

- 25 Code Act. In her judgment, the trial magistrate emphasised that the prosecution had the burden of proving the ingredients in the alleged offences against the accused person beyond a reasonable doubt. Upon examining and weighing the evidence of both the prosecution and the defence, the trial magistrate decided that she was not convinced that there was a making of a false document by the accused.
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Brief facts

The prosecution's case was that the appellant herein forged a memorandum of sale of unregistered land at Kitagobwa – Bamba village, Nangabo Sub-county in Wakiso district, 35 purporting that he purchased the said land from Nakiwala Florence at a consideration of Ugx. Shs. 6,000,000, and the transaction was witnessed by Ellis Robins Kasolo, an advocate, and signed by Nakiwala Florence as a vendor, whereas not.

The accused, on the other hand, denied the charges. His evidence is that he purchased the kibanja interest from the late Nakiwala Florence, upon which they entered into a 40 memorandum of sale agreement signed by both of them before an advocate in Kampala.

The trial magistrate believed the accused's case and found him not guilty of making any false document, and he acquitted him on both counts.

Having been dissatisfied with the trial court's judgment, the appellant appeals to this Honourable court contesting the acquittal of the accused. The appellant filed the present

45 appeal based on the following grounds in its Memorandum of appeal;

hence, she wrongly acquitted the Respondent.

- 1. The learned Trial Magistrate erred in law and fact when she failed to evaluate evidence and acquitted the respondent.
- 2. The learned Trial Magistrate erred in law and fact when she considered and relied on 50 aspects of the Defence evidence in isolation of the prosecution (Appellant's) case;

Representation

55 On Appeal, the Appellant was represented by a State Attorney from The Office of the Director of Public Prosecutions while the Respondent was represented by Ajju, Baleese, Bazirake (ABBA) Advocates.

Submissions for the Appellant

In support of this appeal, the appellant submitted that the Learned Trial Magistrate misdirected himself on the opinion of the handwriting expert PW6. PW6 found certain differences between the sample handwriting and signatures on Exhibits "B" "C" and "D" and the questioned signature on Exhibit "A" (P. Exh 4) in handwriting, skill, design, and manner

- 65 of execution of letters. PW6 concluded by stating that it is unlikely that the author of the sample signatures or handwriting on Exhibits B, C and D signed the questioned signature on Exhibit "A". Counsel further stated that though the handwriting expert clarified that the word unlikely infers negative or positive, it is evident that the trial magistrate misdirected herself.
- 70 Regarding the offence of uttering a false document, counsel for the appellant laid out the ingredients of the same as;
 - a) Knowledge on the part of the person
 - b) Fraudulent presentation of the false document.
- 75 Counsel submitted that the trial magistrate disregarded the evidence of D/AIP PW7, which was clearly showing that the respondent presented to him the Memorandum of sale between him and the late Nakiwala Florence at CID Headquarters at Kibuli, which was marked as PEXH4 in court. Counsel further submitted that since the handwriting expert found that the signatures on the questioned document were different from the unquestioned documents,
- 80 the magistrate should have concluded that the respondent presented a false document before D/AIP Ekolu Micheal PW7 knowingly and with intention to fraudulently acquire the Kibanja of the late Florence Nakiwala thus uttering a false document.

Counsel further submitted that throughout the trial, there was evidence showing that the respondent made the false document to wit memorandum of sale dated 25 85 th November 1987 between him and Nakiwala Florence for land situated at Kitagobwa village in Wakiso District, which was marked in court as PEX4. It was further evident that the respondent forged the signature of the late Nakiawla Florence and made the document to defraud or deceive.

- 90 It was further submitted for the appellant that both the children of the deceased PW1 and PW2 were unaware of the sale of land by their deceased mother since they lived on the disputed land with her until her demise. The brothers of the deceased, too, denied knowledge of any transaction of sale of land by their dead sister. Counsel further submitted that it is interesting how DW1 did not take possession of the land, having purchased the unregistered

- 95 interest in 1987 and only claimed it in 1997 after the deceased's demise. It was also submitted for the appellant that none of the respondent witnesses witnessed the alleged Memorandum of sale between the respondent and the deceased. Thus, they did not know about the alleged sale, contrary to DW1's testimony.

100 Submissions of the Respondent

Counsel for the respondent started by defining forgery as per Sections 342 and 347 of the Penal Code as the making/forging of a false document with intent to defraud.

Further, section 351 of the Penal Code Act provides that any person who knowingly and 105 fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question.

It was the counsel's submission that the offender's intention is important and that, similarly, one who puts forward a document with knowledge of its falsity and intent to defraud 110 commits the offence of uttering. He added that the burden of proof lay to the prosecution to prove all the ingredients of the offences.

Counsel further submitted that the contentious document was the Memorandum of Sale for unregistered land in Kitagombwa Bamba village, Nangabo Sub-County, Wakiso District. He

- 115 further stated that PW1 testified that he handed over documents written by Nakiwala Florence to the investigating officer: a memorandum of sale, an agreement of sale of land and a document documenting herb.
- It is counsel's submission that it was clear from their evidence that it was not the respondent 120 who drafted the agreement in dispute; that the prosecution had to lead evidence to show that it was the respondent who forged the signature of Nakiwala Florence but failed to do so as pointed out by the handwriting expert (PW6). PW6, the handwriting expert, admitted both during examination in chief and cross-examination to not knowing the owner of the handwriting on specimen C (PEXH4).

That PW1 further confirmed that the lawyer who drafted the memorandum of sale was alive and practising, Ellis Robins Kasoola.

That in the absence of the testimony of Ellis Robins Kasoola to shed light on the memorandum of sale weakened the appellant's case and that because of that, the respondent cannot be 130 said to have forged the document and uttered the same.

Consideration of the Issues

From the memorandum, it is evident that all the grounds raised are based on the trial 135 magistrate's evaluation of the evidence. However, I shall consider them as raised by the parties under the following heads-

- 1. Whether the learned Trial Magistrate failed to evaluate evidence and acquitted the 140 respondent.
- 2. Whether the learned Trial Magistrate considered and relied on aspects of the Defence evidence in isolation of the prosecution (Appellant's) case hence wrongly acquitting the Respondent.

145 Consideration of the Appeal and Decision of the Court

I have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein.

- 150 It should be noted that this Court is the first appellate Court to handle this appeal. It is settled law that the first appellate Court must re-evaluate evidence on the Trial Court record as a whole, subject the same to exhaustive scrutiny and come to its conclusion. In the case of **AKAL PATRICK & ORS VS – UGANDA [2006] 1HCB 4**, the Court of Appeal Justices held that: - **"The 1st appellate Court must re-evaluate the entire evidence on record and come to its**
- 155 **conclusions bearing in mind that it did not see the witnesses testify."**

And in the case of **Charles Bogere Vs – Uganda [1999] KALR 17**, it was held that: - **"The 1st appellate Court must reconsider the entire evidence on record and subject it to a fresh and exhaustive Scrutiny and make its conclusion."**

To shoulder my duty as the first appellate Court, I have evaluated the parties' evidence on the Court record afresh. I shall subject the same to exhaustive scrutiny and come out with my conclusions.

165 The appellant's first issue is based on the failure of the trial magistrate to evaluate the evidence, leading to his acquittal. The appellant stated that the trial magistrate misdirected himself on the opinion of the handwriting expert, who was PW6.

The document in contention is the memorandum of sales agreement dated 25th/09/1987, marked as PEXH 4. For the trial court to establish whether the respondent forged the

170 signature thereon of the deceased, PEXH 4 was submitted to the handwriting expert to verify the authenticity of the handwriting or if it was forged in comparison to other documents that were marked PEXH 5 that had been purportedly signed by the deceased before she died.

Upon examining the evidence of PW6, the handwriting expert, it is evident that on page 23 of the record of proceedings, he stated clearly that he found specific differences between the

175 sample handwriting and signatures on exhibits B, C, and D marked in court as PEXH 5 and the questioned signature on PEXH 4 in handwriting skill, design, and manner of execution of letters, Capital "n" (N), I, w, a, k, and e.

It was also his finding that it was unlikely that the author of sample signatures or handwriting on Exhibit B, C and D (marked in court as PEXH 5) signed the questioned signature on Exhibit 180 A (marked in court as PEXH 4).

It was also evident that the handwriting expert on page 25 of the record confirmed that specific differences mean it's inconclusive and again further stated that unlikely infers a positive or negative.

Expert Evidence According to **SARKAR ON EVIDENCE 11TH EDT. P. 497**, an Expert is defined as 185 "One who has acquired special knowledge, skill or experience in any science, art and trade or profession. Such knowledge may be acquired by practice, observation, research, or careful study."

See also Section 43 to 49 of the Evidence Act Cap 6

- However skilled or eminent, expert witnesses can give no more than evidence. They cannot 190 usurp the functions of the Judge any more than a technical assessor can substitute his advice for the court's judgment. They must furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions to enable the Judges to form their independent Judgment by applying that criteria to the facts proved in evidence. **Davie Vs Magistrates of Edinburgh (1953) SC 34. 29**
- 195 Though the courts must respect experts' opinions, such opinions are not binding on courts, and such evidence must be considered along with all other available evidence; the court would be entitled to reject it if the expert opinion is not soundly based. **Kimani v Republic [2002] 2 EA 417. See also Dr. Henry Kamanyiro Kakembo Vs Roko Construction Limited Civil Appeal No. 05 of 2005, Page 13.**
- 200 Where the authorship of documents is questioned, the Handwriting Expert's evidence is relevant. **Complant Engineering & Trade Ltd V. Joseph 31 Kironde (HCT-00-CC-MA 172 OF 2011) (HCT-00-CC-MA 172 OF 2011) [2011] UGCOMM 96 at page 6.**

Drawing from all the above authorities on expert evidence, it is clear that the expert should give no more than evidence, and his opinions are not binding on the judge. Expert evidence

205 has to be considered alongside all other evidence, and the judge can reject the expert's opinion if it is not soundly based.

In the present case, the expert opinion of the handwriting expert was inconclusive as the expert could not tell the court whether there were forgeries regarding the signatures of the deceased. This court rejects the findings of the expert evidence.

210 Further to the above,

The second issue was how the trial magistrate erred in law and fact when she considered and relied on aspects of the defence evidence in isolation of the prosecution case hence wrongly acquitting the respondent.

Section 103 of the Evidence Act stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe its existence unless it is provided by law that the proof of that fact lies on any particular person.

In the case of **Uganda vs Dick Ojok [1992-93] HCB 54**, the court found that in all criminal cases, the duty of proving the guilty of the accused person always lies on the prosecution. The duty does not shift to the accused except in a few statutory cases, and the standard to be exhibited by the prosecution is beyond a reasonable doubt.

In the present case, while writing the judgment, the trial magistrate reviewed the evidence produced by both the prosecution and the defence. It was based on that review that the trial magistrate stated that he was not convinced that there was making of a false document.

The charge of forgery as brought against the accused is provided for under Sections 342 and 225 347 of the Penal Code Act.

"Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing" *Re Windsor*, 10 Cox 118.*

- 230 It was the evidence of the prosecution witnesses that the respondent forged a sale agreement purporting to have bought land from their late mother, Nakiwala Florence, and put their mother's signature on the agreement. That he purported to have purchased the deceased's kibanja, measuring approximately 2 acres. PW1 specifically stated that the signature on the sale agreement differed significantly from their late mother's known
- 235 signature.

On the other hand, the accused denied making any forgeries and stated that he bought the kibanja interest of the deceased at Ugx Shs. 6,000,000, upon which they went to a lawyer and made an agreement at Kasolo and Khiddu Co. Advocates in Kampala. After that, Nakiwala 240 took him to the local authorities at Kitagobwa and introduced him as the new owner. The respondent further stated in his evidence that he first purchased the whole land, which belonged to Mpalampa, who also gave him the title and bought the unregistered interest of the deceased Nakiwala Florence.

245 DW2 Were Isaiah, the chairperson during 1990, also testified that the deceased Nakiwala brought the accused to his place and introduced him as the person who had taken over her kibanja in the trading centre.

DW3 also, in her testimony, stated that the respondent bought the land from her late father, 250 William Musisi Mpalampa.

For the charge of forgery to stand, the prosecution has to prove the following ingredients; a) That the document is forged /false.

b) That it was made with intent to deceive or to defraud.

255 c) That it was done by the accused.

In my analysis, no evidence has been adduced to show or prove that the memorandum of sale agreement (PEXH 4) was forged in any way, as the handwriting expert's opinion was inconclusive. The brother of the deceased confirmed in court that he had never seen the

- 260 deceased enter into any transaction or see her sign and hence could not tell whether the deceased's signature was forged. That notwithstanding, the prosecution failed to prove that the accused forged the sale agreement and could not prove the charge of uttering false documents.
- 265 There is uncontroverted evidence on record that the deceased took the respondent to the local authorities and introduced him as the new owner of her kibanja. DW2 also confirmed to the court that her father sold his registered interest to the respondent. Furthermore, in her judgment, the trial magistrate evaluated the evidence of the prosecution witnesses from page 3 of the judgment to page 6 and later also evaluated the defence case. It is also evident that
- 270 the trial magistrate considered the prosecution evidence, weighed it against the defence evidence and concluded on page 8 of the judgment. Thus, the submission of counsel for the appellant that their evidence was not considered holds no water. The appellant's counsel is unfairly criticising the trial magistrate.

275 Decision

In conclusion, this appeal has no merit, and it's accordingly dismissed. It is so ordered.

280 Gadenya Paul Wolimbwa JUDGE 28th July 2023

I request the Deputy Registrar to deliver this judgment on 31st July 2023.

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Gadenya Paul Wolimbwa JUDGE 28th July 2023

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