

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CRIMINAL CASE NO. 0042-2003

OPOBO – O – OBBO BENJAMIN ::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE TABARO

JUDGMENT

The appellant Opobo – O - Obbo Benjamin was tried before the Chief Magistrate’s Court at Buganda Road, in Kampala for several counts of forgery, uttering a false document obtaining money by false pretences and abuse of office, jointly with Kiwanuka Twaha. From the record of proceedings it would appear both accused persons were found guilty of some of the offences charged. In the present appeal, however, we are concerned only with the appeal lodged by Obbo Benjamin only. Twaha Kiwanuka seems to have had his appeal heard before another Judge. This appellant, Obbo Benjamin was convicted of uttering a false document, C/S 330 of the Penal Code, on count 4, obtaining money by false pretences C/S 289 of the Penal Code, on Count 5, and abuse of office C/S 83 of the Penal Code, and sentenced to 4, 3 and 3 years respectively, to run concurrently, on 31st March, 2003. The appeal was lodged against both conviction and sentence.

The prosecution of the appellant followed a transaction under which the President’s office wrote a cheque in favour of Uganda Electricity Board (UEB) for settlement of a bill for electricity consumed by the department, in the sum of about Shs 21,000,000/=. The appellant at the material time was an employee of the President’s office, apparently attached to the Internal Security Organisation (ISO). It is not in dispute that the figure of 21,995,256/= was

altered to Shs 321,995,256/= and the same cheque was presented to Bank of Baroda purportedly for purchase of foreign currency, in dollars, for buying of materials for Uganda Television and Radio Uganda. it was a Uganda Government Cheque drawn on Bank of Uganda. it is not in dispute that the appellant presented the cheque to bank of Baroda for payment. Nor is it in controversy that the cheque was forged, through the false alteration. The primary issue is whether the appellant knowingly and fraudulently obtained uttered the false cheque. At trial he was acquitted of all charges of forgery because the handwriting expert found that there was no evidence linking the appellant to the act of forging. The charges were preferred in 2000 before the current edition of Laws of Uganda come into force, and hence the references to the old sections of the Penal Code. The evidence relied upon to secure the conviction as wholly circumstantial.

The circumstances under which the cheque was uttered so as to obtain the sum 200,000 US dollars are testified to by a number of prosecution witnesses as well as the accused himself in his defence. According to Busulwa Lutaya (PW5) who is the Senior Accountant in the President's Office, and Belly Baruka (PW8) who was an Accounts Assistant in the same department, the cheque was signed for by Twaha Kiwanuka who was the first accused at trial. Twaha Kiwanuka testified that the cheque was handed to Thomas Tondo the Senior Commercial Officer of UEB but the assertion was denied by Thomas Tondo (PW7) himself. A voucher for the cheque was made but no covering letter was written to accompany the cheque. After presenting the cheque to the Bank of Baroda the letters were given to the appellant and the same were delivered to the Principal Accountant.

According to the defence version, on 12th April, 2000 the appellant went to the Principal Accountant to ask for permission to travel to Gulu to attend a funeral. However, before he (appellant) left the Principal Accountant called him to his office and gave him the cheque in question for withdrawal of Shs 312,995,256/= which he did. After the money was withdrawn he purchased dollars, using the money, and thereafter handed it to the Principal Accountant Allegedly the Principal Accountant told him that the receipt for the money would be ready on the following Tuesday. On returning from Gulu he was arrested on the ground that the cheque he took to the Bank of Baroda was a forgery. Subsequently the charges in question were preferred against him.

Counsel for the appellant has rightly pointed out that since this is a first appeal the appellant is entitled to have the whole evidence submitted to a fresh scrutiny, so that this court weighs the conflicting evidence and arrives at its own conclusions – Okero – Republic [1972] EA: 32, a decision of the court of Appeal for East Africa. In so doing an allowance should be made for the fact the trial court had the advantage of hearing and seeing the witnesses – Peters V Sunday Port, [1958] EA. 424. If the court finds that the appellant knowingly and fraudulently presented the cheque to Bank of Baroda for the purpose of enriching himself the charge of abuse of office will easily follow because there is no contention that he was employed in a public body at the material time, the cashing of the false cheque resulting in loss of money to his employer, the Government of Uganda, the act of cashing the cheque was arbitrary in the sense that it was calculated to benefit himself and not the employer and since he was employed to properly keep books of accounts for his employer the act of falsifying transactions would amount to abuse of authority entrusted to him.

The forgers and the place of forgery remain unknown, and as already pointed out the appellant was acquitted of the offence of forgery as there is not an iota of evidence linking him to the act of forging or falsifying the cheque. It is for this reason that the Principal Accountant who handed over the cheque to the appellant should have been called as a witness for the prosecution. Indeed on the evidence available there is no good reason why he should not have been prosecuted because the evidence in favour of the state does not appear to incriminate any of the accused persons more than it does the Principal Accountant himself.

The trial magistrate based his findings to convict the appellant primarily on the absence of the “covering letter,” presumably the letter that would explain to the bankers the nature of the transaction in question. But there is no evidence to establish that officials of the section in which the appellant worked could not withdraw money in absence of the covering letter at trial the magistrate observed on his judgment:-

“A2 uttered the documents so as to obtain cash from Bank of Baroda. In his defence he claims to have acted innocently, on instructions of his boss. The Principal Accountant to whom he handed the proceeds of the cheque. I find this hard to believe. For the accused, an experienced officer who handled money for a long time, to draw funds against forged documents then just innocently hand them over to another officer is hard to believe. It is not reasonable for him to have handed over 200,000 dollars without any form of

acknowledgement of receipt. From the evidence on record I am convinced that he acted knowingly and fraudulently. Count 4 is proved beyond reasonable doubt.”

Of course a court is entitled to draw certain inferences from evidence, whether circumstantial or otherwise. But in doing so it should always be borne in mind that the burden to prove the charge beyond reasonable doubt rests with the prosecution, unless by exception the law imposes some duty on the defence to prove certain matters (and if needless to emphasize such burden is always discharged on a balance of probabilities. There is no such exception in the present case). Equally significant before a conviction can be based exclusively on circumstantial evidence, court must be satisfied that the inculpatory facts are incompatible with the innocence of the accused, and are incapable of explanation upon any other reasonable hypothesis than that of guilt – SIMONI MUSOKE VR [1958] EA 715 at P. 718, a decision of the then court of Appeal for Eastern Africa. The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt – TAYLOR ON EVIDENCE 11th Edition – at p.74, as approved in Simon Musoke’s case. The unfortunate factor in the present case is that the trial magistrate appears to have proceeded under the impression that the appellant had a duty to establish that he presented the cheque to the Bank of Baroda innocently. It did not occur to the magistrate that the duty was on the prosecution to establish that the appellant presented the cheque with guilty knowledge in the sense that the evidence should have shown that he was aware that the cheque had been forged.

The prosecution evidence does not disprove the appellant’s assertion that after handing over the money to his superior he proceeded up country to attend a funeral, he was arrested on returning to Kampala. The trial magistrate did not take the accused’s explanation into account, so as to decide whether or not the explanation sufficiently accounted for failure to get a receipt after he handed the money to the principal accountant.

I find the absence of a covering letter not helpful to the prosecution. Whoever caused the forging of the cheque appears to have had knowledge of the inside work set up of the section. At any rate he knew which bills were payable, and he was so artful that only a computer could detect the forgery. To an innocent holder the cheque looked genuine. It appears to me if the appellant were a party to the forgery he would insist on a covering letter to make the transaction appear bone fide. The evidence available arouses only suspicion. The appellant went to the bank, that is, Bank of Baroda, on instructions. There is nothing in evidence to

show that the purpose stated for which the money was purportedly required, that is, purchase of materials for radio and television equipment, was out of the ordinary or outside the scope and functions of the department in question.

It is impossible for anyone to say with any word certainty that the appellant presented the cheque to the bank in issue with a fraudulent interest. With this finding the convict of uttering a false document cannot stand. Evidence to prove that he presented the cheque knowing it to be forged is lacking. So with abuse of office. The prosecution should have charged the principal account or any other person who would appear to have been the perpetrators of the scheme under which the cheque was forged, falsely, so as to defraud Government of the colossal sum of money. Since the appellant might have acted innocently I am unable to find that he acted in abuse of his office. I find that the facts lead to suspicion that the appellant was a party to the fraud on question; but more than that, in my humble opinion, belongs to the reaction of speculation. The appellant is entitled to an acquittal; then convictions are quashed and sentences set aside. He shall be set at liberty unless there are other charges lawfully pending against him.

J.P.M Tabaro

Judge

19-12-2005

19-12-2005

Appellant not present.

Counsel for appellant absent

Mr. J. Wamimbi, for State Attorney for the respondent

Counsel for appellant was served with notice.

Judgment delivered.

J.P.M Tabaro

Judge

19-12-2005

