THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0079 OF 1979

(Originating *from* Nakawa Chief Magistrate's Court Criminal Case No. 1609/98)

JOHN WANDERA.:::::::::::::::::::::::::::::: APPELLANT'

VERSUS

UGANDA:::::::::::::::::::::::::::::::.RESPONDENT

BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI

JUDGMENT

This judgment is in respect of an appeal whose background is briefly as follows. The appellant and one Ogutu Gusimba (the complainant and PW1 in Nakawa Criminal Case No. 1609/98) were members of an association called "Mwanyi Control Bar", which sold a local brew popularly known as "maiwa". In the course of its business, Ogutu Gusimba came to owe some money to that association. Eventually, the association filed Mengo Civil Suit No. GK 356 of 1997 (ie. Mwanyi Control Bar v Ogutu Gusimba) with a view to recovering the said money from Ogutu Gusimba. Before the case was heard, an attempt was made by both sides to settle it amicably. In the course of that exercise, Mr. Ayigihugu (the advocate who represented Mwayi control bar in the above suit is presently the appellants dvocate) sent to the complainant's advocate (Mr. Katongole) some documents, which Mwanyi Control Bar sought to rely on in the civil suit. When Ogutu Gusimba saw those documents, he denied having signed them. Accordingly, he reported the matter to the police. The police in turn sent the questioned documents together with Ogutu Gusimba' s specimen signatures and the appellant's specimen handwriting to the Government handwriting expert .later on the appellant was arrested on charges arising out of those documents. Those charges were brought under 7 counts, that is to say, 5 counts of forgery c/s 336 of the Penal Code Act and 2 counts of making a document without authority c/s 334 of the Penal Code Act. At the time of hearing the criminal case, the prosecution called five witnesses in a bid to prove its case against the appellant. At the close of the prosecution case the learned trial Magistrate ruled that the prosecution had failed to make out a prima facie case of forgery against the appellant. She therefore acquitted him on those counts, but she put him to his defence on the remaining two counts of making a document without authority. In his defence the appellant gave an unsworn statement and denied

the offences under the remaining two counts. He called one witness to support his defence. In the judgment that she delivered on 4th August 1999, the learned trial Magistrate convicted the appellant of the two counts of making a document without authority contrary to section 334 of the Penal Code Act and sentenced him to a fine of shs. 200,000/= on each count (to run cumulatively) or to a term of imprisonment for 1 year. She further made an order in favour of the State forfeiting the appellant's bail money.

The appellant was dissatisfied with the learned trial Magistrate's judgment. He therefore appealed to this Honourable Court against both the conviction and the sentences that were imposed against him. The appellant's Memorandum of appeal cited five grounds of appeal which are as follows,

"1. The learned trial Magistrate erred to convict the appellant when the ingredients of the offence had not been proved.

2. The learned trial Magistrate erred in law not to acquit the accused after she had held that the appellant did not sign those documents.

3. The learned trial Magistrate erred in law to shift the burden of proof to the appellant and to equate the standard of proof with that in civil cases.

4. The learned trial Magistrate erred to convict the appellant on the basis of circumstantial evidence which she did not point out and indeed which did not exist.

5. The learned trial Magistrate erred to forfeit the bail money which the appellant had deposited in court".

In essence, the above Memorandum of Appeal raises two fundamental questions, that is to say,

1. Whether the prosecution proved all the basic ingredients of the offence of making a document without authority?

2. Whether the learned trial Magistrate could, in the circumstances of Nakawa Criminal Case No. 1609 of 1998, have lawfully forfeited the appellant's bail money in favour of the State?

In Court's opinion what both counsel (ie. Mr. Ayigihugu and Ms. Nafuna) submitted on behalf of their respective clients (ie. the appellant and the State) at the time of hearing the appeal falls under the above questions. accordingly court will discuss the said questions below; and in that discussion it will take into account the evidence on the record of Nakawa Criminal Case No. 1609 of 1998, the submissions of both counsel and the law. It will however, discuss the above questions in the reverse order. For that reason, it will begin with the second question.

With regard to the second question, Mr. Ayigihugu submitted that the learned trial Magistrate erred in law to order the forfeiture of the appellant's bail money in favour of the State when it was very clear that the appellant had not jumped bail at any given time. Mr. Ayigihugu then concluded that the order which, in effect, is part of the learned trial Magistrate's sentence is wrong and should not be allowed to stand because it has no legal basis. Ms. Nafuna conceded that the learned trial Magistrate's said order had no legal basis; and should, therefore, be set aside.

Court fully associates itself with the submissions of both counsels in respect of the learned trial Magistrate's order concerning the appellant's bail money. There is no law authorizing the forfeiture of such money if the owner thereof has not failed to keep the terms of his release on bail. Indeed, the record of Nakawa Criminal Case No. 1609/98 is very clear. It does not reflect any failure on the appellant's part to answer the terms of his release on bail at any given time. Consequently, the trial Magistrate could not have lawfully forfeited the appellant's bail money. As things stand, it is obvious that the trial Magistrate simply forfeited the appellant's bail money as a form of sentence after convicting him on the two counts of making a document without lawful authority. However, section 334 of the Penal Code Act does not include such a punishment as part of the sentence to be meted out against an accused person on conviction. All in all, the answer to the second question is that the learned trial Magistrate could not, in the circumstances of Nakawa Criminal Case No. 1609 of 1 998 have lawfully forfeited the appellant's bail money in favour of the State.

With regard to the first question, in essence Mr. Ayigihugu submitted that the prosecution failed to prove the basic ingredients of the offence of making a document without authority contrary to section 334 of the Penal Code Act. He pointed out that these ingredients were

(a) that the appellant executed a document; and

(b) (b) that the said execution consisted of signing those documents.

According to Mr. Ayigihugu although the handwriting expert's evidence (ie. PW5) showed that the appellant could have written the body of the questioned documents. it was not clear as to who purported to sign those documents as the complainant. In Mr. Ayigihugu's opinion the learned trial

Magistrate contradicted herself when she acquitted the appellant on the five counts of forgery relating to similar documents, but then convicted him on the two counts of making a document without lawful authority when one of the vital ingredients of that offence is forgery.

On her part, Ms. Nafuna submitted that there is abundant evidence on record to show that all the basic ingredients of the offence of making a document without authority (namely, an intention to deceive; lack of lawful authority, and forgery) had been proved by the prosecution. She pointed out that the intention to deceive was proved by the fact that the appellant sought to use the documents in question in Mengo Civil Suit OK *356* of 1997 when he knew fully well that the complainant (PW1) did not sign them. Lack of lawful authority was proved by the complainant when he denied that he signed the documents in question. Lastly, forgery can be deduced from the handwriting expert's evidence to the effect that the body of the questioned documents (Exhs P2b and P2c) may have been written by the appellant and the fact that the appellant had those documents which he later passed on to his advocate Mr. Ayigihugu with a view to using them in Mengo Civil Suit. No. GK. *356* of 1997. In Ms. Nafuna's opinion those two facts inevitably suggested that the appellant was the one who forged the documents in question.

A close examination of section 334 of the Penal Code Act reveals that the following are the essential ingredients of the offence of making a document without authority,

(a) making or signing or executing a document for or in the name or on account of another;

(b) without lawful authority;

(c) with an intent to defraud or deceive or excuse; and

(d) the participation of the accused in that offence.

Our law demands that for the prosecution to succeed in showing that the appellant committed the offences in question it must have led evidence to prove all the essential ingredients referred to above. **(See Director of Public Prosecution v Woolmington [19351 AC 462). In** essence, that means that if the prosecution succeeded in leading evidence to prove only some of the essential ingredients of the offences in question, but to do so in respect of the rest of the essential ingredients or even in respect of one of them, then it wholly failed to prove the offences in question. Court will now examine each of the essential ingredients referred to above with a view to determining whether the prosecution succeeded or failed in proving them.

With regard to the first ingredient, the two counts in question allege that the documents which are the subject of this judgment were executed in the name of the complainant (Ogutu Gusimba). Collins Englisfl

Dictionary and ihesautus ueLuies tile io **xcuL** a iar a it is relevant to this judgment) as follows, to make or produce: to render (a deed,) etc. effective as by signing, sealing and delivering

Byrnes Law Dictionary at page 362 also defines the action verb "to execute" as follows, "To execute is to complete or carry into effect Thus to execute a deed is to sign seal and deliver it From the above two definitions, Court takes it that the verb "execute" that appears in the first ingredient of the offences in questions connotes the idea of giving effect to a deed or document by way of signing, sealing and delivering it; and that is the meaning Court will apply to it in this judgment. Be that as it may, there is no doubt that the record contains evidence to show that the documents in question (ie Exhs. P2b and P2c) were purportedly signed in the name of Ogutu Gusimba by some one and released (for use) in a bid to give them legal effect. That evidence was not contradicted or shaken. For that reason, Court is satisfied that the prosecution proved, beyond reasonable doubt, that the documents (relating to the two counts in question) were executed in the name of the complainant (Ogutu Gusimba). That takes care of the first ingredient.

Court will now discuss the second and third ingredients together; and it has this to say. Firstly, the handwriting expert (PW5) testified that the complainant did not sign the documents in question (ie. Exhs. P2b and P2c) as they purport to show. In his view, some one else signed the said documents in the complainant's name. Secondly, the complainant also testified that he was not the one who signed those docuineins and that ne thu nut knu' did so. Both the handwriting expert's evidence and the complainant's evidence referred to above was not contradicted or shaken. In Court's opinion when that evidence is read together, it shows that whoever signed the said documents in the complainant's name did so without the complainant's authority; and that the culprit's only intention in doing so, was to deceive cthers by making them believe that the complainant had himself signed the documents in question. For that reason, Court is satisfied that the prosecution proved, beyond reasonable doubt that the documents in question were executed without lawful authority from the complainant and that the intention behind that act was to deceive.

With regard to the fourth ingredient, the vital question to answer is wheth1 hic rect or indirect evidence that connects the appellant to the commission of the offences in question. The record shows that the handwriting expert's evidence does not fix the appellant as the person who signed the complainant's signature on the documents in question. In fact, the handwriting expert does not know who forged the complainant's signature that appears on those documents. In essence, that means that there is no direct evidence on record linking the appellant to the complainant's forged signature on the documents in question. What about indirect or circumstantial evidence? The record shows that appellant handled the documents in question at some stage and then handed them to an advocate to enable that advocate to file

Mengo Civil Suit No. GK 365 of 1997. Does that chain of events irresistibly point to nothing else, but the appellant's guilt or his participation in the offences in question? In Court's view it does not, for Mengo Civil Suit No. GK 365 of 1997 is not a personal suit between the appellant and the complainant. That suit is between Mwanyi Control Bar and the complainant. It seems that the appellant handled the documents in question officially by virtue of the fact that he was a member of the above association, which claimed that the complainant owed it some money. Consequently, in the absence of more cogent evidence (from the prosecution) that shows the actual role the association assigned to the appellant in the matter; and the state in which the documents in question were when the association gave them to the appellant, Court thinks that it would be unreasonable to hold the appellant accountable for the forged signatures on the said documents. All in all, therefore, even the indirect evidence or the circumstantial evidence on record does not irresistibly point to the guilt of the appellant or his participation in the offences in question. **(See Simon Musoke v R[19581 E.A. 715).** In the circumstances, Court is of the opinion that the prosecution failed to prove, beyond reasonable doubt, that the offences in question were committed by the appellant or that he participated in them.

In conclusion, Court has no choice but to find that the trial Magistrate erred in law in finding that the appellant was guilty of the offences in the two counts in question and in convicting him of those offences. For that reason, the appeal which is the subject of this judgment has succeeded. It follows, therefore, that the conviction of the appellant by the learned trial Magistrate for the two counts of making a document without authority must be quashed; and it is so ordered. It is further ordered that all the sentences that the learned trial Magistrate imposed against the appellant are hereby set aside. That includes the forfeiture of the appellant's bail money. The appellant shall recover from the trial court the money that he paid as fine (if any); and his bail.

Read before: At 9.40 a.m

Ms. Nabasa for DPP

Appellant in Court

Mr. Senabulya Court Clerk

(JUDGE)
4/9/2001