THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 0039 OF 2008

DAN NSUBUGA WERAGA:::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the decision of Mrs. E. K. Kabanda (Chief Magistrate) dated the 22nd April 2008 in Mukono Criminal Case No. 0200 of 2006]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the judgment of Her Worship, Mrs. Elizabeth Kabanda in which she convicted Dan Nsubuga Weraga (the appellant) of forgery c/t ss.342 and 348 (1) of the Penal Code Act (PCA) and sentenced him to imprisonment for 5 years, with no option of a fine.

The background to the appeal is that it was alleged that the two accused persons forged a transfer and an application for consent to transfer in respect of land known as Block 229 Plot 52 at Busabaga in order to facilitate its transfer from the names of one Dorosi Naziwa (deceased) into the names of the appellant. The prosecution called 8 witnesses to prove its case while the appellant testified in his own defence and called one witness to support him. His co-accused testified in his own defence, also defending the appellant, and he called no witnesses.

The trial magistrate found that the prosecution proved the first count, i.e. forgery, against the appellant but that they failed to prove the charge of uttering false documents against him. She also found that the prosecution had not proved any of the offences against the 2nd accused and she acquitted him. She then sentenced the appellant to 5 years in prison.

The appellant appealed against both conviction and sentence and raised two grounds in his memorandum of appeal as follows:

1. The trial magistrate failed to properly and strictly evaluate the evidence on the court record and thus arrived at a wrong finding that the appellant had forged the transfer form.

2. The trial magistrate passed a harsh sentence against the appellant.

The appellant then prayed that this court re-evaluates the evidence on record, finds him innocent and quash the conviction and set aside the sentence.

When this appeal came for hearing on 18/03/2010, I ordered that counsel for both parties file written submissions. The appellant's advocates filed submissions on 1/04/2010 to which the DPP replied on 26/04/2010. The appellant's advocates filed a rejoinder thereto.

In her submissions for the appellant, Ms. Evelyn Kabonesa submitted that the trial magistrate failed to evaluate the evidence because Apollo Mutashwera Ntarirwa (PW8) who examined the questioned documents did not tell court his qualifications with regard to the examination of documents or handwritings. Ms. Kabonesa therefore submitted that Mr. Ntarirwa was not competent to testify as an expert witness within the meaning of s.43 of the Evidence Act. Counsel further attacked his report (and testimony) because in them Mr. Ntarirwa stated that his analysis was on letters "K, W, a, s, b and i." She contended that the names Dorosi Naziwa and Dan Nsubuga Weraga did not contain in them the letter "K" and that the significant letters "D" and "R" which appeared in both names were never examined. Ms. Kabonesa also complained that Mr. Ntarirwa examined letters "I", "S" and "B" which appeared in only one name. She concluded that the only letters that the witness could have examined were letters "N", "a" and "W" and the three could not have led him to a conclusive report.

Ms. Kabonesa went on to complain about inconsistencies in the evidence adduced by the prosecution. In particular, she pointed out that while PW1, PW2 and PW5 told court that PW3 was a witness to the will of Kayaga Oliver Florence Okwi (Exh P1), PW3 denied that he affixed his signature to the document. He concluded that the evidence adduced was connivance by members of the appellant's family to implicate him. Ms. Kabonesa also advanced the argument that the appellant

was a member of the complaint's family and therefore could not have transferred the land in dispute with the intention of defrauding anyone.

Ms. Kabonesa next advanced the argument that the appellant testified that he was illiterate and could not read and that he could only write his name. She argued that since the appellant did not know and had never seen the deceased Naziwa, he could not have signed the transfer dated 13/09/2005. She also drew court's attention to the testimony that one of the officials in the Registry of Titles poorly guided the appellant at a fee of shs 700,000/=, thus inferring that it was this official that forged the documents in issue. She went on to propose that this court ought to consider the testimony of the appellant that members of his clan told him to take on the responsibility for the land in question. On that note she concluded that court failed to evaluate the evidence on record because the evidence in the appellant's defence was never considered.

Turning to the charge sheet, Ms. Kabonesa complained that court did not consider that part of s.348 (1) PCA that refers to *"other authority for the payment of money by a person carrying on business as a banker."* She contended that there was no evidence that the title was forged by the appellant for the purpose of obtaining payment from a bank as is stated in s.348 (1) PCA. She concluded that the charge was not properly brought under that provision and for that reason the trial court wrongly convicted the appellant under it.

With regard to the 2nd ground of appeal, which was to do with the sentence imposed, Ms. Kabonesa complained that neither did the trial magistrate take it into consideration that the appellant had a family to support, nor that he had been on remand before the sentence. She then called upon this court to take it into consideration that the maximum sentence for forgery under s.347 PCA is 3 years. She finally proposed that since the appellant had been in prison for 2 years since he was sentenced, this court should consider that period as sufficient punishment and order that he be released.

In reply, Ms. Nabisenke Vicky for the DPP submitted that in order to prove the offence of forgery, the prosecution had to prove three ingredients, i.e. that there was forgery of a document, that the falsified document was in relation to title to land, and finally that the appellant participated in the forgery. She drew courts attention to the definition of forgery in s.342 PCA, and to s.345 (d) PCA which defines the making of false documents as being part of the offence of forgery.

Ms. Nabisenke went on to submit that the prosecution had proved that the entries in the transfer of land and the consent to transfer had been made with the intent to defraud because the person in whose name the transfer purported to be had been dead for a long time before the document was made. That the transfer of the land title into the appellant's names in 2005 when the owner of the land died in 1982 was a clear indication of his intention to defraud. That the fact that he claimed to have been authorised to take charge of the land by clan elders did not exonerate him from the offence because it was proved that the transfer of the land title into his names meant that he defrauded PW2 and PW3 of their bequest from Kayaga Oliver, the testator of a will **(Exh P1).**

Ms. Nabisenke further submitted that the participation of the appellant in the offence was proved by the testimony and report of the handwriting expert (PW8). She argued so because when the report was produced in evidence at the trial the appellant and his advocate did not object to its admission onto the record. That as a result, they could not contest it on appeal. She further submitted that the testimony of PW8 ought to be considered as valid by this court because he had the necessary experience for him to identify the appellant as the person who wrote Exhibits **P10** and **P11**, the basis of the charge.

With regard to the propriety of the charge under s.348 (1) PCA, Ms. Nabisenke submitted that the reference to the document being for purposes of payment of money by a banker referred specifically to one category of documents and did not extend to wills, documents of title to land, judicial records and all other documents mentioned therein. In her view, Ms. Kabonesa misconstrued the meaning of the provision. She concluded that the appellant was properly charged under s.348 (1) PCA because the complaints against him were about a transfer of land and a consent for the same transfer.

With regard to the 2nd ground of appeal, Ms. Nabisenke submitted that the sentence that was awarded to the appellant was lenient because the maximum sentence for offences under s.348 (1) is life imprisonment. She complained that the trial magistrate disregarded the fact that the appellant was at the time of his conviction serving another prison sentence just because the details of the previous conviction were not supplied to court. She concluded that it was this decision that favoured the appellant and led to his conviction to only 5 years in prison. She therefore asserted that the trial magistrate was *very* lenient in her sentence given that the maximum sentence for the offence was life imprisonment together with the evidence that the appellant was not a first time offender. Nonetheless, she prayed that the conviction *and* the sentence be upheld.

On a first appeal such as this one, the appellant is entitled to have the whole evidence submitted to a fresh scrutiny so that the appellate court weighs the conflicting evidence and arrives at its own conclusions (**Okero v. Republic [1972] EA).** In so doing an allowance should be made for the fact the trial court had the advantage of hearing and seeing the witnesses which the appellate court does not (**Peters v. Sunday Post, [1958] EA. 424**). I will therefore re-evaluate the whole of the evidence taking into consideration the points raised by Ms. Kabonesa in respect of ground 1 of the appeal and then deal with ground two separately.

Ground 1

I considered that the questions raised for this court to answer in ground 1 of the appeal were as follows:

i) Whether the appellant was properly charged under s. 348(1) of the PCA.
ii) Whether the prosecution proved all the ingredients of the offence charged.
iii) Whether the trial magistrate failed to take it into consideration that there were inconsistencies in the evidence adduced by the prosecution.
iv) Whether the trial magistrate failed to take the appellant's defence into consideration in her evaluation of the evidence.

With regard to propriety of the charge, Ms. Kabonesa approached the matter as though the appellant had been charged with forgery under s.342 PCA. However, the charge sheet which was dated 25/04/2006 under CRB 42/2006, and which was signed by the Magistrate on 15/06/2006 showed that the appellant was charged with forgery contrary to s. 342 and 348(1) PCA. It was then stated in the particulars of the offence that Dan Nsubuga Weraga, Mpomya Fred, and others at large, on the 13th day of September 2005 at Mukono Land Office, with intent to defraud, forged transfer forms for the registration of title of land known as Block 229 Plot 52 at Busabaga village, Kyaggwe, which was registered in the names of the late Dorosi Naziwa.

It is pertinent to differentiate between the two provisions under which the appellant was charged in order to identify the proper charging section. S.342 falls under Part XXXIII of the PCA which provides for definitions. That section therefore provides that forgery is the making of a false document with intent to defraud or to deceive. It therefore becomes clear that s.342 being merely

descriptive could not have been the charging section. On the other hand s. 348(1) PCA falls under Part XXXIV which proscribes and provides for punishments for forgery as follows:

> **"348. Forgery of wills, etc.**
>
> (1) **Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker is liable to imprisonment for life."**

It is therefore under this provision that the appellant was charged, the former provision only being supportive of the charge. The charge could also have properly been brought under s.348 (1) without mentioning s. 342 PCA. I therefore find that the trial magistrate did not fail in her duty. She properly scrutinised the charge sheet and ensured that the offence charged was properly founded in law before embarking on a trial.

With regard to the second issue, i.e. whether the prosecution proved all the ingredients of the offence under s. 348(1) PCA, the offence of forgery is constituted by four elements. There must be: i) false making or material alteration or possessing of a document, ii) the document must have been made with the intent to deceive, defraud, or injure and iii) the document must have legal efficacy as provided in s.348 (1), i.e. it must be a will, document of title, etc, and iv) the accused must be proved to have participated in the making of the document. I will now consider whether the evidence on record proved these 4 ingredients of the offence.

Regarding the first ingredient, the testimonies of PW3, PW6 and PW7 proved that there was a certificate of title for land known as Block 229 Plot 52 at Busabaga, Kyaggwe and that the land was registered in the names of one Dorosi Naziwa as the proprietor. Awoloy Giptha (PW6) the records assistant at the Registry of Titles in Mukono produced a certified copy of the title deed and it was admitted in evidence as **Exh.P9**.

By the testimonies of Miriam Nabawanuka (PW1), Simon Peter Misango Tabula (PW2) and Mugula Kigonya (PW3), it was proved that Dorosi Naziwa, the registered proprietor of the land in Block 229 Plot 52 at Busabaga died in 1982. That by the time she died the certificate of title was still registered

in her names. The testimonies of the three witnesses also proved that Dorosi Naziwa had only one child, Oliver Kayaga who died in 1993. That Oliver Kayaga was the sole beneficiary to the estate of Dorosi Naziwa and before she died, she made a will in which she bequeathed the land in Block 229 Plot 52 at Busabaga to PW2 and PW3. The will was admitted in evidence as **Exh.P1**. By the will it was confirmed that by the time Oliver Kayaga died, the certificate of title was still registered in the names of her mother, Dorosi Naziwa.

The prosecution also proved by the testimonies of PW3, PW6 and D/C Mulumba (PW7) that in 2005, proprietorship of the land in Block 229 Plot 52 at Busabaga was transferred into the names of the appellant. The certificate of title (**Exh.P9**) showed that the date of the transfer was 4/11/2005, 23 years after the death of Dorosi Naziwa. Further that the transfer was from the names of Dorosi Naziwa directly into the names of the Dan Nsubuga Weraga, the appellant, before any grant of letters of administration was made in her estate. PW6 produced the instrument of transfer (**Exh.P10**) and the application for consent to transfer (**Exh.P11**). The two documents purported to have been signed by the late Dorosi Naziwa in 2005.

The testimony of the appellant (DW1) proved that sometime in 2005, he put his signature on an instrument of transfer of land, though he stated that it was a blank document that Mpomya Fred (DW2) his co-accused took to him at his home in Lugazi. His wife Rehema Karachi (DW3) also testified that she saw the appellant put his signature on a land transfer that Mpomya Fred gave him at their home. It was also the testimony of the appellant that Dorosi Naziwa was his grandmother through marriage to his late grandfather, one Enock Weraga. That he heard about Dorothy Naziwa but he never saw her. Further that the clan of his father in a meeting gave him responsibility over his grandfather Enock Weraga's estate. Also that the authority to manage Enock Weraga's estate was in writing but the appellant did not produce any such document it in court.

When he was cross-examined, the appellant stated that he did not know how to read and write but could write his name and therefore was able to sign the land transfer form. He showed court where he had signed. He further stated that he paid shs 700,000/= to facilitate Mpomya, his co-accused to get the land transferred into his names because Mpomya was conversant with land transfers. He denied having filed in the rest of the transfer form with details and Naziwa's signature. He denied having signed **Exh.P11**, the application for consent to transfer. Most importantly he told court that Naziwa died before he was born. The appellant further testified in cross-examination that he later

went to the land office with Mpomya and he got a certificate of title in respect of Block 229 Plot 52 at Busabaga which had been transferred from Naziwa's to his name.

Given the evidence above, I was satisfied that the prosecution proved without the shadow of a doubt that the appellant signed a transfer form in respect of the land known as Block 229 Plot 52 at Busabaga very well knowing that the registered proprietor of the land died long before he was born. Though he denied having filed in the particulars of the document, he admitted that he put his hand to it. The first ingredient of the offence, i.e. the false making of a document was therefore proved against the appellant by his own admission. I also find that by the same evidence the 3rd ingredient, i.e. the legal efficacy of the document as one that could confer title to another was proved against the appellant by his own admission because even if it were proved that he could not write, he could not have signed a blank transfer document about whose purpose he had not a clue.

As to whether the document was made with the intent to deceive, defraud, or injure, the appellant testified that he was given the mandate to administer the estate of his late grandfather, Enock Weraga in 2005. The appellant also testified that Dorosi Naziwa was the step mother to his late father. Also that he knew that the late Dorosi Naziwa had only one child, his aunt Oliver Kayaga who was deceased. Knowing these facts, and that Dorosi Naziwa was long dead, the appellant still signed the transfer form to have her land transferred into his names. Clearly, the land in Block 229 Plot 52 at Busabaga was not part of Enock Weraga's estate which he claimed to have been given authority to manage. The appellant therefore signed the transfer form with intent to deceive the officials in the Registry of Titles and to defraud the estate of the late Naziwa. The intent to defraud was also evident from the fact that he signed the transfer and procured its registration without first obtaining letters of administration in Naziwa's estate. Neither did he establish whether there were other beneficiaries to the estate nor that Naziwa died testate. The same goes for the estate of Kayaga, Naziwa's daughter, and almost the sole beneficiary to her estate.

The final ingredient that had to be proved was participation. The evidence above clearly proved the participation of the appellant in the false making of the transfer and in effecting registration in his names. Though he claimed he did not personally go to the Registry to lodge the transfer, he admitted that he paid Mpomya Fred shs 700,000/= to do the dark deed. That in itself was participation in the forgery. However, there is further evidence that was adduced by the prosecution that put the nail in the coffin and removed all doubt that the appellant was guilty of the offence as charged.

D/C Paulo Mulumba (DW8) testified that he got the transfer of the land in question as well as the application for consent to transfer it into the names of the appellant from the Registry of Titles at Mukono. Further that when he took the appellant's statement, he (the appellant) admitted that it was he that lodged the documents in the land office at Mukono. D/C Mulumba testified that he took the appellant's specimen handwriting and signature and he submitted the documents together with the specimens to a handwriting expert.

When he was cross-examined, D/C Mulumba stated that he received a report from the handwriting expert that showed that the writer of the specimen handwriting and signature he submitted was the same as the author of the transfer form and the application for consent to transfer, **Exh.P10** and **P11**, respectively. He identified the report of the handwriting expert that he received after the analysis of documents.

The handwriting expert, Apollo Mutashwera Ntarirwa was PW4. He told court that he was the holder of a Bachelor of Science Degree, Chemistry and Geology, from Makerere University. He said he had been employed as an examiner of document since 1977. Counsel for the appellant complained about PW4's qualifications stating that given his stated qualifications, he could not be a competent examiner of documents. She referred to s. 43 of the Evidence Act to support her submission which provides as follows:

> **"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts. Such persons are called experts."**

PW8 testified that he examined the documents and that the specimens of the appellant's handwriting were presented to him by D/C Mulumba. The three pages with the specimen writing of the appellant and signature were admitted in evidence as **Exh.P4, P5** and **P6**. I saw the three pages of specimen writing which were taken before D/C Mulumba. The appellant acknowledged the specimen handwriting and signature by signing on each page that the writing in it was his and that the specimens were truly those of his handwriting and signature.

I carefully looked at the three pages of the appellant's specimen handwriting. **Exh.P6** in particular showed several words that the appellant wrote before D/C Mulumba, apart from his signature and the name 'Dorosi Naziwa', the appellant put down a description of land, i.e. '222 Kyaggwe Mukono' and its location, 'Busabaga'. He was also made to write the name 'Senyonga Paulo', his own name 'Dan Nsubuga Weraga' and his address 'P. O. Box 171 Lugazi' as well as the name 'Daniel Babumba' and his clan 'Mamba'. **Exh.P4** had the appellant's name written 8 times, while **Exh.P5** had the name 'Dorosi Naziwa' written 8 times. It is these specimens that PW4 compared to the writing in **Exh.P10** and **P11**.

In his testimony on 12/07/06, PW4 repeated what he stated in his report (**Exh.P8**) as follows:

> *"I have compared the questioned handwritings with the specimens availed. I have observed significant similarities between the questioned handwritings on the TRANSFER and APPLICATION, and then the specimens. These include letter designs (e.g. N, K, W, a, s, b, etc); the few letter joins (e.g. a-u and a-n), letter proportions; individual letter slope; final strokes and other writing characteristics. The only problems appear to be the constructions of letter Z and u.*
>
> *In my opinion, there is evidence consistent with the writer of the specimens having written the questioned entries on EXH. R6 & R5."*

R6 and R5 referred to the transfer form and the application for consent to transfer the land which he compared to the specimen handwriting and signature supplied to him. Given this evidence, the argument that PW4 could not have examined the form of letter 'K' does not hold water because it appears in the word "Kyaggwe." PW4 also had the opportunity to examine many other letters as written by the appellant because the contents in the specimen handwriting (**Exh.P6**) were some of the particulars filled into the land transfer and the application for consent to transfer.

Turning to the competence of PW4 to testify as a handwriting expert, in **Mohamed Ahmed v. R, [1957] 1 EA 523,** the Court of Appeal of East Africa held:

"It is true that in Gatheru s/o Njagwara v. R. (1) (1954), 21 E.A.C.A. 384, this court said that the competency of an expert witness should be shown before his evidence is admitted. That, however, is a rule of practice and the omission to observe it will not in all cases render the evidence inadmissible; particularly when, as in the instant case, the witness's occupation imports a prima facie qualification and his capacity to give expert opinion is not challenged. The rule will obviously be applied more strictly in criminal proceedings than in civil ones, and the original proceedings here, though entered as a criminal cause, were more in the nature of a civil case."

I think that the principles stated above can properly be applied to the instant case. PW4 stated in his testimony that he had a B.Sc. Degree of Makerere University. Although the degree was in Chemistry and Geology, he also stated that he had been examining documents since 1977, a period of 29 years by the time he testified. Given the length of time he had been employed in examining handwritings, I have no doubt that Mr. Ntarirwa was competent to examine the handwritings and signatures in this case.

Regarding the credibility of the witness, the Court of Appeal of East Africa held in the case of **Muzeyi v. Uganda, [1971] 1 EA 225** that the credibility of the expert is to be decided by the court, but lack of rebutting evidence was not a factor. The province of a handwriting expert was established by the same court in the case of **Maulidi Abdullah Chengo v Republic [1964] 1 EA 122.** It was held that 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. Court further held that the handwriting expert should point out the particular features of similarity or dissimilarity between the forged signature on the questioned document and the specimens of handwriting. The court referred to a passage from the summing-up of Lord Hewart in the trial of William Henry Podmore (the Famous Trials Series), which received approval of the Court of Criminal Appeal in R. v. Podmore (2) where he said:

"Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes 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 person who, habituated to the examination of handwriting, practised in the task of making minute 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."

That being an exposition of the duty of handwriting experts and their skill, I concluded that the habitual examination of handwritings (experience) was more important for purposes of identifying experts than their academic qualifications. The period of 27 years spent by PW4 as an examiner of documents was therefore proof that he was competent and covered by s. 43 of the Evidence Act. He qualified to be an "expert". Further, the handwriting expert pointed out the similarities in the writings and then gave his opinion in the positive; that there were sufficient similarities in the writings that made him arrive at the opinion that the specimens and the two questioned documents were authored by the same person, i.e. the appellant. This too was in his province as was held in the case of **Nguku v. Republic [2004] 1 EA 188**. In that case 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 product 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; (**Onyango v. Republic [1969] EA 362**, followed).

As an appellate court, I did not have the advantage of seeing the demeanour of the witness when he testified but the trial magistrate believed him. She also made no comment about his demeanour so I assume he was a confident witness who could be believed by the trial magistrate. The appellant cross-examined the witness very briefly, and not on his qualifications or the findings that he made. Cross-examination only established that the expert did not know the accused/appellant but only received documents from D/C Mulumba. His testimony was therefore very objective.

Having seen the specimen handwriting of the appellant contained in the three exhibits before court, I next considered the appellant's defence that he could neither read nor write. I did not think that the handwriting in **Exh.P4, P5** and **P6** was that of a person who could not read and write because the writing in the three exhibits appeared to be distinct and had no spelling mistakes at all. It appeared to be the writing of a person who was literate or semi-literate. And though I have no experience as a handwriting expert I observed that the handwriting in the specimens was very much similar to the hand that filled in the land transfer and the application for consent to transfer. I was therefore satisfied that the appellant could not only write his name but he could ably read and write.

I therefore find that by the testimony of PW4 the prosecution proved that not only did the appellant sign his name on the transfer form but he also made the entries in the transfer form and the application for consent to transfer. The two documents told lies about themselves. They purported to be documents signed by Dorosi Naziwa, a person who died 23 years before they were filed in and signed. The two documents induced the Registrar of Titles at Mukono to transfer the land comprised in Kyaggwe Block 229 Plot 52 at Busabaga to the appellant who was not entitled to it. The trial magistrate therefore properly found that the appellant participated in the forgery of the said documents.

As to whether the trial magistrate considered the inconsistencies and or contradictions between the testimonies of PW1, PW2 and PW5 on the one hand, and the testimony of PW3 on the other, the law on inconsistencies in evidence was re-stated in the case of **Wephukulu Nyuguli v. Uganda, S/C Criminal Appeal No. 21 of 2001** (unreported). Their Lordships of the S/C held that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses should be ignored and major ones which go to the root of the case, should be resolved in favour of the accused.

With regard to the making of the will (**Exh.P1**), PW1 testified that she was present when it was made and signed by Oliver Kayaga. She also said that Misango (PW2) was present but she did not recall whether the clan head was present. She also said she did not recall all the people who were present and witnessed the will. PW2 said that Kigonya (PW3) was present and he signed the will. However, PW5 said nothing about witnesses to Kayaga's will in his testimony. It is therefore not true that all three witnesses said that PW3 was a witness to the will. However, the will was admitted in evidence and it showed that C.S Kigonya (PW3) signed it as a witness. The will was made in 1992 while the witness testified in 2006, 14 years later. PW3 was not shown the will to refresh his memory. A long time had gone by since the will was made, sufficient for the witness to forget what happened on the day it was executed. He also did not appear to have told a deliberate lie about the will. I therefore find that this inconsistency in the evidence adduced was minor and therefore immaterial, given the whole body of evidence above that was adduced against the appellant.

The next question that must be addressed is whether the trial magistrate took the appellant's defence into consideration in her evaluation of the evidence. On the 2nd page of her judgment the trial magistrate considered the evidence of the appellant and his co-accused and she noted as follows:

> *"The defence evidence by A1 is that A2 is the one who gave him vacant transfer forms which he signed. However the transfer form Exh.P10, (sic) that the application for consent to transfer Exh.P11 and application for a duplicate certificate of title did not bear his signature. That he later got from A2 a Certificate of title in his (A1's) names. He was not the one who took the forms to the land office. He does not recall when Dorothy Naziwa died."*

On page 3 of the judgment she analysed the defence of both accused persons vis-à-vis the evidence adduced by the prosecution. She pointed out that PW1, PW2 and PW4 testified that Naziwa died in 1982. Also that the appellant said he did not recall when Naziwa died. Further that his co-accused made no mention at all of Naziwa in his defence. That the appellant said he signed blank transfer forms in the presence of his co-accused and DW3 (his wife). That PW4's evidence and **Exh.P8** showed that the author of **Exh.P9** was the same as the author of the specimen handwritings which had been submitted to a handwriting expert. She then concluded that Naziwa could not have signed the transfer because she was already dead by the time it was signed. That as a result it was a forged instrument. Further that the appellant's testimony that he did not write **Exh.P9** had been rebutted by the prosecution. She then concluded that the appellant forged the transfer and she exonerated his co-accused. Having found so, I reiterate that, I agree with the trial magistrate entirely and also find that she properly evaluated the appellant's defence before she convicted him as charged.

Ground 2

With regard to the complaint that the sentence of 5 years imposed on the accused was excessive, I will start by observing that the maximum sentence for forgery under s. 348(1) CPA is imprisonment for life, and the trial magistrate appears to have taken that into consideration. She also considered that the appellant wasted a lot of court's time because the trial took 3 years to complete.

However, though it was drawn to her attention that the appellant had served a previous sentence and was therefore not a first time offender, she ruled that she would consider him a first time offender because the prosecution did not provide court with the particulars of the previous charges. I found

this rather strange because during the course of his trial, the record showed that on 11/10/2007, court noted that the accused was a convict serving a sentence of one year at Luzira Prison. The appellant admitted this and informed court that he had by then served 3 ½ months of his sentence. The court then made an order that he be transferred from Luzira Prison to Kauga Prison to facilitate his trial in this case. I was therefore satisfied that though the particular offence he had been convicted of was not specified, the appellant was already a convict when he was convicted in this case.

It was argued for the appellant that court should have considered the fact that he was a married man with children to support. However, that is common to most accused persons and serves no useful purpose in mitigation. It was also argued that the court did not take it into consideration that he had been on remand before conviction. Counsel then urged this court to consider that appellant had served 2 years of the sentence and should be released. I thought that the trial magistrate considered all these factors before arriving at the sentence. I say so especially because though the maximum sentence was life imprisonment the appellant got off with only 5 years.

I then went on to consider Ms. Nabisenke's complaint, though not a formal appeal, that the trial magistrate was very lenient in this case in spite of the evidence on record of the appellant's antecedents and I thought it was justified. S. 34 of the Criminal Procedure Code Act lays down the powers of an appellate court and in particular, s.34 (2) (b) and (c) provide that the appellate court may alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence by imposing any sentence provided by law for the offence; or with or without any reduction or increase and with or without altering the finding, alter the nature of the sentence.

In **Mugasa Joseph v. Uganda, C/A Criminal Appeal 241 of 2003**, the court observed that the DPP did not appeal against the sentence of the appellant but the 1st appellate court had similar powers to those of the trial court. The court enhanced a sentence of 17 years that had been awarded to the appellant on an indictment for defilement of his nephew to 25 years. Having observed that the High Court has similar powers to the Court of Appeal, I am constrained to point out that the offence of forging titles is rampart in this country. It has made all Registries of Titles in the different locations in the country suspect and inefficient. It has also caused innocent land owners untold misery and financial loss. The appellant herein therefore ought to be given a more stringent sentence to deter him and others that might be planning to forge titles from doing so.

In conclusion, this appeal fails on all grounds. I also hereby set aside the sentence of 5 years imprisonment and substitute it with a sentence of 10 years in prison. The appellant is informed that he has a right to appeal against the substituted sentence.

Irene Mulyagonja Kakooza
JUDGE
2/09/2010