

ALBERT MAVHIYA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHIKOWERO & KWENDA JJ  
HARARE, 14 September 2022

### **Criminal Appeal**

*T Muzana*, for the appellant  
*F Kachidza*, for the respondent

#### **CHIKOWERO J:**

#### **INTRODUCTION**

1. This is an appeal against conviction only, the appeal against sentence having been abandoned at the hearing.
2. The appellant was convicted of criminal abuse of duty as a public officer as defined in s 174(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).
3. He was sentenced to 14 months imprisonment of which 6 months imprisonment was suspended for 5 years on the usual conditions of good behavior. The remaining 8 months imprisonment was suspended on condition the appellant performs community service.

#### **FACTUAL BACKGROUND**

4. The appellant, a nurse at Karoi District Hospital, was on night duty on 8 December 2012.
5. He acted contrary to and inconsistent with his duty as a nurse by charging and receiving money from a patient, which he pocketed, as a consideration for treating the patient. The appellant then used his own medication, in the form of an injection and two packets of tablets, to treat the patient.
6. Monica Chumbu, the patient, was brought to hospital by her spouse. The couple, together with one Ngoni Nduna, the hospital administrator, and Masiyanhau (the nurse who took over from the appellant on 9 December 2012 in the morning) testified for the prosecution. The trial magistrate, finding all five to be credible witnesses and the appellant's defence

false, convicted the appellant. We mention also that the trial court took into account the contents of the medical card issued by the appellant to Chumbu. It was signed by the appellant. It reflects the prescription and treatment administered to Chumbu by the appellant.

7. The trial magistrate was satisfied that the appellant charged Chumbu US\$20 for treating her, received US\$10 with the balance earmarked to be paid to the appellant on 9 December 2012 lest the patient would not be discharged from hospital.
8. The appellant's defence was a denial of receipt of the money, and that Nduna's wife, also a nurse at the hospital, had fabricated the charge because of work related differences.

#### **THE GROUND OF APPEAL**

9. The appeal was argued on one ground.
10. Mr Muzana accepted that the first and second grounds of appeal are invalid.
11. He then applied to strike out some superfluous words from the remaining ground of appeal. The application was unopposed. We granted it.
12. Resultantly, the sole ground of appeal reads:

“3. The Court *a quo* erred in holding that the Appellant had received \$10.”

#### **THIS COURT'S APPROACH IN AN APPEAL OF THIS NATURE**

13. The appellant attacks the factual finding of the trial court which was based on assessment of the credibility of the witnesses.
14. The assessment of the credibility of witnesses is a matter for the trial court. An appeal court will not lightly interfere with such factual findings unless the findings are outrageously irrational and not consistent with the evidence led.
15. The principles applicable where factual findings are impugned on appeal were reiterated in *State v Mashonganyika* 2018(1)ZLR 216(H). See also *State v Mlambo* 1994(2) ZLR 410(S); *State v Soko* SC 118/92.
16. We are not satisfied that the factual finding that Chumbu paid US\$10 to the appellant as consideration for treating her defies reason or common sense.
17. That the patient said she paid that amount while the husband said that it was himself who effected the payment is, in reality, no inconsistency at all. In other words, whether the husband paid on behalf of his ill wife or the latter physically effected the payment it all

boils down to the person who received the treatment having paid. That person was the wife.

18. That having been the whole of Mr Muzana's argument, this really is the end of the matter.
19. Indeed, all the state witnesses corroborated each other. The couple, which did not know the appellant before it lost US\$10 to him, testified that the appellant demanded US\$ 20 from them before he could treat Monica Chumbu, was paid half of that amount, pocketed it without issuing any receipt, told them that he was utilizing his own medication to treat her, injected her and gave her two packets of tablets. Having confined the complainant to the hospital bed for the night, he then invited the husband, Bonjis Chumbu, to the office where the appellant furnished Bonjis with a mobile number for onward transmission to the couple's employer, who was based in Kariba. The employer was to pay the balance, to the appellant (not the hospital) lest Monica Chumbu would not be discharged from hospital.
20. It was Bonjis who testified on what happened in the office, that the two packets of tablets contained six pills apiece and that the appellant emphasized that no one apart from the couple's employer was to know that the appellant had received US\$10 from the couple. This damning evidence was not challenged.
21. In finding Monica and Bonjis Chumbu to be credible witnesses, the trial court was mindful of the fact that they had no reason to falsely incriminate the appellant. One was a patient. The other was the husband. Both did not know the appellant before losing US\$10 to him. Although they were unsophisticated farm workers both stuck to their evidence even under cross-examination. The record confirms all this.
22. Further, two other circumstances demonstrated that the Chumbus were truthful witnesses. First, the medical card was produced as an exhibit. Duly signed by the appellant, it reflects the treatment administered on the patient during the night in question. It also shows the prescription which he issued. Yet he had denied treating the patient at all. Second, Monica Chumbu was still hospitalized on 9 December 2012, with the appellant having told Masiyanhau that the former would be discharged on her relatives appearing to collect her.
23. It was Ngoni Nduna's appearance at the hospital on 9 December 2012 which triggered the detection of the offence. He is brother to the Chumbus' employer. Bonjis had approached him seeking monetary assistance to purchase food because the US\$ 10, which was all he

had on his person, had been paid to the appellant at the hospital. Even then, a balance of US\$10 was still required to facilitate Monica Chumbu's discharge from the hospital. Shocked by these high charges, Nduna contacted the hospital administrator whereupon the former appeared at the hospital to pay the US\$10.

24. Nobody could accept the payment. Masiyanhau said the appellant should finish what he had started. Furious, Nduna threw the US\$10 at the nurses and left for his residence.
25. The nurses trooped to Nduna's residence to apologise for whatever the appellant may have done. Nduna would have none of it.
26. This evidence, which was not challenged, tended to support the Chumbus' testimony that they paid US\$10 to the appellant and that if the balance of US\$10 were paid Monica Chumbu would be discharged from hospital. This explains why Nduna, who stayed in Karoi, opted to pay that amount instead of waiting for his brother to travel all the way from Kariba to effect the payment. The Magistrate commented that Nduna was a credible witness. Nothing on record detracts from that assessment.
27. The hospital administrator testified that:
  - it was the hospital's policy not to accept any payments from patients at night.
  - the drugs which the appellant prescribed to Monica Chumbu cost US\$7, not US\$20.
  - the hospital's pharmacy did not operate at night, so he wondered where the appellant had obtained the drugs which he used to treat the patient.

This evidence remained undisturbed. Thrown into the scales, it satisfied the trial magistrate that the appellant used his own drugs to treat the patient in question, having inflated the cost of such medication and received US\$10 as part payment for the treatment administered on Monica Chumbu.

28. Masiyanhau told the learned magistrate that the medical card was proof that the appellant had treated Monica Chumbu at night. She also testified that patients hospitalized overnight were not required to pay any hospital fees. On taking over from the appellant, the latter told her that the patient was waiting for her relatives to take her home. The appellant did not cross-examine this witness. Having explained the purpose of cross-examination, the trial court acted properly in accepting Masiyanhau's unchallenged testimony.

29. The court *a quo* concluded that the real reason why Monica Chumbu was still hospitalized on 9 December 2012 was this. She had paid US\$10 to the appellant at night. A balance of US\$10 was still owing to the appellant. If it were a matter of waiting for relatives to arrive and take her home, her husband, Bonjis would have done that at daybreak on 9 December 2012. He had brought her to hospital in the first place. He could take her home. He could not have continued sitting by her bedside unless the appellant had told the couple that Monica Bonjis would not step out of Karoi District Hospital before the couple had paid him the balance for the “favour” that he had afforded them. In our judgment, there is nothing grossly outrageous in the learned magistrate’s reasoning and finding in this regard.
30. We accept that the defence, which focused more on what appeared to be the appellant’s other “shenanigans” at Karoi District Hospital, unrelated to what he was tried for, was correctly rejected.

**ORDER**

31. In the result, the appeal against conviction be and is dismissed.

**CHIKOWERO J:**.....

**KWENDA J:**Agrees.....

*Tapera Muzana and Partners*, appellant’s legal practitioners.  
*The National Prosecuting Authority*, respondent’s legal practitioner