THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 179 OF 2021

SENFUKA ABUBAKER::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Arising from the decision of the High Court by Oyuko Anthony Ojok, J, in High Court Criminal Appeal No.32 of 2018, dated the 15th day of February 2021)
(Arising from Makindye Chief Magistrates Court Case No.783 of 2013)

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF THE COURT

Background to the appeal

The appellant, Senfuka Abubaker was indicted with two counts:

Count 1 is forgery contrary to **section 342 of the Penal Code Act.** The particulars of the offence are that the appellant on the 2nd day of February, 2008 at Kibiri 'B' zone LC.1 in Wakiso District forged a land Sale agreement.

Count 2 is uttering a false document contrary to section 351 of the Penal Code Act. The particulars of the offence are that the appellant on the 2nd day of February, 2008 at Kibiri 'B' zone LC.1 Busabala parish in Wakiso District Knowingly and fraudulently uttered a false document to wit a land Sale Agreement purporting to have been signed by Musoke Dick whereas not.

The learned trial Chief Magistrate found that the prosecution failed to prove all the ingredients in respect of both counts and acquitted him on both counts.

Being aggrieved by the decision of the trial Chief Magistrate, the respondent appealed to the High Court in Criminal Appeal No.32 of 2018 before Hon. Justice Oyuko Anthony

Ojok, J, found the appellant guilty on both counts. He convicted and sentenced the appellant to two and a half years imprisonment on both counts. The sentences were to run concurrently. The appellant was ordered to give back the said land to the complainant and pay compensation of Shs.10,000,000 for the cost of destruction of the suit property.

Dissatisfied with the decision of the first appellate Judge, the appellant appealed to this Court against conviction and sentence on the following grounds:-

1. **"The learned trial Judge erred in law when he failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of forgery contrary to section 342 of the Penal Code Act.**
2. **The learned trial Judge erred in law when he failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of uttering false document contrary to section 351 of the Penal Code Act.**
3. **The learned trial Judge erred in law and fact when he ordered the appellant to pay costs for destruction of property and the land with the sum of Uganda shilling 10,000,000/-."**

Legal Representation

At the hearing of the appeal, the appellant was represented by Mr. Sewankambo Hamza on private brief while the respondent was represented by Mr. Kunya Noah, a Chief State Attorney. Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Luzira Prison.

Submissions of Counsel

Ground 1: The learned trial Judge erred in law when he failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of forgery contrary to section 342 of the Penal Code Act.

Counsel for the appellant submitted that the offence of forgery was not proved against the appellant as there was no evidence that the appellant made a false document with intent to defraud or deceive.

Counsel contended that the first appellate Judge entirely relied on the evidence of PW4 (the hand writing expert). He submitted that the law regarding expert evidence according to Hellen Obura, J as she then was, in ***Civil Suit No.380 of 2009, Makua Nairuba Mabel vs. Crane Bank Limited***, is that: ***"It is now trite law that while Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the Courts and the Courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."***

He further relied on the case of ***Namatovu Magaret vs. Tom Kaaya and anor, Civil Suit No.432 of 2005,*** where Monica Mugenyi, J as she then was, cited Sarkar's Law of Evidence, 17th Edition, 2010 and noted that:

> ***"The infirmity of expert evidence consists in this that it is mostly matters of opinion and is based on facts detailed by others, or assumed facts and opinions against opinion; and experts are selected by parties by ascertaining previously that they will give an opinion favourable to the party calling them. Expert evidence is, however, of value in cases where courts have to deal with matters beyond the range of common knowledge and they could not get along without it, eg matters of scientific knowledge_or when the facts have come within the personal observation of experts."***
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> ***"The evidence of an expert is not conclusive. It is for the courts to assess the weight of the evidence and come to its own conclusion. An expert is fallible like all other witnesses and the real value of his evidence lies in the logical inferences which he draws from what he has himself observed, not from what he merely***

surmises or has been told by others. Therefore in cross-examining him it is advisable to get at the grounds on which he bases his opinion. There is great difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution; they are too often partisans – that is they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence. ... Their duty is merely to assist the court by calling its attention to, and explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters."

Counsel thus argued that the evidence from PW4 was not sufficient to prove that the appellant forged a land sale agreement dated 2nd February 2008. He submitted that PW4 stated that due to tremor on the specimens, the signatures were not suitable for comparison and thus, making his report inconclusive. He added that PW4's finding that there was no sufficient evidence showing common authorship between the questioned signatures marked with red and the specimen due to the differences in the execution in upper cases D, M,K and small "u" before "s" is not helpful since the specimen signatures authored by PW1 were not suitable for comparison.

Counsel submitted that, in light of the cases earlier cited, the appellate Court ought to have re-evaluated all other pieces of evidence and come to its own conclusion but not to base the existence of a false document on the evidence of PW4 alone. He argued that the appellant (DW1) testified that the impugned agreement (exhibit 2) dated 2nd February 2008 was written by one of the witnesses called Kasibante Sulaiman (DW2). According to counsel, DW2 in his testimony, confirmed that the impugned sale agreement was written by him and that it was in his own handwriting. That in cross examination, DW2 was very emphatic stating that he was called by the Chairman to write the agreement. Counsel added that, DW2 further testified that (PW1) Dick Musoke and the appellant had previously transacted four times where he authored all the agreements. Similarly, DW3 participated in the transaction dated 2nd February 2008 and confirmed his signature on exhibit 2. He argued that DW3 was also a witness to all other previous land transactions (agreements) between PW1 and the appellant.

Counsel further contended that the above piece of evidence was further reinforced by PW2, Mukasa Lawrence, who testified that the signature on the agreement was a lot similar to that of the deceased Chairman. He argued that the first appellants' finding that PW2 could not tell whether or not the agreement was genuine should be rejected since it's not part of his testimony. He added that since the testimony of PW4 indicated that the signatures were not suitable for comparison, the appellate Court erred when it made a finding that the report was comprehensive to justify the conviction.

Counsel submitted that PW4 testified that an original land sale agreement in Luganda dated 2nd April 2008 was presented for examination. He argued that PW4's testimony in cross examination that he made a report based on the documents presented to Court is not supported by evidence. He averred that the impugned original agreement presented was never brought to Court for inspection. Counsel argued that PW4's finding that there could be an error in typing, should have been resolved in favour of the appellant such that the evidence is considered as a whole. He contended that, had the first appellate Judge re-evaluated all the prosecution evidence and the defense, he could not have convicted the appellant on basis of PW4's testimony.

Counsel contended that there was no proof that the appellant intended to defraud PW1. He cited **section 346 of the Penal Code Act,** which provides that intent to defraud is established by evidence of the existence of a false document and a specific person, ascertained or unascertained, capable of being defrauded. He argued that the first appellate Court never pointed out any evidence relied on by the prosecution to prove that important element.

He submitted that, had the first appellate Court carried out its duty, it would have found that PW1 had previously transacted with the appellant since 2006. He added that PW1 used to make his transactions with the former Chairman.

Counsel submitted that according to PW3, Court should have found that there was a land dispute between PW1 and the appellant. He added that according to PW5, the report

made at Police was in respect of malicious damage to property following the alleged demolition of the foundation erected by PW3 on the disputed part of the land. He argued that the appellant stated that he first used the disputed land for brick making and later as an assembly ground for the school children of his school. That the appellant further stated that PW3 deposited on the disputed land building materials in 2013 and yet he had been in occupation since 2008. Counsel contended that the use and occupation of the disputed land by the appellant was confirmed by DW2 and DW3. He added that PW3 told Court that the appellant used to put firewood on the disputed land. That PW3 further stated that whereas PW1's (his father), has a fence, the disputed part was not within and that the disputed agreement was witnessed by DW2, DW3 and Chairman LC1, Kirembwe James.

Counsel argued that since the evidence showing that the agreement was not forged has been underscored and the fact that the appellant was in use and occupation of the disputed land, as the purchaser thereof from PW1, there was no intention to defraud the appellant.

On participation of the appellant in forgery, counsel submitted that the first appellate Court ignored the evidence of DW1, DW2 and DW3 who prepared and witnessed the agreement. He argued that PW2's testimony that the signature on the agreement had a lot of similarities to the signature of the deceased supported the testimonies from DW2 and DW3.

Counsel concluded that, in the circumstances, the first appellate Court had no basis to convict the appellant of the offence of forgery based entirely on the evidence of PW4.

On the other hand, counsel for the respondent submitted that the offence of forgery was proved against the appellant. He argued that the first appellate Court Judge correctly outlined all the ingredients of the offence and applied the laws applicable to the facts in arriving at his decision.

Counsel submitted that the first appellate Court Judge did not entirely rely on the evidence of PW4, the examiner of the documents in question. He argued that the Judge referred to the fact that the appellant had used the disputed suit land since 2008 as an assembly ground for the appellant's school and the appellant never denied this fact.

He relied on this Court's decision in ***Gerald Nsubuga and anor vs. Uganda, Criminal Appeal No. 064 of 2008***, where Court held: "***It is trite law that before Court of law comes to any finding of acts, it must look at the whole case as a whole. The Court must consider the evidence of both sides and look at the whole evidence together.***" Counsel argued that the first appellate Court complied with the above provision.

Counsel submitted that the appellant testified that he had the sale agreements that he used to make with PW1, Dick Musoke. He averred that PW3 asserted that *"in 2010 the accused brought firewood and poured it on the said land. He slashed the cassava on the land, when I asked him he denied but alleged it was done by children. Later he approached me and asked me that I sell the said land to him."* Counsel questioned why the appellant was asking PW3 to sell him the disputed land again when he alleged that he had already bought it. According to counsel, after the appellant failed to get the blessing of PW3 to sell the land, he chose to forge a purchase agreement by himself.

Counsel submitted that PW4 clearly told Court that: *"The most suitable signature is found on exhibit "C". I found similarities from the questioned exhibit "c" such that in my opinion it is very unlikely that a person other than the author of specimen C wrote on exhibit D."* He noted that exhibit C was the specimen signature of PW1 while exhibit D and E were specimen signature and handwriting of Dick Musoke on a plain paper.

Counsel contended that the explanation by PW4 that there could have been a typing error is understandable. He averred that contrary to the appellant's submission that there was no evidence, there is evidence on record that the appellant used the land over which he forged the sale agreement from 2010 as indicated in the evidence of PW3. He submitted that this was fraud on the appellant's part.

On participation, counsel contended that the prosecution did not have to produce evidence that it was the appellant who did the actual forgery because whether he did it himself or through another, either way he participated in view of the clear provision of **section 19 of the Penal Code Act** which provides:

1. **"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it—**
   a) **every person who actually does the act or makes the omission which constitutes the offence;**
   b) **every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
   c) **every person who aids or abets another person in committing the offence.**
2. **Any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part, is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the act or made the omission; and he or she may be charged with doing the act or making the omission."**

Counsel contended that the evidence of DW2 and DW3 was suspect and therefore not worthy believing because PW1 denied authorising the sale agreement which was confirmed in evidence by PW4 that PW1 was unlikely to have authorised it. He averred that the above evidence was further corroborated by PW3's evidence which showed that the unending desire by the appellant to own that particular piece of land by using it as an assembly ground and later destroying their cassava and foundation through children he sent to do so.

He therefore argued that there is sufficient evidence to prove all the ingredients of the offence hence the first appellate Court was justified to convict the appellant of forgery.

Ground 2:

The learned trial Judge erred in law when he failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of uttering false document contrary to section 351 of the Penal Code Act.

Counsel for the appellant submitted that the findings of the first appellate Court that the appellant was guilty of uttering a false document basing on exhibit 2 should be rejected. He noted that the prosecution failed to lead evidence to proof that the appellant knowingly and fraudulently uttered a false document.

Counsel contended that, according to PW4, his report was on an examined original land sale agreement in Luganda dated the 2nd of April 2008. He argued that, surprisingly, a photocopy of the document in question dated the 2nd of April 2008 was presented by PW1 and admitted as exhibit P2. Counsel submitted that whereas the defense does not dispute the content of exhibit P2, it would be important for the Court to confirm whether the original forming the report of PW4 is similar to exhibit P2. According to counsel, that it was not enough for PW4, in cross examination, to state that his report was based on documents presented to Court. He argued that no evidence was led to show that the original he examined was also produced in Court. He added that PW4's testimony creates doubt as to the very document forming the basis of his report. Counsel contended that despite the absence of the original document dated 2nd April 2008, DW2 and DW3 confirmed witnessing exhibit P2 and appended their signatures thereon.

Counsel further contended that PW4 contradicted himself when he stated that Specimen signatures of PW1 were not suitable for comparison. He therefore submitted that PW4's findings that the signature on A (exhibit 2) was probably written by a person other than that of C, D and S, was not conclusive in the absence of an original dated 2nd April 2008 presented to him. He stated that the same signatures referred to by PW4 had tremor and unsuitable for comparison. He added that, on the other hand, DW2 confirmed writing exhibit 2 and it had a signature similar to the deceased Chairman.

Counsel therefore submitted that exhibit P2 relied on by the prosecution instead of an original dated 2nd April 2008 was truthful since those who participated in the execution testified to its authenticity. According to counsel, it was therefore important for the investigating officer called Simon as mentioned by the appellant, to testify in respect of the whereabouts of the original land sale agreement dated 2nd April 2008. He noted that an attempt by the appellant to have a photocopy of the said original document was objected to by the prosecution. He averred that the absence of Simon's testimony rendered the prosecution evidence inadequate and thus it was incumbent upon the appellate Judge to consider other pieces of evidence.

On the other hand, counsel for the respondent submitted that once the Court found the appellant guilty of forgery of the sale agreement, the appellant had to be found guilty of uttering a false document since he is the one who uttered the same to the Police.

Counsel submitted that PW5 testified that the original was returned to the appellant which meant that he is the one who uttered the sale agreement to the Police.

Counsel noted that the agreement was found to be a forged document. He relied on **Gerald Nsubuga and anor vs. Uganda** *(Supra)*, where Court held: ***"While resolving ground one above we have come to the conclusion that the learned trial Judge had properly re-evaluated the whole evidence and then justified in relying on the evidence of PW10 which pointed to the fact that the 2nd appellant had filed the questioned transfer form and signed it purported to a transfer form signed by PW5 whereas it was not. We agree with the concurrent finding of both lower courts that exhibits P2 is a false document thus having been forged"***

Counsel contended that, by tendering the impugned sale agreement, the appellant was in fact tendering a false document in as far as it alleged that PW1 had authored it whereas not. He argued that the said document told a lie about itself.

He prayed that Court uphold the appellant's conviction on count two.

Ground 3:

The learned trial Judge erred in law and fact when he ordered the appellant to pay costs for destruction of property and the land with the sum of Uganda shilling 10,000,000/-.

Counsel for the appellant submitted that under **section 126 (1) of the Trial on Indictments Act,** compensation is ordered if it appears from the evidence that some other person, whether or not he or she is a prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed. He contended that the order to pay compensation for the cost of destruction of property and that the land be given back to the complainant is not supported by any evidence as required by law.

Counsel submitted that PW5 told Court that PW1 and PW3 reported a case of Malicious damage to property. He argued that during the trial, no evidence was led in Court about a Police investigation on the same. He stated that the evidence of PW3 that the foundation was demolished by the appellant was never proved. According to counsel, when PW3 reported the matter, no investigations were conducted but rather the Police concentrated on establishing the present charges after the appellant presented his original land sale agreement. He averred that in the absence of any finding as to damage, it was improper for the appellate Judge to order any compensation.

Counsel argued that since the case of forgery was not proved, Court could not have made an order for the land to be returned. According to counsel, the evidence only indicated that there was a dispute over the land and thus requiring the Court of competent jurisdiction to hear it. He further argued that the issue of costs and compensation was not a ground of appeal in the first appellate Court.

He therefore prayed that Court sets aside the orders that the land be given back to the complainant and payment of compensation for the said destruction on the land in question.

Counsel for the respondent submitted that the first appellate Court has the power to vary or confirm a sentence or orders made by a lower Court. He contended that there was evidence of loss of property as a result of the actions of the appellant. He stated that PW3 testified that the appellant destroyed cassava, building materials and the foundation of the suit land.

Counsel therefore submitted that Court was justified to make any lawful orders in accordance with the clear provisions of **section 35 of the CPCA Cap 116** which provides: **"The appellate Court may, on appeal from an acquittal or dismissal, enter such decision or judgement on the matter as may be authorised by law and make such order or orders as may be necessary."**

Counsel argued that the order for compensation is authorised by law and the order to return the land to the rightful owner was necessary to avoid any further unnecessary litigation.

He prayed that Court finds that all the grounds of appeal have no merit, dismisses the appeal and upholds the sentence and orders of the first appellate Court.

Consideration by Court

This is a second appeal. In resolving the issues raised in this appeal we are guided by what was held by the Supreme Court in ***Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997:-***

> ***"On a second appeal, a second appellate court is precluded from questioning the findings of fact 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 the finding of fact, this being a question of law."***

We have perused the records of proceedings of the Chief Magistrates Court and the High Court as well as the judgments of both Courts. We have also studied the submissions of both counsel for the appellant and counsel for the respondent and the relevant available authorities. We shall now proceed to apply the relevant legal principles in resolution of the appeal.

We shall resolve grounds 1 and 2 together while ground 3 shall be resolved separately.

Resolution of grounds 1 and 2

The learned first appellate Judge was faulted for failing to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of forgery contrary to **section 342 of the Penal Code Act** and guilty of uttering false document contrary to **section 351 of the Penal Code Act.**

Section 342 of the Penal Code Act defines Forgery as the making of a false document with intent to defraud or to deceive.

Section 351 of the Penal Code Act provides:-

> **"Any person who knowingly and fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question."**

To prove that the offence of forgery was committed, the following ingredients must be proved by the prosecution:-

1. That the document was forged
2. That it was made with intent to defraud or deceive
3. That it was done by the accused

The learned first appellate Judge in revaluation of evidence was alive to the above ingredients and analyzed the evidence as follows:-

"PW2, the area LC1 Chairperson Kibiri, said that he did not sign the agreement but his former Chairperson, now deceased, did and he could not tell whether it was genuine or not but that the signature resembled that of the former Chairperson. Succeeding somebody does not make you acquainted with somebody's signature unless you work with that person closely or interacted with his documents.

Section 45 of the Evidence Act is to the effect that when Court has to form an opinion, as to the person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was not written or signed by that person is a relevant fact.

A person is said to be acquainted with the handwriting of another person when he or she has seen that person write or when he has received documents purporting to be written by himself or herself or under his or her authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him or her. Therefore, it was necessary to subject the documents to a handwriting expert since PW2, the LC1 Chairperson was not acquainted with the signature nor handwriting of the former Chairperson. However, PW4, the Handwriting expert stated that though he did not have the original document, because he had handed it to police, he examined the agreement.

In his testimony on page 15 of the Record of proceedings, he mentioned his qualifications and experience which were not denied. That part of his work was to examine questioned or disputed documents from police and courts of law. This would be in form of signatures, handwriting, e.t.c. including products of machines (e.g. photocopies). Even if there was no original document, still PW4 would examine and give a comprehensive report, as he did. I do respectfully disagree with the learned trial Chief Magistrate that the original document was necessary before the handwriting expert could do his work nor that the investigating officer should have come to court to testify. It is therefore my considered opinion that the trial Chief Magistrate did not evaluate the evidence properly.

Intention to deceive or defraud

S.342 of the Penal Code Act defines forgery as the making of a false document with intent to defraud or deceive. To forge a document means to make or alter or deal with the document so that the whole or part of it;

a) Purports to be what or of an effect that, in fact is not

b) Purports to be made, altered or dealt with by authority of a person who did not make, alter or deal with or for some person who does not in fact exist, or

c) Purports to be made, altered or dealt with by the authority of a person who did not give that authority

d) Otherwise, purports to be made, altered or dealt with in circumstances in which it was not made, altered or dealt with. In cases such as this one, the meaning of a document at times arises.

The word 'document' was defined in Maritime dictionary 5th edition to include anything on which there is writing and anything on which there are marks, figures, symbols, codes perforations or anything else having a meaning for a person qualified to interpret them.

Intention to defraud here means the intention to practice fraud or another person so long as that person shall be prejudiced by the fraud.

In the present case, there is no dispute of previous agreements but that the disputed suit was used since 2008 as an assembly ground of the accused.

What is in dispute is whether PW1 signed the agreement dated on the 2nd day of February 2008 in respect to the plot. The testimonies of the current chairperson that the signature of the agreement resembled that of his predecessor is not enough proof but that of PW4 rested the matter and I tend to agree with that conclusion.

That it was done by the accused

The fact that the disputed land was used as an assembly ground and the accused does not deny it in his testimony makes it clear that the act was done by the accused person. Therefore, the ingredient of forgery was proved by prosecution.

Having found in favour of the prosecution, it is not in doubt that this document was used to deceive the public and as such I find the accused guilty of Count Two of uttering false documents.

In a nutshell, the accused is hereby found guilty on both counts and the learned trial Chief Magistrate never evaluated the evidence properly and I therefore set aside the order of acquittal and substitute it with conviction. This appeal therefore succeeds."

We respectfully disagree with the first appellate Judge's finding that PW2, Mukasa Lawrence, the LC1 Chairperson Kibiri, was not acquainted with the former Chairman's signature nor his handwriting because succeeding somebody does not make one

acquainted with somebody's signature unless you work with that person closely or interacted with his documents.

Section 45 of the Evidence Act provides:-

> **"45. Opinion as to handwriting, when relevant.**
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> **When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact.**
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> **Explanation – A person is said to be acquainted with the handwriting of another person when he or she has seen that person write, or when he or she has received documents purporting to be written by that person in answer to documents written by himself or herself or under his or her authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him or her."**
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> **(Underling is ours)**

As a successor of the deceased LC1 Chairman Kibiri, PW2 took over the office and documents written by the previous Chairman as he carried out his duties. He took over documents from his predecessor and in the course of his duties got acquainted with his handwriting. In our view, this makes PW2 acquainted with the handwriting and signature of his predecessor and in accordance with **section 45 of the Evidence Act,** qualifies to testify and give his opinion on the handwriting

We agree with the learned trial Chief Magistrate that PW2, having succeeded the former Chairman, was indeed acquainted with his handwriting and signature.

On the evidence from PW4, Ezati Samuel, the handwriting expert, he stated that he examined the original Sale agreement and thereafter handed it back to the investigating Police Officer. The said document was not tendered in Court because it was left in the

hands of the investigating officer who was absent during the trial. The evidence from the investigating officer was pertinent to ascertaining whether the document which was alleged to have been forged and uttered by the appellant was indeed the one which was submitted to the handwriting expert for analysis.

This Court in ***Consolidated Criminal Appeals No.0358 of 2015 and No.0741 of 2015, Owole Alfred vs. Uganda,*** held:-

> ***"The failure to call all the witnesses necessary for presentation of the whole picture in a case may render the verdict reached by the trial Court unsafe. In Bukenya and others vs. Uganda, [1972] 1EA 549 (East African Court of Appeal), it was held:***
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> > ***"It is well established that the Director (DPP) has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree, s.37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***
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> ***...Where the prosecution does not call the witnesses necessary for establishing the whole picture of a case, reasonable doubt as to the accused's guilt may arise. We adopt the definition of reasonable doubt as articulated in the Canadian Supreme Court decision in R vs. Lifchus [1997] 3 S.C.R 320:- "Reasonable doubt is not an imaginary or frivolous. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from evidence or absence of evidence." "***

In the instant case, adverse inference must be drawn owing to the prosecution's failure to call the investigating officer as a witness considering the fact that he was in possession of the original Sale agreement in question. Under the general law of evidence, it has to be

inferred that had the investigating officer testified, it would have been adverse to the prosecution's case.

It is our considered view that the absence of the original Sale agreement in question created reasonable doubt as to whether the same was the actual document that the Handwriting expert examined and made a report thereof. The original Sale agreement is the center of contention as to whether it was forged or not. The document should have been tendered in Court by the author, the handwriting expert who examined it or the investigating officer who took it, in order to prove that it was forged. This did not happen.

We therefore respectfully disagree with the first appellate Judge's finding that the original Sale agreement was not necessary before the handwriting expert could do his work and that it was not necessary for the investigating officer to have testified in Court.

The learned first appellate Judge ought to have re-evaluated the evidence from the handwriting expert alongside the evidence from DW1 (the appellant) who contested the authenticity of the handwriting experts' report and the evidence from DW2 Kasibante Sulaiman and DW3, Kawooya Haruna, which was to the effect that DW2 was requested by the then LC1 Chairman to write the said Sale agreement which was done in the presence of PW1, Dick Musoke (the complainant), DW1 (the appellant) and DW3, Kawooya Haruna.

All this evidence illustrates the need to have had the original contested document tendered and proved in Court.

We therefore find that the learned first appellate Judge failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion that the appellant was guilty of forgery contrary to **section 342 of the Penal Code Act** and guilty of uttering false document contrary to **section 351 of the Penal Code Act.** We hereby quash the appellant's conviction and sentence.

Accordingly, grounds 1 and 2 succeed.

Ground 3

Having quashed the appellant's conviction, we find it unnecessary to discuss ground 3 of this appeal.

Conclusion

As a result, we hereby allow the appeal and set aside the decision of the first appellate Court. We order for the immediate release of the appellant unless he is being held on other lawful charges.

Dated at Kampala this 14th day of March 2022

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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CHEBORION BARISHAKI
JUSTICE OF APPEAL

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MUZAMIRU MUTANGULA KIBEEDI
JUSTICE OF APPEAL