31 December, 2012. He said he furnished the Finance Director with all the documentation for the property which he was purchasing and the money was paid. He did not play any part in the falsification of Municipality records as regards the purpose of the disbursements. He averred that it would have been up to the Finance Director, Joshua Manyepa, who had become deceased at the time of the trial, to explain why he misrepresented the purpose of the payment as "servicing of Nyatsime stands" instead of just stating that the payments were disbursements of a loan advanced by the Chitungwiza Municipality to the appellant. He said, in any event, the Municipality did not suffer prejudice because the disbursement was a loan to be repaid by 31 December, 2012.

*Count 10*

His defence was that he denied taking, concealing or destroying the book. He put the State to the proof of the allegation in count 10.

As stated above the appellant was convicted at the end of the trial on counts 1, 9 and 10 and acquitted on counts 2 to 8. He was sentenced in count 1 to imprisonment for 6 years of which 18 months were suspended on condition of good behavior and 2 years suspended on condition he

paid restitution to Chitungwiza Municipality in the sum of USD \$80 000. In count 9 he was sentenced to pay a fine of USD\$300 or in default of payment imprisonment for one month. In count 10 he was sentenced to imprisonment for 1 year which the court ordered to run concurrently with the sentence in count 1.

The appellant appealed against the convictions and sentences. The appeal was opposed by the State challenging the validity of some of the grounds of appeal against conviction and on the merits. It will not be necessary to deal in detail with the State's objections to the validity of the grounds of appeal against conviction because appellant's counsel made various concessions in that regard as will more fully appear hereunder.

*Appellant's grounds of appeal against conviction in count 1*

Initially the appellant was relying on 7 grounds of appeal with respect to count 1. At the hearing his legal representative abandoned grounds 1, 5, 6 and 7 and argued grounds 2, 3, and 4 only. I will paraphrase grounds 2, 3 and 4 as follows:

Ground 2

The court *a quo* erred in failing to appreciate that the State had failed to prove the essential elements of fraud as defined in s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]

Ground 3

The court *a quo* erred in placing the onus on the appellant to prove that the USD\$ 80 000 paid by Chitungwiza Municipality for his personal property was not a loan because the onus was on the State to disprove his defence.

Ground 10

The court *a quo* erred in rejecting the appellants' defence that the funds disbursed on the purchase of his personal property had been loaned to him by the Municipality describing the defence as improbable or untruthful when there was no evidence adduced by the State that the appellant had not applied for a loan.

*Appellant's grounds of appeal against conviction in count 10*

The appellant was initially relying on 6 grounds of appeal but at the hearing counsel abandoned all except ground 4. The import of ground no. 4 is that the court *a quo* erred by relying on the evidence of one Takesure Kudakwashe Mudiwa without exercising caution yet the same court expressed reservations about that witness' evidence.

The State also opposed the appeal on the merits.

With respect to count one, the State submitted that the misrepresentation in writing was clear and indisputable. The prejudice to the Municipality was actual in that money was disbursed by the Municipality on the strength of falsified documents. When the false documents were created it was intended to cause the Municipality to act on them. The State submitted that the unescapable conclusion was that the appellant was complicity in the falsehoods because he benefited.

The State initially opposed the appeal against conviction on count ten but later conceded in argument that the conviction could not be supported because the key State witness on that count was also a suspect and the trial court should have treated his evidence with caution. The court failed to do so rendering the conviction unsafe. The State conceded that Takesure Kudakwashe Mudiwa who was the witness called by the State on this count was the custodian of the cash acquittals book. He may have had reason to conceal or destroy the cash acquittals book and may have done so. The State also conceded that the State should have warned the court that the witness was also a suspect. In the end the State conceded that the appeal should succeed. The concession is proper. The failure by the trial court to warn itself of the dangers of being misled by a suspect to divert attention from oneself amounted to a misdirection. The conviction on the 10<sup>th</sup> count cannot stand.

#### **Merits of the appeal on count one**

The abandonment of the appeal against conviction in count nine and the concession by the State in count ten leaves this Court with only count one to deal with. In disposing of the grounds of appeal with respect to count one, I take note of the following:

1. Appellants' counsel had to, and did, concede that indeed the State proved that a fraud was committed against the Municipality. The facts that were and remain common cause prove all the essential ingredients of fraud as defined in s 136 of the Criminal Law (Codification & Reform) Act. A misrepresentation was made to Chitungwiza Municipality in writing to procure release of the sum of US\$80 000 purportedly to pay for the servicing of Nyatsime stands. The misrepresentation was intended to cause the Municipality to act on it and disburse funds ostensibly as payment for the servicing of Nyatsime stands. The misrepresentation caused the Municipality to disburse the sum of US\$80 000 which went towards the purchase of the appellant's private property. Chitungwiza Municipality therefore acted on the misrepresentation to disburse the sum of USD\$80 000 as payment

for something else contrary to the representation made to it. The concession necessarily disposed of ground of appeal No 2.

2. Without conceding that the appeal has no merit, appellants' counsel conceded that there was circumstantial evidence which pointed to the appellants' involvement in making the misrepresentation. The concession was unavoidable in view of the following correct findings made by the trial court.: -
  - a) There was a receipt which showed that the sum of US\$80 000.00 disbursed by the Chitungwiza Municipality as aforementioned was part payment for appellant's personal property at stand No 115, Chisipite (also known as 67 Hindlead Road Chisipite).
  - b) The appellant did not dispute that he used the money to buy a personal property.
  - c) There was no paper trail which showed that the appellant applied for a loan or that a loan to him was approved.
  - d) The State produced the minutes for the council meeting preceding the disbursement of funds and they make no reference to a loan applied for by or disbursed to the appellant.
  - e) The appellant's warned and cautioned statement dated 12 February 2012 which was duly produced at the trial does not make mention of a loan as claimed by the appellant.
  - f) The court made the adverse inference in terms of s 25 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] that the appellant failed to mention the loan in his warned and cautioned statement because he feared that the Police would investigate it and prove that it was false.
  - g) Philemon Tavengwa Chipiyo, the then Mayor of Chitungwiza Municipality testified that he set in all council meeting except two and the alleged loan was never on the agenda.
  - h) The Chamber Secretary, Omega Mugumbate who kept all minutes of council had no knowledge of the loan.
  - i) The appellant had deliberately not paid the loan as at the date of judgment preferring instead that Chitungwiza Municipality had to sue him to recover the money
  - j) The payment was made at a time when Chitungwiza Municipality had cash flow problems which the appellant was aware of.

- k) Omega Mugumbate testified as an accomplice witness and the Court properly warned itself of the need to treat her evidence with caution. Although she down played her role the court inferred that she knew the purpose of the disbursement had been misrepresented.

The evidence of Philemon Tavengwa Chipiyo, the then Mayor of Chitungwiza Municipality, that he sat in all council meeting except two and the alleged loan was never on the agenda and the Chamber Secretary, Omega Mugumbate who kept all minutes of council had no knowledge of the loan, combined to destroy appellant's argument that the trial court erroneously placed the onus on him to prove that the amount of US\$80 000.00 disbursed by the complainant was not a loan. The finding by this court disposes of the third ground of appeal against conviction.

The appellant is the one who put in motion the whole process of buying the immovable property for himself. He was the beneficiary of the whole fraudulent transaction. In argument the appellant's counsel conceded that as the Town Clerk the appellant would have seen the fraudulent paper work because he was the Chief Executive Officer of the Municipality. He must have known of the payments made on his behalf because that was a performance due by him. In addition to that he was the Chief Executive Officer of the Municipality and all disbursements are naturally within his purview, he would have known of the misrepresentation. It is therefore clear that while Omega Mugumbate and Alfred Chikerema executed the fraudulent RTGS forms, they did so at the appellant's instance because he stood to benefit. He also set the disbursement in motion without any legitimate paper work which justified disbursement by the Municipality for his benefit. The tenth ground of appeal against conviction cannot therefore succeed. The circumstances permit of no other reasonable inference other than the appellant defrauded Chitungwiza Municipality and was properly convicted.

In the result we find no misdirection by the trial court which warrants interfering with the conviction with respect to counts 1 and 9.

Appellant's counsel did not make any submissions on the sentence imposed *a quo* thereby abandoning the appeal against sentence.

In the result it is ordered as follows

1. The appeal against conviction on count 1 be and is hereby dismissed.
2. The appeal against conviction on count 10 is upheld and the conviction is quashed.
3. The appeal against sentence in counts 1 and 9 be and is hereby dismissed.

CHITAKUTA J agrees .....

*Dururu and Associates* Appellant's Legal Practitioners

*National Prosecuting Authority* Respondent's Legal Practitioners