

UGANDA / JUDGMENT

Uganda v Obur & 3 Others

(Criminal Appeal No. 7 of 2019)

[2020] UGHC 135 (14 August 2020)

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COURT

High Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Appeal No. 7 of 2019

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IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable Criminal Appeal No. 0007 of 2019

In the matter between

UGANDA APPELLANT**And**

1. **OBUR RONALD 2. ODEM GABRIEL 3. ONONO CHARLES**
4. **OYELLA MARIAM RESPONDENTS**

Heard: 23 June, 2020. Delivered: 14 August, 2020.

Criminal law— Forgery C/s 342 and 347 of The Penal Code Act. — this offence entails the making of a false document, with intent to defraud or deceive and proof that the document was made by the accused person. It involves making a document purporting to be what in fact it is not or making a material alteration to a document.t — 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 really is, but which contains false statements —The false document must be clearly stated in the charge sheet and identified at the trial. The prosecution cannot expand its case to rely on the falsity of other documents that are attached or annexed to the document specified in the charge sheet.

Evidence — Best evidence rule— sections 60 and 61 of The Evidence Act — the contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the court sections 64 of The Evidence Act — For secondary evidence to be admissible it requires proof one of the following; when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved, or when the original has been destroyed or lost, or when the original is of such a nature as not to be easily movable.

STEPHEN MUBIRU, J.

[1] The respondents were jointly charged with the offence of Forgery C/s 342 and 347 of *The Penal Code Act*. It was alleged that the respondents and another still at large, on 24th December, 2014 at Pece Prison sub-ward, Laroo Division in Gulu District unlawfully forged a letter of recommendation purporting it to have been written by the Chairman L. C.1 of Pece Prison sub-ward whereas not. All the respondents were acquitted upon a finding of no case to answer.

[2] In his ruling at the close of the prosecution case, the trial magistrate found that the document allegedly forged by the respondents was never tendered in evidence. P. W.1 Yahaya Farajal Opira testified about a stamp impression that was procured by trickery. P. W.3 Sebuwufu Elisa testified about handwriting based on pieces of documents. The letter said to have been forged was not produced. The person purported to have written the letter never testified to deny authorship. The evidence adduced is worthless and does not support the charge preferred. The prosecution having failed to establish a case to answer against

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- [3] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of a first appellate court.

- [4] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").
- [5] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make

its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E. A 424*).

- [6] At the close of the prosecution case, sections 127 and 128 (1) of *The Magistrates Courts Act*, requires the trial court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his or her defence (see section 128 (1) of *The Magistrates Courts Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E. A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

Prima facie case.

- [7] A **prima facie** case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See **Rananlal T. Bhatt v R. [1957] EA 332**). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a **prima facie** case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.
- [8] There are mainly two considerations justifying a finding that there is no **prima facie** case made out as stated in the Practice Note of Lord Parker which was

published and reported in **[1962] ALL E. R 448** and also applied in **Uganda v. Alfred Ateu [1974] HCB 179**, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence, or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

Ingredients of the offence of Forgery.

- [9] For a prima facie case to be made out with regard to the offence of Forgery C/s 348 (1) of The Penal Code Act, the prosecution had to lead credible evidence on each of the following essential ingredients;
- 1. The making of a false document.
- 2. With intent to defraud or deceive.
- 3. The document was made by the accused.

1 st issue; whether a false document was made.

- [10] Forgery is the creation of a false document or material alteration of a document. It involves making a document purporting to be what in fact it is not or making a material alteration to a document, i.e. taking a genuine document and changing it, in some significant way by making of a material alteration in or addition to a document which is genuine. A person "makes" a new document when he or she alters an existing document (see **R v. Ondhia [1998] 2 Cr App R 150**). Altering, or dealing with a document so that the whole of it or a material part of it purports to be what in fact it is not; or purports to be made, altered or dealt with by a person who did not make, alter or deal with it.

- [11] According to section 2 (b) of *The Evidence Act*, "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may

be used, for the purpose of recording that matter. Therefore, a "document" includes: any book, map, plan, graph or drawing; any photograph; any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever; any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

- [12] 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 really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing (see *Ex parte Windsor (1865), 10 Cox C. C. 118 at 123*). The document must "tell a lie about itself." To be "false", the document must purport to be something which it is not (see *Brott v. R (1992) 173 CLR 426*). The material included must have been fabricated or altered significantly in order to represent something it is actually not. It is possible for some lines or words or even letters to be subsequently added, deleted, erased or obliterated from original text changing the meaning or value of the original document considerably. A document which is false in reference to the very purpose for which the document was created is certainly one which is false in a material particular.
- [13] A document is "false" if it purports:- to have been made in the form in which it is made by a person who did not in fact make it in that form; or to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or to have been made in the terms in which it is

made by a person who did not in fact make it in those terms; or to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or to have been altered in any respect by a person who did not in fact alter it in that respect; or to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered (for example a valuation of non-existent goods (as the goods needed to exist before the valuation could properly be made, see *R v. Donnelly [1984] 1 WLR 1017* - or a document that purported to be made in the presence of people who were not present, see *R v. Warneford [1994] Crim LR 753*); or to have been made or altered by an existing person who did not in fact exist (this does not include documents made using a false identity, an alias or *nom de plume*, - see *R v. More [1987] 1 WLR 1578* and *Brott v. R (1992) 173 CLR 426 at 446*).

- [14] The false document must be clearly stated in the charge sheet and identified at the trial. The prosecution cannot expand its case to rely on the falsity of other documents that are attached or annexed to the document specified in the charge sheet (e.g., supporting documentation for a loan application).
- [15] In the instant case, P. W.1 Yahaya Farajal Opira, the L. C.1 Chairman testified that he was made to stamp a blank document that he did not know, upon a misrepresentation that it was required to enable the 1st respondent obtain money for children's school fees from BRAC. Later he discovered that the document bore the handwriting of the L. C.1 Chairman and it had been used by the 1st respondent Obur Ronald, to sell the witness' father's land at Pece. P. W.2 Acan Hilder testified that he was given instructions to survey two plots of land owned by the 1st respondent Obur Ronald. There was no dispute over the land expressed during the survey. She had no knowledge of any forged document. P. W.3 Sebuwufu Elisa testified that he examined the questioned document. He

examined a photocopy of a letter dated 14th December, 2014 addressed to the District Staff Surveyor, Gulu District. He found that the author of the specimen handwriting, the 3rd respondent Onono Charles, was the author of the questioned document. He did not analyse the signature and stamp. He tendered his report 24th July, 2017 as exhibit P. Ex.1. Whereas the charge sheet stated that a stamp impression had been forged, the handwriting analysis done was in respect of handwriting.

- [16] According to sections 60 and 61 of *The Evidence Act*, the contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the court. For private documents, secondary evidence includes; (i) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with those copies; (ii) copies made from or compared with the original; (iii) counterparts of documents as against the parties who did not execute them; and (iv) oral accounts of the contents of a document given by some person who has himself or herself seen it.
- [17] However for such evidence to be admissible, sections 64 of *The Evidence Act*, requires proof one of the following; when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved, or when the original has been destroyed or lost, or when the original is of such a nature as not to be easily movable, etc. Those provisions combined state the is called the "best evidence rule," also referred to as the "original writing rule," a principle of evidentiary law which underscores the need for production of original document that was allegedly forged.
- [18] In order to prove forgery, the original document is the best evidence but in this case, neither the original nor admissible secondary evidence of it was produced

in evidence. Accordingly, I find that the prosecution failed to lead any credible evidence to prove this essential ingredient of the alleged offence.

1 st issue; whether the false document was made with intent to defraud or deceive;

- [19] Whereas acts of destroying, alteration, or mutilation, of any original document are considered as falsification, the act is not unlawful if it occurred out of negligence, without an intention to deceive. "To deceive is to induce a man to believe that a thing is true which is false, and which the person practicing the deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action" (see *R v. Bussey (1931) 22 Cr App R 160 at 162;* See also: *Attorney – General's Reference No. 2 of 1980 (1981) 72 Cr App R 64; [1981] 1 All ER 493* and *R v. Turner (1981) 72 Cr App R 117)*. The intention to deceive commonly arises as the way to trick people into parting with money or some other property. Forged documents are commonly used to substantiate false claims, for financial or extraneous gains usually causing wrongful loss to others.
- [20] For purpose of this offence, the accused must have the intention that someone be induced to accept the document as genuine (see *R v. Utting [1987] 1 WLR 1375*). The prosecution must prove that this intention existed at the time the accused made the document (see *R v. Ondhia [1998] 2 Cr App R 150* and *R v. Tobierre [1986] 1 WLR 125*). To defraud is to deceive by deceit and to deceive is to induce a man or woman to believe that a thing is true which is false. Shortly put, to deceive is falsehood to induce a state of mind; to defraud is by deceit to induce a course of action (see *R. v. Wines [1953] 2 ALL E. R ER1497*). It is not necessary to show that the accused achieved his or her intended purpose. The gist of the offence lies in intention, rather than consequence (see *Attorney-General's Reference (No 1 of 2000) [2001] 1 WLR 331* and *R v. Garcia (1988) 87 Cr App R 175*).
- [21] The only evidence led on this ingredient is that of P. W.1 Yahaya Farajal Opira, the L. C.1 Chairman who testified that he was tricked by A2 Odem Gabriel whom he trusted as his General Secretary, to stamp a blank sheet of paper. St the time he stamped the blank piece of paper, it was upon a misrepresentation that it was required to enable the 1st respondent obtain money for children's school fees from BRAC. Later he discovered that the document bore the handwriting of the L. CII Chairman and it had been used by the 1st respondent Obur Ronald, to sell the witness' father's land at Pece. However, he was unable to identify the document produced in court as the one he stamped. Having failed to establish the falsity of the document produced in court, the intention behind its creation could not be proved either. Accordingly, I find that the prosecution failed to lead any credible evidence to prove this essential ingredient of the alleged offence as well.

3rd issue; whether the false document was made by the accused;

- [22] A person "makes" a document if he or she is ultimately responsible for it coming into existence. Making of a document is different from causing it to be made. A charge of forgery cannot be imposed on a person who is not the maker of the same.
 - [23] The evidence on this element came from the testimony of P. W.1 Yahaya Farajal Opira, the L. C.1 Chairman who testified that it is the 2nd respondent Odem Gabriel who brought him the document claiming it was required to enable him obtain money for his children's school fees from BRAC. He was made to stamp a document that he did not know. P. W.2 Acan Hilder testified that the two plots she surveyed belonged to the 1st respondent Obur Ronald. P. W.3 Sebuwufu Elisa testified that the author of the specimen handwriting, the 3rd respondent Onono Charles, was the author of the questioned document.
- [24] Had the three been credible evidence regarding the other two elements, this evidence would have implicated the 2nd and 3rd respondents only. But since that is not the case, I find that the trial court came to the correct conclusion when it found that none of the respondents had a case to answer since the prosecution failed to establish a *prima facie* case against any of them.

Order:

- [25] In the final result, for the above reasons, there is no merit in the appeal, and it is accordingly dismissed.

Delivered electronically this 14th day of August, 2020Stephen Mubiru..... Stephen Mubiru Resident Judge, Gulu

Appearances

For the appellant :

For the respondents:

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