THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CRIMINAL APPEALS NOS. 0307 & 0321 OF 2015
(Arising from High Court (Anti-Corruption Division) Criminal Appeals Nos. 0023 & 0024 of 2013)

1. DR. EUMU SILVER
2. ATAI HELLEN DOREEN :::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda (Anti-Corruption Division) before Tibulya, J. delivered on 21st September, 2015 in Criminal Appeals Nos. 23 & 24 of 2015 also arising from Chief Magistrate's Court attached to Anti-Corruption Division Criminal Case No. 0021 of 2013)

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF THE COURT

Introduction

These consolidated appeals were preferred against the decision of the High Court (Tibulya, J.) while exercising its jurisdiction as a first appellate Court, in which the convictions of the appellants by the trial Chief Magistrate's Court of multiple counts of Causing Financial Loss contrary to Section 20 (1) of the Anti-Corruption Act, 2009 and Abuse of Office contrary to Section 11 (1) & (2) of the Anti- Corruption Act, 2009 and the relevant sentences it imposed were upheld.

Brief Background

The appellants who were employees of Amuria District at the material time, were charged with corruption related offences and were tried in the Chief Magistrate's Court attached to Anti-Corruption Division. They denied any wrong doing, but were convicted as charged by the trial Court and sentenced accordingly. They were dissatisfied with the decision of the trial Court and

appealed to the High Court, which dismissed their appeal and upheld their convictions and sentences. The details of those convictions and sentences are these:

- In count 1, both appellants were convicted of Causing Financial Loss contrary to Section 20 (1) of the Anti-Corruption Act, 2009, and were sentenced, each, to $3^{1/2}$ years imprisonment.
- In count 2, both appellants were convicted of Abuse of Office contrary to Section 11 (1) & (2) of the Anti-Corruption Act, 2009, and were sentenced, each, to 2 years imprisonment.
- In count 3, the 2nd appellant alone was convicted of Causing Financial Loss contrary to Section 20 (1) of the Anti-Corruption Act, 2009, and was sentenced, to $2^{1/2}$ years imprisonment.
- In count 4, the 2nd appellant alone was convicted of Abuse of Office contrary to Section 11 (1) & (2) of the Anti-Corruption Act, 2009, and was sentenced, to 1 year imprisonment.

A refund order was made against the appellants in the following terms; both appellants were to jointly refund Shs. 43,500,000/= under counts 1 and 2; while the 2nd appellant would refund Shs. 22,500,000/= under counts 3 and 4. Being dissatisfied with the decision of the High Court, the appellants lodged this appeal in this Court on grounds which were set forth in their independent memoranda of appeal as follows:

Grounds in the 1st appellant's memorandum of appeal:

"1. **The Appellant (sic) Judge erred in law when she failed to re-evaluate evidence as an Appellate Court but instead repeated the lower Court's evaluation of evidence and used such evaluation to determine the Appeal.**

2. **The Appellant (sic) Judge erred in law when she failed to hold that the ingredient of loss to the charges the Appellant was charged had not proven (sic).**

3. **The Appellant (sic) Judge erred in law when she failed to determine that principle in law of the handwriting expert witness in determining whether PW12 had signed the document in issue.**

4. **That the Appellate Judge erred in law that the alleged weakness of the defence witness as evidence of guilt of the Appellant (sic).**

5. **The Appellate Court erred in law when she shifted the burden of proof in a Criminal trial to the appellant when she found that the Appellant brought compromising and/or suspicious and/or doubtful defence witness and/or evidence.**

6. **The trial Judge erred in law in involving her own explanations and thinking about the Appellant's deeds in the case, such as thoughts of alleged cover-ups, without any evidence adduced in Court."**

Grounds in the 2nd appellant's memorandum of appeal:

"1. **The Learned Appellant (sic) Judge erred in Law when she convicted the appellant for Causing Financial Loss of Ug. Shs. 43,500,000 (Uganda Shillings Forty Three Million, Five Hundred Thousand Only) to Amuria District Local Government.**

2. **The Learned Appellant (sic) Judge erred in Law when she held that the appellant abused the authority of her office, when she released Ug. Shs. 43,500,000 (Uganda Shillings Forty Three Million, Five Hundred Thousand Only) for purchase of medical equipment at Amuria District Local Government.**

3. **The Learned Appellant (sic) Judge erred in Law when she held that the appellant Caused Financial Loss of Ug. Shs. 22,500,000= (Uganda Shillings Twenty Two Million, Five Hundred Thousand Only) for purchase of revenue item.**

4. **The Learned Appellant (sic) Judge erred in Law when she held that the appellant abused the authority of her office, when she released Ug. Shs. 22,500,000= (Uganda Shillings Twenty Two Million, Five Hundred Thousand Only) for purchase of revenue item.**

5. **The learned Appellant (sic) Judge erred in Law when she failed to exhaustively re-evaluate the evidence as a first Appellant Court thereby reaching a wrong decision which caused a miscarriage of justice.**

6. **The Learned Appellant (sic) Judge erred in Law when she ordered the Appellant to refund Ug. Shs. 43,500,000/= (Uganda Shillings Forty Three Million, Five Hundred Thousand Only) and Ug. Shs.**

22,500,000/= (Uganda Shillings Twenty Two Million, Five hundred Thousand Only)."

The respondent opposed the appeal.

Representation

At the hearing of this appeal, Mr. Okalany Robert and Mr. Kevin Amujong, both learned counsel, jointly represented the 1st appellant; Mr. Ssemuyaba Justine, learned counsel, who held brief for Mr. Mudoola Dennis, learned counsel represented the 2nd appellant; while Mr. Wycliffe Mutabule, a Senior Inspectorate Office in the Inspectorate of Government, who held brief for Mr. Thomas Okoth, represented the respondent.

At the hearing, Court was informed that there were written submissions on record for both appellants, and it directed the respondent to file and serve their reply within 7 days, which was not done. Therefore, we considered only the submissions for the appellants in the determination of the present appeals.

1st appellant's case

Counsel for the first appellant argued the grounds in the memorandum of appeal in the following order: ground 1, separately; grounds 2 and 6 jointly; grounds 4 and 5 jointly; and ground 3, separately, respectively.

Ground 1

Counsel faulted the learned first appellate Judge for a failure to exercise her duty to re-evaluate the evidence adduced in the trial Court, and come up with her own conclusions. Counsel contended that the learned first appellate Judge had merely picked the findings of the trial Court and reflected them in her judgment. For example, she adopted the conclusions of the trial Court concerning the credibility of the evidence of DW6 owing to his questionable demeanour while he testified. Counsel submitted that the learned first appellate Judge ought to have scrutinized that finding instead of taking it as the gospel truth. He cited **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 0010 of 1997**, for the proposition that there may be circumstances quite apart from manner and demeanour which may show,

whether a statement is credible or not which may warrant a court (first appellate court) in differing from the Judge even on question of fact turning on the credibility of witnesses which Court has not seen.

Counsel further submitted that the testimony of DW6 had established that the relevant medical supplies were supplied to Amuria District Local Government by PW12 Akullo Mary Goretti, despite her denials. Further that there were documents signed by PW12, including invoices and delivery notes which showed that the medical supplies in issue were purchased and delivered. Counsel contended that the denials by PW12 were not validated by the testimony of PW13, the handwriting evidence, who testified that the position and moods of a person could influence how he/she wrote, which was a probability in the circumstances.

Counsel further submitted that the testimony of PW2 Olungura Joseph, who ran the business, which denied either having received money from the 1st appellant or having supplied the medical supplies for which the money was allegedly paid, had done very little to clear the doubt in the prosecution case. He pointed out that PW2 had claimed that the LPO and receipts which the 1st appellant stated to have been issued by PW2's business to him, had instead been issued to Teso College and Soroti Marketing Office and not Amuria District Local Government. Counsel contended that if that were the case, the prosecution would have brought witnesses to testify to those facts, which was not done and the failure in that regard should have been resolved in the 1st appellant's favour. He asked this Court to find that the first appellate Court failed in its duty to reappraise the evidence and to rectify that failure.

Grounds 2 & 6

The case under these grounds was that the evidence adduced by the prosecution was insufficient to found a conviction of the 1st appellant as charged. On the conviction of Causing Financial Loss, it was submitted that there was no evidence of loss of money belonging to Amuria District Local government, as the 1st appellant had adduced evidence to show that the

medical supplies which were requisitioned for had been delivered to the District stores, which was confirmed by the Stores Manager.

On the conviction of Abuse of Office, Counsel submitted that the prosecution had failed to adduce evidence which proved that the 1st appellant, a Medical Officer of the district had done any arbitrary act prejudicial to his office. Counsel contended that although the prosecution case, which was believed by the Lower Courts was that the 1st appellant had withdrawn Shs. 43,500,000/= in abuse of office, the appellant had testified that he was in charge of health care promotion and not the finances of the district. It was further contended that the district had identified the need to purchase emergency medical equipment, and the 1st appellant was authorized by the Chief Administrative Officer, to raise an LPO for the same which he did. After raising the LPO, the 1st appellant sent it to the District Finance Officer who made the necessary payments. Thereafter, the medical equipment were supplied to the Health Centre II's in the district. Counsel contended that no loss was proven nor quantified in the circumstances as required.

Further, it was submitted that the prosecution's attempt to implicate the appellant in wrong doing by presenting PW12 had been an exercise in futility. PW12's signature appeared on documents like delivery notes, invoices and receipts which were used in the procurement of the medical supplies in question, but she had denied the signature thereon. The trial Court had ordered for the examination of PW12's signature by a handwriting expert who had testified that there were variations between the signature on the documents and PW12's usual signature. However, counsel submitted that it was established that PW12 used different signatures for different occasions and that coupled with the evidence of the handwriting expert that a handwriting could vary depending on position and mood left a probability that PW12 actually signed the documents in issue. Counsel submitted that the doubt in the prosecution case ought to have been resolved by the first appellate Court, upon re-evaluation of evidence, in favour of the 1st appellant which failed to do so. He asked this Court to allow these two grounds.

Grounds 4 & 5

Counsel faulted the learned first appellate Judge for a misdirection in law, when she shifted the burden of proof to the 1st appellant to prove his innocence, and a further misdirection when she lowered the standard of proof, contrary to the established legal positions. He relied on **Sections 101, 102, 103, 104 & 105** of the **Evidence Act, Cap, 6**; **Woolmington vs. DPP (1935) AC 462**; and **Uganda vs Dick Ojok [1992-93] HCB 54**, all to the effect that the burden of proving the guilt of an accused person in criminal cases lies on the prosecution, which must prove his/her guilt beyond reasonable doubt. The authorities further articulated that any doubt in the prosecution case must be resolved in favour of the accused, who should not be convicted due to a weakness in his defence but a strength in the prosecution case.

Counsel submitted that the learned First Appellate Judge had erred when she reinforced the prosecution case by discrediting the evidence of DW2 (the appellant), and DW7, which was a misdirection on her part. Counsel further submitted that the learned First Appellate Judge ignored the parole evidence rule, to the prejudice of the 1st appellant. He concluded that the learned First Appellate Judge had focused on the weaknesses in the defence evidence before proceeding to uphold the trial Court's decision, which was a misdirection and asked this Court to make a finding to that effect, and allow grounds 2 and 6 as well.

Ground 3

Counsel submitted that the learned First Appellate Judge had misdirected herself on the evidence of PW13, the handwriting expert, and evaluated the same contrary to the legal position laid out in various precedents. He relied on **Dan Nsubuga Weraga vs. Uganda, High Court Criminal Appeal No. 0039 of 2008** where the case of **Muzeyi vs. Uganda [1971] 1 EA 225** was cited, and it was held that the credibility of the expert is decided by the court but lack of rebutting evidence was not a factor.

Counsel further relied on **Maulidi Abdallah Chengo vs. Republic [1964] 1 EA 122**, where it was held that the most an expert on handwriting could properly say was that he did not believe a particular writing was made by a particular person or positively, that two writings are so similar as to be indistinguishable. It was further held that the expert should point out the particular features of similarity or dissimilarity between the forged signature on the questioned document and the specimen of the handwriting.

He further relied on a passage by **Lord Hewart** in the trial of **William Henry Padmore**, which was cited with approval in **R vs. Padmore**, that:

> **"...let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is something rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a man who, habituated to the examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province."**

Counsel further relied on **Nguku vs Republic [2004] 1 EA 188**, where it was held that the handwriting expert is not restricted to merely pointing out the features of similarity or dissimilarity between a forged signature and specimens of handwriting. He is also entitled to express without argument an opinion on whether two handwritings are the products of the same hand. If the opinion is a confident one, and is not challenged in cross-examination, the court is entitled to accept the opinion of the expert.

Counsel then submitted that the relevant handwriting expert who was called by the trial Court to examine PW12's signature did not confidently establish whether it was hers or not. When he was showed, a sample signature of PW12 during cross-examination, which looked similar to the allegedly forged signature, he became dodgy and evasive. Counsel submitted that the handwriting expert had testified that the mood and position of the writer could influence his/her general pattern of writing. Counsel contended that as the 1st appellant had testified that PW12 had signed on the documents while squatting, there was a probability that PW12 had signed the

documents in issue. He prayed that this ground is allowed for the above reasons.

All in all, counsel prayed that this Court allows the appeal, and acquits the appellant of all the offences he was charged with.

The 2nd appellant's case

The order in which counsel for the 2nd appellant argued the grounds of appeal was this: Grounds 1 and 3, jointly; grounds 2 and 4 jointly; ground 5, separately; and ground 6 separately, respectively.

Grounds 1 and 3

Counsel faulted the learned First Appellate Judge for having upheld the 2nd appellant's convictions on the two counts of Causing Financial Loss, the first which related to Ug. Shs. 43,500,000/= and the second, which related to Ug. Shs. 22,500,000/=. He pointed out that the said decision was based on the evidence of PW2 and PW12, who worked for Malta Enterprises, the business association which had supplied the medical equipment in issue but denied having done so at trial. Counsel contended that the relevant officials at the district testified that Malta Enterprises had supplied the equipment in question. Counsel pointed out that the Procurement Officer, who may have seriously supported the prosecution case was not brought to Court by the prosecution, which should have been interpreted in the 2nd appellant's favour.

Counsel further submitted that the 2nd appellant was not involved in the procurement, requisition and/or delivery of items at the relevant district, and her only role was to make payments as authorized by other departments. It was further established that the document, in which Malta Enterprises requisitioned for cash payments was not adduced in the trial Court. This document would have shown that the supplier asked for cash payments and then turned around to deny delivery of the goods in question. The said document was withheld by the state which tended to affect the justice of the case.

Counsel faulted the learned First Appellate Judge for having believed the testimony of PW1 Yachesikol Rosemary, and PW4 Okanyakure Justine Oscar, against the weight of documentary evidence on record. The said witnesses had testified that they made entries in the cash book without supporting documentation which counsel contended was untrue, because there were LPOs, invoices and receipts which supported those entries. Moreover, the testimony of DW2 Eumu Silver, DW4 Okodel Francis, DW5 Aswa Isaac, and DW6 Otwau Denis Geoffrey, confirmed that the medical equipment had been supplied to the district.

Counsel further complained of the following misdirection by the learned First Appellate Judge; firstly, in holding that the items which were delivered were from other government agencies, without any supporting evidence; secondly, having made a finding that the denial by the relevant supplier of having supplied the medical and revenue equipment had proved the offence of Causing Financial Loss against the 2nd appellant; thirdly, the reliance on the untrue testimonies of PW6, through to PW11 and PW12 that the goods in question were delivered belatedly. He contended that the distribution lists in respect of the medical equipment had shown that the equipment was delivered on time and it was erroneous for the learned First Appellate Judge to hold otherwise. Counsel contended that the late delivery of the relevant medical equipment to the Health Centre II's cannot be said to have caused financial loss; fourthly, a misdirection to believe the untrue testimony of PW4, that the medical equipment delivered to the Health Centre II's were from the Ministry of Health and not the goods requisitioned by the 1st appellant. In support of the foregoing, counsel submitted that the Prosecution had failed to adduce evidence at the trial to prove that they visited all the Health Centre II's in Amuria district to ascertain that they had not received the medical equipment in issue, and PW4 had contradicted himself when he stated that some of the Health Centre II's had received the medical equipment.

Counsel further contended that since PW14 had failed to visit all the beneficiary Health Centre II's in Amuria, there was a gap in the prosecution

case because the prosecution had failed to establish that the medical equipment were not delivered in all the Health Centre II's. He contended that the prosecution had failed to adduce evidence of loss of money belonging to the district. Counsel therefore asked Court to find that there was no such loss relating to the payments which were made for medical equipment.

Regarding the payment for revenue documents, which purportedly caused financial loss of Ug. Shs. 22,500,000/=, counsel majorly repeated the submissions made on the purchase of medical equipment. He contended that the actual procurement, receipt and delivery of the revenue items had been carried out and there were photos to show that a market survey was carried out using the procured documents.

Counsel further submitted that PW1 did not give the money for purchasing revenue receipts to the 2nd appellant contrary to the finding to that effect by the learned First Appellate Judge. He maintained that no loss had been occasioned to Amuria District by the acts of the 2nd appellant, and asked this court to acquit her on the 2 counts of Causing Financial Loss.

Grounds 2 and 4

These grounds related to the counts of Abuse of Office in the relevant charge, which alleged that the 1st appellant had withdrawn Shs. 43,500,000/= and Shs. 22,500,000/= from the Amuria District Account, and put it to her own use. Counsel contended that the ingredients of the said offence involved doing an arbitrary act which would then be proved to be prejudicial to the interests of one's employer. In the present case, the 2nd appellant was not responsible for the purchase of the medical or revenue items and any attendant documentation, and she could not be said to have abused her office if those documents were subsequently queried. Counsel contended that it was, therefore, erroneous when the learned First Appellate Judge based her decision on the fact that the supplier of the medical or revenue items had denied having supplied the same, because that denial did not remove the fact that the appellant had dutifully executed her role as Chief Finance Officer in the circumstances.

In relation to the medical equipment, counsel submitted that their distribution to the various Health Centre II's meant that there was no arbitrary act done by the 2nd appellant. Moreover, PW14, the Investigating Officer, had failed to prove that the 2nd appellant had converted any money to her own use. Counsel contended that the 2nd appellant did not breach any rules, law and or plans and systems of the district when she effected the payments in question.

On ground 4, counsel submitted that it was a misdirection by the learned First Appellate Judge when she made a finding that DW4's evidence had watered down the 2nd appellant's defence, by testifying that "nothing showed that the receipts were from Malta, when he was given samples of the same to say if there is anything on the receipts that shows Malta." Counsel contended that receipts don't bare the suppliers' marks. Counsel also submitted that the evidence of PW5 had established that he had seen people go to the field for revenue collection basing on the revenue instruments in issue and there was documentary evidence to prove the same. In conclusion, he asked this Court to allow grounds 2 and 4, and acquit the 2nd appellant on the counts of Abuse of Office for which she was convicted.

Grounds 5

This ground was formulated in a manner which offended the **Judicature (Court of Appeal Rules) Directions S.I 13-10.** It was framed as follows:

> **"The learned Appellant (sic) Judge erred in Law when she failed to exhaustively re-evaluate the evidence as a first Appellant Court thereby reaching a wrong decision which caused a miscarriage of justice."**

The evidence which was allegedly not properly re-evaluated by the First Appellate Court, was not specified in this ground as required under **Rule 86** of the Rules of this Court. For that reason, we shall not consider it.

Ground 6

Counsel asked this Court to set aside the order of refund made against the 2nd appellant by the trial Court, and upheld by the First Appellate Court, as it was established by the evidence adduced in the trial Court that the medical

equipment and revenue equipment from which it arose were paid for. He contended that it was not within the schedule of duties of the 2nd appellant to carry out procurements from which any alleged loss may have arisen.

All in all, counsel prayed to this Court to acquit the 2nd appellant on all counts as charged, and set aside the relevant sentences and refund orders.

Resolution of the Appeal

We have carefully studied the Court record, and considered the submissions of counsel for either side, the law applicable, the authorities cited, and those not cited which are relevant to the determination of the present appeal. This is a second appeal, and the duty of a second appellate Court has been recently re-iterated by the Supreme Court in **Kamya Abdallah & 4 others vs. Uganda, Supreme Court Criminal Appeal No. 0024 of 2015**, where it was observed:

> **"This is a second appeal and the duty of the 2nd appellate Court is to determine whether the 1st appellate Court properly re-evaluated the evidence before coming to its own conclusion. Except in the clearest cases where the first appellate Court has not satisfactorily re-evaluated the evidence, the appellate (second appellate) Court should not interfere with the decision of the trial Court."**

The Court further referred to **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal; No. 0010 0f 1997** where it was held:

> **"On the 2nd appeal, the court of appeal is precluded from questioning the findings of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support a finding of fact."**

We shall keep the above principles in mind, as we determine this appeal.

The decision of the first appellate Court against the appellants, which is captured at pages 83 to 87 may be summarized as follows:

1st appellant

- The Court upheld the convictions and sentences of the 1st appellant, of the offences of Causing Financial Loss and Abuse of office, after making a finding that the ingredients of the said offences were proved against him through evidence that showed that he had commenced the process of requisitioning for the Shs. 43,500,000/= for the purchase of medical equipment but the same was not put to its use.
- The Court reasoned that there was evidence that Malta Enterprises, which had allegedly delivered the medical equipment was neither paid to deliver the equipment nor had it delivered the same.
- The Court further made a finding that the 1st appellant had tried to cover up the scam related to fraudulent procurement of medical equipment, when he made belated deliveries to several Health facilities and yet those items were not delivered to those facilities. Court made a finding that the items, which were distributed to those health facilities were items from other sources.
- The Court made a further finding that the learned trial Chief Magistrate had acted with justification, when she rejected the testimony of the defence witnesses for the reasons she gave.
- Last but not least, the Court made a finding that the order of refund of Shs. 43,500,000/=, which the trial Court made against the appellant had been justified in the circumstances, since he had diverted money meant for medical equipment from its intended purpose.

2nd appellant

- The first appellate Court made a finding that 2nd appellant was rightly convicted on two counts of Causing Financial Loss contrary to section 20 (1) of the Anti-Corruption Act, 2009. Count one, related to Shs. 43,500,000/= meant to purchase medical equipment, and the Court made a finding that the 2nd appellant had requisitioned for the money, had drawn it from the bank but did not put the money to its intended use.
- Count two related to the Shs. 22,500,000/= meant to purchase revenue receipts, and the Court made a finding that the prosecution had proved

that the money was drawn, and given to the 2nd appellant who did not put it to its intended use.

- The Court further made a finding that the 2nd appellant was rightly convicted of the two counts of Abuse of Office contrary to section 11 of the Anti-Corruption Act, 2009, because she had handled the monies in issue in the two counts in an arbitrary manner when she failed to put them to their proper use.

It seems that the above findings were premised on an acceptance of the following facts:

The first appellate Court accepted that the 1st and 2nd appellants had, during the course of their duties as District Health Officer, and Chief Finance Officer, or Amuria District, respectively, been involved in a fraudulent procurement process, whereby they purported to purchase medical equipment and revenue equipment (for the 2nd appellant alone), from Malta Enterprises, which neither received any money from them nor made the alleged supplies.

Although there were several supporting documents, including Local Purchase Orders, vouchers and receipts, which tended to lend credence to the transactions in issue, the first appellate Court made a finding that the documents were unauthentic, because they bore an unauthentic signature of PW12 Akullo Mary Goretti.

In our view, this calls for scrutiny of the evidence of PW13 Sebufu Elsa, the handwriting expert, who examined the documents in issue, and compared the writings thereon with a sample signature of PW12, who had allegedly signed the supporting documentation, which proved that Malta Enterprises had delivered the medical and revenue equipment in issue. PW13's key findings at page 159 of the record were these:

> **"...I observed fundamental differences between sample handwriting and questioned handwriting which include fluency of the writer (line quality), character shapes and the manner of construction i.e letters "Y", "e", "r" & "G" they also differ in relative spacing of characters, shape of correcting stroke i.e. x – y, relative slant, internal proportions of letters Y & G.**

Another point of deference (sic) is that there is a loop formed on letter Y in the samples and is not observed on the questioned writings.

In my opinion, there is strong evidence to show that the author of sample handwriting in exhibit D4 and P22 did not write questioned handwriting marked X on exhibit P13."

PW13 further stated in cross examination that there would be normal variations in any person's handwriting depending on his/her mood and position, and that he had not considered PW12's mood and position in the circumstances. However, he was emphatic that the mood and position would only cause what he termed as "normal" variations as opposed to the "fundamental" variations which were apparent on the supporting documents and the sample handwriting of PW12 which was examined.

Counsel for the 2nd appellant relied on a host of cases, in an attempt to challenge PW13's expert opinion. We understood him to have insinuated that the said expert opinion was erroneously relied on by the lower Courts, in contravention of the law.

Relevant to this appeal, an expert is a person who is specially skilled in questions, as to the identity of a handwriting, and any opinion given by the expert in the matter is relevant, and may be relied on by court. **See: Section 43 of the Evidence Act, Cap.6.** In **Nguku vs. Republic [2004] 1 EA 188,** the Court referred to **Salum vs. R [1964] EA 126,** where it was observed that:

"(i) The most that an expert on handwriting can properly say in an appropriate case, is that he does not believe a particular writing was by a particular person or positively, that two writings are so similar as to be indistinguishable; the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimens of handwriting."

In **Nguku (supra)**, the Court further referred to **Onyango vs. Republic, [1969] EA 362**, where the Court considered Salum vs. R (supra), and observed interalia that:

"Although a judgment of the High Court of Tanzania (Salum) is not binding on this Court, it has considerable persuasive authority and

particularly when it falls (if we may say so) from so careful a judge. Nevertheless, we do not think the passage cited provides sufficient support for the proposition sought to be based upon it. In particular, we do not find anything in the remark of Lord Birkenhead or of Lord Hewart in the passages cited which precludes the reception in evidence of the opinion of an expert that two documents were written by the same hand. Cross on Evidence, third edition at page 504 referring to proof of handwriting by comparison says this:

A document, which is proved to have been signed or written by the person whose handwriting is in issue is first produced, and this is compared with the writing, which is being considered by the court. On the basis of such comparison, an expert in these matters may give evidence.

Section 48 of our Evidence Act recognizes the existence of handwriting experts, and expressly allows evidence to be given of their opinion 'as to identify or genuineness of handwriting'. It may be that if a positive opinion is given that a particular writing is in the hand of a particular person it should be received with caution, but it seems to us that at any rate under the law of this country, a handwriting expert must be allowed to give his opinion that two documents were written by the same hand. Otherwise it is not easy to see what sort of 'opinion' an expert can give on any matter concerning handwriting. That is precisely what the document examiner did in this case and we find no substance in the submission that he went outside the proper submission that he went outside the proper province of a handwriting expert.

With regard to the further submission that is for the court to make up its own mind whether a particular writing is to be assigned to a particular person, we respectfully agree, but we do not think that in this respect the evidence of a handwriting expert is to be regarded in any different way from the evidence of experts in other subjects. An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and Government analyst, even in the rare cases where he is called

as a witness, may state without argument his conclusion (for example) that seminal stains were found on clothing.

In every case the court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind. The magistrate did so in this case. There was no challenge to the competence of the document examiner, and his opinion was a confident one. In the context of the other evidence before her she accepted his opinion as correct. It might of course have been better if the witness had indicated either in his written report or in his evidence in court the grounds on which his opinion was based. We do not think this is a universal requirement and we note that of the cases relied on as suggesting that this must be done, neither Wakeford v Bishop of Lincoln nor RK Padmore is mentioned in Phipson on Evidence, and in Cross on Evidence (loc cit) the citation from the former case is prefaced by the words 'strictly speaking'. In the instant case the Magistrate had before her the disputed writing and the specimens, and also the confident opinion of the expert that they were in the same hand. We cannot say that she was in any way wrong in her approach to the evidence and conclusion which she drew from it".

In our view, the trial Court admitted PW13's expert opinion, after it was satisfied that the said evidence had fully adhered with the legal requirements articulated in the Onyango and Salum cases (supra). PW13 stated his competences as a handwriting expert, and the same were not challenged. Thereafter, he gave a confident testimony, in which he stated the dissimilarities between the disputed signature and her specimen handwriting. PW13 then emphatically stated that, notwithstanding mood or position, it was unlikely that there would be fundamental variations in one's handwriting, although normal variations could happen. The trial Court was therefore, entitled to rely on PW13's expert opinion, and the first appellate Court acted within its powers to uphold the decision to do so.

Having so held, we are now faced with the concurrent findings of fact by the two lower courts that the testimony of PW13 had established that the Local Purchase Orders, vouchers, delivery notes and other documents which were allegedly issued by Malta Enterprises, the alleged suppliers of the medical equipment and revenue documents to Amuria District Local government, were unauthentic. For that reason, it could be concluded that the said Malta

Enterprises did not receive any money as alleged, and it did not supply or deliver the equipment in issue. This was the testimony of PW2 and PW12, who denied having supplied the medical equipment or revenue equipment to Amuria District Local Government, as alleged. Therefore, the money which passed through the hands of the appellants for purchase of the relevant equipment remained with them, and Amuria District Local Government lost the same. Those were the concurrent findings of the two lower courts and we cannot now, on a second appeal interfere with them, except in the rare circumstances that the two lower courts had erred, of which this case is not among.

For the above reasons, we are unable to fault the decisions of the first appellate Court, or indeed the trial Court to convict the appellants as they did.

It might be that there was an undesirable emphasis on the weaknesses in the appellant's cases, yet it is trite that a conviction must be founded on the strength of the prosecution case, and not the weakness of the defence case. However, we are convinced that the aforementioned flaw did not occasion a miscarriage of justice to warrant us to interfere with the decision of the first appellate Court, or indeed that of the lower Court.

In our view, there was sufficient evidence to support the decision of the first appellate Court, which, on a whole, properly carried out its duty as a first appellate Court to reappraise the material before the trial Court and came to the right conclusions. The sentences and orders passed against the appellants are, therefore, maintained.

The substantive grounds of this appeal would be disposed of accordingly. The appeal lacks merit, and therefore, stands dismissed.

We so order.

Dated at Kampala this 18th day of February 2020.

.....

Alfonse Owiny-Dollo, DCJ

Justice of Appeal

.....

Elizabeth Musoke

Justice of Appeal

.....

Percy Night Tuhaise

Justice of Appeal