

THE STATE
versus
CLEVER MAVHURA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 28 October 2020

Criminal Review

CHATUKUTA J: The accused was convicted on a guilty plea of contravening section 89 (1) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. He was sentenced to 10 months imprisonment of which 3 months imprisonment was suspended for 5 years on condition of future good behaviour. The remaining 7 months were suspended on condition accused completes 245 hours of community service.

The following are the facts giving rise to the conviction: On 11 August 2020 and at around 2200hrs, the complainant and the accused had an altercation over the issue of a torch. The accused then assaulted the complainant several times with fists all over the face. The accused was medically examined on 14 August 2020. As *per* the medical report commissioned on 27 August 2020 by the officer-in-charge, Wedza and produced before the court as exhibit “A,” one Dr Mwelula noted that the complainant was suffering from a headache and his teeth in the lower jaw were shaking. The entries by Dr Mwelula are in blue ink. There are other entries on the face of the affidavit by one Dr Msau in black ink. Dr Msau’s name and signature appear at the bottom of the affidavit and after the signature and stamp of the commissioner of oaths. Dr Msau’s entries are that the complainant’s 34 to 44 teeth were shaking and the 44th tooth had fallen off. He concluded that the complainant had sustained a permanent injury. Dr Mwelulu had not stated that one tooth had fallen off and that the complainant had sustained a permanent injury.

The present case raises the question whether the entries made by Dr Msau are proper. The question is pertinent particularly in light of s 278 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Section 278 (2) provides that an affidavit relating to a medical examination by a medical practitioner is, on its mere production, *prima facie* proof of the facts and of any opinion therein stated. A medical affidavit therefore takes the place of oral evidence. No two persons can give evidence at the same time and thus cannot depose to one

affidavit. In *Mpofu and another v Chakaza Investments (Pvt) Ltd* HB 103/2010 the court held that:

“...an affidavit filed of record takes the place of oral evidence and in that regard it is practically impossible for two deponents to take a witness stand, take oath and give evidence at the same time. This, in my opinion, is one of the reasons why applicants cannot be allowed to invent a new procedure for themselves and themselves alone.”

In that case the applicant’s affidavit was deposed to by two applicants with both their names and signatures appearing on the same page and before the same commissioner of oaths. The court held that there was no affidavit before it. Although the matter relates an affidavit in a civil matter, the principle stated therein are equally applicable to an affidavit in a criminal matter.

The present case is similar to the *Mpofu* case. It is not competent for the two doctors to have written one affidavit. Further, it is trite that once an affidavit has been commissioned, the deponent cannot amend the affidavit. All that he/she can do is to depose to a new affidavit.

It was improper for Dr Msau to amend Dr Mwelula’s affidavit. The proper procedure which ought to have been followed would have been for Dr Msau to compile his own affidavit, clearly outlining his name, medical qualification, the date on which he completed the exam and the name of the hospital where the exam was carried out. If there was need for an amendment then Dr Mwelula should have filled another affidavit amending his previous findings and then explain why he had filed an amended affidavit.

The trial magistrate therefore misdirected himself by accepting an invalid affidavit (Medical Report). The misdirection does not warrant interfering with the conviction of the accused and the sentence. The seriousness of the offence is reflected in the outline of the state case. It is stated that the accused assaulted the complainant in the face with fists and as a result of the assault the complainant lost a tooth. The loss of a tooth speaks of the permanency of the injury sustained by the complainant. The accused during the inquiry into the essential elements of the offence did not dispute the seriousness of the assault and the injuries sustained by the complainant. The sentence is in my view not excessive and does not induce a sense of shock.

Both conviction and sentence are accordingly confirmed.