

GHANA / JUDGMENT

Republic Vrs Apiah and Another

[2023] GHACC 293 (30 March 2023)

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1. IN THE CIRCUIT COURT HELD AT MPRAESO ON THURSDAY 30TH DAY OF MARCH 2023 BEFORE HIS HONOUR STEPHEN KUMI, ESQ CIRCUIT JUDGE. CASE NO: B1 /70 /2019. THE REPUBLIC V

1. GABRIEL YAMOAHA APPIAH
2. EVANS AMOAKOHENE

JUDGMENT:

Before the court in this judgment are two accused persons: They are Gabriel Yamoah Appiah and Evans Amoakohene as A1 and A2 respectively. They are before the court because on the basis of a charge sheet filed in the Registry of this court, they are jointly to answer to the following offences:

1. Conspiracy to commit crime; namely forgery of official document contrary to sections 23 (1) and 158 of the Criminal Offences Act, 1960, Act 29.
2. Conspiracy to commit crime namely; stealing contrary sections 23 (1) and 124 (1) of Act 29/1960.
3. Forgery of other document; contrary to section 158 of Act 29/1960.
4. Stealing; contrary to section 124 (1) of Act 29/1960. Meanwhile, the particulars of the stated offences as supplied by the prosecution on the accompanying charge sheet read as follows :
COUNT ONE “1. GABRIEL YAMOAHA APPIAH, banker; 2. EVANS AMOAKOHENE; banker: During the of month of January, 2017 in the Eastern Circuit and within the jurisdiction of this court, did agree to act together with common purpose to commit crime to wit; forgery of document
COUNT TWO . “GABRIEL YAMOAHA APPIAH, banker; 2. EVANS AMOAKOHENE; banker: During the of month of January, 2017 in the Eastern Circuit and within the jurisdiction of this court, did agree to act together with common purpose to commit crime to wit; stealing.
COUNT THREE “GABRIEL YAMOAHA APPIAH, banker; 2. EVANS AMOAKOHENE; banker: During the of month of January, 2017 in the Eastern Circuit and within the jurisdiction of this court, with intent to evade the requirement of the law, you

forged the receipts of Electricity prepaid from January, 2017 to June, 2018, in the name of Fidelity Bank, Nkawkaw branch” COUNT FOUR : GABRIEL YAMOAHA APPIAH, banker; 2. EVANS AMOAKOHENE; banker: During the of month of January, 2017 in the Eastern Circuit and within the jurisdiction of this court, did steal cash the sum of GHC 112,550.00, the property of Fidelity Bank Nkawkaw branch”. When the accused persons originally appeared before this court, they pleaded not guilty on all the counts against them. By those pleas, they put themselves in charge of the court, which required of the 2 prosecution to adduce sufficient and quality evidence to prove their guilt beyond reasonable doubt as same is the requirement or stipulation under Article 19 (2) (c) of the 1992 Constitution; as follows: “ A person charged with a criminal offence shall.... be presumed innocent until he is proved or has pleaded guilty”. CASE OR EVIDENCE ADDUCED BY THE PROSECUTION IN SUPPORT OF THE CHARGES AGAINST THE ACCUSED PERSONS: The prosecution in their attempt and effort to discharge this Constitutional and Common Law burden of proving the guilt of the Accused called some four (4) witnesses. They are as follows:

1. Kwabena Gyateh Acquah; the Internal Control Officer with Fidelity Bank Ghana Ltd.
2. Emmanuel Gyamfi; the Financial Crimes Investigations Manager of Fidelity Bank Ghana Ltd
3. Godfred Frempong; an assistant manager of the Total 2 fuel station at Nkawkaw.
4. Number 45448 Corporal Agyekum Mintah; a police detective and the police investigator in the case, formerly of the Nkawkaw Divisional CID. The relevant or material pieces of their testimonies or evidence will be stated where necessary in the course of the trial. Except to state herein that at the close of the case of the prosecution, the court determined pursuant to section 174 of the Criminal Procedure Act, 1960, Act 30, that the prosecution had succeeded by a long shot to establish a prima facie case against both accused persons on all the four counts or charges against them. The said section 174 of Act 30/1960 is that; “174: “At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make a defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement...” The court accordingly invited or asked the accused persons to open their defence to the said charges in order to avoid a ruling against them on the basis of the prima facie evidence or case. Apposite to the ongoing discussion is the case of *Atsu v The Republic* (1968) GLR 717 at 719, CA, the law was also stated to be as follows; “As a general rule, evidence from the defence is not taken until the court has held that the prosecution has established a prima facie case. This is based upon the well-known principle that it is the prosecution which has the onus to prove the guilt of the person they accused of an offence, and not an accused who should establish his innocence, the accused should therefore not show his hands until the need arises”. . The above authorities relate to and affirm the Constitutional or even Common Law right of an accused person in criminal proceedings not to self-incriminate; a right that an accused person should generally not be compelled to say anything until there is a need to do so. Article 19 (10) of the 1992 Constitution supports this

position as follows: “ No person who is tried for a criminal offence shall be compelled to give evidence at the trial” 3 Despite an accused person’s right not to be compelled to testify, the law is equally that upon a finding or ruling by a trial court that a prima facie case has been established against an accused on the appropriate charge (s), it becomes necessary, needful and utterly critical for an accused person to say something in defence as in the absence of an accused person saying anything in defence- by way of a reasonable explanation-, the court may be entitled to convict the said accused person on the basis of that prima facie evidence. In the case of Kwabena Amaning @ Tagor v The Republic (2009) 23 MLRG 78 CA, at pages 129-130, Appau JA (as he then was) stated the effect of an accused person refusing or failing to say anything in defence when a prima facie case has been established as follows: “Prima facie evidence is nothing other than evidence that can lead to the conviction of accused if the accused leads no evidence to rebut presumption(s) raised in it. The standard required in establishing a prima facie case is therefore not lesser than the standard required in establishing or proving a case beyond reasonable doubt.... Prima facie evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person charged.” See the case of Kwabena Amaning @Tagor v The Republic [2009] 23 MLRG 78 CA; @ pages 129-130; per Appau, J.A. (as he then was)”. The accused persons in this case led by their Counsel- and presumably aware of the above legal consequences- elected to open their defence to offer their side of the story. That decision finds support per section 96 (1) of the Evidence Act, 1975 (NRCD 323), which provides that; “The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on his own application”. The two accused persons thus testified in their separate defence but none of them called any witnesses in support of their defence. In the following paragraphs, I will endeavour as much as I can to state the material or relevant parts of the said testimonies and the evidence generally adduced by the parties at the trial in relation to the charges aforementioned.

BURDEN OF PROOF: I will resolve the aforementioned counts or charges in the order they appear above and in terms of how they are laid out in the charge sheet. But before I deal with that, I wish to at this juncture undertake some reasonable discussion on the incident of burden of proof in this case and how same ought to be discharged. As has been stated above, the accused persons are before this court to to answer to the above- mentioned charges. The accused persons denied the charges or offences against them. In my opinion, the effect of the plea of the accused persons in law was as follows, especially, as this case is a criminal one: “Unless it is shifted, the party claiming that a person committed a crime or wrongdoing has the burden of persuasion on that issue”. See section 15 of the Evidence Act, 1975, NRCD 323. 4 In criminal proceedings, the received learning generally is that it is the prosecution- upon a plea of not guilty by an accused- that assumes the burden of proof, which they must establish beyond reasonable doubt. In the popular English case of Woolmington v DPP (1935) AC 462; where Lord Sankey (as he then was) held thus; “Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt subject to.... the defence of insanity and subject also

to any statutory exception..... No matter the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained". The above Common Law principle has enjoyed both statutory and case law blessings in Ghana. Under the statute, sections 11 (2) and 13 (2) of the Evidence Act, 1975, NRCD 323, state of the burden of proof on the prosecution as follows: "11(2) In a criminal action the burden of producing evidence, when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond reasonable doubt." "13(1) In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt." Similarly, in the case of *Donkor v The State* [1964] GLR 598, SC, it was held inter alia by the Supreme Court of Ghana that in criminal trials, the burden of proof in the sense of the burden of establishing the guilt of the accused is generally on the prosecution or The Republic. But what does proof beyond reasonable doubt really mean? The answer would be found in the following authorities. Both local and foreign decisions would come in handy in that regard. In the case of *Osei v The Republic* [2009] 24 MLRG 203, C.A; it was held to endorse the established common law view that "proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Court would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course it is possible, but not at all probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice". See also the case of *Miller v Minister of Pensions* (1947) 2 ALL ER 372 at 373; per Denning J (as he then was). So that is the burden the prosecution assumes in the case. However, the law is generally that an accused person in a criminal trial does not assume any burden of proof. He has no duty to prove his innocence or disprove anything. At worst, an accused only has to lead evidence to raise a reasonable doubt as to his guilt. And even with that the standard is a lower one- on the balance of probabilities. See sections 11 (3) and 13 (2) of the NRCD 323 (supra). The Supreme Court in the case of *MALLAM ALI YUSIF v THE REPUBLIC* [2003-2004] SCGLR 174 held that: "...the burden of producing evidence and the burden of persuasion are the components of 'the burden of proof.' Thus, although an accused person is not required to prove his innocence, during the course of his trial, he may run a risk of non-production of evidence and/or non-persuasion to the required degree of belief, particularly when he is called upon to mount a defence" 5 Therefore in this case, it can safely be said that the prosecution, for alleging that the accused persons herein, Gabriel Yamoah Appiah and Evans Amoakohene, have both conspired to commit the crimes of forgery of and stealing, which allegations had been denied, came to assume the onus of proof to establish and prove by sufficient, quality and credible evidence that the accused persons committed the above-stated offences beyond reasonable doubt. See section 11 (2) of the NRCD 323 (supra). As a necessary corollary to the above discussion- in terms of the need for and the bounden duty of the court or judge to do justice by taking a fair and holistic assessment of the evidence before them- in the case of *Dabla v The Republic* (1980) GLR 501, Taylor J (as he then was)

held that in a criminal trial, there are generally three types of facts that may emerge at various stages of the proceedings that a judge has to consider. There are;

- a. The facts which the prosecution may give before the commencement of the actual trial, indicating the material they intend to prove by admissible evidence.
- b. The facts which the accused person, may, if he chooses, lead in evidence in his defence; and
- c. The facts which on the consideration of the respective facts of the prosecution and accused/ defence mentioned above, the presiding judge or magistrate finds as representing in his opinion the actual facts (emphasis mine). In fidelity to the above guidelines, in resolving the instant charges, I will accordingly discuss what the elements of the offences are and then determine whether on the evidence as adduced by the prosecution and the accused persons as well as within the competing facts, the respective charges have been established or proven against the accused persons. **EVALUATION OF THE EVIDENCE ON THE COUNTS AND APPLICATION OF THE LAW:** I will first deal with the counts 1 and 3; which are whether or not the accused persons conspired to forge documents and whether or not they successfully forged documents (the ECG receipts) beyond reasonable doubt. In determining that, I will look at the various pieces of evidence as adduced by the prosecution witnesses and indeed on all the evidence including the defence of the accused persons before the court to determine that. Ultimately, I am thus to make a finding or decision whether or not the above crimes were committed by the accused person herein or otherwise. That is in conformity with the duty a trial judge in a contested matter- such as this one- assumes to make findings of fact of primary facts in dispute based on the two versions of the story before it. See the case of *Quaye v Mariamu* (1961) GLR 93, SC; where it was held by the Supreme Court of Ghana as follows as to the duty of a trial judge in a contested matter like this one; “To make up his mind one way or the other on the primary facts and when he has made up his mind he should state his findings and then proceed to apply the law. It is only then that this court can properly found or the inference properly drawn or the law properly applied”. In order to satisfy the Constitutional, statutory and common law threshold of proof beyond reasonable doubt, the law is also that; 6 “...the prosecution has a duty to prove the essential ingredients of the offence with which the appellant (accused) and the others have been charged...”. See the dictum of Dotse JSC in the case of *Frempong alias Iboman v The Republic* [2012] 1 SCGLR 297. Similarly, in the case of *Homenya v The Republic* (1992) 2 GLR 305, Acquah J (as he then was), sitting at the High Court, Ho, held and reiterated the position of the law thus; “...the first and mandatory duty of a trial judge in a criminal trial is to examine the case of the prosecution so as to determine whether the prosecution had established all the essential ingredients of the charge leveled against the accused person...”. So what are the offences against the accused persons under the counts 1 and 3 and what are their essential ingredients of same. In arriving at that, reference is made to the case of *Republic v Halm and Ayeh-Kumi*, Court of Appeal (Full Bench), Digested in (1969) CC 155; where the then Full Bench of the Court of Appeal held that in determining whether an offence under any enactment has been proved, a court must

look at the essential ingredients of the offence as contained in the enactment which creates and defines the offence and not the charge as set out in the charge sheet. In terms of the offence of conspiracy it is provided for under section 23 (1) of Act 29/1960 (supra) as amended by the Statute Law Review Commissioner per the Revised Edition Act, 1998, Act 562, as follows: “Where two or more persons agree to act together with a common purpose for in committing or in abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence”. See also the case of Republic v Augustina Abu and Others, (Unreported) Criminal Case No. ACC/15/2013; per Marful-Sau J.A, (as he then was). This definition is admittedly different from the old definition of conspiracy which was defined in section 23(1) of the old Criminal Code 1960 (Act 29) as follows: “If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation each of them is guilty of conspiracy to commit or abet that crime as the case might be.” In the case of Francis Yirenkyi v The Republic, (Unreported) Criminal Appeal No. J3/7/2015, Dotse JSC held inter alia that the new formulation no doubt reinforces the view that conspiracy is an intentional conduct; observing that under the new formulation, a person could no longer be guilty of conspiracy in the absence of any prior agreement. So that the mere acting together of two or more persons in a criminal enterprise is not enough to sustain conviction. Beyond that, there must be proof that the accused persons agreed to act together to commit the crime. It is however not a defence for an accused person who is charged for conspiracy to state that he did not have prior or previous concert or deliberation with the other accused persons to commit the offence where there is evidence that they agreed to act together to commit the offence, even if just before the commission of the substantive offences. See Dennis Dominic Adjei: “Contemporary Criminal Law in Ghana” at page 89; as well as the case of The Republic v Kwame Amponsah and 6 Ors; Unreported; CC. No. FT/0066/2016; delivered on 18th April, 2019; per Asare-Botwe J. In terms of the offence of forgery under section 159 of the Criminal Offences Act 29, it is stated that; “159. Forgery of other documents; 7 A person commits a misdemeanour who forges a document,

- (a) with intent to defraud or injure another person, or
- (b) with intent to evade the requirements of the law, or
- (c) with intent to commit, or to facilitate the commission of, a criminal offence.” Further instructions regarding the crime of forgery is contained in section 164 which reads as follows: “(1) A person forges a document if that person makes or alters the document, or a material part of the document, with intent to cause it to be believed
 - (a) that the document or the part has been so made or altered by a person who did not in fact so make or alter it; or
 - (b) that the document or the part has been so made or altered with the authority or consent of a person who did not in fact give the authority or consent; or

- (c) that the document or the part has been so made or altered at a time different from that at which it was in fact so made or altered.” In the case of *Francis Arthur v The Republic*; Criminal Appeal No. H2/09/2018; delivered on 21st February, 2019, Mabel Agyemang JA, delivered of herself as follows to illustrate and elucidate on the nature and essence of the offence of forgery under our law; “Thus the proof of a crime which is on the standard of proof beyond a reasonable doubt, see: S.13 of the Evidence Act (supra), is on the prosecution. In the instant matter, on a charge of forgery of document contrary to S.159 of Act 29 (supra), the prosecution was required to lead evidence to establish, on the requisite standard of proof beyond a reasonable doubt, any of the following: that the appellant had made or altered a document, or a material part of the document, with intent to cause it to be believed: that the document or the part had been so made or altered by a person who did not in fact so make or alter it; or that the document or the part had been so made or altered with the authority or consent of a person who did not in fact give the authority or consent; or that the document or the part has been so made or altered at a time different from that at which it was in fact so made or altered, see: S. 164 of Act 29 (supra)...”. In proving the offences against the accused persons, the prosecution mainly relied on the testimony of the PW2, Emmanuel Gyamfi, who essentially testified that information received from the Internal Control department of the bank after its periodic reviews raised suspicions of overstated expenses of Electricity Company of Ghana (ECG) prepaid credit purchased by the Nkawkaw branch, which compelled an investigations to ascertain the circumstances leading to the said overstated expenses. According to him, in the course of the said investigations, he and his team came across payment vouchers, account statements, receipts as well as interviewing the accused persons. From their investigations, they found that between January, 2017, to June, 2018, the accused persons had requested tellers at the branch to debit the branch's general ledger with GHC 8,500 monthly and had purposed same for the purchase of ECG prepaid credit, however the account statements of the three meters from the ECG showed that a monthly of GHC 1,500.00 was made contrary to GHC 8,500 debited and purposed in the bank's records for the purchases of ECG prepaid credit. 8 It was the evidence of the PW2 that in order for the accused persons to do achieve the overstated expenses, they agreed with a common purpose and forged receipts to cover genuine or actual purchases of ECG prepaid credit together with the amount taken without any authorization. He added that the accused persons forged the said ECG receipts by discarding the actual or original ECG receipts with the reasons that original receipts were faded; even though they had not scanned or photocopied the original receipts neither could same be found in the bank's record. Indeed, at the trial, copies of the said forged receipts were admitted into evidence. In the course of the police investigations, one Chief Superintendent Akyem Badu, had on the 21st day of March, 2019, wrote a letter to the ECG- then called Power Distribution Services (PDS)- in Accra attached with copies of the allegedly forged ECG receipts for the outfit to “confirm the authenticity or otherwise of the attached copies of the receipts to assist investigations..”. In a reply to the said letter or request, the PDS- per one Ing. Jones Ofori Addo, with the designation of Director of Customer Service, wrote inter that “ our observation is that the copies of the receipts attached to your letter are different from

what was generated from our system. We have attached a few of them (from our system) for ease of reference...”. The learned Counsel for the Accused in his written address on this issue had argued that the letter written by the Customer Service Director of the PDS stating that the copies of the receipts that the accused persons had submitted to the police as being different from what had been generated from the system of PDS did not mean they had been forged but simply that they were photocopies of the originals that the accused persons had lost. With due respect to Counsel, that argument cannot be true and does not find favour with the court and same cannot be supported from even a cursory examination of the two different documents. For it is not a question of one being original or the other being photocopied receipts. Rather it is about the differences in the makeup and contents of the figures or amounts found on the two separate documents that made them “ different”. An original document that has for example GHC 10.00 on it cannot change to GHC 20.00 just because it has being photocopied. It will still read GHC 10.00. This court is also perfectly aware that a photocopied document is as good and admissible as the original, especially when there is a chance to compare them and reasonable explanation is given for the production of the photocopy. However, that is not the case here. I will explain myself better presently The court carefully examined the two species of receipts; and found as follows: The receipts attached to the letter from the Ing. Jones Ofori Addo had the PDS logo. It is a matter within the remit of judicial notice under section 9 of the Evidence Act that at that time the ECG was operating under the name of PDS. The allegedly forged receipts had the previous ECG logo and details. They contained same details such as customer name as Fidelity Bank; same dates of purchase, same account numbers and meter I. D. numbers. However, the point of departure was the amount of ECG prepaid credit purchased for the same month (s) as they appeared on the contrasting receipts. For example, for the month of January, 2017 (specifically on the 3rd of January, 2017), while the receipt from PDS stated that GHC 2,500 worth of ECG prepaid credit was bought on that date, however on the allegedly forged receipt submitted by the accused persons, it was stated that GHC 8,500 worth of ECG prepaid credit had been purchased on that same date. Both documents had the same meter I. D. number as P15301786 and account number as 5503341001. 9 Similarly, on 5th July, 2017, in respect of the same meter I. D. number P13309278 and account number 5504291001, the receipt from had stated that GHC 1,500 worth of ECG prepaid credit had been purchased by the Fidelity Bank, however on the allegedly forged receipt submitted by the accused persons for that same date, it stated GHC 8,500 as the amount of ECG prepaid credit purchased. Same can be said about 4th April, 2018; for while the receipt submitted by the PDS stated that the Fidelity Bank had bought GHC 1,500 worth of ECG prepaid credit in respect meter I. D. number P13309278 and account number of 5504291001, the allegedly forged receipt submitted by the accused stated GHC 8,500.00; all these showed a difference of GHC 7,000.00 between the two transactions on the two contrasting receipts for the same dates! It is observed that the central theme that runs through the provisions and authorities is that the said forged document must tell a lie about itself. See Russel on Crime (11th ed), p 1400. In essence, the lie or false statement must relate to the authenticity of the document. For Ayebi JA (as he then was) in the case of Patterson Ahenkan and 2 Others v The Republic;

Criminal Appeal No. H2/7/10; delivered on 25th March, 2014, quoted and relied on the case of Antwi v. The Republic [1971] 2 GLR 412, he even held that the essence of the offence of forgery is simply a misrepresentation. He continued to add that; "That is to say the document must represent what it actually is not or must purport to show that it was made by one who did not actually do so. In the instant case the letter Exhibit A, was actually made in the name of Mensah Saahene who died about eight years ago, hence it was unsigned. Therefore the evidence led by the prosecution must prove that the appellants herein wrote the letter with intent to make it appear as genuine and with the further intent to defraud the complainant in this case. The intention to defraud implies the obtaining by false representations some material or financial gain from the complainant, while the intention to injure is to make PW1 act to her detriment or loss. By way of persuasive authority, I refer to the Nigerian Court of Appeal case of Gayus v. Federal Republic of Nigeria (supra) where this Court, per Abiriyi, JCA restated, at pages 44-45 of the E-Report "Forgery or uttering is the fraudulent making or alteration of a writing with intent to defraud or deceive. The tendering of a forged document simpliciter is not per se the uttering; it is the content that harbours forgery or uttering. The offence of forgery is said to have been committed when the document tells a lie about itself. The offence is proved where the lie is exposed and confirmed before a Tribunal or Court. On a charge of forgery, it is essential for the prosecution to prove that the accused person forged the document." In my opinion, and as deductible from the above statutory provisions and authorities on the offence of forgery, a conviction for forgery must establish the following:

- a) That there is in existence of an original/genuine document.
- b) That the document is forged.
- c) That forgery was done by the accused. 10 d) That the accused knows that it was forged.
- e) That the accused intended the forged documents to be acted upon as an original/genuine to the detriment of the victim, whether to defraud or injure the victim. In the Nigerian case of APC v. PDP (2015) ALL FLWR (Pt.791) 1493, it was held that before an allegation of forgery can be said to be established, the original documents and the forged ones must be tendered in evidence. The court said: "In my view, based on the definition above, to prove forgery or that a document is forged, two documents must be produced:
 - (1) The document from which the forgery was made, and
 - (2) The forgery or the forged document...". In relating or applying the above authorities on forgery to the very facts of this case and the very evidence before the court, the court finds that the prosecution adduced evidence of the original ECG receipts which were issued and confirmed by the Director of Customer Service of the ECG Ltd as well as copies of the allegedly forged receipts that the accused persons had submitted. There was no credible and serious objection to the exhibit or receipts by the prosecution issued by the director of the ECG. That being so, as the exhibit was prima facie a credible and official document from an official of that high rank within the ECG, then its contents and information therein can

safely be accepted as acceptable and accurate on the figures found thereon. This is informed by section 37 of the Evidence Act, 1975 (*supra*) on statutory presumption of regularity of official duties. That section reads that; “It is presumed that an official duty has been regularly performed..”. Section 37 of the Evidence Act is not a conclusive presumption. It is only a rebuttable presumption. Section 30 provides that: "Rebuttable presumptions include but are not limited to those provided in sections 31 to 49 and 151 to 162.". The Black Law Dictionary at page 1223 defines presumption as; “a legal inference or assumption that a fact exists based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption – page 1223 (Black’s Law Dictionary) Black’s Law Dictionary, Eight Edition, by Bryan A Garner, further highlights on this type of presumption when it defines ‘rebuttable presumption as: “An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence. Also termed prima facie presumption; disputable presumption; conditional presumption.” Section 20 of the Evidence Act provides that: “A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact.” 11 The effect of all that has even discussed in the immediately preceding paragraphs is that a prima facie case had been raised against the accused persons for them to have called other credible, contrary and admissible evidence to overcome, dispute and contradict the presumption of regularity raised against them on the basis of the receipts submitted under the hand of an officer or director of ECG Ltd. However, in their defence and at the trial, they failed to call such evidence to rebut that presumption. No documents were tendered to rebut the receipts tendered by the prosecution. They also failed to call the person or cashier at the ECG who issued the disputed or impugned prepaid receipts to them to have testified to their authenticity. If that had been done, it would have at least rebutted the presumably original receipts submitted by the prosecution and a fortiori raised a reasonable doubt about the existence of the presumed forged receipts. The net effect was that at the close of the defence of the accused persons and by extension at the end of the trial, the prima facie evidence of the prosecution on the forged ECG receipts had not been rebutted by the accused persons. Accordingly, on the basis of the *Kwabena Amaning @ Tagor v The Republic* case (*supra*), the court is entitled to infer and conclude on the guilt of the accused persons that they conspired to forge and succeeded in forging the ECG prepaid receipts that they submitted to the Complainant bank and the police at the time of the investigations, same admitted into the record. In the premises, the court finds and holds that the prosecution have succeeded to prove beyond reasonable doubt the guilt of the accused persons herein on the counts 1 and 3 of conspiracy to commit the crime of forgery and forgery. The two accused persons are hereby convicted and found guilty on the counts 1 and 3. COUNTS 2 AND 4: WHETHER OR NOT THE ACCUSED PERSONS CONSPIRED TO STEAL: AND WHETHER OR NOT THE ACCUSED PERSONS STOLE THE AMOUNT OF GHC 112,550.00 BELONGING TO THE COMPLAINANT BANK: Now, the erudite Dotse JSC in the

case of Frimpong alias Iboman v The Republic (2012) 1 SCGLR 297, held inter alia thus; “ The prosecution has a duty to prove the essential ingredients of the offence with which the appellant and the others have been charged beyond reasonable doubt....”. Similarly, in the case of Homenya v The Republic (1992) 2 GLR 305, Acquah J (as he then was), sitting at the High Court, Ho, held and reiterated the position of the law thus; “the first and mandatory duty of a trial judge in a criminal trial is to examine the case of the prosecution so as to determine whether the prosecution had established all the essential ingredients of the charge leveled against the accused person...”. So what are the essential ingredients of the offences under the counts 2 and 4? In arriving at that, reference is made to the case of Republic v Halm and Ayeh-Kumi, Court of Appeal (Full Bench), Digested in (1969) CC 155; where the then Full Bench of the Court of Appeal held that in determining whether an offence under any enactment has been proved, a court must look at the essential ingredients of the offence as contained in the enactment which creates and defines the offence and not the charge as set out in the charge sheet. The aspect of conspiracy charge on the count 2 and its ingredients have been discussed above and they will apply to the instant discussion mutatis mutandis. In terms of the offence of stealing, it is provided under section 124 (1) of Act 29/1960, as follows: “A person who steals commits a second degree felony” It is important to state that, for the offence of stealing- in terms of the count 4- while section 124 (1) of Act 29/1960 (supra) creates stealing as an offence by statutorily providing that a person “who steals commits a second degree felony”; section 125 of the same Act 29/1960 (supra) defines what is stealing under the law. That provision reads as follows: “A person steals who dishonestly appropriates a thing of which that person is not the owner” So that in the case of Brobbey and Others v The Republic [1982-83] GLR 608, the court, per Twumasi J (as he then was) stated the following as the essential ingredients of the offence of stealing: (i) (ii) The person charged must have appropriated the thing allegedly stolen. The appropriation must be dishonest. (iii) The person charged must not be the owner of the thing allegedly stolen. In the case of John Cobbina v The Republic; Unreported: Criminal Appeal No. J3/07/2019; delivered on 19th February, 2020, the Supreme Court, speaking through Dordzie JSC (as she then was), distilled the following as ingredients of the offence of stealing; “... the essential ingredients of the crime of stealing which the prosecution ought to prove beyond reasonable doubt therefore are:

1. The subject matter of the theft that is the monies the appellant is accused of stealing belong to another person.
2. He appropriated the monies and
3. He did so dishonestly” I thus hold that the two (2) main conditions that must exist or be established in a case of stealing is dishonesty and appropriation. In the case of Anang v The Republic [1984-86] 1 GLR 458, the element of dishonesty in the offence of stealing was stated or described as to connote a “moral obloquy....such nature as to cast a slur on the character revealing him as a person lacking in integrity or a plainly dishonest person”. In the case of Ampah v The Republic (1977) 2 GLR 171, Azu Crabbe CJ (as he then was) “In the opinion of

this court it is the statute creating and defining the offence that determines the ingredients of the offence which are to be proved. This court agrees with the observations of Abban J. in *Ampah v. The Republic* (supra) at p. 412 that: “If these three essential elements are proved to the satisfaction of the court, the court will be bound to convict unless the accused is able to put forward some defence or explanation which ‘can cast a reasonable doubt’ on the case for the prosecution.” Similarly, section 120 of the Criminal Offences Act, 1960 Act 29 defines dishonest appropriation as follows:

- (1) “An appropriation of a thing is dishonest 13
 - (a) if it is made with an intent to defraud, or
 - (b) if it is made by a person without a claim of right, and with a knowledge or belief that the appropriation is without the consent of a person for whom that person is trustee or who is owner of the thing or that the appropriation would, if known to the other person, be without the consent of the other person. “ I will now look at, scrutinize and evaluate the evidence adduced by the prosecution as well as the evidence adduced by the defence as well as the exchanges during the cross-examinations and then determine if they establish or raise a prima facie case of stealing against the accused persons. In doing that, I will take and resolve each of the three (3) ingredients of the offence of stealing in turn and then determine if the prosecution proved them. It is instructive to note that the failure of the prosecution to prove even one of the above-mentioned ingredients will be fatal to their case against the Accused. So that if the first ingredient is not proved, that would end further consideration of the remaining two ingredients of the offence. See the dictum of Koranteng-Addow J (as she then was in the case of *Antwi and Another v The Republic*; Unreported; delivered on 7th April, 1971. I will first deal with the ingredient that the Accused must not be the owner of the property or specifically the amount of money in question. As it has been found from the elements or ingredients of stealing above, the prosecution only has to adduce evidence to show that the property or item in question did not belong to the accused persons and that it could have belonged to anyone in this world apart from the accused persons herein. In the case of *Republic v. Halm and Ayeh-Kumi*, Court of Appeal (full bench), 7 August 1969, unreported; digested in (1969) C.C. 155, the full bench of the Court of Appeal, speaking through Amissah JA (as he then was) held inter alia that “The primary relationship for consideration in a charge of stealing is not so much a relationship between the person charged and some other, identified as owner, as a relationship between the person charged and the thing alleged stolen. This is the approach of our law and it is also the approach which influenced the early development of the common law of larceny in England”. It is therefore unnecessary to prove the ownership or value of the thing. Thus, in the criminal case of R
- v. HALM [1969] CC 155 it was held that a charge of stealing is not founded on a relationship between the accused and an identified owner of the thing allegedly stolen, but rather on the relationship between the accused persons and the thing alleged to have been stolen. In doing that it is useful to remind ourselves about the explanation given in the commentary to

section 11 (4) of the Evidence Act in respect of the burden of producing evidence: “A party with the burden of producing evidence is entitled to rely on all the evidence in the case and need not rest entirely on evidence introduced by him. The party with the burden of producing evidence on the issue may point to evidence introduced by another party which meets or helps the test of sufficiency. It is for this reason that the phrase “ on all the evidence” is included in each of the tests of sufficiency”. 14 I have had to quote the above explanation in the commentary to section 11 (4) of Evidence Act advisedly: And it is because the accused persons in their separate out-of-court unsworn statements (cautioned statement and charge statements) have accepted or admitted at least one of the ingredients of the offence of stealing; that is that they used the money and that the money belonged to the Complainant bank. For example, the A1, Gabriel Yamoah Appiah, in his verified witness statement on oath in the box stated at paragraph 17 that; “17. I and the operations manager used the amount of GHC 8,500.00 debited to the Nkawkaw branch’s petty cash to mostly purchase GHC 1,500 electricity prepaid credit and mostly GHC 7,000 to purchase fuel for the generator of the bank’s branch on monthly basis from January, 2017 to April, 2018, for the smooth running of the bank’s branch...”. Similarly, in the verified witness statement on oath of the A2, Evans Amoakohene, he also stated as follows at paragraphs 11 and 12; “11. I further explained to the team that the above electrical challenges necessitated our decision to improvise for the smooth running of the branch’s operation.

12. I again explained to the team that on a monthly basis, an amount of GHC 8,500.00 made available from the branch petty cash was used for the bank’s electrical energy cost”. It would be seen from the above that, the accused persons by their own statements or admissions on oath, do not lay any claim to the money or amount used in question, but agree that it belonged to the Complainant bank. Similar admissions were made by the accused persons in their cautioned and charge statements as admitted into the record. The law is that when a party makes an averment and same is not denied by the adversary, no issue is joined and the party does not have to lead any evidence to prove same. Similarly, when a party gives evidence of a material fact and was not cross-examined upon he needs not call further evidence to corroborate that fact. Indeed, there is no better evidence than the admission of an opponent. See KUSI and KUSI v. BONSU 2010 SCGLR @ 60 per Wood CJ (as he then was). In the light of that, I find and hold that the prosecution succeeded to prove the first ingredient of the offence of stealing; that is that the amount in question did not belong to the accused persons. I now proceed to address the remaining two ingredients of the stealing offence; which are whether or not the accused persons appropriated the money of the Complainant bank and whether the said appropriation, if any, was dishonest. I have decided to resolve the two issues jointly and together as one as they appear to flow from each other, while looking out for their distinctive elements. From the above definitions and ingredient of appropriation and dishonesty, and relating same to the evidence before the court, it is not in dispute that the accused persons took or moved the money or dealt with the money, to constitute or suggest appropriation. Section 122 of the Criminal Offences Act 1960 explains what constitutes an act of appropriation as;

- (1) An appropriation of a thing by a trustee means a dealing with the thing by the trustee, with the intent of depriving a beneficiary of the benefit of the right or interest in the thing, or in its value or proceeds, or a part of that thing.
- (2) An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that a person may be deprived of the benefit of the ownership of that thing, or of the benefit of the right or interest in the thing, or in its value or proceeds, or part of that thing.” Under normal circumstances, in criminal proceedings, and as the above ingredients for stealing indicate on the authorities, the prosecution would have as part of discharging their duty to prove the identity of the offender, in showing that it was the accused persons who appropriated the money. Ordinarily, the law is that where the identity of the accused was in issue, there can be no better proof of his identity than the evidence of the person who has sworn to have seen him committing the crime. See the case of Yamoah and Razak v The Republic (2012) 2 SCGLR 750. However, based on the admission by the accused persons, I find that the prosecution has been relieved of their duty to a large extent in proving whether the money was appropriated by the accused persons because they have admitted to taking and using and dealing with the money of the Complainant bank. The offence of stealing within our jurisprudence requires for the prosecution to adduce credible and admissible and quality evidence beyond reasonable doubt of specific misappropriation to sustain a conviction. In that sense, stealing or appropriation cannot be at large, speculative and presumptuous. This is illustrated from a long line of Ghanaian authorities. In the case of Datsa v The Republic (1971) 1 GLR 418, Francois J (as he then was), upon reviewing the existing authorities on stealing stated inter alia as follows; “The principle in the Aboah case presupposes an acceptance by the accused of the money, subject-matter of the charge, being originally in his possession and a subsequent failure to account for its disappearance. This can hardly apply where dominion is in the master’s hands as well as the accused’s.... The rule is precisely stated in Vyras v. Commissioner of Police (supra), at p. 2 that; “If it is not possible, as a result of an enquiry resulting therefrom, to trace or establish how the shortage occurred then that would be a general deficiency and the storekeeper is not liable to a criminal conviction; but once there is shortage and evidence of the means whereby it was effected is established, or if there be evidence of misappropriation relating to specific transaction which contributed to the shortage the case assumes a different character and the storekeeper is liable to a criminal prosecution in respect of the specific transactions...”. In R. v. Okorodudu (1947) 12 W.A.C.A. 129 (which was cited with approval in State v. Hagan [1961] G.L.R. (Pt. II) 652) it was said at p. 130 that: “It is in these days generally conceded that great difficulty is imposed upon the prosecution in proving actual conversion in such cases as this, and the tendency is to restrict rather than to extend the application of the general rule from which such difficulty arises. It is clear that the mere omission to pay over moneys received by a clerk or servant does not suffice to show a conversion, nor does the mere fact of there being a deficiency as shown by the accounts, for he may have done no more than fail properly to enter items of disbursement in his books, or may have lost the money by negligence, or have

spent it on his master's account. There must, therefore, be some evidence that the particular amount specified was misappropriated at a 16 particular date and place." In the case of *Osae v The Republic* (1980) GLR 446, Taylor J (as he then was) quoted Avory J. in R.

- v. Sheaf (1925) 19 Cr.App.R. 46, C.C.A, in which he sought to state the principle at p. 49 that; "... it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received . Taylor J after reviewing the local and English authorities, held as follows as the position on stealing by specific appropriation as follows; "...I think a close study of both the local and the English cases do reveal that the principle may have been inadvertently stated perhaps too widely. I think the exceptions indicated in the principle are not exhaustive. The true statement of the Ghana position reflecting the principle running through all the cases and omitting cases of the so called general balance will be thus: It is not sufficient in a charge of stealing money to merely prove general deficiency. Proof must rather be given of a specific misappropriation of a particular sum of money or of circumstances from which it can be reasonably inferred that the accused stole the whole or part of the sum involved...". In the opinion of the court, the evidence adduced by the prosecution at the close of their case- including the admissions of the accused persons- showed a strong prima facie case of specific misappropriation by the accused persons. The evidence established that the particular amount specified was appropriated by the accused persons during the period in question and while in charge of the Fidelity Bank Nkawkaw branch. Consequently, it is my considered opinion that the evidential burden and burden of persuasion had shifted unto the accused persons to offer reasonable explanation as to how they used the money; especially in terms of showing that they used the money of the Complainant bank without any intention that the bank may be deprived of the benefit of the ownership of that thing, or of the benefit of the right or interest in the thing, or in its value or proceeds, or part of that thing; or to show that they used and dealt with the money with a claim of right, or with the consent of the Complainant bank or with no intention to defraud the bank as provided for under sections 120 and 122 of the Act 29 (supra). In other words, for the accused persons to show that they used or dealt with the money devoid of any dishonesty. In the case of *Republic v Yiadom* (2001-, 2002) 1 GLR 558, Quaye J (as he then was), held as follows to distinguish between general deficiency and stealing properly so-called; "Where, therefore, such a person was not able to pay any money which he should have paid, that fact alone does not suffice to sustain a charge of stealing. However, where the person charged is established to have specifically misappropriated any money dishonestly, he can appropriately be charged and convicted of stealing. Whenever the prosecution succeeds in showing how the money got missing, the onus would shift onto the accused to offer an explanation. In this case the appellant did not offer any explanation...". 17 In this case, can it said that the accused persons succeeded to not only offer an explanation but more importantly reasonable explanations for the use of the money to raise any reasonable doubt of an intention to defraud (animus furandi) or that the use of the money, would, if known to the Complainant bank, be without the consent of

the bank. As I said or stated above, there was a prima facie evidence against the accused persons. They had given an explanation that they had spent about GHC 8,500 a month from January, 2017 to April, 2018, to purchase GHC 1,500 worth of ECG prepaid credit and GHC 7,000 worth of fuel to power the generator set to ensure a 'smooth' operation or running of the bank. This the bank through the prosecution have denied, particularly on the aspect of the GHC 7,000 a month that the accused persons allegedly used to purchase fuel monthly during the period, especially because according to the PW2, Emmanuel Gyamfi, during that same period in question, the Nkawkaw branch of the bank had also utilized about GHC 1,200 deposited on a "Tom Card" meant for the fueling of the generator set at the branch. Yet the accused persons had made positive assertions that they had spent GHC 7,000 a month to purchase fuel to power the generator set at the bank. In my opinion, those positive assertions which they had relied on for their defence needed to be proved by them and were capable of proof by them. At this juncture, I wish to take a necessary detour and state that in terms of the instant issues, I painstakingly read through the written address filed and submitted by learned Counsel for the accused persons. Inasmuch as I appreciate his efforts, I am however unable to agree with him on some of the issues he had raised and resolved as the issues for determination in this case. Specifically, I wish to state that contrary to his submissions in the address, the issue for determination was not about "...whether or not there was erratic supply of electricity at the Fidelity Bank Ghana Limited, Nkawkaw branch which called for disbursement and usage of the alleged sums stolen"; or even whether or not the accused persons did not record information on the said electrical challenges and expenditure on the bank's "cost tracker" file. It was not also about the failure of the prosecution in not tendering into evidence an audit report prepared by the bank relating to the accused persons. Similarly, it was also not a "witch hunt" of the accused persons as Counsel suggested. In its truest form and hue, it was for the accused persons to give account for the use of the money in terms of the specific expenditures during the period in question. That was all. Nothing more, nothing less. Put differently, in the opinion of the court, the real issue at the trial was for the accused persons, who have been proved and have even admitted using specific amounts of money to purchase fuel monthly during the period in question to run the business of the branch, which assertions had been denied by the bank and prosecution, to now adduce raw, sufficient and credible and admissible evidence to prove the said fuel and ECG prepaid credit expenditures. At that point therefore, the evidential burden had shifted unto them, who were required to have called evidence to discharge the presumption of guilt against them at the close of case of the prosecution. They were required to have called evidence to show the contrary and to raise a reasonable doubt as to their guilt. Those facts- in terms of how they used the money and to whom they paid to- were facts that were not only capable of proof but which were facts or matters peculiarly within their knowledge. 18 For the law as was held In R v Turner [1816] 5 M and S 206 at 211; per Bailey J (as he then was) is that; "I am of the same opinion. I have always understood it to be a general rule, that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative". Within our Ghanaian

criminal jurisprudence, the above principle of law has been famously held in the case of *Salifu and Another v The Republic* (1974) 2 GLR 291; where *Ata-Bedu J* (as he then was), held at holding 2 of the case thus; “The law, in cases where knowledge of a fact was peculiarly within the knowledge of an accused person a negative averment was not to be proved by the prosecution but on all the contrary, the affirmative must be proved by the accused as a matter of defence. If the first appellant said he had exhibit B as the written authority from the fourth prosecution witness then the burden of proving this, in the light of the above principle of law, lay on him and it was not for the prosecution to prove the negative...”. In *ABODAKPI v. THE REPUBLIC*; (Criminal Appeal No.H2/6/2007 dated 20th June 2008), the Court of Appeal, held that; “...It is trite learning that “where knowledge of a fact was peculiarly within the knowledge of the accused person a negative averment was not to be proved by the prosecution but on the contrary the affirmative must be proved by the accused as a matter of defence”. In the *COP v Isaac Antwi* case (*supra*) it was held by the Supreme Court that; “The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a series of cases. Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence. In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt; but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject-matter is peculiarly within the accused’s knowledge and the circumstances are such as to call for some explanation...”. Although this is a criminal trial, however it is trite that when the evidential burden on a fact in dispute is on an accused to call evidence to raise a reasonable doubt in the mind of the court, he discharges that on the standard of proof on the preponderance. Accordingly, the following civil authorities are relevant for consideration: In *Sagoe v. SSNIT* (2011) 30 GMJ 133; (2012) 52 GMJ 47 at page 58, *Gbadegbe JSC* similarly held that: “The party who asserts the affirmative of an issue has the incidence of the legal burden . . . “ The rule is that it is the party who in his pleading makes a positive assertion who is bound to call evidence to prove that assertion as negative assertions are incapable of proof. *Bank of West Africa V. Ackun* 1963 1 GLR 176. 19 So how did the accused persons herein discharge that evidential burden? The accused persons in this case in their attempt to discharge the evidential burden tendered into evidence some photocopied receipts for the purchases of the fuel from Total Ghana Ltd as Exhibit 3 series. The said receipts had dates spanning the period January, 2017 to April, 2018. A simple calculation or additions of the amounts stated on the receipts appeared to equal the amount the accused persons claim to have used for the purchase of the fuel for the period. But is that a reasonable explanation for the use of the money? Now, it is seen from the record that long before the accused persons had tendered the receipts into evidence at the trial, the prosecution had initially filed and tendered them into evidence at the early stages of the trial. The prosecution had tendered into evidence the same copies of the Total filling station receipts mainly for the purposes of showing that same were not genuine based on their

checks from the alleged issuing filling station at Nkawkaw. Indeed, at the trial, the prosecution called one Godfred Frempong- as assistant manager of the Total fuel station at Nkawkaw otherwise known as Total 2- to testify in respect of that. His testimony was that even though the management of Fidelity Bank Nkawkaw used to buy fuel from the station to power their generator, it was somewhere in 2017 that the A2, Evans Amoakohene, came to him and told him that they were going to be audited by the head office and that he needed empty receipts and stamps for endorsement to cover up losses they had incurred in the fuel they used to buy lest they would be in trouble. He then gave the empty receipts and the stamp to the A2, who returned later in the day. He had added that following the arrest of the accused persons and upon their release on bail, the two accused persons came to him in the evening at his workplace on the same day, where they told him that if anyone came there to interrogate him about the receipts, he should reply that they were from his station, which he obliged and the accused persons left the workplace. According to him, during the investigations, out of all the receipts that the police investigator came to show him, it was only one out of the lot that had his signature. The testimony of the PW3 remained and stood intact despite the good efforts of the learned Counsel of the accused persons, Suleman Musah, Esq. The Counsel had asked some number of questions to essentially show that it was normal or 'customary' for customers who have made purchases to return later for receipts of purchases, which the PW3 agreed with. However, even if it were to be accepted that it was normal for customers who have purchased fuel to go back to fuel stations to collect and to be issued receipts for previous purchases, I find that that was not the case in the instant case involving the accused persons. This is because it was not the case that they merely went back to the PW3 to issue to them receipts for proved past purchases and they were issued same by the PW3 and management of the Total 2 filling station. Instead, the A2 and by extension the accused persons, demanded for and took away empty receipts together with a stamp and at their own convenience and in the comforts of their offices and by their own acts, they prepared and endorsed the receipts to pass as evidence of fuel purchases to match the amount outstanding or unaccounted for. It is the considered opinion of the court that there is everything wrong, suspicious and inadmissible about the receipts in question. I will explain myself better presently. 20 Now, ordinarily, receipts and such documents issued by businesses are hearsay evidence as they are out court statements. What is hearsay evidence? Under Part VIII of NRCD 323, a definition of hearsay is given under section 116 (c) as follows: "(c) 'hearsay evidence' is evidence of a statement, other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated". Generally, hearsay evidence is inadmissible per section 117 of NRCD 323 thus: "Hearsay evidence is not admissible except as otherwise provided by this Decree or any other enactment or by agreement of the parties." However, an exception is made under section 125 of the NRCD 323 for the business records to be made admissible at a trial. Section 125 states: "125. (1) Evidence of a hearsay statement contained in a diagnosis is not made inadmissible by section 117 if—

- (a) the writing was made in the regular course of a business.

- (b) The writing was made at or near the time the act or event occurred, the condition existed, the opinion was formed, or the diagnosis was made; and
- (c) The sources of the information and the method and time of preparation were such as to indicate that the statement contained in the writing is reasonably trustworthy.
- (2) Evidence of the absence from records of a business of a record of an alleged act, event or condition is not made inadmissible by section 117 when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if -
 - (a) it was the regular course of that business to make records of all such acts, events or conditions at or near the time the act or event occurred or the condition existed and to preserve those records; and
 - (b) the sources of information and method and time of preparation of the records of that business were such that the absence of a record is a reasonably trustworthy indication that the act or event did not occur or that the condition did not exist.
- (3) For the purpose of this section a 'business' includes every type of regularly conducted activity, business, profession, occupation, governmental activity, or operation of an institution, whether carried on for profit or not.
- (4) A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant." However, it is not every business record that is admissible or even if admitted, has use or probative value in relation to a fact in contention. In *Ghana Ports and Harbours Authority and Another v. Nova Complex Ltd.* [2007-2008] GLR 806 at 835 Georgina Wood CJ (as she then was) held that: "Under section 125 (1) of the Evidence Act (NRCD 323), it is not every entry of a business record that may be admitted in evidence or accorded full weight if received in evidence, but only those entries of transactions which satisfy these three statutory requirements, namely: that
 - (i) the entry was made in regular course of business; (ii) the entry was made contemporaneously with the event in question; and (iv) the sources of information, the time and method of preparation were such that the facts contained in the entry can be said to be reasonably trustworthy". See also the case of *Ghana Rubber Products Ltd. v. Criterion Ltd.* [1984-86] 2 GLR 56, per Apaloo CJ (as he then was). So do the receipts tendered by the accused persons from Total 2 filling station at Nkawkaw satisfy and meet the test and conditions under section 125 of the NRCD 323 to have made them not only admissible evidence but to entitle the court to attach full weight to them as proof of actual fuel purchases made by the accused persons? And to that, my answer is that the Exhibit 3 series woefully failed the test of sufficiency and credibility. I find that the receipts were not issued by the Total 2 filling station in the regular course of business. I also find that the receipts were not made contemporaneously with or around the same time when the said daily purchases were made for the corresponding month. In addition, I find that the time,

manner and method of preparation of the receipts made them to be susceptible to fabrication and thus untrustworthy. It is bereft and shorn of any probative value. As a corollary to the above findings, the court also finds and holds that the receipts were self-serving documents and thus lacks probative value. They were not made by the PW3 as an agent or officer of the Total 2 filling station who would have had the authority to do so, especially if it was done contemporaneously and within the regular course of business. It was the accused persons who went for the empty receipts and stamp from the PW3 and prepared same at the time the audit team from the complainant bank served notice to audit them. The Exhibit 3 series were thus prepared by the accused persons to specifically bolster their case or claims of actual and full purchase of the fuel at a time they were being investigated. They were made in their interests at the time they made them. They are self-serving because it raised questions of bias against the accused persons and by extension the trustworthiness of the receipts- in particular its circumstantial probability of reliability. The state of mind of the accused persons at the time they prepared and wrote the receipts, post litem motam, and the very surrounding circumstances, are such that to lend themselves to reasonable inferences of dishonesty, rendering the receipts, even if not inadmissible, suspicious and bereft of any probative value to prove the defence of the accused persons. The courts in this country have with remarkable consistency refused to attach any weight or probative value to self-serving documents and other documents tendered into evidence which were prepared by a party or witness post litem motam. For example, in the case of *Mondial Veneer (Gh.) Ltd. v. Amuah Gyebu XV* (2011) 1 SCGLR 466, the Supreme Court, had this to say about the probative value vel non of statutory declaration, which is an example of a self-serving document; "Given the nature of the pleadings and the burden of proof cast on the defendant company, producing a self-serving statutory declaration is definitely the most unreliable mode of proving ownership of the disputed land..." Similarly in the case of *ADJI and CO V. KUMANIN* [1982-1983] GLR 1382, CA, Abban J, held as follows to state that a letter written by an interested person at the time a suit has been pending before a circuit court was not only self-serving but inadmissible, which I find applies to the instant case and the acts of 22 the accused persons in personally preparing the fuel receipts at the time they had been arrested and were being investigated by the police and the Complainant bank mutatis mutandis "...In support of these grounds, counsel submitted that since exhibit 7 was contemptuously written after the case had been in court for some time, and since the matters raised in the said exhibit touched on the subject-matter in dispute before the court, it offended against Order 37,

- r. 62 of the High Court (Civil Procedure) Rules, 1954 (LN 140A). Thus the trial judge ought to have rejected it. The argument of learned counsel is unanswerable. The letter, exhibit 7, came into existence after the case had been pending before the circuit court for some time. The writ of summons was issued on 27 January 1977 and exhibit 7 was written by the Akyem Abuakwa Traditional Council on 27 February 1978. The council, no doubt, was an interested party, because the said council was the lessor of the disputed land, according to the lease, exhibit D; and any decision in the case before the court would definitely affect its interest

one way or the other. Again, the contents of the letter were self-serving. They purported to show that the council had ruled that the said lease was null and void and that the land belonged to the defendant. What was worse, the contents of exhibit 7 dealt with issues that were before the court for determination....” It is the considered opinion of this court that the above evidence as a whole show that the assertions or representations by the accused persons to the Complainant bank that they had used the money to purchase fuel for the branch’s operations were not only false but have not been found to be reasonably probable or reasonably true at least. The evidence rather showed that the accused persons have woefully failed to give a reasonable account or explanation on how they spent the money. This is a criminal trial and even though the court had ruled that there was a prima facie case against the Accused at the close of the prosecution’s case, however that presumption of guilt is rebutted and punctured only when and if an accused is able to adduce credible and sufficient evidence to raise a reasonable doubt as to his guilt on the appropriate charges. When a reasonable doubt as to the guilt of an accused is raised successfully, then the law mandates that an accused is acquitted and discharged. The converse equally holds true. That is the essence of the criminal law principle of three-tier test. In the case of *Amartey v. The State* [1964] GLR. 256, S.C, per Ollenu JSC (as he then was) stated the principle as follows; “Where a question boils down to oath against oath, its solution does not depend upon the whim and caprice of the judge; this is particularly so in a criminal case where the decision rejects the version of the defence. To do justice, the court is under a duty to consider firstly, the version of the prosecution applying to it all the tests and principles governing the credibility and veracity of a witness; and it is only when it is satisfied that the particular prosecution witness is worthy of belief that it should move on to the second stage, i.e. the credibility of the defendant’s story; and if having so tested the defence story it should disbelieve it, move on to the third stage, i.e. whether short of believing it, the defence story is reasonably probable.”. Similarly, in the more recent case of *THE REPUBLIC v. FRANCIS IKE UYANWUNE* [2013] 58 GMJ 162, C.A, in what is appropriately another version of the principle, it was held per Dennis Adjei J.A that; 23 “The law is that the prosecution must prove all the ingredients of the offence charged in accordance with the standard burden of proof; that is to say the prosecution must establish a prima facie case and the burden of proof would be shifted to the accused person to open his defence and in so doing, he may run the risk of non- production of evidence and/ or non- persuasion to the required degree of belief else he may be convicted of the offence. The accused must give evidence if a prima facie case is established else he may be convicted and, if he opens his defence, the court is required to satisfy itself that the explanation of the accused is either acceptable or not. If it is acceptable, the accused should be acquitted, and if it is not acceptable, the court should probe further to see if it is reasonably probable. If it is reasonably probable, the accused should be acquitted, but if it is not, and the court is satisfied that in considering the entire evidence on record the accused is guilty of the offence, the court must convict him. This test is usually referred to as the three- tier test”. In applying the above authorities to the facts of the instant case and the whole of the evidence before me, it is my considered opinion and I hold that the accused persons failed to adduce sufficient and credible evidence to raise a

reasonable doubt in the mind of the court that they truly or reasonably probably used the full amount in question to purchase fuel monthly during the period in question to run the business of the Complainant bank at Nkawkaw. Their explanations or defence were not only unbelievable but they were not also reasonably true or reasonably probable. The conducts of the accused persons showed plain dishonest arrangement to defraud the complainant bank; a dishonest arrangement exposed by and given its deserving quietus by the fabricated, patently forged and self-serving Total filling station receipts tendered, which lacked any probative value to exculpate them from criminal liability. The effect is that the court holds that the prosecution succeeded to prove beyond reasonable doubt that the accused persons conspired to steal from the complainant bank and succeeded in stealing the money of the Complainant bank entrusted into their care. In the case of *Osae v The Republic* (1980) GLR 446, Taylor J (as he then was), quoted and relied on the case of *R. v. Okorodudu* (1947) 12 W.A.C.A. 129 at p. 130, and agreed that in appropriate circumstances the conduct of an accused person- who was found to have been in possession of money and who has failed to give a reasonable explanation as to where the money was and how the money got lost- could be used as a strong evidence of mens rea (criminal intent) in a stealing charge. Although I will quickly add that, even though the evidence shows that the accused persons probably purchased some quantities of fuel to run the operations of the bank during the period in question, they failed to prove on the balance of probabilities by credible and admissible evidence that they used the whole of the GHC 7,000 to purchase fuel monthly during the period in question, same which were debited from the petty cash in the general ledger account at the bank. This is because any use or spending of the whole or part of the amount in question by the accused persons that did not go to the benefit of Fidelity Bank Nkawkaw branch would have been dishonest and a fortiori constituted stealing. This is important because the law is that in a charge of stealing, a conviction can still be maintained even if the accused stole part of a stated amount. This is supported by the case of *Obeng alias Donkor v. The State* [1966] G.L.R. 259, S.C. In that case a man was charged with stealing £G321 19s. 6d. but the prosecution proved that he stole £G315. *Apaloo* 24 J.S.C. (as he then was) sitting as an additional judge, with assessors, at the High Court, Accra, acquitted the man on the ground that only part of the amount was proved to have been stolen and not the whole amount charged. At the then Supreme Court, *Azu Crabbe* J.S.C. (as he then was) delivering the judgment of the court deprecated this approach to criminal justice when he said at pp. 260-261: “With all due respect to the learned trial judge, we think he erred in the view he took of the law ... where a person is charged with stealing a certain sum it is sufficient if the prosecution proves that he in fact stole part of that sum.” It is for all these reasons and findings that the court has held and ruled that the prosecution has succeeded to prove beyond reasonable doubt that the the two accused persons on the date and place in question at Fidelity Bank Nkawkaw branch conspired to steal and succeeded in stealing the money of the Complainant bank. The effect is that the accused persons person herein, Gabriel Yamoah Appiah and Evans Amoakohene, are convicted and found guilty on the charges. **SENTENCING OF THE CONVICTS ON THE COUNTS:** In determining the appropriate sentence for the convict herein, I have had to consider the authority of Kwashie

v The Republic (1971) 1 GLR 488, which provides for the factors to be considered by a court before imposing the nature and length of sentence on a convict. I have therefore, in the context of the facts of this case, considered, by way of mitigating factors, that the convicts are first offenders. They are also of youthful ages. They have also prayed for leniency from the dock. They have also spent some 23 days in lawful police custody after their conviction on 30th March, 2023, following the delivery of the final judgment, which made it indubitably imprudent to allow them to be at large; and remanded them into police custody pending the eventual sentencing. See Article 14 (6) of the Constitution, 1992. In addition- most importantly- they have refunded the principal amount in question together with the appropriate interest to the Complainant bank. This was confirmed to the court by Mr. Emmanuel Gyamfi, an officer of the bank and a witness in this case. He also informed the court that the bank has also withheld and retained the provident funds of the convicts, albeit in respect of some unspecified loans taken by the convicts. That is a double whammy! Despite the above mitigating factors, there are equally extenuating factors that work against the convicts without mincing words. The first is that their criminal acts were premeditated, especially for the kind of positions of trust they held. The reasonable expectation is therefore that the convicts would have protected the finances and interests of Fidelity Bank Ghana Ltd. They had carefully planned their activities to steal from the employers. Such acts affect the fortunes of businesses and serve as disincentive to private individuals and entities from investing and maintaining businesses. It would therefore be seen that the convicts, who instead of being responsible and honest employees or officers of the bank, rather, in the most condemnable of circumstances, conspired and succeeded in 25 stealing the money of Fidelity Bank Ghana, their employers. The convicts have indeed shown to be plainly dishonest and have been motivated by greed. Nonetheless, the court has decided to consider the mitigating factors the more- especially based on the compensation or refund to the bank. They have now lost their jobs and from what the court has been informed in court, they have also been blacklisted by the Bank of Ghana. The court is thus of the opinion that an original custodial sentence of any kind would be harsh and excessive. In the light of the foregoing, the court hereby sentences the convicts as follows;

1. On the count 1, each of them is sentenced to pay a fine of two hundred (200) penalty units; or in default, serve six (6) months imprisonment in hard labour.
2. On the count 2, each of them is sentenced to pay a fine of two hundred and fifty (250) penalty units; or in default, serve nine (9) months imprisonment in hard labour.
3. On the count 3, each of them is sentenced to pay a fine of three hundred (300) penalty units; or in default serve nine (9) months imprisonment in hard labour.
4. On the count 4, each of them is sentenced to pay a fine of three hundred and fifty (350) penalty units; or in default serve twelve (12) months imprisonment in hard labour.

5. Lastly, each of them is sentenced to sign a bond to be of good behavior for twenty-four (24) months. Or in default, serve six (6) months imprisonment in hard labour without the option of a fine. For the avoidance of doubt, the sentences in respect of the counts 1 to 4 are to run concurrently. SGD: STEPHEN KUMI ESQ, CIRCUIT JUDGE. LEGAL REPRESENTATION: INSPECTOR BEATRICE LARBI FOR THE PROSECUTION PRESENT. EMMANUEL WILSON FOR SULEMAN MUSAH, ESQ FOR THE ACCUSED PERSONS PRESSNT.

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