THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 083 OF 2013

(Arising from High Court (Anti-Corruption Division) HCT-00-AC-SC-0138-2012)

GEOFFREY KAZINDA :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF COURT

The appellant was indicted and convicted of the offences of Abuse of Office contrary to section 11(1) and (2) of the Anti-corruption Act 2009 and sentenced to 5 years imprisonment; Forgery c/s 342 and 347 of the Penal Code Act and sentenced to 2 years imprisonment on each of the 37 counts; Making documents without authority c/s 355(a) of the Penal Code Act and sentenced to 5 years imprisonment; unlawful possession of government stores c/s 316(2) of the Penal Code Act and sentenced to 2 years imprisonment. All sentences imposed were to run concurrently.

The appellant appeals to this court against both conviction and sentence on the following grounds;

1. The learned trial Judge erred in law and fact when he failed to properly evaluate the whole evidence and relied on insufficient, uncorroborated and incredible evidence to come to a wrong

conclusion that Exhibits P3, P5(a-f), P10 and P11 were recovered from the room of Peter Lubulwa in Teopista Nanfuka's home.

2. The learned trial Judge erred in law and fact when he applied a lower burden of proof in cases hinged upon circumstantial evidence to make a wrong finding that the appellant exercised dominion over exhibits P3, P5(a-f), P10 and P11.

3. The learned trial Judge erred in law and fact when he convicted the appellant of constructive possession of documents in Teopista Nanfuka's home without making a finding of whether the appellant was aware of the presence and character of the documents in the house.

4. The learned trial Judge erred in law and fact when he made a finding that PW9's signature on Exhibit P.3 was forged.

5. The learned trial Judge erred in law and fact in convicting the appellant of forgery and abuse of office, based on the wrong premise that the appellant possessed the documents allegedly recovered from the home of Teopista Nanfuka.

6. The learned trial Judge erred in law and fact when he convicted the appellant of creating a document without authority whose facts are akin to the offence of forgery.

7. The learned trial Judge erred in law and fact when he did not resolve ambiguity as to whether PW9 authorised addition of the two companies in Exhibit P-3 in favour of the appellant, and convicted him as such.

8. The learned trial Judge erred in law and fact when he used wrong aggravating circumstances to outweigh the appellant's mitigating factors and thereby imposed harsh and excessive prison terms.

9. The learned trial Judge erred in law and fact when he punished the appellant more than once for the same act.

10. The learned trial Judge erred in law and fact when he based on wrong sentencing principles to sentence the appellant severely.

Background

The appellant was employed by the Government of Uganda as Principal Accountant in the Office of the Prime Minister between July 2007 and July 2012. Mid-May 2012, the appellant's health deteriorated and was granted sick leave ending 9th July 2012 but before his return, he was replaced with another Principal Accountant. On 18th July 2012, in a complaint to the Inspector General of Police (PW9), the appellant was declared away without leave. On 22nd July 2012, in absence of the appellant a search was conducted in the house of Teopista Nanfuka (the appellant's mother) and it was alleged that government documents belonging to Office of the Prime Minister were recovered in the room of Peter Lubulwa (appellant's nephew). The said documents were recorded on the search certificate which was exhibited P8.

The prosecution case was that the documents recovered were in three categories; cash withdraw forms marked exhibit P.10 which are used by government departments to withdraw cash from Bank of Uganda. The second category were security papers marked exhibit P3 and P5 (a-f) which are documents used by government departments to effect funds from one account to another. The third category were letters addressed to the Director Banking marked as exhibit P.11. The prosecution case was that the signatures attributed to Pius Bigirimana from the recovered documents were forged and as such taken to a forensic examiner, PW11, who confirmed the suspicion. Following these events, the appellant was indicted and convicted of the above offences.

Representations

At the hearing of this appeal, the appellant represented himself while the respondent was represented by Mr. Jonathan Okello Senior State Attorney with the Director of Public Prosecutions (DPP).

The parties filed written submissions.

Submissions of the appellant

The appellant submitted that ground 1 has a number of issues for this court to resolve including whether the documents were recovered from one location, the issue of why the items where not shown to any member of the search party during examination in chief; the tendered documents' appearances differ from the descriptions of documents allegedly recovered and the failure to bring key witnesses. He submitted that the learned trial Judge ignored grave inconsistencies and contradictions in the search certificate (exhibit P8) which goes to the root of the case. PW8 stated that he did not read the search certificate even though he signed it. PW10 Wamala Fredrick also stated that he did not see any cash withdraw authority form and yet it was included in Exh.P8 by the prosecution. PW10 also simply signed the search certificate as directed. The appellant contends that the said items were not actually recovered from the home of Teopista Nanfuka as alleged by the prosecution but were planted there to strengthen the prosecution case.

PW3 tendered in exhibit P.3 as a document served on ~~to~~ the Office of the Prime Minister by Bank of Uganda not as one recovered from the home of Nanfuka Teopista as was misconstrued by the learned trial Judge. In addition, that there were tendered documents whose appearances differ from the description of documents allegedly recovered. According to exhibit P.8, the recovered cash withdraw forms had both signatures of Geoffrey Kazinda, the appellant herein and that of Pius Bigirimana and a stamp. However, the cash withdraw authorization forms tendered in court had only the signature of Pius Bigirimana which meant these were different documents altogether.

In regard to the photographic evidence, the appellant submitted that what was alleged to have been recovered was not actually photographed and there is no photograph of what was recorded. PW14 could not have taken the photographs at the scene yet he was never there. That the documents reflected in the photographic evidence in exhibit P.15 related to the documents of transfer of funds which were a continuation of search which PW14 did not witness.

That the failure to produce key witnesses like Peter Lubulwa and Nanfuka Teopista who had to explain how the said documents reached their house was a big gap in the evidence of the prosecution.

In regard to ground 2, the appellant cited the case of **Padala Veera Reddy Vs State of Andhra Pradesha and others AIR 1990 SC 79** in which it was held that when a case rests upon circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. That exhibit P3 did not feature in any of the photographs exhibited and its descriptions was disowned by PW8 and PW10. That it was unreasonable for the trial Judge to infer that the appellant's personal letter was co-mingled with the exhibits yet it was not included in the search certificate.

Further that there was no evidence on record to find the appellant guilty of constructive possession of the documents basing on dominion of the appellant to the home of Nanfuka Teopista. That whereas the home was rented by the appellant for his mother, the prosecution had to prove that he had knowledge of existence of such documents. That according to the case of **Dawkins Vs State 313 Md 1988**, an individual would not be deemed to exercise dominion and control over an object he is unaware of. Knowledge of presence of an object is normally a prerequisite for exercising dominion and control.

Whereas the handwriting expert was required to examine various signature specimens, he demonstrated that he came to his conclusion by use of a magnified laboratory printout. It was thus wrong for the trial judge to find that the signature on exhibit P.3 was a forgery. He argued that the said documents were not in the house and as such, the trial Judge had no basis to infer forgery on the appellant basing on documents he was not aware of.

In regard to the offence of abuse of office, the trial Judge based the conviction on the documents recovered at Nanfuka's home. As already submitted, the appellant contends that the said documents were not in Nanfuka's home and as such, the appellant did not do any act prejudicial to his employer.

The appellant submitted in regard to sentence that the trial Judge failed to consider the appellant's remand period while passing sentence. That the award of fines would have been sufficient instead of a custodial sentence.

Submissions of the respondent

In reply, the respondent submitted that grounds 1, 2, 3, 4 and 5 have one cross cutting issue for this court to determine which is whether the appellant was properly convicted of the offences of forgery and abuse of office. Regarding the offence of abuse of office, the respondent submitted that the first ingredient was not disputed as the appellant was employed in the office of the Prime Minister as Principal Accountant. That the appellant's claim that exhibits P3, P5 (a-f), P10 and P11 were planted at the home of Nafuka Teopista by police was made in bad faith.

That there was credible evidence showing that the appellant willingly kept sensitive OPM documents bearing forged signature of PW9 in the private residence of his mother. From the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, all employees of Office of the Prime Minister, it was asserted that exhibits P3, P5(a-f) and P10 were sensitive documents used in OPM to pay and transfer huge amounts of public and donor funds from Treasury General Accounts and Crisis Management Project Accounts.

The evidence on record showed that the only two signatories to the security papers and cash withdrawal forms are the appellant and PW9. Further, that the evidence pointing to the appellant as the only person keeping security papers and cash withdrawal forms in a safe in his office was never challenged. PW8, the Local Council (LC) Defense secretary and neighbor to the appellant led PW12, PW13 and PW14 to the appellant's home in Bukoto to carry out a search.

PW10, a brother to the appellant confirms that a search was conducted in his mother's house and was carried out in his presence at the room which was locked but broken into by PW7. A laptop and documents were recovered from there and this evidence corroborated the evidence of PW12 and PW13 who conducted a search. That the

photographic evidence simply offered additional corroboration since the photos were admitted in evidence unchallenged.

In regard to the offence of forgery, the respondent submitted that the trial Judge rightly evaluated the evidence on record and convicted the appellant accordingly. The said documents with the questioned signatures of PW9 were submitted to PW11 and a report was accordingly submitted confirming that the said signature was a forgery. This was corroborated by the evidence of PW9 who testified that he never signed the questioned document.

On grounds 6 and 7, the respondent submitted in reply to the appellant's argument that the trial Judge wrongly convicted the appellant of the offence of making documents without authority on the same facts as those of forgery, that there was no ambiguity or contradiction regarding the appellant's lack of authority. The document in question was forged and was made with intention to defraud and having been recovered from the appellant's mother's home, the appellant was held responsible.

In regard to the allegation of double punishment, the respondent argues that the offences with which the appellant was indicted and convicted of are distinct offences as per the indictment. The elements in each of the offences are different and these offences are not minor and cognate but distinct. Further, that any offence, whether a felony or misdemeanor may be charged together in the same indictment if the offences charged are founded on the same facts or form part of a series of offences of the same or similar character and each offence is set out in separate counts as was the case herein.

Lastly, that the sentence imposed by the trial Judge was lawful and lenient enough considering the circumstances of the offence. That the trial Judge did not ignore the mitigating factors but the aggravating factors outweighed the mitigating factors. The trial Judge considered the period spent on remand while imposing the highest sentence of 5 years and the lowest sentence of 2 years.

Resolution of the appeal

This is a first appeal and this court takes cognisance of the established principles regarding the role of a first appellate court. The cases of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Pandya v. R [1957] EA 336,** and **Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997** in essence have established that a first appellate court must review/rehear the evidence and consider all the materials which were before the trial Court, and come to its own conclusion regarding the facts, taking into account that it has neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

Rule 30 of the **Judicature (Court of Appeal Rules) Directions SI 13-10** is also relevant. It provides that;

"30. Power to reappraise evidence and to take additional evidence

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) Re-appraise the evidence and draw inferences of fact; and

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."

We have borne the above principles in mind in resolving this appeal. We consider that the logical way to proceed is to re-evaluate the evidence in regard to the offences with which the appellant was convicted as laid out in the memorandum of appeal.

Abuse of Office

The offence of abuse of office is provided for under Section 11 (1) and (2) of the Anti-Corruption Act and provides that;

"11. Abuse of office.

(1) A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

(2) where a person is convicted of an offence under subsection (1) and the act constituting the offence was done for the purposes of gain, the court shall, in addition to any other penalty it may impose, order that anything received as a consequence of the act, be forfeited to the Government."

The ingredients for the offence of abuse of office are;

(a) The appellant at the time of the commission of the alleged offence, was employed by a public body or company in which the government has shares.

(b) The appellant does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person.

(c) The act was done in abuse of authority.

On the 1st ingredient, it is not a disputed fact that the appellant was, at the time the offence was committed, employed by the Uganda government as a Principal Accountant in the Office of the Prime Minister.

A search was carried out on the 22nd of July 2012 at the appellant's mother's home and a number of items were, according to the prosecution case, found in one of the rooms. This was testified to by a number of prosecution witnesses including PW7, a carpenter, who testified that on the said date, he was approached by PW8 to open a certain locked door in the presence of policemen who had come to conduct a search. PW8, the area Local Council (LC.1) Defense secretary, also testified that he was asked by police to witness a search they intended to carry out at the home of the appellant. The

search led them to a locked door to a room in the house and the police recovered a laptop and a number of documents. PW10, a biological brother to the appellant, testified that the police searched the house in his presence and stated that one of the rooms was locked and a carpenter was brought to open the door. On opening the door, a laptop was found together with some documents after which he signed on the search certificate. PW14 testified that he took photos of some of the documents and some parts of the house while at the search and they were exhibited as Exhibit P.15.

Regarding the recovered documents, the appellant contends that they were planted at the home of Nanfuka Teopista. The prosecution led evidence of various witnesses that witnessed the search. PW8 was the LC1 Defense secretary and neighbor to the appellant who led PW12, PW13 and PW14 to the appellant's home and witnessed the search. PW10, a brother to the appellant also testified that a search was carried out in his presence and his mother, Teopista Nanfuka, told him to take the policemen around the house. He testified that a laptop and documents were recovered from the room. PW10 however testified at~~on~~ page 297 of the record that when the search team came, they had bags and envelops with them.

PW12 was the police officer who led the investigation and he made the decision to have the room broken into. Thereafter, PW7 was called by PW8 to break into the said room to carry out the search. PW8 testified on page 225 that when the room was broken into, there was a drawer and one big blue bag from which was removed some documents and a laptop.

According to the search certificate exhibited as P-8, the recovered cash withdraw forms had both signatures of the appellant and that of one Pius Bigirimana. However, the cash withdraw forms tendered in evidence only had the signature of Pius Bigirimana who testified as PW9. In addition, there was photographic evidence tendered in court by PW14, a scene of crime officer. The appellant contends that PW14 did not participate in the search because he did not sign on the search certificate. The photographs exhibited did not show what was mentioned in the search certificate. There were no photographs

of the said recovered documents in the drawers of the room. PW14 simply took photographs of the documents displayed on the bed.

The appellant contends that he was employed by the Government of Uganda as Principal Accountant in the Office of the Prime Minister between July 2007 and July 2012. His health deteriorated and as such was granted sick leave from 2nd June 2012 to 9th July 2012. The search was carried out on 22nd July 2012. The prosecution contends that the appellant was granted sick leave from 4th June to 8th June 2012, which was only 4 days off. The basis of the prosecution case was that the appellant kept sensitive documents of the Office of the Prime Minister bearing a forged signature of PW9. In addition were documents used in Office of the Prime Minister to transfer huge amounts of public and donor funds from Treasury General Account and crisis management project accounts and this was testified to by PW1, PW3, PW4, PW5 and PW9.

PW1 and PW4 testified that the signatories to the account at OPM are the Principal Accountant and the Permanent Secretary. That security papers are supplied from Bank of Uganda and each account has its own set of security papers serially numbered and are only supplied by Bank of Uganda on request. Once the Permanent Secretary has approved a requisition, it comes back to the Principal Accountant who would direct payment to the person handling the particular account. PW5 stated that cash withdraw forms replaced cheque books and he used to fill in payment instructions on a security paper upon direction from the appellant after which he would hand the filled paper back to the appellant.

PW10 testified that the search team came into their home with a bag and envelops. The appellant argued that the said documents were planted in the room. PW8 was the LC Defense secretary who was requested by the police to be part of the search at the home of the appellant. PW8 did not specifically mention the items listed on the search certificate during cross examination. The testimony of PW10 on page 323 of the record was that when the search team entered Lubuulwa's room, they had their bags but he did not know the content of the bags.

The question for this court to determine is whether all the documents in the search certificate were recovered from Busuulwa's room.

As already noted above, the search was carried out at the home of the appellant which included the small house occupied by the appellant's children, the house occupied by the appellant's wife, one occupied by the appellant which was also, according to the testimony of PW12, under construction and the one occupied by Teopista Nanfuka, the appellant's mother, in which the said documents were recovered from one Lubuulwa's room. The police officers carried out the search together with PW8, the LC1 secretary, PW7, a carpenter who broke into the room, PW14, a police officer who took the photographs of the searched room.

A search is defined in Justice Benjamin Odoki's **'A guide to criminal procedure in Uganda'** as an inspection made on a person or in a building for the purpose of ascertaining whether anything useful in criminal investigation maybe discovered on the body of the person or in a building searched. According to him, the occupant of the place searched shall be permitted to attend the search. In addition, **Section 27** of the **Police Act Cap 303** provides that;

> *"(6) The occupant of the place searched, or some other person in his or her behalf, shall, in every instance, be permitted to attend during the search; and where possible a local leader should be present during the search.*
>
> *(7) Notwithstanding the provisions of this section or the provisions of the Magistrates Courts Act relating to the search of premises, no police officer shall search any premises unless he or she is in possession of a search warrant issued under the provisions of the Magistrates Courts Act or is carrying a warrant card in such form as shall be prescribed by the inspector general."*

A police officer may search the dwelling or place of business of the person so arrested or of the person for whom the warrant of arrest has been issued and may take possession of anything which might reasonably be used as evidence in any criminal proceedings. **See section 69 of the Magistrates Courts Act Cap16.**

From the above provisions relating to searches, there must be a search warrant for a search to be carried out.

When the search team according to the testimony of PW12 who led the search team, they arrived at the home of Teopista Nanfuka, the appellant's mother, and found was around but for health reasons, she told PW10 to take them around. PW10 testified on page 323 of the record that;

> *'When they came to the place they had the bags and envelops. When they entered Lubuulwa's room they had their bags. I do not know what was in their bags.'*

It was also PW10's testimony that the search team entered the room and came out with a laptop and documents relating to Peter Lubuulwa and their bags. He was then told to sign on the search certificate which was one paged. He testified that;

> *"I signed this document. Kazinda did not sign. He was not around. There are other three sheets attached. I did not sign on them. These three sheets were not attached at the time I signed. There is PTO at the end of the second page, none on the 3rd page and PTO on the 4th page. But there is no other sheet after that. The 2nd, 3rd and 4th pages are not initiated by us. I only saw a laptop. I do not know any of these other things written here. They did not introduce themselves. They did not show us a search warrant or anything. Mr. Kazinda was brought after the search was over."*

The evidence on record shows that a search was carried out without a search warrant and certain documents were allegedly recovered from the Lubuulwa's room. PW10 took the search team around but did not enter the room when it was opened. He just saw the officers coming out with the alleged recovered documents. PW14 is the police officer who took photos of the recovered documents. The photographic evidence marked P. 15 did not show any of the documents in exhibit P. 8. The search certificate included a laptop having been recovered from the room during the search however no such laptop was photographed by PW14 according to his evidence on

page 460 of the record. PW14 testified during cross-examination that he did not take photographs of the recovered documents while in the shelf from which they were allegedly recovered. Exhibit P.3 and P.10 which are cash withdraw authorization forms were not photographed. The photographs exhibited were selective of the search process. PW14's testimony was that photograph P was a close range shoot exposing some of the recovered documents from Kazinda's house. It included a personal letter to the appellant.

The learned trial Judge held that;

> *"Furthermore, the letter to the accused was a personal possession of the accused. This letter played a major role showing ownership and therefore dominion and control from this which court can safely find that the accused was in constructive possession of the documents found in his mother's house."*

This finding was, in our view, an error on the part of the learned trial Judge. Photograph P included the personal letter to the appellant, however, it was the testimony of PW14 that photograph P was a close range shoot of documents recovered from Kazinda's house not Teopista Nanfuka's house. Exhibits P3, P5 (a-f), P10 and P11 from which the charge against the appellant was founded were allegedly recovered from Teopista Nanfuka's house and not the appellant's house. This in essence means the photograph of the personal letter was not of Lubuulwa's room.

We must note that photograph P was not included on the search certificate. The prosecution evidence has contradictions that cannot be ignored in proving the offence of abuse of office. The appellant's case is that exhibits P.3, P5 (a-f), P10 and P11 were not recovered from Lubuulwa's room as was alleged by the prosecution. The appellant alleges that the said documents were planted in the room by the search team which allegation we cannot rule out considering the evidence of PW10 who testified that the search team had documents and a bag with them when they entered Lubuulwa's room. We find that the prosecution did not prove that the said

recovered documents were in constructive possession of the appellant.

Further, the learned trial Judge held that the appellant's act of keeping such important documents away from office and away from his home amounted to hiding the documents from whoever might have come looking for them.

On the record is a letter from the Permanent Secretary, Pius Bigirimana, to the Inspector General of Police requesting action to be taken against the appellant and reporting his disappearance from office after he had been transferred. There is a letter on record marked 21 (v) from PW9 addressed to the appellant about his prolonged absence from duty. Paragraph 4.0 of the letter was about the appellant's redeployment and PW9 advised the appellant to prepare the final accounts by 31st July 2012 and handover office not later than 30th August 2012. The search was carried out on 22nd July 2012 before the expiry of the deadline for handover. DEXH 10 showed that the appellant had to handover on 31st August 2012 and DEXH 11 shows that there was already a Principal Accountant on duty before the handover of the appellant.

The appellant testified on page 478 of the record that;

> *"When I reported to police I found the under secretary, my supervisor then she told me how will I supervise two principal accountants? The letter was saying in paragraph 4 he had put a padlock on my office door, he indicated clearly that he had put surveillance around and this is the situation I found. I said now there is another challenge an accountant does not hand over a room an accountant hands over accounts, paper reconciliations, statements and now if I am not on the IFMS what will I handover as a professional because at that duty station your role is gone you are cut off, 2. You are not a signatory to Bank of Uganda all those accounts if you call Bank of Uganda you are unrecognized so I said what am I going to handover..."*

According to the evidence on record, it is clear that the appellant's handover deadline was still running at the time he was arrested and

as such, it cannot be said that he absconded from duty. He was also blocked from his office and as such could not handover office as an accountant.

Further, Public Service Standing Order (A-n) 19 states that;

"in absence of any communication from the officer within 30 days, the officer shall be deemed to have abandoned duty"

He could only be deemed to have absconded after 8th August 2012 which is 30 days after 9th July when his leave ought to have expired. We do not find that the offence of abuse of office was proved by the prosecution.

In the Supreme Court of Appeal of South Africa case of **DPP VS Oscar Leonard Carl Pistorious Case No. 96 of 2015,** it was held that;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the conclusion which the court has before it..."

The decision in **Justine Nankya v. Uganda SCCR Appeal No. 24 of 1995 (Unreported)** citing with approval **Okoth Okale v. R. (1955) E.A. 555** emphasizes among others that an accused has no obligation to prove his innocence. Even where he or she opts to keep quiet throughout the trial or offers a very incredible defence, he or she can only be convicted upon the strength of the prosecution case against him or her. This means that before an accused is convicted the trial judge has to see to it that the prosecution has proved its case to the required standard.

We thus find that the trial Judge erred in finding that the offence of Abuse of Office was proved.

Grounds 1, 2, 3 and 5 therefore succeed.

Forgery

The offence of forgery is provided for under Sections 342 and 347 of the Penal Code Act;

"342. Forgery.

Forgery is the making of a false document with intent to defraud or to deceive.

347. General punishment for forgery.

Any person who forges any document commits an offence which, unless otherwise stated, is a felony and is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years."

To prove the offence of forgery, the prosecution must prove the existence of;

(a) Making of a false document
(b) The intention to defraud or deceive

The prosecution relied on the handwriting expert report which was exhibited P.11. The handwriting expert was required to examine and compare specimen signatures S1-S5 against Q1, O2, Q3, Q5, Q6, Q7, Q9, Q10, Q13, Q14, Q15 and Q17-Q20, Q22-24, Q27-Q34, Q41-Q49 and Q52-Q53. According to PW11's report, he found that there were fundamental differences between the QS and Ss. He found that there are several differences between questioned signatures attributed to the Permanent Secretary in exhibits Q1, O2, Q3, Q5, Q6, Q7, Q9, Q10, Q13, Q14, Q15 and Q17-Q20, Q22-24, Q27-Q34, Q41-Q49 and Q52-Q53 and the specimen signatures provided in S1-S5.

The appellant contends that the finding of PW11 should have been made with the exception of Q10 whose description was for exhibit P3. PW9 testified that he never signed the questioned document. PW11 explained that the error in the interchanged specimen signatures S11-S12 was corrected on record. He examined specimen signatures S11-S12 of the appellant against the questioned documents. The

respondent argues that the correction did not occasion any miscarriage of justice since the chain of exhibits was not broken.

Section 43 of the **Evidence Act** provides that;

"When Court has to form an opinion as to the identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in questions as to the identity of handwriting or finger impressions are relevant facts. Such persons are called experts."

The principles of dealing with a handwriting expert were laid down in the case of **Kimani vs Republic (2000) E.A 417,** where it was held as follows: " *.....it is now trite law that while the courts must give proper respect to the opinion of expert, such opinions are not as it were, binding on the courts.....such evidence must be considered along with all other available evidence and if a proper and cogent basis for rejecting the expert opinion would be perfectly entitled to do so....."*

This is a case was based purely on circumstantial evidence considering the fact that there was no eye witness to the signing of the forged documents. As already noted above, the search team came into the home of Nanfuka Teopista with a bag and some documents in an envelope. To prove forgery, the prosecution has to prove that the appellant made the false documents with intention to defraud. We cannot ignore the appellant's contention that the alleged documents were planted in the room in Nanfuka's house. The photographic evidence relied on by the respondent was selective as it did not capture all the movements right from outside the room to immediately after the room was broken into to show that the documents were actually in the room when the search team entered. PW10, who was part of the search team from the start, incredibly could not identify the exact documents that were recovered from Busuulwa's room.

We note that the case of **Simon Musoke Vs R [1958] EA 715:-** held that;

"in a case depending exclusively or partially upon circumstantial evidence, the Court must before deciding upon a conviction find that, the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt."

See also Teper v. R. (2) AC 480 which held,

"it is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

While **Taylor on Evidence (11th Edn.) page 74** *states "the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

It is the appellant's case that the said documents were planted in Busuulwa's room by some members of the search team. The handwriting expert's report showed that there were fundamental differences between the QS and Ss. He found that there are several differences between questioned signatures attributed to the Permanent Secretary in exhibits Q1, O2, Q3, Q5, Q6, Q7, Q9, Q10, Q13, Q14, Q15 and Q17-Q20, Q22-24, Q27-Q34, Q41-Q49 and Q52-Q53 and the specimen signatures provided in S1-S5. However, Q10 was not among the documents in which the sighted defects manifested. PW11, the handwriting expert, included Q10 in his report that it was among the forged. This error placed doubt on PW11's evidence and as such, the prosecution failed to prove that the appellant committed the said forgery.

Ground 4 succeeds accordingly.

Making a document without authority

Section 355 of the Penal Code Act provides for the offence of making a document without authority and it provides that;

"355. Making documents without authority.

Any person who, with intent to defraud or to deceive—

(a) without lawful authority or excuse, makes, signs or executes, for or in the name or on account of another person, whether by procuration or otherwise, any document or writing; or

(b) knowingly utters any document or writing so made, signed or executed by another person, commits a felony and is liable to imprisonment for seven years."

To prove the offence of making a document without lawful authority, the prosecution has to prove that the appellant made a document he was not authorized to make, or utters a document purportedly signed by another person. All the questioned documents were examined by PW11. The prosecution led evidence of PW8, PW10, PW12, PW13, and PW14 who testified that several documents were recovered including Exhibit P3. The appellant contends that the trial Judge did not resolve the issue of whether PW9 authorised addition of the two companies in Exhibit P.3 in favour of the appellant.

Exhibit P.3 was a security paper which sought a transfer of funds out of Crisis Management Account No. 0000300880000030 amounting to shs. 564,570,000/= (five hundred million five hundred and seventy thousand). It was intended for payments to suppliers of food for disaster affected areas and the claimants to be paid were extracted from a claimants list Exhibit D13. The essence of tendering in Exhibit P.3 through PW3 was that the document was a sample of the documents issued to the Office of the Prime Minister by Bank of Uganda and not that it was one of the documents recovered from the home of the appellant's mother. As such, it cannot be said to have been in the confines of Nafuka's home. As already discussed above, the prosecution failed to prove that the appellant actually committed the alleged forgery on the documents PW9 denies having signed. We find that the offence of making a document without lawful authority was not proved against the appellant.

Ground 6 also succeeds.

Ground 7

It was the appellant's case that PW9 gave him a verbal authorization to include two extra companies to be paid using Exhibit P3 alongside those that were on Exhibit D. 13. The respondent argues that documents supporting security papers are acted upon after PW9 has endorsed as second and last signatory. PW9 testified that he endorsed a request dated 22/3/2012 for payment of 1 billion to pay 57 firms on page 312-313 of the record. The 57 food suppliers all appear in the security form that PW9 alleged was a forgery. Ideally, all the 57 food suppliers on the security document also appear on the supporting documents and the requisition which PW9 confirms having signed.

The appellant's case is that he received verbal authorization from PW9 to include the two extra companies. PW9 actually confirms having signed the supporting documents to the security paper but claims the signature on the security paper (P.3) was a forgery. The learned trial Judge held on page 617-618 of the record that;

> *"A critical look at EXH P3 however reveals that it was not strictly on the claimants list EXH D13. Two other suppliers unknown to EXH D13 were included. These were Kaweesi Dauda and Sons for 32,430,000/= and St. Paulo Agencies Limited for 36,660,000/=. The accused in his defence told court that he later received a verbal authorization. PW9 denied that such authorization was given. He even denied that he signed EX P3. This exhibit was taken to a handwriting expert PW11 as EX P10, together with the specimen signatures of PW9 namely S1-5 which are EXH P6 and those of the accused S11-S12 which are EXH P13. It was the finding of PW11 that PW9 did not sign the document EXH P3. As for the accused he himself told court he signed the document. PW9 also admitted the authorization. There is nothing in the evidence to show that the accused was authorized to alter the list of claimants."* (Emphasis ours)

We find that this was a misdirection on the part of the learned trial Judge. The security paper which is alleged to have been forged was serial number 243607. As a matter of procedure, such security paper is accompanied with supporting documents. There is an internal

memo dated 22nd March 2012 which has a request of payment of 1,691,000,000/= which PW9 confirms is in his handwriting. Exhibit P.3 constitutes part of the payment in the internal memo. This was in relation to the 57 food suppliers which food suppliers were also captured in the internal memo dated 21st March 2012. In essence, all the 57 suppliers on the security paper were also indicated in the documents. We find the denial by PW9 that he did not give authorization untrue. The learned trial Judge also noted in his judgment that PW9 admitted the authorization which was to add the two companies.

The trial Judge rightly found that the appellant told court that he signed the document. The appellant, on page 483 of the record, testified that he did sign the said document. The appellant, together with PW9 were the signatories to the said security papers and as such, it was not illegal for the appellant to sign the papers. We thus find that PW9 authorized the addition of the two companied in exhibit P-3 and as such, ground 7 succeeds.

Unlawful possession of government stores

The appellant was charged and convicted on 2 counts of unlawful possession of government stores contrary to section 316(2) of the Penal Code Act.

> *"316. Unlawful possession of Government stores.*
>
> *(2) Any person who is charged with conveying or with having in his or her possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he or she came by the stores, commits a misdemeanor."*

The ingredients of the offence of unlawful possession of government stores are;

(a) The appellant was in possession of the stores

(b) They were suspected to have been stolen or unlawfully obtained.
(c) The accused had failed to give a satisfactory account of how he had come by the stores.

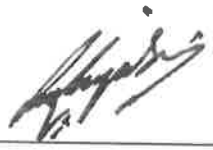
The stores that the appellant was convicted for having in his possession are security papers serial No. 116319, 110360, 110359, 110361, 116320 and 116318 which were produced in court and exhibited as P5a-f. These security papers were ordinarily for the signature of the Principal Accountant and the Permanent Secretary. The trial Judge also found that the search team recovered Exh. P3 from the appellant's possession. As already noted above, the essence of tendering in Exhibit P.3 through PW3 was that the document was a sample of the documents provided to the Office of the Prime Minister by Bank of Uganda and not that it was recovered from the home of the appellant's mother as was held by the trial Judge. We find that the trial Judge based this finding on an error of fact. As already found above, the prosecution failed to prove that all the alleged documents were found in the home of Teopista Nanfuka. We have found that the appellant's deadline for handover of office had not expired at the time of his arrest. This was seen in his deployment letter which required him to hand over at the end of August. Even though some of the security papers were found in the possession of the appellant, it was not out of the ordinary because he was still the Principal Accountant at the Office of the Prime Minister until official handover or expiry of his handover period. We find that this offence was also not proved by the prosecution.

This appeal therefore succeeds. We accordingly set aside the judgment and orders of the trial court and order for the appellant's immediate release unless he is held on other lawful charges.

Before we take leave of this appeal, we wish to express our displeasure at the poor conduct of investigations in this case. The investigations were bungled and lacked professionalism. It left a lot to be desired.

Dated this 12th day of March 2019

Signed



Hon. Justice Geoffrey Kiryabwire, JA

Hon. Justice Stephen Musota, JA

Hon. Justice Percy Night Tuhaise, JA