

OSCAR TAPERA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & TAGU JJ
HARARE, 5 August 2014

Criminal appeal

J Mugogo, for the appellant
E Makoto, for the respondent

TAGU J: At the hearing of this matter we gave an *ex tempore* judgment and dismissed the appeal against both conviction and sentence. We have been requested to furnish written reasons for our decision for purposes of appeal to the Supreme Court. The following were our reasons.

This was an appeal against the conviction and sentence imposed by the Provincial Magistrate sitting at Harare on the 28th August 2013 in Case Number CRB 4395/13.

The appellant pleaded not guilty to the charge of contravening section 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]- (FRAUD), but was convicted after a contested trial and sentenced to 15 months imprisonment of which 5 months imprisonment was suspended for 5 years on the usual conditions of good behaviour and a further 5 months imprisonment was suspended on condition that the appellant restituted CIMAS Medical Aid Society in the sum of US\$2 015.16 through the Clerk of Court Harare by the 30th September 2013. The appellant was to serve an effective sentence of 5 months imprisonment.

The facts upon which the appellant was convicted may be summarised as follows. The complainant is CIMAS Medical Aid Society situated at corner Harare Street and Jason Moyo Avenue, Harare. The appellant is a male adult employed by the Ministry of Health and Child Welfare as a Medical Scientist. On divers occasions between the 21st November 2011 and the 9th November 2012 the appellant misrepresented to CIMAS Medical Aid Society that RAPHA Medical Laboratories had offered medical services to nineteen different patients, and by

forging their claim forms, claimed a total of US\$3 294.30 of which US\$1 279.14 was discovered before it was deposited in his personal Barclays Account number 4331048. The appellant by this misrepresentation got away with an amount of US\$2 015.16, which was deposited into his personal account and of which nothing was recovered.

The appellant challenged his conviction and sentence on a number of grounds. The grounds against conviction can be summarised as follows, that the court a quo erred-

- (i) when it denied the appellant legal representation by proceeding with the matter in the absence of the appellant's legal practitioner who had been explained to be appearing in the High Court;
- (ii) when the legal practitioner attended court, by refusing the appellant's request to recall the witness whom the appellant had cross-examined on his own without the assistance of the legal practitioner;
- (iii) accepting the evidence of Doctors Dafana and Pareck who initially denied that they had issued the request forms used by appellant to conduct tests when in fact the doctors later accepted that the stamps appearing on the forms were from their clinics;

The grounds of appeal against sentence were that the court a quo erred:

- (i) by not considering community service as an option to effective imprisonment;
- (iv) by ordering the appellant to reimburse the money fraudulently acquired before the 30th of September 2013 when the accused would still be in custody serving his sentence and in essence denying him the opportunity to reimburse the complainant.

The appellant prayed that the decision of the court a quo be set aside or that the sentence be altered to one of community service.

In this case the trial magistrate accepted the evidence of the state witnesses and rejected that of the appellant. It is trite that a court of appeal does not generally interfere with the findings of a trial court on the credibility of witnesses unless the findings are not supported by the evidence adduced during the trial. (See *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62E-H to 63 D and *Bertha Hollington & Dicko Kaila v The State* HH 125/2002.)

A perusal of the record of proceedings shows that it was proved beyond a reasonable doubt that the appellant is the owner of RAPHA Medical Laboratories. All the claim forms where referred to CIMAS Medical Aid Society for payment by the appellant after some test were purportedly done at RAPHA Medical Laboratories.

Request form exhibit 33 did not have Doctor Parekh's stamp. The doctor denied having sent the patient on that exhibit to RAPHA Medical Laboratories but instead sent the patient to BIO SCIENCE LABORATORIES. He further denied exhibits 1, 2, 14, 29, 42 and 43 which were all forged by the appellant.

Doctor Cletos Masiya confirmed that he used to work with appellant but disengaged him in December 2011. He thus denied having sent a claim form for one Tobias who was proved to have been in Nigeria at the time the claim form was submitted by the appellant.

Turning to the evidence of Doctor Johannes Marisa, the doctor testified that he only ordered one test for TB Screening on one Last Gara but there were now several tests added on the claim form. The doctor said he saw the patient on the 3rd and 9th of November 2012 but the claim form submitted to CIMAS by the appellant shows that the patient was also seen on the 1st of November 2012 a clear indication that another date was forged by the appellant for purposes of claiming more money. Further, a patient by the name Sylvia Ruzani was attended to by this doctor but no blood investigations were ordered as claimed by appellant. The doctor ordered four tests for one Bekezela Mgwenzi as he suspected a sugar condition but the appellant forged the form by adding six more tests. The doctor did not order any blood tests for Emmanuel Mahenga but the appellant submitted to CIMAS Medical Aid Society a form that shows that nine tests were done at RAPHA Medical Laboratories. The doctor in his evidence said the patient had presented a headache and he prescribed painkillers only. Lastly this doctor ordered four tests on one Tatenda Chingono but the request form sent by appellant to CIMAS Medical Aid Society now had eleven blood tests and did not bear the Doctor's signature and stamp which is a clear forgery.

Doctor Jane Hwingwiri denied sending Kenny Tim Muvi on exhibit 17 to appellant's laboratory. He denied filling a request form for a patient called Bernard Jamera, neither did she attend to the patient on exhibit 5. She further denied filling request forms on exhibits 6, 9 and 10 on the 21st January 2011. All these were forged by the appellant.

Doctor Blessing Dafana denied referring a patient called Lucky Makarau to RAPHA Medical Laboratories.

Lastly a patient by the name Fatso Kenius Muvi denied filling a claim form which now bore his name and correct particulars. He further denied ever having gone or had blood sent to RAPHA Medical Laboratories for tests.

The court a quo in dismissing the appellant’s defence concluded in his judgment which we found to be well reasoned as follows-

“On all the medical aid claims there were exceptionally high numbers of tests conducted except only exhibit 34 which had only 4 tests yet on all the others they ranged from 7 to 12 tests. The request forms which accused used to claim monies did not have the stamps from doctors and the doctors have disowned them. From the totality of the evidence it is crystal clear that accused would compile fresh request forms purporting as if it was the doctor who had ordered the numerous tests and basing on that fraudulently request form he would claim for more tests than he had actually did. In some instances, the patients denied ever visiting Rapha medical laboratories yet accused certified that those patients were tested at his laboratory. Clearly the accused is dishonest. I have no reason to doubt all the doctors who have nothing to win by lying. I am satisfied that they told the truth....”

Having heard submissions and gone through the record of proceedings we were satisfied that the court a quo did not err in concluding that the State had proved its case beyond a reasonable doubt that appellant committed acts of fraud. The court a quo was right to even convict the appellant on claim forms that originated from some doctors because the forms were later tampered with and tests inflated by the appellant. All the forms were in one way or the other signed by the appellant who is the owner of Rapha Medical Laboratories and sent to CIMAS Medical Aid Society by the appellant. The conviction was unavoidable.

As to the sentence, the court properly took into account the fact that appellant was a first offender who is a sole breadwinner in his family. The court properly took as against the appellant the fact that he defrauded CIMAS Medical Aid Society of US\$ 2 015.16 and only caused potential prejudice of US\$ 1 279.14. The appellant was not contrite and an amount of US\$2 015.16 was not recovered hence an order for restitution was properly made. Community service in our view would have trivialised the fraud that took place over a period of time. An effective custodial sentence was called for, not only to deter appellant but other would be offenders.

In the result, we dismissed the appeal against both conviction and sentence.

CHATUKUTA J agrees.....

Gunje and Chasakara Law firm, appellant’s legal practitioners
National Prosecuting Authority, respondent’ legal practitioners

