

**CHIEDZA MAPHOSA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU AND KAMOCHA JJ  
BULAWAYO 31 OCTOBER & 10 NOVEMBER 2011

Appellant in person  
*K Ndlovu* for the respondent

Criminal Appeal

**KAMOCHA J:** After hearing arguments from the appellant who was a self actor and the respondent's counsel we allowed the appeal and indicated that our reasons would follow. These are they.

The appellant aged 54 years was charged with the crime of theft as defined in section 113 (1) (a) (b). The allegations were that on 28 October 2009 she stole a packet of 20 aselin tablets and a half full 30ml bottle of water injection all valued at \$4.50 and was recovered. She pleaded not guilty to the charge.

The appellant was the sister-in-charge of the clinic at Sino-Zimbabwe Cement Company, Lalapanzi. When the appellant was on her way out she was searched at the main gate and was found in possession of the 20 tablets and a half full 30ml bottle of water injection for which she had no gate pass.

She was arrested and arraigned before the magistrates court in Gweru where she pleaded not guilty and sentenced to pay a fine of \$20 or in default of payment 15 days imprisonment despite her protestations. Aggrieved by the decision of the trial court she sought redress from this court by appealing against the conviction.

In her grounds of appeal she complained that the trial court had erred in making a decision based on a gate pass which was not the relevant document in the matter, and disregarded the fact that there was no written company policy as to how the company required drugs for home visitations were to be withdrawn.

She asserted that the court *a quo* had erred in failing to consider that she had been operating on professional guidelines which stipulated that documentation of drugs given on home visitations were to be recorded only after assessment and issuing to patients.

Further, she went on to complain that the trial court erred in relying on the unreliable evidence of the guards who searched the car in which she was being driven in a pre-planned arrangement with management, all of whom knew that she had no gate pass and had not used one for the 3 years she was there.

Further more the decision of the court *a quo* was assailed on the basis that it had misdirected itself in concluding that she could conceal a drug worth \$2.50 and water for injection worth \$2 yet she was in charge of the clinic with access to all drugs for the community and company and was a professional of 30 years experience.

She finally asserted that the court *a quo* erred in finding her guilty when there was no concrete testimony to support the conviction.

In her defence outline she told the court that she was the sister-in-charge at the company clinic. She was the only trained nurse working with nurse aids. There were three shifts at the clinic thus:- 7am to 3pm; 3am to 11am; 11pm to 7am.

Her duties were consultation and counseling services. On the day in question she was going for home visitation and hospital visitations. She had visited some patients the previous day and was supposed to return to give them some medication. When going for visitations she would take some painkillers and medication and assess the patient's condition.

On the day in question she requested for a car which she was given and would be driven by one Ndlovu who, however later said he was unable to go with her. She had decided to call off the visit but she got another driver. She then took a packet of the tablets in question. She got a gate pass for the car. It was her story that she had never produced a gate pass for tablets and had never been asked to produce one for the 3 years she had worked at the company clinic. She did not see the need to get one on that day.

After she had been given another driver and had obtained a gate pass for the car she proceeded to the gate where her car was stopped and was told the car was to be searched. The driver produced the gate pass for the car. She said she held the tablets in her hand. A female guard then searched her bag and found the water injection and asked her about it and her response was that she did not recall how it got there as she was busy. She could not remember how it got there. But the bottom line was that it was meant for the patients she was visiting. She got no satisfactory response when she queried why she was being asked for a gate

pass for the tablets and water injection on that day when she had never been asked to do so before. Instead the items were taken away from her. A day or two later she was informed that she had been fired.

At her trial three witnesses testified for the state namely Samson Sibanda and Nasian Botoman who were security officers and the assistant loss control officer Prince Trust Ndlovu. Both security officers said on the day in question they had been given specific instructions by the loss control officer Mr Mpofu to thoroughly search a Mazda 323 motor vehicle in which the accused was when it got to the gate. A thorough search of the vehicle had to be conducted since something had been put in it. The loss control officer did not tell the witness what it was that was allegedly put in the car.

The vehicle was indeed thoroughly searched resulting in the packet of 20 tablets and the half full 30ml water injection bottle being found.

The first witness Samson Sibanda alleged that the packet of tablets was found in the appellant's shoes but that was hotly disputed by the appellant who said she had it in her hand.

It is common cause that the appellant was going to visit patients that was why she was authorized to use a company vehicle. She uses public transport to and from work.

It is also common cause that there is no written company policy relating to how the sister-in-charge of the company clinic should draw medication to be used for home visitations. There is no clear cut written policy on whether or not she needed a gate pass for medication to be used on home visitations because the appellant said she had never been asked for one during the 3 years she had worked for the company. She was being asked for a gate pass for medication for the first time on that day.

The gate pass produced by the assistant loss control officer was irrelevant and does not shade any light on whether or not the appellant needed a gate pass to take medication for home visitation. The gate pass produced as an exhibit shows the items being taken out as BP machine, stethoscope, and gloves for use at a hospital. These were not being taken out for home visitations. The items cannot be classified as medication.

It is also clear from what appellant put to the witnesses in cross-examination that the gate pass procedure is not documented for all employees to see and read for themselves. It is also difficult to understand why the appellant would steal a packet of 20 tablets and half full bottle of water injection which she was in charge of. She was the one to account for all the medicines at the clinic. The appellant should have been given the benefit of doubt when she

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maintained when cross-examining witnesses that the items were meant for the home visitation patients. The appeal succeeds in the light of the aforesaid.

Further after the state case had been closed the record of proceedings does not show the defence case. The record is incomplete. One cannot tell how the appellant fared under cross-examination. The irregularity is very serious and fatal. It is highly doubtful if she was afforded an opportunity to present her defence. The appeal could have been allowed on that basis alone without considering grounds of appeal raised by the appellant.

In the result it was ordered that the appeal be and hereby allowed.

Ndou J ..... I agree

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