THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 0039 OF 2008

UGANDA:: APPELLANT

VERSUS

OKIROR JAMES:: RESPONDENT

[Appeal from the Decision of Atukwasa J. Magistrate GI

dated the 7th August 2008]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the ruling of Atukwasa J. sitting as Magistrate Grade I where she acquitted the respondent on the ground that there was no case to answer on two counts: forgery c/s 342 of the Penal Code Act and uttering a false document c/s 351 of the PCA.

The facts from which the appeal arose are briefly that on the 11/05/06, the respondent's motor vehicle was involved in an accident with the vehicle belonging to the complainant, Kizito Henry. The respondent's motor vehicle was damaged and had to be repaired. The respondent claimed that during the period of repair, he hired a motor vehicle to facilitate him in his work. After the motor vehicle was repaired, he brought a suit against the complainant in the Chief Magistrates Court at Jinja claiming special damages of shs 1,960,000/= as the cost of transport for 23 days. In order to prove his claim, he presented a cash sale receipt issued by Dirisa Transport Services. Court found in his favour and awarded him damages in that amount which the complainant paid. The complainant was however convinced that the receipt that the respondent presented in court and on the basis of which he got damages of shs 1,960,000/= was a forgery. He thus made a

complaint to the police as a result of which the respondent was apprehended and charged in the Magistrates Court.

After the prosecution witnesses testified in the lower court, Mr. Okalang submitted that the evidence adduced by the prosecution did not make out a prima facie case against the respondent so as to put him on his defence. The trial magistrate found in favour of the respondent and the state appealed on the following grounds:

1. The learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record and hence came to a wrong ruling.
2. The learned trial magistrate erred in law when she ruled that the forged receipt was issued by Mukasa whereas the purported Mukasa had not confirmed issuing the same.
3. The learned trial magistrate erred in law and fact when she ruled that there was no forgery and nothing false uttered by the accused.
4. The learned trial magistrate erred in law when she ruled that the prosecution failed to establish a prima facie case to require the accused to give a defence.

It was proposed that the trial magistrate's ruling be set aside and the respondent be returned to the lower court and put on his defence.

At the hearing of the appeal, Mr. Hamuza Sewankambo (RSA) argued all the grounds of the appeal together. He submitted that all the ingredients of both the counts were proved by the evidence on record because PW2 testified that the document in question Exh P2 did not bear his signature. Further, that the signatures on the document belonged to the respondent and one Mukasa and so he (PW2) was not the author of Exh P2. That PW2 also testified that he traded under the name of Dirisa Transport Company but he did not have a company. Further that PW4 had carried out investigations and found that there was no such company as Dirisa Transport Services registered with the Registrar of Companies. Mr. Sewankambo submitted that the document could not be a genuine document if the company did not exist. Further that while PW2 told court that he had worked for the respondent for 15 days, the receipt showed that he worked for 23 days. It was Mr. Sewankambo's submission that the document told a lie about itself because it stated more days than PW2 had actually worked for the respondent which meant that

the person who produced it meant to defraud or deceive. That as a result, the trial magistrate should have concluded that the respondent had a case to answer and put him on his defence with regard to count 1.

With regard to the second count, Mr. Sewamkambo submitted that the trial magistrate should have found that the respondent uttered a false document because the respondent used the receipt (Exh P2) in Civil Suit No. 48 of 2006 between the respondent and Henry Kizito. He thus prayed that court exercises its powers under s. 35 of the Criminal Procedure Code Act and set aside the acquittal and also order that the respondent be put on his defence.

In reply, Mr. Okalang for the respondent opposed the appeal and submitted that it ought to be dismissed for having no merit. He submitted that the appeal was instituted because the complainant lost a civil suit and was a bitter man. That court should find that the complainant as PW1 was a witness of motive whose testimony required corroboration. Mr. Okalang invited court to find that PW1's testimony had no corroboration of his complaints and allegations. He further contended that PW2 who would have been the best witness to corroborate PW1's testimony gave contrary evidence to that of PW1. While PW1 told court that PW2 had told him that he knew nothing of the questioned documents, PW2 testified before court that his transport business was called Dirisa Transport Services and he authorised one Mukasa to issue Exh P2 on his behalf. It was thus Mr. Okalang's view that Exh P2 was a genuine document upon which PW2 admitted that he had received shs 1,960,000/= from the respondent. Further that PW2 was a witness for the state but he was not declared hostile; neither did the state call Mukasa to establish whether he actually issued the questioned document as stated by PW2.

With regard to the difference in the number of days stated in the receipt (23 days) and the number of days that PW2 testified that he provided services for the respondent (15 days), Mr. Okalang submitted that this contradiction could be explained by PW2's testimony that he was paid for 23 days but the respondent stopped him after 15 days. That there was no refund for the balance of 8 days that the respondent paid for but that amount could be recovered in a civil action. It was also Mr. Okalang's submission that the fact that the contents of the document were false was not a test for determining whether or not the document was false. That the fact that there was a difference between the 23 days named in the receipt and the testimony of PW2 that it

was 15 days was immaterial. He relied on the case of **Baigumamu v. Uganda [1973] EA. 26** which the trial magistrate had also cited in her ruling. Mr. Okalang further contended that the state failed to prove fraud against the respondent. This was because PW2 confirmed that he authorised Mukasa to make the receipt on his behalf when he received payment. That as a result, the trial magistrate's finding that there was no falsifying of a document, fraud or intent to defraud was correct.

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 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 (**Peters v. Sunday Post, [1958] EA. 424**).

Four questions need to be answered in this appeal as follows:

i) Whether it was proved that the receipt in question was issued by Mukasa.
ii) Whether the receipt (Exh P2) was forged.
iii) Whether the respondent falsely uttered the receipt in court; and finally,
iv) Whether the prosecution established a prima facie case so as to require the respondent to be put on his defence.

i) ***Whether it was proved that the receipt in question was issued by Mukasa.***

It was the appellant's case that though PW2 testified that he authorised Mukasa to issue a receipt to the respondent, it was not proved that it was actually Mukasa who issued the receipt. The evidence on record showed that PW2 stated both in-chief and confirmed in cross-examination that he authorised Mukasa to issue Exh P2 to the respondent. Further that Exh P2 bore Mukasa's signature. The state for whom PW2 testified did not challenge this evidence by calling another to rebut it. I therefore agree with the submissions of counsel for the respondent that PW2 authorised Mukasa to issue Exh P2 on his behalf as Dirisa Transport Services.

ii) ***Whether the receipt (Exh P2) was forged.***

Forgery is defined as the making of a false document with intent to defraud or to deceive. The elements of the offence are: i) false making or material alteration or possessing of a document, ii) ability to defraud and iii) legal efficacy of the document and iv) the intent to deceive, defraud, or injure.

With regard to the first ingredient of the offence, the person must have taken paper and ink and created a false document from scratch or she/he must have taken a genuine document and changed it in some significant way. It is the writing itself which must be false, not the document.

In the instant case, the prosecution argued that the document was false because it specified the number of days that the respondent had employed PW2 as 23 days, yet PW2 testified that he worked for the respondent for 15 days from the 11/05/2005 till the respondent told him to stop. That however, the respondent paid him shs 1,960,000/= for 23 days. Mr. Okalang submitted that the difference in the number of days did not go to the genuineness of the document because the respondent paid PW2 for 23 days. That the balance of 8 days could be refunded to the respondent and so fraud was not proved. He relied on the case of **Baigumamu v. Uganda** (supra).

The material evidence in the instant case is that on 11/05/2005 the respondent's motor vehicle was involved in an accident with that of the complainant (PW1). Due to the damage to the respondent's vehicle it had to be taken to the garage for repairs. According to the document in issue (Exh P2) the respondent then hired Dirisa Walugembe (PW2) to provide him with transport for 23 days at a cost of shs 80,000/= per day around Jinja for 20 days, and shs 120,000/= to Kampala for 3 days. The receipt purported to have been issued on the day of the accident (11/05/2005). Thereafter, the respondent used the receipt in a civil suit against the complainant in which he claimed for damages of shs 1,960,000/= as expenses incurred when his vehicle was out of use. Court awarded him the said amount (*ex parte*) upon which he executed the decree against the complainant and got the money out of him.

In cross-examination, the complainant stated that the accident occurred at around 9.00 am and he was with the respondent person the whole day (i.e. on the 11/05/2009). That there was an agreement for him to repair the respondent's m/vehicle and the respondent chose to take the m/vehicle to a garage of his choice. According to the complainant the vehicle was repaired the

following day so the respondent did not spend any money for subsequent days. There was a written agreement that had the terms of the understanding to repair the car but it was not admitted in evidence. This evidence of the complainant was not challenged by counsel for the respondent save that it was contradicted by PW2's testimony.

Dirisa Walugembe (PW2) was the owner and driver of the m/vehicle that was hired by the respondent. He testified that at about 3.00 p.m. on the fateful day, the respondent requested him for his services. Further that he did not remember when he started working for the respondent but he worked for 15 days till the respondent stopped him. That the respondent paid him shs 1,960,000/= for his services for which he authorized one Mukasa to issue him with a receipt because PW2 did not have receipts to issue.

From the evidence above, it appears that the respondent received services from PW2 for a period of 2 or 15 days; certainly not 23 days as alleged in Exh P2. Exh P2 was obtained by the respondent most probably for purposes of recouping the loss that he had sustained following the accident. It was not truthful about the number of days that the respondent had to use alternative transport.

Baigumamu v. Uganda (supra) which was cited by counsel for the respondent can be distinguished from the instant case. In that case, the appellant received shs 30/= from a litigant being court fees for a copy of proceedings and judgment in a civil suit instead of shs 15/= which was the proper fee to charge. He issued him with a receipt for that amount but later filled the amount as shs 15/= in the duplicate receipt. He kept the balance of shs 15/= for himself. Court found that the appellant was not guilty of forgery because the litigant had indeed paid shs 30/= and received a receipt for that amount. He was therefore not defrauded. It was held that the falsity in a forgery must be of the purport of the document, not its contents; the document must tell a lie about itself.

Did Exh P2 tell a lie about itself? Exh P2 represented that PW2 had offered services to the respondent for 23 days when he had not. It purported to prove that the respondent had hired PW2 to drive him and his children for 23 days when he had done so for less. The document was dated 11/05/2005, the date on which the accident occurred. The fact that 23 days were paid for on the

same day casts doubt on the genuineness of the document. There is no doubt that the respondent's car was to undergo repairs from the 11/05/2005 onwards. However, it is difficult to believe that the respondent would have known on that day that the repairs would go on for a period of 23 days, and with so much certainty that he would have paid PW2 shs 1,960,000/= in advance for his services.

The respondent went further and used the document to extort shs 1,960,000/= out of the complainant who should have paid less to him because he was not responsible for the respondent's use of PW2's services for the 13 or 21 extra days that were charged in excess. Contrary to Mr. Okalang's submission that it did not matter that the shs 1,960,000/= was alleged to have been received by PW2, it mattered a lot. The complainant was defrauded of the difference of the cost between the actual times that PW2 worked for the respondent and that for which he recovered damages in the civil suit.

In **Uganda v. Seezi Cheeye Criminal Case No. 1254 of 2008** Katutsi J. defined deceit and fraud as follows:

> "To defraud is to deceive by deceit and to deceive is to induce a man or woman to believe that a thing is true which is false. Shortly put, to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action (R. v. Wines [1953] 2 All E.R. 1497)."

There is no doubt that the statement in Exh P2 that the PW2 worked for the respondent for 23 days was a falsehood. It was an attempt to make any person who read Exh P2 believe that the respondent spent shs 1,960,000/= on transport when he had not. The document had the ability to defraud; it looked genuine enough to fool people. It in fact induced a state of mind in the Magistrate in Civil Suit No. 46 of 2006 against the complainant that the complainant was liable to compensate the respondent in the sum of shs 1,960,000/= whereas he was not.

Turning to the third element of the offence, i.e. the legal efficacy of the document, the document was a receipt. It was a formal acknowledgement which falls under relevant facts provided for by s. 30 (b) of the Evidence Act. Where PW2 could not be found or where he could not attend court,

court was bound by s. 30(b) of the Evidence Act to accept the receipt issued by Dirisa Transport Services as evidence of the transaction because it was a statement made by PW2 in the ordinary course of his business, and, in particular an entry or memorandum made by him in books kept in the ordinary course of his business.

The final ingredient is the intent to defraud. It is clear that the respondent did not make Exh P2 but he participated in procuring it for his expenses. PW2 testified as follows:

> *"The accused got a problem because I have no company so I told him to get someone who witnessed him give me money to make (for) him a receipt which he required.*
> …
> *This is the receipt. It does not bear my signature it bears signatures of the other person one Mukasa and that of the accused. I call my business Dirisa Transport Services. I did not author the receipt. The accused's signature is probably there.*
> …
> *I am the one who gave the accused the invoice he filled it himself. After filing he retains a copy I do not remember the day I started working. I worked till he stopped me it took me about 15 days.*
>
> *I authorized Mukasa to deal with the accused and I signed the authorization. I understood what I was signing I read through the document it was briefly that I have authorized Mr. Mukasa to work with Okiror to make a receipt to cover his expenses (show). He gave me 1,960,000/- Mukasa wrote the authorization."*

The specific state of mind for forgery does not require an intention to steal, only an intent to fool people. The person must have intended that other people regard something false as genuine. A forgery is complete upon having created such a document with this requisite intent. No use need ever be made of the document nor does it ever need to be tried out or circulated by the offender ("Possession is 9/10 of the law"). The test is whether anyone might have been defrauded.

There is no doubt that when the respondent had ExhP2 made he had the intention of using it. He would not have gone to the lengths that he did to procure it if he did not intend to use it. Because he knew that document was false (i.e. he did not pay PW2 shs 1,960,000/= on 11/05/2005 for the alleged journeys) the intention to defraud was constituted.

With regard to the offence of uttering, s. 2 (cc) of the Penal Code Act defines “utter” as meaning and including using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question. The offence is constituted by 3 elements: passing or making use, intent to defraud and knowledge of forgery. Passing and making use is constituted by putting into circulation a writing or document that involves forgery. Any form of material gain may be the motive, but generally financial gain is the motive. The second element is the same intent to defraud under forgery. Knowledge of forgery is held to exist when the person uses a forged document with knowledge that it is forged.

I have already ruled that the forgery was constituted when the respondent had Exh P2 made when he knew that it did not represent what happened between him and the complainant. Though PW2 admitted that he authorized the making of the document, the respondent knew that it was meant to fool the court or any person who read it. The offence of uttering was thus constituted when he attached it to his plaint in the suit, and when he produced it in court in evidence.

In the end result, grounds 1, 3, and 4 of the appeal succeed. Ground 4 fails because there is no doubt from the testimony of PW2 that Mukasa made the document with the participation of the respondent. This appeal therefore partially succeeds. The acquittal is set aside and the respondent should return to the trial court to be put on his defence.

Irene Mulyagonja Kakooza
JUDGE
12/11/2009