

GERVAS JOSEPH
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 22 July 2014

Criminal Appeal

P. Kawonde, for the appellant
R. Chikosha, for the respondent

HUNGWE J: This appeal concerns the propriety of a conviction for fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] after the following basic facts were proved beyond a reasonable doubt.

The appellant was a tenant of the complainant and her late husband. At some point the complainant and her husband decided to bequeath to their granddaughter Olga Mafusire, their immovable property 7188 Muzari Street, New Mabvuku Harare. Their only problem was that they were illiterate. Their tenant was quite astute on how knowledge of these matters could be obtained, being a barman of an upmarket country club in Harare. They sought his assistance. He obliged. He engaged lawyers to execute a deed of donation. At his assistance, this deed of donation was executed in favour of both Olga Mafusire and himself. When the deed was eventually executed at the relevant Municipal Offices the only beneficiary became the appellant in his own right.

No one explained that their wish had been implemented in a way that benefitted a total stranger until one of their relatives stumbled upon the premises service bills reflecting the appellants names.

When he was confronted with this paper trail by the Police he reversed the registration of the beneficiary back into the couples intended beneficiary.

He was convicted of fraud, all this notwithstanding; and sentenced to 4 years imprisonment of which one year was suspended for five years on conditions.

He now appeals against both conviction and sentence.

His defence at the trial was that the couple had made a donation of their immovable property in his favour and Olga Mafusire's. His defence was correctly rejected on the facts, in my view.

On appeal the following grounds were advanced.

First it was contended that the court *a quo* erred in holding that appellant connived with a lawyer at Kantor and Immerman in preferring a deed of donation whose contents the late John Sandreque was unaware of and that the contents of that deed of donation was not explained to the deceased in a language he understood.

Secondly it was contended that the court erred in holding that the late John Sandreque was incapable of understanding the contents of the documents he had signed.

Thirdly the appellant contends that the court *a quo* erred in holding that because there was no relationship between the appellant and the couple therefore the actions taken to effect cession with appellant's name must have been fraudulent.

The fourth ground attacked the finding of the court that the inclusion of Olga Mafusire's name in the cession pointed to fraud since, at that time, Olga Mafusire was still a minor and therefore could not have been included.

The fifth ground attacked the absence of evidence from the law firm Kantor & Immerman, as well as Council officials as constituting a serious defect in the conviction of the appellant.

Regarding sentence the attack is that it is so severe as to induce a sense of shock.

The crime of fraud as defined in s 136 of the Criminal Law Code is committed by

- a) any person who makes a misrepresentation;
- b) intending to deceive another person or;
- c) realising that there is a real risk or possibility of deceiving another person, and
- d) intending another person to act upon the misrepresentation to his or her prejudice
or
- e) realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice.

The first issue to decide is whether, there was sufficient evidence upon which to convict in light of appellant's attack on the sufficiency of evidence.

It is correct to observe that the matter was decided on the oral evidence given by the complainant. The other potential witnesses in the likes of Solomon Mutizwa, Mr Mawaoko of Kantor and Immerman Legal Practitioners, the District Housing Officer who processed the cession etc may or may not have added value to the case against the appellant.

What must be determined is whether the legal requirements regarding evidence of a single witness have been met before a conviction can be pronounced as sound at law.

It is trite that the court can convict on the evidence of a single witness provided that the single witness has been found to have been competent and credible in every material respect. Section 269 the Criminal Procedure and Evidence Act [*Cap 9:07*].

The complainant, Anastacia Shadreck, told the court that she and her husband had approached their tenant so that they bequeath their immovable property to their granddaughter Olga Mafusire. She described what happened resulting the property changing hands from their names to the appellant's name.

She stated, among other things that, she and her husband were both illiterate. The accused confirmed the fact.

She confirmed that accused took her husband to a firm of legal practitioners. That is a fact.

She and her husband were later taken to council offices. This again is a fact.

These facts corroborate her version regarding the appellant's criminal behaviour. He in my view clearly intended to defraud the complainant and her granddaughter.

In any event, he was the literate one yet when the bills were directed in his name to this house he did not try to explain that a mistake must have occurred somewhere along the line until he was charged with this crime. He then effected a reversal of the process. He is not related to the complainant, his supposed benefactors. In my view the criticism levelled against the finding of the court *a quo* is without substance at all.

The appeal against conviction is dismissed.

As for sentence I do not think that there is any sense of shock handed by the sentence. It is deserved.

BERE J agrees.....

Kawonde & Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners