

DOWELL ZVEGA
versus
THE STATE

THE HIGH COURT OF ZIMBABWE
HUNGWE and WAMAMBO JJ
HARARE, 12 June 2018

Criminal Appeal

N Mugiya for the appellant
Ms F Kachidza, for the respondent

HUNGWE J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to a fine US\$400 or in default of payment three months imprisonment. He appeals against condition only.

At the hearing of the appeal the appellant abandoned the first two grounds of appeal and relied on the only two remaining grounds.

The first of the two remaining grounds stated that;

“The court *a quo* misdirected itself in disregarding appellant’s defence that he was given the service station as an exit package by his employer, which defence was most probable in the circumstances.”

The second of the remaining grounds of appeal stated that;

“The *court a quo* erred in convicting the appellant when there was no proof that he forged the document which formed the basis of the offence.”

Although we were of the view that, like the abandoned grounds, these two grounds did not comply with the requirements of clarity and specificity as required by rule 22 (1) of the *Supreme Court, (Magistrates Court) (Criminal Appeals) Rules, 1979* we allowed Mr *Mugiya* to argue the appeal as if that requirement had been met. The more we listened to him, the further it became clearer that our initial views were correct. The appellant was convicted for fraud on the following facts. Sometime in 2012 Mobil Oil Zimbabwe went into voluntary liquidation. It handed over all its fuel depots to Total Zimbabwe except for the one at Concession Service Station, Concession. At that time the service station was run by an agent as a distributor for Mobil Oil Zimbabwe. That

agent employed the appellant. Appellant was aware that he Concession Service Station had not been handed over and continued to run it on his own account. The appellant forged a document which misrepresented that he had been awarded the Concession Service Station as an exit package from Mobil Oil Zimbabwe. Using this document he applied for and was issued a trading license by the Mazowe Rural District Council as if he was the owner of the Service Station. The matter surface in 2012 when the Ministry of Lands which had authority over gazetted lands, directed the Rural District Council to issue leases to sitting tenants among them, the appellant and others. The appellant resisted this directive and barred the others from beneficial use of the Service Station claiming that he owed it as part of his golden handshake from Mobil Oil Zimbabwe.

During the trial a former employee, who is reflected as the author of the document relied upon by the appellant when he misrepresented the facts to Mazowe Rural District Council disowned the document. The court found that, this person Geoffrey Madanha did not issue the document upon which the council acted in issuing the appellant a trading license. It also found as fact that the appellant was never employed by Mobil Oil Zimbabwe.

Under cross-examination the accused claimed that he had other documents which showed that the land on which the Service Station was situated belonged to Mobil Oil Zimbabwe and that he was in the process of taking transfer of the land from Mobil Oil Zimbabwe. He claimed that his lawyer, who happened to be present in court during trial, had those documents. They were never exhibited to court either at trial or afterwards. The court made a finding that the appellant was less than honest as he changed the basis of his defence each time he was pinned down. It concluded that he had forged exhibit 1, the document that he had presented to Mazowe Rural district Council well aware that it was a forgery.

We are unable to disturb this finding of fact as it is consistent with the evidence led during trial. Mr *Mugiya* submitted that there was no proof that Madanha had not authored this document as Madanha was not clear when he left Mobil Oil Zimbabwe. He further urged us to find that the defence that the appellant was given this service station by his employer as an exit package was most probable in the circumstances.

The submissions by counsel sum up the rather blunt grounds of appeal put forward by the appellant. A defence to a criminal charge must generally be one which is known in law. Generally, where it is not possible to raise the known defences in criminal law, an accused person will escape conviction if he shows that an essential element constituting the offence charged was not proved.

It may be an element in respect of the *mens rea* requirement of the offence or an element in respect of the *actus reus* of the offence charged. *In casu* the essential elements of the crime charged, being fraud are:

- a) a misrepresentation;
- b) which causes actual prejudice; or
- c) which is potentially prejudicial;
- d) made intentionally;
- e) with the realization of the possibility that another person may act on the misrepresentation.

The facts proved at trial reveal that the Human Resources Manager at Mobil Oil Zimbabwe at the time, Ms Mazhandu, confirmed that appellant was not at any time employed by Mobil Oil Zimbabwe.

She confirmed that Madanha was employed by Mobil Oil Zimbabwe but at a junior level. As such he was not in a position to have issued the letter titled "To whom it may concern." Ex 1. In any event Mobil Oil never gave a golden handshake in the form of an asset like a service station.

Faced with such evidence, we were taken aback by the suggestion by the appellant that the court *a quo* erred in dismissing appellant's defence as false. It was entitled to do so as the appellant was not worthy of belief. He concocted a story which he supported by Ex 1, another forged document. He succeeded in misleading the Rural District Council into regarding him as an owner of the service station. The council was prejudiced in its good administration. That finding was most proper in the circumstances.

We found no merit in the appeal and dismissed it on the turn.

WAMAMBO J agrees:.....

Mugiya Macharaga & Partners, appellant's legal practitioner
National Prosecuting Authority, respondent's legal practitioner