

**JOHN GAZI**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU AND KAMOCHA JJ  
BULAWAYO 26 SEPTEMBER 2011 & 26 APRIL 2012

*K. Phulu* for appellant  
*Miss N. Ndlovu* for respondent

Criminal Appeal

**KAMOCHA J:** This appeal was dismissed in its entirety after both parties had presented their arguments and the court indicated that reasons would follow in due course. These are they.

The 54 years old accused was charged with fraud. The allegations being that on 4 July 2002 at number 8 Napier House between Fife Street and 13<sup>th</sup> Avenue Bulawayo, he unlawfully made a misrepresentation to Margret Zimbwora by claiming that he had bought a flat which is number 8 Napier House between Fife Street and 13<sup>th</sup> Avenue from the complainant's late husband the late (Philemon Zimbwora) thereby taking control of the said property intending to cause Margret Zimbwora to act upon the misrepresentation to her prejudice and lose control of the flat duly owned by the late Philemon Zimbwora and the complainant jointly or realizing that there is a real risk or possibility that Margret Zimbwora may act upon misrepresentation to her prejudice.

On arraignment the appellant tendered a plea of not guilty but was found guilty at the end of the trial. He was then sentenced to pay a fine of US\$5 000,00 or in default of payment 10 months imprisonment. In addition he was sentenced to undergo 4 years imprisonment of which 2 years imprisonment was suspended for 5 years on the customary conditions of future good behaviour and the remaining 2 years imprisonment was suspended on condition he paid complainant compensation of US\$4 620,00 as arrear rentals through the Clerk of Court Bulawayo Magistrates' Court on or before 30 November 2010.

The appellant was aggrieved by the trial court's decision and appealed to this court against both conviction and sentence on these grounds:-

"The Regional magistrates erred in the following manner:-

- 1) In that she failed to appreciate the fact that what was before her was a civil matter than a criminal matter.
- 2) The Regional magistrate did not appreciate or recognize the fact that a verbal agreement is recognized at law.
- 3) The Regional magistrate did not appreciate or recognize the fact that there are pending cases in the High Court pertaining to the same matter where same facts are being tendered so her judgment is trying to put finality to the matters pending at the High Court which is improper.
- 4) The Regional Magistrate imposed an excessive fine the same as the restitution and it is not clear how she arrived at the restitution figure of US\$4 620,00.”

I shall deal with the last two grounds of appeal as they can be disposed of easily and quickly. The appellant was required to pay rent in the sum of US\$220 per mensem starting from February 2009 when the United States dollar was formally recognized as legal tender in this country up to the month the appellant was convicted i.e. \$220 x 21 months equals \$4 620,00.

The fine of \$5 000,00 cannot be described as excessive when one has regard of the fact that the appellant was not ordered to retribute the rentals of the period between 2002 to January 2009. He must be thinking crime pays. That is undesirable.

In as far as the complaint that there were cases relating to the same matter pending in the High Court. The assertion remained a bald one as the appellant and his lawyers were unable to produce any documents to show the cases. Instead, cases involving other people were produced. No proof of any pending cases or cases was produced where he was involved. Producing cases where the complainant was suing other tenants had no relevance to his case.

Was it proper to prosecute the appellant for the crime of fraud or the matter should have been proceeded with as a civil matter?

In terms of section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] the crime of fraud is committed by:

“Any person who makes a misrepresentation:-

- (a) Intending to deceive another person or realizing that there is a real risk or possibility of deceiving another person; and

(b) Intending to cause another person to act upon the misrepresentation to his or her prejudice, or realizing that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice.”

The person shall be guilty of fraud if the misrepresentation causes actual or potential prejudice to another person.

According to C R Synman in *Criminal Law* 3<sup>rd</sup> Edition, Butterworth Publishers (Pvt) Ltd, 1995 at page 490 the crime of fraud is complete the moment a misrepresentation is made to somebody. Whether the person to whom the misrepresentation is made acts on it to his or her prejudice or whether an accused's fraudulent scheme is unsuccessful is of no consequence, the crime of fraud would still have been committed under the circumstances.

The circumstances under which the crime of fraud is committed were reiterated by the Supreme Court in *Attorney-General v Paweni Trade Corp (Pvt) Ltd and Others* 1990 (1) ZLR 24 (SC) that the crime of fraud consists of:-

“knowingly making a false representation of fact with the intention to defraud the party to whom it is made and such false representation actually causes prejudice or is potentially prejudicial to another.”

The court further stated that for the charge of fraud to stand it is not necessary that the false representation be acted upon by the party to whom it is made to his or her prejudice.

The evidence of the complainant in this case was that she and her late husband were the registered co-owners of the said flat. They were looking for someone to rent the flat and tasked one Kaseke to find them a tenant. He managed to find them the appellant – John Gazi.

In 2002 her husband died. She told the appellant of the untimely death of her husband and at the same time told the appellant to continue depositing the money for rent into the same account he had been given by her late husband. The appellant agreed to do so without demur.

Surprisingly the appellant did not deposit any money as agreed. He gave endless excuses. At times he would claim to have been out of the country.

This went on for a period of five years and the complainant felt she had had enough of his excuses and decided to institute proceedings in this court for his eviction.

The appellant came up with a bombshell. He, for the first time, began to allege that he in fact had bought the flat from her late husband. He did not end there but went on to allege

that she had in fact granted her husband a power of attorney to dispose the jointly owned flat. He further alleged that the agreement between the parties was a verbal one. He had no written document or receipt to show that he had bought the flat.

Even at the time of the trial he had nothing to show that he had indeed bought the flat. He could not even produce the power of attorney the complainant allegedly granted in favour of her late husband. She denied ever executing any power of attorney for her late husband. The appellant was clearly being untruthful on that point.

Further, the appellant had been in occupation of the property for 8 years, he had even put tenants in the property who paid rentals to him but in all those years he had not done anything to have the property registered in his name. The rates bills still came in the names of complainant and her late husband. The rates were still being paid by the complainant. Furthermore, the complainant advertised the estate of her late husband but appellant never laid a claim against the estate.

The trial court's finding that the appellant was being untruthful about the whole matter cannot be assailed. The suggestion that he bought the property from the complainant's late husband is clearly false and was properly rejected by the court *a quo*. The false representation caused actual prejudice to the complainant as appellant received rentals from tenants but did not pass on the money to the complainant.

The suggestion that he entered into a verbal agreement of sale of the property with the deceased was equally false and was properly rejected by the trial court.

The appeal was devoid of any merit and was *ipso facto* dismissed in its entirety.

Ndou J ..... I agree

*Phulu & Ncube*, appellant's legal practitioners

*Criminal Division of the Attorney General's Office*, respondent's legal practitioners