Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Thursday 9 May 2024 – Thursday 16 May 2024

Virtual Hearing

Name of Registrant:	**Elias Kudakwashe Matungamire**
NMC PIN	18H1107E
Part(s) of the register:	Registered Nurse – Adult Nursing RNA, level 1 – (20 September 2018)
Relevant Location:	Gloucestershire
Type of case:	Misconduct
Panel members:	Louise Fox (Chair, Lay member) Catherine Devonport (Registrant member) Vicki Harris (Lay member)
Legal Assessor:	Nicholas Baldock (9 and 10 May) Nigel Ingram (13-17 May)
Hearings Coordinator:	Nicola Nicolaou
Nursing and Midwifery Council:	Represented by Eleazar Anyene, Case Presenter
Mr Matungamire:	Not present and not represented
Facts proved:	Charges 1a, 1b, 1c, 1d and 2
Fitness to practise:	Impaired
Sanction:	**Striking-off order**
Interim order:	**Interim suspension order (18 months)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Matungamire was not in attendance and that the Notice of Hearing letter had been sent to Mr Matungamire's registered email address by secure email on 8 April 2024.

Mr Anyene, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Mr Matungamire's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In the light of all the information available, the panel was satisfied that Mr Matungamire has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mr Matungamire

The panel next considered whether it should proceed in the absence of Mr Matungamire. It had regard to Rule 21 and heard the submissions of Mr Anyene who invited the panel to continue in the absence of Mr Matungamire.

The NMC has attempted to contact Mr Matungamire twice via email in September 2023 and a further two times via telephone in September 2023. The NMC also sent Mr Matungamire a text message on 25 April 2024 informing him that an email had been sent to him. These attempts to contact Mr Matungamire were to provide him with information

regarding this hearing, and to see if he would engage with the NMC process. However, he has not responded to any of these communication attempts and has not had any contact with the NMC since 2021.

Mr Anyene submitted that there had been no engagement at all by Mr Matungamire with the NMC in relation to these proceedings and, as a consequence, there was no reason to believe that an adjournment would secure his attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *'with the utmost care and caution'* as referred to in the case of *R* v *Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel has decided to proceed in the absence of Mr Matungamire. In reaching this decision, the panel has considered the submissions of Mr Anyene, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and the case of *Davies v Health and Care Professions Council* [2016] EWHC 1593 (Admin) and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Matungamire;
- The NMC has made reasonable attempts to contact Mr Matungamire, but he has not engaged with the NMC and has not responded to any of the letters sent to him about this hearing;
- There is no reason to suppose that adjourning would secure his attendance at some future date;
- The allegations in this case are very serious;
- The charges relate to events that occurred in 2021;

- One witness would attend on day one to give live evidence, and another on day two;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr Matungamire in proceeding in his absence. Although the evidence upon which the NMC relies has been sent to him at his registered address, he has made no response to the allegations. He will not be able to challenge the evidence relied upon by the NMC and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mr Matungamire's decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and not to provide evidence or make submissions on his own behalf.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Mr Matungamire. The panel will draw no adverse inference from Mr Matungamire's absence in its findings of fact.

Details of charge

That you, a registered nurse:

1) On 31 May 2021

a) Lay down on Resident A's bed next to her so that your body was touching, or in very close proximity to, hers. **[PROVED]**

b) Lowered Resident A's trousers and underwear. **[PROVED]**

c) Put your arm over Resident A's body so that your hand was in close proximity to her unclothed vaginal area. **[PROVED]**

d) Touched or attempted to touch Resident A's vaginal area with your hand. **[PROVED]**

2) Your conduct at Charges 1a), 1b), 1c) and/or 1d) was sexually motivated in that it was done for sexual gratification. **[PROVED]**

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.

Background

Around the time of 31 May 2021, Mr Matungamire was carrying out shifts at Woodstock Nursing Home ('the Home') in Gloucester via an Agency.

It is alleged that on 31 May 2021, Mr Matungamire worked a shift at the Home from 08:00 until 20:00. At roughly 18:00, Witness 1, a healthcare assistant at the Home, entered Resident A's room. Resident A was an elderly female resident living with dementia. She lacked capacity to make informed choices and had difficulties with communication. Upon entering the room, Witness 1 noticed that Resident A was in a state of semi undress. She had appropriate clothing on the top half of her body, but her trousers and underwear were halfway down her legs around her knees. Mr Matungamire was lying on the bed behind Resident A in a 'spooning' position.

Witness 1 escalated what she had seen to one of the senior members of staff, and also spoke to the Home Manager, Witness 2, on the phone regarding the incident. The police were informed, and Mr Matungamire was arrested later that day. Following a police

investigation, they found there were evidential difficulties and Mr Matungamire was not charged with any offence.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Anyene on behalf of the NMC.

The panel has drawn no adverse inference from the non-attendance of Mr Matungamire.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Witness 1: Healthcare Assistant at the Home
- Witness 2: Home Manager at the Home

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by the NMC. Mr Matungamire did not produce any written submissions for this hearing, but the panel had sight of two testimonials and a police report which included a summary of his responses during a police interview under caution.

The panel then considered each of the disputed charges and made the following findings.

Charge 1a

That you, a registered nurse:

1) On 31 May 2021

a) Lay down on Resident A's bed next to her so that your body was touching, or in very close proximity to, hers.

This charge is found proved.

In reaching this decision, the panel took into account all the documentary evidence before it and considered the oral evidence it had heard from Witness 1 and Witness 2.

The panel acknowledged that Mr Matungamire was not present at the hearing and had not provided any statements to the NMC in relation to the charges.

The panel heard that, at the request of Witness 2, Witness 1 had drafted a local statement approximately one hour after the incident had occurred on 31 May 2021. This statement was included in the Exhibits attached to her witness statement, whose accuracy was confirmed by Witness 1 during her oral evidence. She explained to the panel how she had a clear view of both Resident A and Mr Matungamire on entering the room and there were no bed covers over Resident A's body. Within the local statement, Witness 1 said *'I came up to Resident A room to collect her crockery from tea time. when I entered the room, I saw the following:* [Mr Matungamire] *was led* [sic] *on the bed with Resident A. He was led* [sic] *behind her in a 'spooning' position'.*

It was the panel's understanding, based on the dictionary definition of 'spooning' that this is a form of cuddling where two people lie facing the same direction, and one person's back presses against the other person's torso and chest.

The panel noted that the only explanation it had on behalf of Mr Matungamire for his actions was within the police report dated 19 April 2022 which contained a non-verbatim summary of the interview with Mr Matungamire. The police report states:

> *'He was doing the medicine rounds and had got to room 24 to administer the after dinner medicine… on getting closer to the resident he noticed the bedding was wet and thought she would need her incontinence pad changing. He took down her trousers and under wear and moved the pad, he decided she did need to be changed. At this point before continuing he thought the bed was too low and did not want to hurt his back so he wanted to adjust the electric powered bed. It was not working with the control. At this point put his hand on the bed and bent down by the side of the bed to check that the plug was in and that it had power and it was working.'*

During her oral evidence, Witness 1 was asked to explain the layout of the room using the diagram that she had produced with her NMC statement. Witness 1 informed the panel that the bed was plugged into a socket located above the headboard, towards the window side. This was confirmed by Witness 2 during her oral evidence, and she subsequently produced a photograph of the room confirming that the plug socket had not been moved since the incident and was located in that position.

Witness 1 also stated that Resident A was facing her as she entered the room, and that Mr Matungamire was lying behind her and '*his right hand was across her body and near her vaginal area'.* Accordingly, the panel determined that it was highly unlikely that Mr Matungamire's right hand was reaching for the plug socket. The panel noted that if Mr Matungamire was in Resident A's bed in the position that Witness 1 allegedly found him in, it would not be possible for him to be reaching for the plug socket to check that the bed was working as the plug socket would have been above and behind him. This is supported by oral evidence from Witness 2 in which she said she *'cannot see why* [Mr Matungamire] … *would have been in the position he was in on the bed because he would not have been assisting the resident at that time'.*

The police report states that Mr Matungamire claimed that *'the bedding was wet'* as the reason why he was providing intimate personal care by changing Resident A's incontinence pad. However, Witness 1 in her local statement said *'there was no sign of wetness on her bedding/sheets'.*

The panel determined that Witness 1's oral evidence was clear and credible, and consistent with her local statement and her NMC witness statement. Witness 1 explained how she felt something was wrong, so she quickly reported it to her manager. The panel considered that Mr Matungamire's account to the police was unlikely given the documented position of the plug socket and Witness 1's statement that Resident A's bedding was not wet.

Therefore, the panel determined that it was more likely than not, that on 31 May 2021 Mr Matungamire was laying down on Resident A's bed next to her so that his body was touching, or in very close proximity to hers.

Charge 1b

b) Lowered Resident A's trousers and underwear.

This charge is found proved.

In reaching this decision, the panel took into account the police report which stated, *'he took down her trousers and underwear and moved the pad'.* This is supported by evidence from Witness 1 who said in her NMC witness statement that *'*[Resident A]'s *trousers and underwear were half way down her legs… I haven't ever seen anyone else pull clothing down that far for a simple pad change'.*

The panel determined that there was no contradiction between the police report letter and Witness 1's evidence to suggest that Mr Matungamire did not lower Resident A's trousers and underwear.

The panel determined that it was more likely than not, that on 31 May 2021 Mr Matungamire lowered Resident A's trousers and underwear.

Charge 1c

c) Put your arm over Resident A's body so that your hand was in close proximity to her unclothed vaginal area.

This charge is found proved.

The panel noted that Witness 1's evidence was that she had a clear view of the room. The panel also took into account Witness 1's local statement where she had written *'*[Mr Matungamire] *was led* [sic] *on the bed… he was led* [sic] *behind her in a 'spooning' position… he was not wearing any PPE. His right hand was across her body and near her vaginal area'.*

In her oral evidence, Witness 1 confirmed that the incontinence pad goes all the way from the front to the back of the genital region, and that Mr Matungamire's hand was at the front of the pad which is close to the vaginal area. This is supported by her local statement in which she had written, *'I saw her try to grab his hand that was in front of her vagina and push it away – I think she had her hand around top of his hand by his wrist'.*

The panel determined that there is a lack of evidence from Mr Matungamire apart from the police report letter stating that Mr Matungamire *'put his hand on the bed and bent down by the side of the bed to check that the plug was in'.* The panel determined that this contradicts the above evidence provided by Witness 1.

The panel preferred the oral evidence of Witness 1 which had been tested in the hearing. This was supported by her contemporaneous local statement and therefore carried significantly more weight.

In light of the above, the panel considered that it was more likely than not that Mr Matungamire put his arm over Resident A's body so that his hand was in close proximity to her unclothed vaginal area.

Charge 1d

d) Touched or attempted to touch Resident A's vaginal area with your hand.

This charge is found proved.

The panel was satisfied that charges 1a, 1b, and 1c have been found proved. It also took into account Mr Matungamire's explanation in the police interview that he was trying to change Resident A's pad.

The panel took account of the following part of Witness 1's NMC witness statement:

> *'When I saw Resident A and* [Mr Matungamire] *it looked like his hand was by her vagina. I couldn't work out if his hand was under or over her pad. There were not any bed covers over Resident A's body. I could see his head and shoulder and arm as these were leaning over Resident A but his legs were tucked in right behind hers. I believe they were in contact with the back of her legs in a spooning position … With regards to her pushing him away, I saw her try to grab his hand that was in front of her vagina and push it away – I think she had her hand around top of his hand by his wrist.'*

The panel also considered the police report letter in which Mr Matungamire asserted that he was providing intimate care to Resident A.

The panel determined that, based on the evidence from Witness 1 regarding where Mr Matungamire was lying and where his hand was located, as well as her explanation that she could not say if his hand was under or over the pad, it could not be proved, on the balance of probability that Mr Matungamire actually touched Resident A's vaginal area.

The panel went on to consider whether there was sufficient evidence to prove that Mr Matungamire attempted to touch Resident A's vaginal area.

In light of Mr Matungamire's body and hand positions which were not consistent with changing Resident A's pad, the panel determined that it was reasonable to infer that Mr Matungamire had been attempting to touch Resident A's vaginal area, and therefore, finds this part of the charge proved.

Charge 2

2) Your conduct at Charges 1a), 1b), 1c) and/or 1d) was sexually motivated in that it was done for sexual gratification.

This charge is found proved.

In reaching this decision the panel considered the wider context in which the incidents took place as well as considering each of the sub-charges for charge 1 individually.

The panel acknowledged that Witness 1 in her NMC statement had outlined concerns about Mr Matungamire's behaviour towards her and another healthcare assistant whilst working at the home. She alleged that he would make inappropriate comments about their appearance, touch them unnecessarily including unsolicited and unwanted hugs and back rubs, and asked them out on dates. She stated that he would not stop even when asked. The panel considered this raised the concern of an attitudinal issue of crossing professional and personal boundaries.

Regarding charge 1a, the panel noted Mr Matungamire told the police he was in the process of changing Resident A's pad. The panel heard evidence of Witnesses 1 and 2 that Registered Nurses who were permanent members of staff rarely completed personal care for residents as this was the role of healthcare assistants. They both stated it was even less likely that Registered Nurses from an agency would provide intimate care to residents. Witness 2 told the panel in her oral evidence, *'there is no reason at all for … any member of staff to be led* [sic] *on the bed with a resident… agency nurses don't tend to do any personal care at all.'*

The panel also took into account Witness 2's NMC statement in which she said:

> *'Resident A is particular and likes female carers but sometimes it is not possible. I exhibit the Gender Sensitive Intimate Care Policy ... At the time Resident A's care plan did not state that she wanted same gender care. At that time it was just informal information. I cannot say if* [Mr Matungamire] *would have been aware of this.'*

Witness 2's evidence was clear that the Home was not understaffed on that day and there were female members of staff available to provide intimate personal care to Resident A. The panel also noted that the Home had a Gender Sensitive Intimate Care Policy in place, and that only in exceptional circumstances would someone of the opposite gender provide personal care. The panel determined that Mr Matungamire would have known this from his induction at the Home and from his training and experience as a registered nurse.

The panel determined that, if Mr Matungamire was in Resident A's room to provide intimate personal care, he should have been wearing gloves as in her live evidence, Witness 1 said it was mandatory to wear personal protective equipment (PPE) at the time. The panel noted that Mr Matungamire had told the police he was wearing gloves. However, Witness 1 said she had a clear view and could see he wasn't wearing any PPE, such as gloves or an apron, when she walked in. The panel preferred Witness 1's

evidence as it is supported by her contemporaneous local statement, and oral evidence. The panel considered that the absence of PPE is inconsistent with Mr Matungamire's claim that he was providing intimate personal care. It further determined that there could have been no reason for any member of staff to be lying on the bed to change a resident's pad.

The panel also took into account Witness 1's evidence that when she entered the room, she saw Mr Matungamire appear to react by jumping up as if startled. She said, *'he jumped up like he was doing something how he shouldn't be'.*

Therefore, the panel did not accept Mr Matungamire's account that he was changing Resident A's pad and could not think of any other reason except for sexual gratification that Mr Matungamire would be lying in a 'spooning' position on the bed in close contact with Resident A having pulled down her trousers and underwear below her knees.

Regarding charge 1b, the panel acknowledged Mr Matungamire's acceptance in the police interview that he lowered Resident A's trousers and underwear. The panel heard from Witness 1 and Witness 2's evidence that there was no reason why he should have been conducting such intimate personal care.

The panel determined that even if Mr Matungamire was changing Resident A's pad, in order to preserve the dignity of the resident, there could be no justification for him to lower her trousers and underwear as low as was alleged. This is supported by Witness 1's comments in her written statement, in which she said:

> *'To do a pad change in bed you have to take their trousers and underwear down by rolling them from side to side and slowly pulling their clothing down a bit at a time until it is far enough to pull the pad out … you normally only have to pull the clothing down to half way down the thigh to be able to replace the pad. When I saw her the trousers were below her knees and pants were sitting on her knees. Most of the*

people I work with have the same procedure. I haven't ever seen anyone else pull clothing down that far for a simple pad change.'

The panel determined that it could not ascertain any realistic alternative reason why Mr Matungamire would have exposed as much of Resident A's lower half and laid next to her in a 'spooning' position in her bed unless it was sexually motivated.

Regarding charges 1c and 1d, the panel preferred the evidence from Witnesses 1 and 2 and did not consider that Mr Matungamire was being truthful in his account in that he was changing Resident A's pad. Therefore, the panel determined that there could have been no reason to be lying in her bed or to have his hand in close proximity to or attempting to touch her vaginal area other than for sexual gratification.

Having considered all of the above, the panel determined that charge 2 is found proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Mr Matungamire's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's ability to practise kindly, safely, and professionally.

The panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the

circumstances, Mr Matungamire's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311 which defines misconduct as a *'word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.'*

Mr Anyene invited the panel to take the view that the facts found proved amount to misconduct. He drew the panel's attention to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015', updated in 2018 (the Code) and outlined how, in the NMC's view, Mr Matungamire had breached the Code, specifically:

> *'Code 1: Treat people as individuals and uphold their dignity.* [Mr Matungamire] *is in breach of 1.1 (Kindness, respect..), 1.5 (uphold people's human rights), among others.*
>
> *Code 4: Act in the best interests of people at all times.*
>
> *Code 20: Uphold the reputation of your profession at all times.'*

Mr Anyene submitted that Mr Matungamire's actions reflect clear instances of poor practice, and that as a registered nurse he poses a risk of harm to those under his care, particularly elderly, vulnerable patients. Furthermore, Mr Matungamire disregarded the Home's Gender Sensitive Intimate Care Policy.

Mr Anyene submitted that Mr Matungamire behaved inappropriately within his place of work which displayed attitudinal concerns. He submitted that Mr Matungamire abused his

position as a registered nurse, and that his practice fell short of the expectations of the Code.

Accordingly, Mr Anyene submitted that the facts proved amounted to misconduct.

Submissions on impairment

Mr Anyene moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. He made reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin).

Mr Anyene submitted that in terms of whether Mr Matungamire's fitness to practise is currently impaired, it is not akin to him doing something in the past that has now been put right, but rather that he has shown an incremental seriousness in his misconduct from the charges found proved. Mr Anyene highlighted the following concerns regarding Mr Matungamire's actions:

- Taking advantage of a vulnerable resident;
- Not engaging with the regulatory progress in any way to suggest any reflection or remorse; and
- Background of other conduct, suggesting abuse of position by Mr Matungamire at other times.

Mr Anyene submitted that the sexual nature of the facts proved is not remediable by any training, insight, or steps taken to strengthen his practice; and that Mr Matungamire poses a risk to the public in the future, particularly vulnerable females.

Mr Anyene submitted that a finding of impairment is necessary to uphold proper professional standards and conduct in this case. Mr Matungamire's misconduct is submitted as having the potential to affect the morale and professional standards within the profession, if not found impaired.

Mr Anyene concluded that, in the wider public interest, Mr Matungamire's misconduct will undermine public confidence in the profession.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council* (No 2) [2000] 1 A.C. 311 and *Nandi v General Medical Council* [2004] EWHC 2317 (Admin).

Decision and reasons on misconduct

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Mr Matungamire's actions did fall significantly short of the standards expected of a registered nurse, and that Mr Matungamire's actions amounted to a breach of the Code. Specifically:

> *'**Prioritise people***
> *You put the interests of people using or needing nursing or midwifery services first. You make their care and safety your main concern and make sure that their dignity is preserved and their needs are recognised, assessed and responded to. You make sure that those receiving care are treated with respect, that their rights are upheld…*

1. Treat people as individuals and uphold their dignity

To achieve this, you must:

1.1 *treat people with kindness, respect and compassion*

4. Act in the best interests of people at all times

To achieve this, you must:
4.3 keep to all relevant laws about mental capacity that apply in the country in which you are practising, and make sure that the rights and best interests of those who lack capacity are still at the centre of the decision-making process

Promote professionalism and trust
You uphold the reputation of your profession at all times. You should display a personal commitment to the standards of practice and behaviour set out in the Code. You should be a model of integrity and leadership for others to aspire to. This should lead to trust and confidence in the profession from patients, people receiving care, other health and care professionals and the public.

20. Uphold the reputation of your profession at all times

To achieve this, you must:
20.1 keep to and uphold the standards and values set out in the Code
20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress
20.6 stay objective and have clear professional boundaries at all times with people in your care (including those who have been in your care in the past), their families and carers
20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to.'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. The panel drew upon the NMC guidance FTP-3 which says, *'protecting people from harm, abuse, and neglect goes to the heart of everything nurses, midwives and nursing associates do.'* However, the panel noted that Mr Matungamire was in a

position of power and trust and was expected to act in Resident A's best interests at all times. The panel determined that Mr Matungamire abused this power for sexual gratification.

The panel decided that Mr Matungamire's behaviour fell seriously short of the conduct and standards expected of a registered nurse and would be considered deplorable by fellow professionals. Accordingly, the panel found that Mr Matungamire's actions constituted the most serious form of sexual misconduct.

Decision and reasons on impairment

The panel next went on to decide whether Mr Matungamire's fitness to practise is currently impaired.

In coming to its decision, the panel had regard to the Fitness to Practise Library, updated on 27 March 2023, which states:

> *'The question that will help decide whether a professional's fitness to practise is impaired is:*
> *"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"*
> *If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.'*

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. Nurses must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In reaching its decision the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant*. In paragraph 74, she said:

> *'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'*

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

> *'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/ fitness to practise is impaired in the sense that S/He:*
>
> *a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
>
> *b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
>
> *c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
>
> *d) ...'*

The panel determined that Resident A was put at unwarranted risk of harm and also should Mr Matungamire's actions be repeated in the future, they would have the potential to cause physical and/or emotional harm to patients. Mr Matungamire's misconduct had breached a fundamental tenet of the nursing profession by not acting in Resident A's best interests and pursuing his own gratification and therefore brought the nursing professions reputation into disrepute.

The panel considered the factors set out in the case of *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin). It noted the importance of insight being central to properly address misconduct. The panel could not find any evidence that Mr Matungamire had demonstrated any insight, nor taken any steps to strengthen his practice, or address his behaviour. The panel noted that the only evidence it had was within the police report in which Mr Matungamire denied any wrongdoing.

The panel considered the two testimonials provided by Mr Matungamire but noted that one is undated and neither indicate that the authors had any awareness or understanding of the serious charges alleged. Both appear to have been written as general character references for potential job applications. Therefore, the panel determined that these testimonials are of no probative value.

The panel observed that it had no information regarding Mr Matungamire's employment, and therefore no evidence to demonstrate whether he had been working safely since the incident in 2021. As there was no evidence of any insight or strengthening of his practice, the panel considered there remains a risk of repetition, and subsequent risk of harm to the public. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public

confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

Having regard to the underlying sexual nature of the misconduct, and the abuse of power, the panel concluded that a member of the public would be appalled, and public confidence in the profession would be undermined if a finding of impairment was not made in this case. Therefore, the panel also finds Mr Matungamire's fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was not satisfied that Mr Matungamire was able to practise kindly, safely, and/or professionally and therefore his fitness to practise is currently impaired both on the grounds of public protection and in the wider public interest.

Sanction

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mr Matungamire off the register. The effect of this order is that the NMC register will show that Mr Matungamire has been struck-off the register.

In reaching this decision, the panel has had careful regard to all the evidence adduced in this case and to the Sanctions Guidance (SG) published by the NMC.

The panel accepted the advice of the legal assessor.

Submissions on sanction

Mr Anyene informed the panel that although the NMC was seeking the imposition of a striking-off order as Mr Matungamire's misconduct is incompatible with remaining on the register, it is also open to the imposition of a suspension order. Mr Anyene submitted that the sanction imposed is ultimately a matter for the panel.

Mr Anyene outlined the aggravating features he identified in this case:

- The age of Resident A
- Resident A's ill health in that she had dementia
- Resident A's memory problems associated with her dementia
- The vulnerability of Resident A
- The lack of engagement by Mr Matungamire meant there was no evidence of any insight

Mr Anyene did not outline any mitigating features in relation to this case.

Mr Anyene confirmed that the NMC had no information regarding any previous regulatory or disciplinary findings against Mr Matungamire.

Mr Anyene submitted that a striking-off order would suitably protect the public for the five-year period in which it would be in place before Mr Matungamire would be eligible to apply for restoration. Mr Anyene further submitted that this period would allow Mr Matungamire time to reflect on his misconduct.

The panel accepted the advice of the legal assessor.

Decision and reasons on sanction

Having found Mr Matungamire's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel identified the following aggravating features:

- Abuse of a position of trust
- Lack of insight into failings
- Conduct which put patients at risk of suffering harm.
- Resident A's considerable vulnerability due to dementia, with associated lack of capacity to consent to decisions about her care, and communication difficulties

The panel did not identify any mitigating features in relation to this case.

The panel took into account the two testimonials provided by Mr Matungamire, however, as previously noted, the authors did not show any awareness or understanding of the serious regulatory concerns under consideration. Therefore, the panel could put very little weight on these testimonials when making its decision.

The panel took into account the NMC guidance SAN-2, in particular, for cases involving sexual misconduct which says, *'Sexual misconduct is unwelcome behaviour of a sexual nature, or behaviour that can reasonably be interpreted as sexual, which degrades, harms, humiliates or intimidates another.'* The panel noted the vulnerability of Resident A, and that Mr Matungamire had abused his position of trust for sexual gratification. The panel also noted that Mr Matungamire's misconduct demonstrated a form of predatory behaviour for the following reasons:

- The panel had already rejected Mr Matungamire's explanation that he was in Resident A's room to provide intimate personal care, as he was not wearing PPE when Witness 1 entered the room, and the panel heard from Witnesses 1 and 2 that registered nurses, especially agency nurses, were not expected to provide personal care to residents;
- The medication trolley was not outside the room, as it would have been if Mr Matungamire was in the room to give Resident A her medication, as he had suggested to the police;

- There could have been no other justifiable reason why Mr Matungamire was in Resident A's room, lying on the bed next to her.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order. The panel noted the SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mr Matungamire's practice would not be appropriate in the circumstances. The panel considered that Mr Matungamire's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Matungamire's registration would be a sufficient and appropriate response. Due to the attitudinal nature of the concerns, the panel considered that there were no practical or workable conditions that could be formulated to adequately protect patients and the public, or meet the public interest given the serious nature of the findings in this case. Furthermore, as the placing of conditions on Mr Matungamire's registration would allow him to remain in practice, the panel determined that it would significantly undermine public confidence in the nursing profession and the NMC as the regulator, given the serious concerns identified.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- *A single instance of misconduct but where a lesser sanction is not sufficient;*
- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *No evidence of repetition of behaviour since the incident;*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*
- *…*
- *…*

The panel noted that Mr Matungamire had not provided evidence to demonstrate any insight and there was evidence of a deep-seated attitudinal problem. Therefore, the panel could not be satisfied that there was not a significant risk of repetition. It recognised that the misconduct took place on a single occasion but considered it to be particularly serious and that the behaviour stopped because Mr Matungamire was interrupted.

The panel determined that the conduct was a significant departure from the standards expected of a registered nurse. It determined that breaching sexual boundaries, and abuse of a position of trust are breaches of fundamental tenets of the profession. Therefore, the panel determined that Mr Matungamire's actions were fundamentally incompatible with remaining on the register.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction to adequately protect the public or meet the public interest in this case. The panel noted that a member of the public would be appalled if a suspension order was imposed given the serious nature of the findings.

Finally, in considering a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*

- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

The panel determined that the charges found proved raised fundamental questions regarding Mr Matungamire's professionalism. It considered that Mr Matungamire's actions were so extremely serious that to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors, the panel determined that the appropriate and proportionate sanction is a striking-off order. The panel concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

This decision will be confirmed to Mr Matungamire in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Mr Matungamire's own interests until the striking-off sanction takes effect.

The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Mr Anyene. He invited the panel to impose an interim suspension order to cover the 28-day appeal period. Mr Anyene submitted that an interim order should be imposed on the grounds of public protection and to meet the public interest, as well as to uphold public confidence in the nursing profession and the NMC as the regulator.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order.

Not to impose an interim suspension order would be inconsistent with the panel's earlier findings. The panel therefore imposed an interim suspension order for a period of 18 months to allow time for any possible appeal.

If no appeal is made, then the interim suspension order will be replaced by the substantive striking-off order 28 days after Mr Matungamire is sent the decision of this hearing in writing.

That concludes this determination.