



## **THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CRIMINAL CASE NO.206/02

In the matter between:

REX  
VS  
SIPHO MARCO GAMA

CORAM  
FOR THE CROWN  
FOR THE ACCUSED

BANDA, CJ  
T. MASINA  
A.M. LUKHELE

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### **JUDGMENT**

16 February 2009

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[1] The accused is charged in eight counts of fraud. It is alleged that between 17<sup>th</sup> May 1999 and January 2001 at Mbabane, the accused did unlawfully and with intent to defraud misrepresent to the Swaziland Royal Insurance Corporation that his children, wife and mother had died and there and then produced and

exhibited death certificates of the four children, wife and mother and made claims under Funeral Assurance Policy No. F.P. 402141 and Endowment Assurance Policy No. LP 310669 totaling a sum of E30 000. The accused pleaded not guilty to all the eight counts.

[2] In the South African Criminal Law and Procedure Volume II and second edition by Milton at page 755, fraud is defined in the following terms:-

“Fraud consists in unlawfully making with intent to defraud a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.

[3] There are, therefore, five elements which the prosecution must prove to sustain a conviction for fraud. The five elements are the following:

- (1) *misrepresentation*
- (2) *unlawfully made*
- (3) *intent to defraud*
- (4) *which causes*
- [5] Prejudice

Under Section 134 of the Criminal Procedure and Evidence Act it is not necessary to allege that the intention to defraud was directed at any particular person. Sub-Section 1 provides as follows:- “

“S134(1) It shall be sufficient in any indictment or summons in respect of.....

(a) .....

.....  
(b) *Obtaining anything by means of a fraudulent trick or device or any other fraudulent means; to allege that the accused did the act with intent to defraud without alleging the intent of the accused to be to defraud any particular person."*

[4] The accused is a police officer and was stationed at Tshanini Police Station when he was arrested. He had two wives by the name of Thembi Lydia Langa and Sibongile Janet Phiri. Thembi now lives in South Africa where all the six children she had with the accused also live. The names of the children are Letsiwe Gama, Mdumiseni Gama, Mthobisi Gama, Sanele Gama, Sinisile Gama and Thembisile Gama. The accused has stated that he last stayed with Thembi Langa in January 1991 and that he last saw his children in that year.

[5] It is common cause that the accused had bought five insurance policies with the Swaziland Royal Insurance Corporation and that he, together with his children, mother and wife are the beneficiaries of those policies.

[6] The first witness the prosecution called was Sisana Winnie Msibi. She was employed at the Raleigh Fitkin Memorial Hospital as a senior statistical officer and that she was so employed during the relevant period when

the alleged offences, in this case, were committed. She said that she had known the accused for a period of eleven (11) years. She said that her duties as statistical officer included keeping, under her custody, registration forms for all the people who wished to register any death. She briefly narrated the procedure that is followed namely that when a person comes to her office and informs her that he/she has lost a relative a form is given to him/her to take to a doctor to complete it. The form requires details of dates of admission, date of death, and the cause of it. The form is then taken back to the witness' office. The form is known as BMD 10. The witness stated that as statistical officer she had no authority to complete the form which had to be filled by a doctor.

- [7] The witness stated that the accused had been her lover of eleven years. The witness said that she recalled going to Tshanini at the accused's residence. She said that the accused asked her to produce for him death certificates in "an illegal manner" because he was in financial difficulties. She said that she agreed to help him although she knew that it was illegal. She said that she had first refused and that when he persisted she finally agreed to produce fake death certificates for him. It is clear to me that this witness is

an accomplice. She said that she knew that what she was doing was illegal and that she knew that the fake death certificates would be used to make false claims.

[8] I must, therefore, direct myself on the danger inherent in the evidence of an accomplice witness. An accomplice witness is not merely a witness with a motive to tell lies about an innocent person, but such witness is peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. See the case of R V NCANANA 1948(4) SA 399. Section 237 of the Criminal Procedure and Evidence Act provides as follows:-

*“Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice*

*“Provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been actually committed.”*

It is clear, therefore, that corroboration is required as a matter of law before any conviction can be grounded on the evidence of the single evidence of an accomplice.

[9] The first prosecution witness stated that it was the accused who told her that a child was dead. She said that all the details she filled in the forms were given to her by the accused. She remembered that she had produced four such certificates. She said that she made the certificates on different dates. She said that after producing the certificates she would call the accused to collect them. It was the evidence of the witness that the accused told her to send certificates to him. She said she remembered giving one such certificate to her neighbour by the name of Lindiwe Mlangeni and that the others she sent to the Swaziland Royal Insurance Corporation. The witness said that she knew that the accused had gone to make the claims in Mbabane because she remembered on one occasion when the accused sent her own daughter Lindiwe Bhembe to make a claim on his behalf. The witness identified the death certificates in Ex. 1 - Ex. 4 as the certificates which she had produced in her office. This evidence was supported by the evidence of PW5 the handwriting expert witness who confirmed that the death certificates in Ex. 1 - Ex. 4 had been written by the same person who had provided specimen writing on BMD 10 from B1 - B36.

[10] The witness said that she was prepared to do anything for the accused because they were lovers. The witness stated that she had sent her daughter Lindiwe Bhembe to the accused and that she had also sent Landiwe Mlangeni to Swaziland Royal Insurance Corporation to make a claim on behalf of the accused. She said Mlangeni brought a sum of E2500 which the witness gave to the accused. The accused did not give her any part of this money.

[11] The witness told court that she knew that the children were not dead and that she got this information from the accused as they had been living together.

[12] The second witness the prosecution called was Elda Gama. This is a lady who, although not the accused's biological mother, is the person who had brought up the accused as his mother had died a long time ago when the accused was still young. She is the person the accused has known as his mother. According to this witness the accused had never seen his biological mother. This witness is the mother who was allegedly dead and her death was the subject of a claim for funeral benefits by the accused and this can be seen from Exhibit 13. This witness stated that there is no other Elda at her home except herself. It is

important to consider the evidence of PW8 so that it can tie up with the evidence of what is contained in Ex. 13.

[13] P.W. 8 is a witness who is employed in the Department of Registrar of Births and Deaths. She had been with the department for twenty years. She is the District Registrar for Manzini District. Her duties included signing Birth and Death Certificates. She remembered that she signed death certificate of Mdumiseni Gama and Sibongile Gama. Although she could not remember all the names she was nevertheless able to remember that all the certificates bore the surname of Gama. This witness remembered the accused coming to her in company of one Lindiwe Dlamini and Cynthia whose surname she could not remember. The witness said that the accused came to her through a clerical officer. She said that she did not sign all the certificates at the same time. She identified the death certificates produced in Exs. 7 - 14 as being issued by her office and was either signed by her or her assistant. This witness also referred to the procedure that is followed before a death certificate can be issued, namely that where death has occurred in hospital a doctor must give details of death and that where death has occurred outside hospital a chief must confirm the



details of death. She remembered that she received details of death regarding Mdumiseni Gama from a chief. She identified Ex. 17 as the register of death which had been issued from her office. She said that the accused signed a declaration stating that the facts in the death certificate were correct. It is to be noted that the affidavit in Ex. 17 was signed by the accused and was witnessed by the Chief's runner PW7 in this case. The witness identified death certificate in Ex 7 as having been issued by her office and was signed by her assistant. She also identified death certificate in Ex. 9 as having been signed by her assistant. The witness said she issued death certificates for Sanele Gama, Mthobisi Gama and Elda Gama as exhibited in Ex 14, Ex. 11 and Ex. 12.

[14] The third witness to be called by the prosecution was Martha Phiri. She stated that she was the mother of the accused second wife Sibongile Phiri Gama. The witness said that Sibongile was her second born child and that she was smeared with red ochre by the accused although no lobola was paid. She recognized the accused in the dock as the husband of Sibongile and more importantly that Sibongile is alive and that she was presently working with an Industrial firm in Nhlangano. She said that she removed

Sibongile from Sigombeni when she heard that she was dead. She said Sibongile has two children with the accused. Sibongile was also a subject of claims for funeral benefits under Funeral Policy NO.402141 and Endowment Policy LP 310669. This is shown in exhibit 9.

[15] The fourth prosecution witness was Siphiwe Nora Hlatshwayo. She was in employment between 1999 and 2001 and worked for the Swaziland Royal Insurance Corporation as Life Manager. She worked within the Life Department and was responsible for authorizing payments and claims whenever they were made. She stated that they had a policy holder in the name of Marco Gama who had purchased insurance policies which included Endowment benefits, Disability benefits and Funeral benefits. She remembered that Marco Gama had purchased the Funeral Policy in 1994 and the Endowment policy was purchased in 1997. Marco Gama had included as beneficiaries his wife Janet, his mother Elda and five of his children. The witness stated that she could only remember the name of children for whom the accused had claimed funds. She recognized exhibit 5 as the document their client Siphon Marco Gama had completed. She said that it is a claim form which was filled on 17<sup>th</sup> November 1994.

She informed court that the owner of the policy was Siphon Marco Gama and that the beneficiaries were his wife Sibongile Janet Gama and his child by the name of Mdumiseni Gama. Other children were Letsiwe Gama, Thembisile Gama, Sanele Gama, Sinisile Gama and his mother Elda Gama. The witness then described the procedure that is followed in making claims. She stated that when death has occurred the person who has a policy approaches the corporation and informs it of the death. A claim form is given to be filled in and that the corporation signs a testimonial or certificate to confirm the fact of death and this usually takes the form of a death certificate. If the deceased is a child the corporation will require a birth certificate and an identity card or a travelling document. She said that Marco Gama came to her office to make a claim. He had gone there for the first time in May 1999. She said that he was claiming funds for the child by the name of Mdumiseni Gama. The witness said the claim was successful and funds were paid. The witness further stated that the procedure she had described was followed in every claim made.

[16] The witness said that in respect of the claim for Mdumiseni Gama the entitlement was E3000 for funeral

benefits and under the Endowment benefits he was entitled to E5000.00. She identified passport number C374118 as the travel document of Siphon Marco Gama, the accused. She identified a birth certificate for Mdumiseni Gama and a death certificate, there was also a funeral claim form; a letter from the company addressed to the policy owner together with a cheque for E3 000.00. There was also a cheque requisition form sent to the accountant with instructions to issue a cheque. The witness stated that a cheque was issued on behalf of Marco Gama by the Corporation. All the documents are shown in exhibit 6.

[17] The witness was shown exhibit 7. The witness stated that a cheque was one of those documents which were issued to Marco Gama in respect of Mdumiseni Gama for endowment policy and that the amount was for E5 000.00. The cheque was paid on 27<sup>th</sup> May 1999. There was identity card for Siphon Marco Gama. The witness said the cheque was paid to Siphon Marco Gama.

[18] The witness was shown exhibit 8. She stated that it contains a claim form for funeral benefits and that the form was submitted by Marco Gama. It was dated 12<sup>th</sup> August 1997. The beneficiaries were Siphon Marco Gama, his wife Sibongile Janet Gama and the

children together with his mother.

[19] The witness stated that there were subsequent claims made. She said they were made in November 1999. It was in respect of his wife Sibongile. The claim was successful and funds were paid. The witness stated that on this occasion the client (Sipho Gama) sent someone to collect the funds. The witness stated that they allow a representative to make a claim. She stated that the representative who was sent was Lindiwe Bhembe. The witness recognized documents in exhibit 9. She said that the exhibit contain documents supporting the payment in respect of Sibongile Gama the wife of Sipho Marco Gama. The amount was in the sum of E8 000 split into E5000 for endowment benefits and E3 000 for funeral benefits and that this amount was paid to Lindiwe Bhembe. The witness stated that Sipho Marco Gama had sent a letter requesting the corporation to make payment to Lindiwe and that he had sent the relevant documents. The witness recognized exhibit 10 as the letter which was written to the corporation by Sipho Marco Gama. It is important to note that the accused has admitted writing this letter. There is also the further evidence by the expert witness who confirmed that the accused had written exhibit 10.

[20] The witness stated that a further claim was made in April 2000. It was made by Sipho Marco Gama in respect of his child Mthobisi Gama. The amount paid was E8 000 divided into E5000 endowment benefits and E3000 for funeral benefits. The funds were paid to Mr. Gama, the accused. The witness said that Mr. Gama personally went to collect the funds. The witness recognized exhibit 11 as documents submitted by Mr. Gama for a claim in respect of his child Mthobisi Gama. The witness said that it was claimed in respect of the funeral benefits and that it was for the sum of E3000 and it was paid on 6<sup>th</sup> April 2000. The documents further show a copy of Mr. Gama's travel document number C374118.

[21] The witness was shown exhibit 12. She stated that they are documents which were brought by Mr. Gama in respect of a claim from the endowment policy in respect of his child Mthobisi Gama. It was for E5000 and was paid on 6<sup>th</sup> April 2000. There were subsequent claims made by Gama. One such claim was made in July 2000. The witness stated that it was in respect of Mr. Gama's mother Elda Gama. The witness recognized exhibit 13 as containing documents to support the claim. She stated that they are

documents which support payment to Mr. Gama in respect of his mother Elda Gama. It was in the sum of E2 000 divided into E1 000 endowment benefits and E1 000 for funeral benefits and it was paid on 26<sup>th</sup> July 2000.

[22] The witness recognized exhibit 14. She stated that they are documents to support payment that was made in December 2000. The payment was in respect of Sanele Gama. The witness stated that Mr. Gama had sent Lindiwe Mlangeni to make the claim. The witness stated that the amount was E2 500 and that it was paid to Lindiwe Mlangeni and it was in respect of endowment benefits.

[23] The witness recognized exhibit 15. She stated that they are documents to support payment that was made in January 2001. The witness told court that Mr. Gama had gone to claim the benefits in respect of his son Sanele. She stated that the documents were submitted by Mr. Siphon Gama and was claiming against funeral benefits in respect of her son Sanele Gama. The amount paid was E1 500 and it was paid to him on the 24<sup>th</sup> January 2001. There was a copy of a travel document of Mr. Gama number C374118.

[24] The witness stated that the company suffered some prejudice. She stated that the funeral policy was designed to assist people where death had occurred. She stated that the claims in this case were made in respect of people who were still alive. She said that the accused had made misrepresentations to the Corporation. The witness stated that the corporation had engaged private investigations to examine the suspicious claims. The report which was submitted showed that the company had suffered prejudice because it had paid claims which were not founded on true facts.

[25] The fifth witness the prosecution called was the handwriting expert Superintendent Lawrence Mashabela. He has worked in the South African Police Services. He examined the specimen handwritings which had been taken from the accused and from Msibi. He was a most impressive witness. He examined the writing on the medical certificates Ex. 1 - Ex. 4 with those on specimen writings on MBD10 forms B1 - 36. He came to the conclusion that these documents were written by the same person PW1 in this case. Indeed PW 1 did not dispute writing the four certificates (I.E. Exhs. 1 - 4). The expert witness also examined specimen writing on B1 - 10, B11 - 12, B13 - 15 and



compared them with Ex. 10. He came to the conclusion that the writer of the specimen writing was the same person who wrote Ex. 10. The accused has admitted being the author of Ex. 10.

[26] The sixth witness was Nonophile Mdluli who was employed as a supervisor at the First National Bank at Matsapa in 2001. She recalled that on 18<sup>th</sup> May 1990 the accused went to the Bank to cash a cheque which had been drawn on FNB, Mbabane. The drawer was the Swaziland Royal Insurance Corporation. The witness stated that the cheque was for the sum of E3 000. The witness stated that the accused produced a graded tax certificate when he cashed the cheque. The witness stated that that cheque had originally been crossed and had later been opened and the witness as supervisor phoned Mbabane Branch to seek authority for the payment of the cheque.

[27] The witness recognized the cheque in Ex. 6 as the cheque which she had been talking about. The cheque reflected the identity number of the accused which was 3221014186478, his graded tax certificate.

[28] The seventh witness is Mr. Mbatha Matsebula. He comes from Sigombeni area and he is the chief's

runner. He stated that he knew the accused and he remembered him coming to request the witness to go and prepare a certificate for his son Mdumiseni. The witness said they went and acquired a certificate. The witness stated that they acquired the certificate from Manzini from the Registrar of Births and Deaths. He said that the certificate was given to the accused. The witness further stated that the accused did not tell him where they were going but only told him to accompany him because his son had died. The witness stated that he did not see the son and that he trusted the accused as a police officer who would not tell him something which was untrue. The witness stated that he did not attend any funeral of the accused's son and that there had been no funeral of the accused son in his area.

[29] The case for the accused is that he did not commit any of the offences brought against him. He has contended that the claims which were made to the Swaziland Royal Insurance Corporation were made as a result of a conspiracy between Lindiwe Bhembe and Sisana Msibi. The accused has admitted that he has five Insurance Policies with the Swaziland Royal Insurance Corporation. He admitted making the claim in respect of her mother Elda. He denies making any

further claims on the policies. He said that from the sum of E8000.00 he claimed in respect of Mdumiseni he sent E5000.00 to South Africa for his children and he used the balance of E3000.00 on his own needs. He denies sending Lindiwe Bhembe to make a claim on his behalf. In cross examination, however, he appeared to admit making claims only in respect of Mdumiseni and his mother. The following is what I quoted him as saying :-

*“As far as I know I only processed claims for Mdumiseni and my mother. As far as I can recall I did not process any other claims”.*

[30] When he was shown exhibit 15 this was his response:

*“It has my signature. It is difficult to recall if I received this money. It has my signature. I received a lot of cheques from Swaziland Royal Insurance Corporation. The cheque at the back has my signature”.*

[31] And further he says this:-

*“I have made a number of claims and I would not know which cheque I received for funeral expenses or on loan”.*

[32] And when he was shown Ex. 10 the accused said as follows:-

*"I have seen the letters. I wrote these two letters. I wrote them so that Lindiwe should go to Swazi Royal Insurance Corporation for claims and I would write to Swaziland Royal Insurance Corporation."*

[33] This is a criminal case and it is the duty of the prosecution to prove their case against the accused beyond reasonable doubt. There is no onus placed on the accused to prove his innocence. But the required standard of proof in criminal cases is now well settled as Denning J, as he then was, said in the case of MILLER V MINISTER OF PENSIONS 1947 2 All E.R. 372 at 373:-

*"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt."*

[34] I have considered both the evidence which was called for the prosecution and the evidence which the accused gave in his defence. There can be no doubt in my judgment that the accused requested Msibi his girlfriend to produce death certificates which were false. It was on the false information which the

accused gave to witnesses PW1 and PW8 that the death certificates were issued. Msibi was a long time lover and I could find no reason why she would concoct a story as she told to this court. She said she only agreed after persistent requests by the accused to help him and that she produced the false death certificates because of his financial problems. She said she knew that what she was about to do was illegal but decided to help her lover in his financial problems. She knew that the children were alive as she was told so by the accused himself. I found PW1 to be a credible witness and I accept her evidence.

[35] PW8 also stated that she issued death certificates on the basis of the false information which the accused gave to the witness. I accept the evidence of this witness is credible. I could find no evidence to suggest that this witness knew that the information the accused gave her was false.

[36] The accused's story that one Lindiwe Mlangeni came to report to him that his children had died is false and I reject it. It is to be observed that the information on the death of the children did not come from his former wife or her relative. Indeed it was the evidence of Mr. Langa PW10 that any message of death about the

children could only have come through from his sister the accused's wife or himself as the uncle of the children. It is extraordinary that children he had not seen for a long time suddenly started to die one by one and he never tried to go to South Africa and verify what was the cause of this spell of deaths in his family. It is clear to me that when the accused set out to engage on this fraudulent mission he knew that the information he had gathered about his family was false. There can be no doubt that his intention was to mislead the insurance company so that they could pay the claims he had fraudulently made.

[37] It is difficult to understand why a man indeed a father, a husband and a son would feign the death of his own children, his own wife and a woman who had brought him up as his only mother and all that for E30 000.

[38] The evidence against the accused is overwhelming and most of it uncontroverted. I accept the evidence of Sisana Msibi that she had sent Lindiwe Mlangeni to Swaziland Royal Insurance Corporation to make claim on behalf of the accused. I also accept her evidence when she said she handed the money to the accused. I further accept the evidence of Lindiwe Bhembe PW3 when she said that she gave the money to the accused

after she had claimed it for him. Ex. 10 appears to support this contention. There is evidence that all the cheques were paid to him or were cashed on his behalf and handed to him. All the requisitions for authority to issue cheques were accompanied by the identity number of the accused. I reject the accused suggestion that this case is a result of a conspiracy between Lindiwe Bhembe and her mother Sisana Winnie Msibi as having no basis for it. I am satisfied and find that the prosecution has proved their case against the accused beyond a reasonable doubt. In the result, I find the accused guilty as charged on all eight counts and convict him accordingly.

RICHARD A. BANDA  
CHIEF JUSTICE

Masina: He is a first offender.

Lukhele: I was prepared to have mitigation today but I have received information which needs verification and would ask for adjournment to Monday the 23<sup>rd</sup> February for mitigation.

Masina: I have no objection.

CJ : Adjournment granted but the accused bail bond is cancelled and shall be remanded in custody

to

23/02/09 for sentence.

R.A. BANDA  
CHIEF JUSTICE  
16/02/2009