

RUSELL T MWENYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE; 17 May 2024 & 7 February 2025

Criminal Appeal

L Madhuku, for the appellant
T Mapfuwa, for the respondent

CHIKOWERO J:

1. This is an appeal against part of the judgement of the Regional Court. The appellant was charged, in the main, with the crime of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:24*] (the Criminal Law Code).
2. He was charged in the alternative with the crime of bribery as defined in s 170(1)(ii) of the Criminal Law Code.
3. The appellant was also charged with the crime of money laundering as defined in s 8(3) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:23*] (the Money Laundering Act).
4. The criminal abuse of duty as a public officer charge, alternatively bribery, was count 1. The money laundering charge was count 2.
5. The appellant pleaded not guilty to all the charges.
6. At the end of the trial the appellant was convicted on the criminal abuse of duty as a public officer and the money laundering charges. He was acquitted on the bribery charge.
7. In respect of those charges on which he was convicted the appellant was sentenced, on each count, to 24 months imprisonment of which 6 months was suspended for 5 years

- on the usual conditions of future good behaviour. The sentence on count 2 was ordered to run concurrently with that on count 1.
8. This appeal is against the convictions only.
 9. Count 1 reads:

“In that during the period extending from October 2015 to December 2016 and at Parirenyatwa Group of Hospitals (P.G.H), Harare, the accused RUSELL TATENDA MWENYE being a public officer by virtue of his employment as the Pharmacy Stores Controller for Parirenyatwa Group of Hospitals a Public Entity, while in the exercise of his functions in that capacity which required him to manage all pharmaceutical stock movements, plan and monitor restocking of pharmaceutical stores in consultation with sectional heads, develop and monitor efficient stock control systems and make orders for the hospital pharmacy did that which was contrary to or inconsistent with his duties as a public officer. The accused received an order raised by Parirenyatwa Group of Hospitals Procurement department of medical sutures in the name of Flancon Investments (Pvt) Limited with a value of US\$37 844.60 which had been awarded to that company through tender. The accused was supposed to verify the contents of that order, sign it and forward the order to the Parirenyatwa Group of Hospitals Chief Pharmacist for onwards processing of the order. The accused unlawfully and intentionally did not process the order and instead unilaterally made Silksilver Investments (Private) Limited to supply the same order which was awarded to Flancon Investments (Pvt) Ltd at an inflated price of US\$86 381.88 without a tender thereby showing favour to Silksilver Investments (Pvt) Limited which had participated in the tender process and lost to Flancon Investments (Pvt) Limited.”

10. The money laundering charge alleged that Silksilver Investments (Pvt) Limited returned the favour by paying off the appellant who then concealed the illicit origin of the funds by paying the purchase price of a piece of land acquired by him, namely, Stand Number 31643 Mabvazuva, Ruwa as well as financing the construction of a house on that piece of land.

THE ISSUES BEFORE THE COURT A QUO AND ITS FINDINGS

11. As regards Count 1, the sole issue was who, at Parirenyatwa Group of Hospitals, placed the order with Silksilver Investments (Private) Limited resulting in that company supplying the sutures without going through tender procedure. The order was made telephonically. It was common cause that whoever made that telephonic order did so unlawfully because Silksilver Investments (Private) Limited had not won that tender. Instead, it had participated in the tender and lost to Flancon Investments (Pvt) Ltd. Despite this Silksilver Investments (Private) Limited was made to supply the order at the astronomical price of US\$86 381.88 when Flancon Investments had won the tender to supply the same sutures at the much cheaper price of US\$37 844.60.

12. The lower Court, after an assessment of all the evidence, found that it was the appellant who had placed the order, through a phone call, for Silksilver Investments (Pvt) Ltd to supply the sutures to Parirenyatwa Group of Hospitals. That was a factual finding.
13. As regards Count 2, the first issue was whether the sums of \$10 000, \$5 698 and \$500 were rewards made to the appellant by Silksilver Investments (Pvt) Ltd for the favour extended to it in respect of count 1. If they were so (that is proceeds of the crime in Count 1) whether the appellant acquired, used or possessed those funds knowing or suspecting at the time of receipt of the funds that they were proceeds of crime.
14. Again, after assessment of the evidence, the lower Court found that the amounts in question were proceeds of crime and that the appellant laundered that money by paying, through Silksilver Investments (Pvt) Ltd, for the purchase of his Stand, namely 31843 Mabvazuva, Ruwa as well as financing developments thereat. These also were factual findings made by the lower Court.

THE GROUNDS OF APPEAL

15. The following are the grounds of appeal:

“Count 1

1. The Court *a quo* erred at law in failing to note that the evidence of Vuragu, Mudenda, and Mudimu was accomplice evidence.
2. The trial court erred in relying on the evidence of accomplice witnesses without warning itself of the inherent dangers of such evidence.
3. The Court *a quo* erred in finding that the appellant had placed the order for the supply of sutures from Silksilver where the finding among other things;
 - a) Ignored and or did not comment on the following evidence, which confirms the appellant’s story that it was Vuragu who had placed that order;
 - i) Vuragu admitted that he sometimes gave verbal orders.
 - ii) That it was common practice at Parirenyatwa Group of Hospitals (PGH) to have goods delivered without any orders being raised.
 - iii) Vuragu admitted that he knew about the delivery of the sutures from Silksilver before payment was made.
 - iv) Vuragu also admitted that he did not comply with a directive to return the sutures to Silversik (sic). He justified this by saying he assumed that the sutures had been used up.
 - v) The trial Court did not query why Vuragu would assume that yet he could either have asked me or physically verified the stock.
 - vi) Vuragu abandoned his statement to the police,
 - b) was based on a cursory dismissal of the appellant’s evidence implicating Vuragu.
 - c) was based on the Court wrongly accepting that Mudenda could not lie since the appellant had said he had a good working relationship with him.

- d) was informed by finding that Mudimu reported to the appellant where there was no evidence of the reporting structure at Parirenyatwa Group of Hospitals.
 - e) was informed by an erroneous finding that Mudenda and Mudimu had no reason to lie against the appellant where it is apparent that everyone had to stay clear of the investigation by ZACC.
 - f) Ignored the material discrepancies between Zvoushe and Mudenda's evidence on how the matter had been reported to the police.
 - g) Ignored the possibility of the appellant's story being probable.
4. **Count 2**
The trial court erred at law in convicting the appellant of contravening s 8(3) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].
- a) where there was no evidence of concealing or disguising the source of funds and or;
 - b) without making a finding that the State proved that the funds had been transferred for the purpose of concealing or disguising the illicit origin of such."

THE APPROACH OF AN APPELLATE COURT IN AN APPEAL ATTACKING FACTUAL FINDINGS OF A LOWER COURT

16. The law is settled in this respect. In *S v Soko* SC 118/92 the court said at p8:

"A Court of appeal will not interfere with the trial court's assessment of credibility lightly. There must be something grossly irregular in the proceedings to warrant such interference. This is so because the trial court by having the witnesses before it is able to make all other factors relevant in assessing credibility. The court of appeal on the other hand is confined to the record." (our underlining)

17. In *S v Mlambo* 1994 (2) ZLR 410 (S) at 413 the Court repeated this principle in the following words:

"The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by the appellate Court unless satisfied that it defies reason and common sense." (underlining our own)

This approach has been followed in several decisions of this Court including *S v Chingurume* 2014 (2) ZLR 260 (H).

18. Although made in the context of a civil matter, the Court made the same point in *Chimbwanda v Chimbwanda* S 28/02. It said:

"It is trite in our law that an appellate Court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage of having seen and heard them. See *Hughes v Graniteside (Pvt) Ltd* S 13/84. The exception to this rule is where there has been a misdirection or a mistake of fact or where the basis the court a quo reached its decision was clearly wrong." (our emphasis)

See also *S v Katsiru* 2007 (1) ZLR 364 (H); *Kereke v Maramwidze and Anor* SC 53/24; *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G – 63A; *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E and *Chitukutuku & Ors v The Prosecutor General and Ors* SC 103/24.

DISPOSITION

19. As regards the first ground of appeal, we agree with Mr Mapfuwa that there is no evidence on record that Vuragu, Mudenda and Mudimu were accomplices. They were employed at Parirenyatwa Group of Hospitals at the material time as Chief Pharmacist, Director of Operations and Pharmacist respectively. There is not an iota of evidence on record suggesting that the trio participated or assisted in making the telephonic order to Silksilver Investments (Pvt) Limited to supply the sutures. The first ground of appeal is meritless.
20. Since Vuragu, Mudenda and Mudimu were not accomplice witnesses, there was no need for the lower Court to warn itself of the inherent dangers of relying on accomplice evidence. Accordingly, the second ground of appeal, being misconceived, is dismissed.
21. The third ground of appeal criticizes the factual finding made by the lower Court, namely, that it was the appellant who asked Silksilver Investments (Pvt) Limited to supply the sutures to Parirenyatwa Group of Hospitals. The criticism is premised on the contention that the Court misdirected itself in finding that Vuragu, Mudenda and Mudimu were credible witnesses.
22. We have already set out the approach of an appellate Court in an appeal where findings of fact are attacked on the basis that the lower Court misdirected itself in believing the State witnesses.
23. The threshold for interference with the factual finding made a *quo*, that it was the appellant who made the verbal order to Silksilver to supply the sutures to Parirenyatwa Group of Hospitals, has not been reached. Sound reasons were given by the lower Court for finding that Vuragu, Mudenda and Mudimu were credible witnesses. That Court explained why it found that Vuragu did not know who had asked Silksilver to deliver the sutures to Parirenyatwa Group of Hospitals. Indeed, Vuragu himself conceded that the reason why, in his statement to the police, he had said that it was the appellant who

- had asked Silksilver to supply the sutures was that he had heard it said at Parirenyatwa Group of Hospitals. That was hearsay evidence, he had no personal knowledge of who made the verbal order to Silksilver. But that is not the end of the matter.
24. Vuragu testified, and was believed, that after Flancon Investments (Pvt) Ltd won the tender to supply the sutures at a price of US\$37 844.60, internal order forms were prepared by the Parirenyatwa Group of Hospitals Procurement Department and sent to the appellant for signature. The appellant was required to check that the order being prepared conformed to the tender awarded to Flancon Investments (Pvt) Ltd before appending his signature. In other words, the appellant was required to check that the order which was being prepared, as reflected in the internal order forms, reflected the correct quantity and quality of sutures in terms of the tender awarded to Flancon Investments (Pvt) Ltd. It will be recalled that the appellant was at the material time employed at Parirenyatwa Group of Hospitals as the Pharmacy Chief Controller. Vuragu testified that the appellant, instead of checking and signing the internal order forms, sat on them.
25. It was common cause that those forms were not signed.
26. Vuragu testified, and was corroborated by Mudenda, that in a meeting of heads of departments and senior management the former reported to the latter that the appellant was refusing to process a tender awarded to a particular company and was sitting on the papers for several months. The appellant's reason for sitting on the papers, as given to Mudenda by Vuragu at the heads of departments and senior management meeting, was that the company awarded the tender had an inferior or sub-standard product and that the users were thus against the procurement of that product.
27. Mudenda testified that at that meeting Vuragu was directed to check with other hospitals who had been using a similar product. This meeting was a Monday briefing. Vuragu, who was the head of the pharmacy department, was directed to give feedback on the next Monday briefing. He did not do so, citing transport challenges. Eventually, he brought the feedback. It was that the product which was being painted as sub-standard was in use at Sally Mugabe Hospital, West End Hospital and a third hospital whose name Mudenda could not recall at the time that he testified. At the meeting

- Vuragu was directed to make sure that the appellant facilitated the delivery of the product from the company awarded the tender. That company was Flancon Investments (Pvt) Ltd. Mudenda chaired the meeting in which Vuragu was directed to check with other hospitals and to report back. Two other directors each chaired the other meetings on this subject.
28. Mudenda said Flancon (Pvt) Ltd did not deliver the sutures as the appellant then approached the witness with the news that he (the appellant) had instructed Silksilver to deliver similar sutures to Parirenyatwa Group of Hospitals as the stock in Parirenyatwa Group of Hospitals pharmacy store had run out. Mudenda asked the appellant if some processes had been done for Silksilver to supply the sutures. The appellant's response was in the negative. The reason for not following due process was that the situation was urgent as the hospital had run out of sutures. Mudenda requested the appellant to put everything in writing because he had wanted to know why Silksilver had been asked to supply the sutures when it had not won the tender. Among the eight or ten questions that he asked the appellant to address in writing was the price at which Silksilver had supplied the sutures to Parirenyatwa Group of Hospitals.
29. The appellant's written response to the questions put to him by Mudenda was a thick dossier containing information collected by the appellant from end users at Parirenyatwa Group of Hospitals justifying why the sutures from the company awarded the tender, namely Flancon Investments (Pvt) Ltd, were sub-standard. The information was technical in nature; appellant was not a technical person. These were the same sutures in use at, among others, Sally Mugabe Hospital. Parirenyatwa Group of Hospitals had also used similar sutures, supplied by Flancon (Pvt) Ltd, in the past.
30. Mudenda's evidence was detailed. He was believed when he testified that it was the appellant who had approached him seeking *ex post facto* authorisation of what the appellant had already done, namely the unlawful verbal placement of the order with Silksilver. Those sutures had almost been used up by Parirenyatwa Group of Hospitals when the appellant told Mudenda of that order. But Silksilver had not been paid because Parirenyatwa Group of Hospitals had not placed any requisition for those sutures.

31. To Mudenda, the lower court and ourselves, there can be no doubt that it was the appellant who asked Silksilver to deliver the sutures. He sat on the internal order forms prepared by the procurement department so that Flancon (Pvt) Ltd, which had won the tender, would not supply the sutures. He did not process Parirenyatwa Group of Hospitals' order to Flancon Investments (Pvt) Ltd. He waited until the sutures in the Parirenyatwa Group of Hospitals pharmacy stores ran out. He was Parirenyatwa Group of Hospitals Pharmacy Stores Controller at the material time. He controlled the level of stock in the hospital's pharmacy. He waited until the suture stock in the pharmacy store ran out to open a window for him to ask Silksilver, who had lost the tender to supply sutures to Parirenyatwa Group of Hospitals, to do that which it had bid and failed to do.
32. On the record, we have no basis to disagree with the lower Court's assessment that Mudenda was a very credible witness. Even the appellant himself, at the trial, conceded that Mudenda had no reason to fabricate evidence against him. In other words, the appellant was virtually confirming that Mudenda testified truthfully in respect of the interaction between those two.
33. We also agree with the lower Court's assessment that Mudenda was an impartial witness. He frankly told the court that if he had known in good time that the end users had concerns with the quality of the sutures to be supplied by Flancon Investments (Pvt) Ltd, a re-tender may have been done. What was unlawful was that which the appellant had done, namely, to ask a party which had participated in the tender and lost to supply the sutures all the same. It will be recalled that the sutures were supplied at more than double the price of the winning bidder, and without a paper trail. In other words, the order to Silksilver was made through a telephone call. There can be no doubt, as correctly observed by the court below, that this was designed to make sure that the identity of the person who placed that order would not be detected. In short, this was meant to conceal the identity of the offender.
34. The lower Court also found that Mudenda was an impartial witness because he had written a scathing memorandum questioning Vuragu's leadership qualities. That memorandum, which Vuragu was required to act on, was produced as an exhibit. The

- Regional Magistrate was correct in saying that Mudenda was not protecting anybody by testifying as he did. He was neither protecting Vuragu, Mudimu, the appellant, himself or anyone else. He was simply telling nothing but the truth.
35. Nor is there a basis for us to quarrel with the lower Court's assessment that Mudimu was also a credible witness. She told the court that she was junior to both the appellant and Vuragu. Her evidence was that the Silksilver sutures were delivered in the absence of Vuragu. She needed to know whether she should receive that delivery because those goods were accompanied by a delivery note and an invoice only. There was no requisition from Parirenyatwa Group of Hospitals to show that it had ordered the goods. In the circumstances, she asked the appellant, who was her immediate superior, whether she should accept the delivery. The appellant answered in the positive. Prior to this delivery, she had been asked to call Silksilver, among other potential suppliers, to enquire whether they were in a position to supply sutures. She was categorical that the enquiry, on instructions from above, did not translate to her placing an order to Silksilver to supply the sutures.
36. That it was the appellant who authorised her to accept the Silksilver sutures is evidence that she was junior to the appellant. The appellant's protestations to the contrary found no favour with the lower Court. It also finds no favour with us.
37. Further, that it was the appellant who authorised her to accept delivery of the unlawfully procured Silksilver sutures is evidence that it was the appellant who made the verbal order for those sutures to be supplied. Under cross-examination, the appellant initially denied that Mudimu had asked him whether to accept delivery of the sutures in the absence of a requisition by Parirenyatwa Group of Hospitals. When he relented he was asked to explain why Mudimu would seek authorisation from him to receive the sutures if the two were at the same level. He then changed his testimony to say she did not seek authorisation but that all she did was to explain to him that the sutures had been brought without a requisition having been made by Parirenyatwa Group of Hospitals. As observed a *quo*, which is also evident on the record, the appellant was a poor witness. He was evasive. We are unable to fault the lower Court for preferring Mudimu's evidence wherever it conflicted with the appellant's.

38. The appellant produced Callisto Tarwirei as a defence witness. Among other things, the witness was meant to confirm the appellant's evidence that it was Mudimu who made the verbal order, over the phone, asking Silksilver to supply the sutures (this was despite the fact that in his defence outline, drafted by his legal practitioner, the appellant had not only denied making the order but also asserted that he did not know who had done so). Indeed, Tarwirei did the appellant's bidding. However, when grilled under cross-examination Tarwirei made an about turn. He departed from his earlier testimony that it was Mudimu who made the order. He confessed that all that he had told the lower Court was hearsay. Again, on our perusal of the record, we share the trial court's view that Tarwirei was an appalling witness, the worst of all those who testified at the trial.
39. The fact that it was the appellant, and not Mudimu, who was asked by Mudenda to present a written explanation of how and why the former had placed a verbal order with Silksilver to supply the sutures when that company had not won the tender fortified the lower Court's factual finding that it was the appellant who had made that verbal order. Mudenda did not direct Mudimu to present that written explanation. Neither did he require Vuragu nor anyone else, besides the appellant, to tender the written explanation. This is clear evidence that the appellant approached Mudenda to break the news that he had placed a verbal order with Silksilver to supply the sutures to Parirenyatwa Group of Hospitals, and why he had done so. The thick dossier is evidence that the appellant was attempting to justify why he had acted unlawfully.
40. It is not correct that the lower Court ignored the appellant's defence that he had not made the order to Silksilver to supply the sutures. The defence was considered. The evidence placed before the court by the appellant in that regard was contrasted with that adduced by the State. Having done that, the lower Court was satisfied that it was the appellant who had made the order. All he was doing at the trial was attempting to distance himself from that order by throwing mud at everybody, chiefly Mudenda, Vuragu, Mudimu and Zvoushe.
41. Having criminally abused his duty as a public officer by unlawfully and intentionally making the verbal order to Silksilver to supply sutures at an inflated price of US\$86 381.88, the appellant was rewarded by Silksilver. It transferred RTGS\$10 000 and

- RTGS\$5 608 into Exodus and Company's account in reduction of the purchase price for a certain piece of land purchased by the appellant in Ruwa. Silksilver also transferred RTGS\$550 into Wilson Maphosa's bank account. This was payment by the appellant, through Silksilver, for roofing the appellant's house which was constructed on the piece of land in question.
42. The three payments were proceeds of the crime committed and charged as count 1. Those payments were made by the appellant through Silksilver, via Exodus, to conceal their illicit origin. They were made in a different currency for the same purpose. The lower Court, on a consideration of the totality of the evidence, made such findings of fact. It rejected the appellant's evidence that it was only upon his arrest that he knew that the three payments had been made by Silksilver. The appellant said it was Tarwirei who knew that the transfers were made by Silksilver. Tarwirei destroyed the appellant's defence by testifying that he had nothing to do with those payments. Kusena, an employee of Exodus, told the court that the appellant claimed those payments, hence it credited them to him towards liquidation of the purchase price of the piece of land in question. If the appellant had not claimed the payments, so said Kusena, Exodus would not have known that Silksilver was paying the purchase price, on behalf of the appellant, for the Ruwa Stand. In these circumstances, the appellant's defence that he neither used proceeds of crime to pay the purchase price of the Ruwa Stand nor to remunerate Maphosa for roofing the house on that stand was correctly found to be beyond reasonable doubt false.
43. Count 1 is linked to count 2. The evidence on Count 1 is linked to that on Count 2. In light of that, the finding of fact grounding the conviction on count 1 spoke also to count 2. That is why the lower Court found that having made the verbal order to Silksilver to supply the sutures the appellant concealed the reward that he received from Silksilver by causing that company to pay not only for his Ruwa Stand but also Maphosa's fee for roofing the house constructed thereon. Guta, the investigating officer, testified on the link between the unprocedural procurement of the sutures from Silksilver and the company's payments for the appellant's stand and to Maphosa. In the latter regard, his evidence was common cause. In other words, it eventually became common cause that

Silksilver paid for the appellant's stand, and also paid the person who roofed the house constructed on that stand. The concealment of the illicit origin of those funds came in the form of involvement of third parties in making the actual bank transfers. Further, the currency of the payment made by the third party (Silksilver), to Exodus, was not the same currency used by Parirenyatwa Group of Hospitals in paying Silksilver for the sutures. But all this changed nothing. The appellant was receiving dirty money from Silksilver for his vital role in placing the corrupt order.

44. In view of the foregoing, there is no merit in the fourth ground of appeal.

45. In all the circumstances, the appeal be and is dismissed in its entirety.

CHIKOWERO J:

KWENDA J: **Agrees**

Mbano Gasva and Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners