



wit “Gold Force” knowing the same to belong to Oyoma General Stores. They pleaded not guilty.

The prosecution case was that PW 1 – **Onanichan Geoffrey**, the complainant, was the General Manager of Oyoma General Store Limited located in Central Village Myangazo Central in Nebbi District. That the company (Oyoma General Store Limited) was fully incorporated and manufactured wine called Gold Force wine. A certificate of incorporation registered on the 21<sup>st</sup> of July 2017 was tendered in evidence. On the 19<sup>th</sup> of June 2018 a Trademark in Class 33 under No 61933 was registered by the company with the Uganda Registration Services Bureau. The company was also granted a permit No. P1362/2019 to use the distinctive Q Mark of the Uganda National Bureau of Standards as a certification mark for its wine. The permit run from the 11<sup>th</sup> of September 2019 to 10<sup>th</sup> September 2020. It was also stated that in July 2019 the company received complaints from customers, especially from the DRC, regarding a tasteless product on the market bearing their trademark which prompted the company to vigilantly monitor the market. On the 29<sup>th</sup> of October 2019 a group of people was found printing the wine label at a company called Modern Arc Printer on Nasser Road. That the first accused person, Ssewankambo Huzafah had placed the order for the labels. The matter was reported to police and Sewankambo arrested. He revealed that it was the appellant who gave him the business. The appellant was called to come to the printery but as he approached, he noticed the police and escaped. He was later traced and arrested after a week. The counterfeit labels and the printing plates were confiscated and tendered in Court as exhibits. Both accused persons were produced before the Buganda Road and charged.

The appellant and his co accused denied the charges. In defence, Sewankambo, A1 stated that he was a taxi driver and the appellant his friend. That the appellant gave him a sticker labelled Gold Force Wines. He also gave him 3,000,000/- to print the sticker. That on the day he went to pick the stickers from the person printing them

he was arrested. That he called A2 to come to the printery but when A2 saw the police he ran off and was arrested after a week.

The appellant, in his defence, testified that one Ponguru who is based in Congo connected him to A1. That he was given 10,000,000/- to give to A1. Later A1 called him to meet in Nakasero but when he saw him in the company of police officers he took off and was arrested after a while.

The trial magistrate found the appellant guilty and sentenced him to one year in Prison.

The appellant being dissatisfied with the conviction and sentence of the trial court filed this appeal with 3 grounds namely,

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record which occasioned a miscarriage of justice against the appellant.
2. The learned trial magistrate erred in law and fact when he convicted the appellant on the offence of forgery or counterfeiting a trade mark before establishing the ingredients of the offence.
3. That the sentence of one year in Prison is harsh and excessive in circumstances.

The appellant prayed that this court allow the appeal and set aside the conviction and sentence of the appellant

### **Submissions**

The parties were directed to file written submissions but only the appellant has complied. His submissions are on record and will not be reproduced here.

This Court reminds itself that as a first appellate court, it has a duty to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (**Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

It is trite that the onus is on the prosecution to prove all the elements of the offence the appellant was charged with to a standard beyond reasonable doubt.

## **Determination**

### **Grounds 1 and 2**

- 1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record which occasioned a miscarriage of justice against the appellant.**
- 2. The learned trial magistrate erred in law and fact when he convicted the appellant on the offence of forgery or counterfeiting a trade mark before establishing the ingredients of the offence.**

I will handle the grounds jointly, just as the appellant has done. Section 71 of **the Trademarks Act** under which the appellant was charged stipulates as follows,

Any person who with intention to defraud or to enable another to defraud any person, forges or counterfeits a trade mark commits an offence and is liable on conviction to a fine not exceeding forty eight currency points or imprisonment not exceeding two years or both.

The elements of this offence are:

- a) The existence of a valid trademark
- b) Forgery or counterfeit of the trademark
- c) With an intention to defraud
- d) Participation of the accused/appellant

The appellant attacked the trial courts finding on the element of intention to defraud. That intention cannot be proved by direct evidence but, as a state of mind, is shown by conduct and surrounding circumstances. That the trial court did not evaluate the evidence on record properly. That PW I and PW II both stated that they received complaints about a tasteless product on the market bearing their logo. That no

evidence was adduced to prove this. In the absence of a person who tasted the product, then it cannot be said that this element was proved.

In addressing this submission, this Court notes that both PW I and PW II testified saying they had received complaints of a tasteless product with their label circulating on the market.

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

In **Black's Law Dictionary** Forgery is described as the act of fraudulently making a false document or altering a real one to be used as if genuine.

In this case therefore, I find there was overwhelming evidence to prove the making of counterfeit labels. The complainant did not authorise the making of these labels. There was no real challenge to evidence that the labels found at Sayuni Plaza on Nasser road were fake. The evidence that these exact copies were being made, at a time when there were customer complaints of a fake product on the market cannot be considered in isolation. Additionally, the prosecution witnesses were never challenged on the evidence of the fake tasteless product. In evidence, testimony that is not challenged in cross examination may be considered proved. In this case, notwithstanding the absence of a person who tasted it, I find the evidence of a tasteless wine proved.

The counterfeit labels were therefore made for purposes of deceiving consumers that the contents of their packaging were made by the complainant.

That now raises the question of participation. In this case the Court had accomplice evidence of A1 to rely on. A1 told the Court that it was A2 (the appellant) who gave him the money and the order to make the counterfeit labels. The appellant admits giving A1 money but denies it was for use in making the Counterfeits. The fact that A1 was arrested in the process of forging the labels negates any denial set forth.

The position is that accomplice evidence may be relied on if it is corroborated. Section 132 of **the Evidence Act** provides that an accomplice shall be a competent

witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial (see **Nassolo V Ug [2003] EA 181**). In the instant case A1 fully participated in the forgery of the labels and is an accomplice.

In this case however, Court has found ample evidence of corroboration. The plates and forged labelled were indeed made just as was stated by the A1. The conduct of the appellant when he fled the scene at Nasser road was not that of an innocent person nor was failure to explain the purpose of the ten million shillings that was recently transferred to his account especially considering the court was informed by A1 that it was meant to facilitate the fraud.

‘Corroboration does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. The principal is that if an accomplice is corroborated not only may that part of his evidence which is corroborated be relied on but also that part which is not corroborated, the corroboration of a material part being a guarantee of the truth of his evidence as a whole’ (See **Rex V Taibali Mohamedai 10 EACA 60**). This holding was cited with approval in **Susan Kigula V Ug. SCCA No. 1 of 2004** where it was summed up that corroboration in part corroborates the whole.

From the evidence above the accomplice evidence was properly corroborated establishing the appellant’s involvement in the entire scheme.

All these circumstances show that the indeed the appellant participated in the forgery of the labels. The first and second grounds of appeal fail.

The third ground of appeal attacks the sentence. It is alleged the trial court did not show lenience in sentencing. That in the circumstances the sentence was cruel and unusual.

I note that Section 71 of **the Trademarks Act** provides for a Maximum sentence of 2 years. The trial court considered the economic impact the forgery was having on the complainants business in passing sentence.

The general principle is that sentence is given at the discretion of the court. The appellat court will only interfere where it is shown to be illegal, ridiculous, manifestly harsh or lenient.

Looking at the circumstances of this case, it is true that the counterfeit was having an adverse effect on the complainant's business. It affected sales and revenue. It was aggravated even farther considering the product had a market in the Congo affecting cross border trade.

Taking the above into consideration the sentence given was just in the circumstances and this Court shall not interfere with it.

In the result, the third ground of appeal fails.

In the result, this appeal stands dismissed and the conviction and orders of the trial Court are confirmed.

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**Michael Elubu**

**Judge**

**27.12.2021**