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IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 109/2018
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

RICHARD SINKONDE APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Mchenga, DJP, Chashi and Mulongoti JJA

On 20th November 2018 and 25th February 2019

For the Appellant: Z. Simposya and F. Zulu, MSK Advocates
For the Respondent: M.G. Kashishi Senior State Advocate
and M. Ngulube State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Yokonia Mwale v The People SCJ Appeal No 285 of 2014.
2. Dorothy Mutale and Another v The People [1997] SJ 51.
3. Charles Phiri v The People [1973] Z.R. 168
4. Joseph Masiye Phiri v The People [1977] Z.R. 251,

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Court of Appeal Act, Act No. 7 of 2016**
3. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

The appellant, an Accounts Assistant with the government, appeared in the Subordinate Court, jointly charged with another person, with the offences of forgery contrary to **sections 342 and 347 of the Penal Code** and theft by public servant contrary to **sections 272 and 277 of the Penal Code**. He denied the charges and the matter proceeded to trial. At the end of the trial, he was convicted of both offences while his co-accused was acquitted.

In the forgery count, it was alleged that they forged a cheque in the sum of K247,250.00 by purporting to show that it had been genuinely issued by the Ministry of Justice. The allegation in the theft count was that they stole K247,250.00, money which came into their possession by virtue of their employment.

The evidence before the trial court was that an Accounts Assistant at the Ministry of Justice, who was reconciling an account known as "Laws of Zambia", discovered that a cheque in the sum of K247,250.00, payable to her, had been drawn on the account by the appellant's co-accused. She brought the transaction to the attention of the ministry's Permanent Secretary, who summoned the appellant and his co-accused.

According to the Permanent Secretary, the appellant's co-accused admitted having encashed the cheque. He told him that he had acted on the instruction of the appellant, who he gave all the money. The Permanent Secretary also told the court that the appellant admitted having received the K247,250.00 and promised to pay it back. Subsequently, the appellant gave him two deposit slips indicating that the sums of K100,000.00 and K29,000.00, had been paid back into the account. When the appellant failed to pay the balance, the matter was reported to the police.

Investigations established that the cheque was signed by the appellant and another signatory. The other signatory told the court that he did not see the supporting documents before signing the cheque, but the appellant assured him that it had supporting documents and it was drawn on an account known as the "Compensation and Awards" account. There was also evidence that the cheque was not typed using a special typewriter that the Ministry of Justice ordinarily used for typing cheques.

In his defence, the appellant admitted signing the cheque and said the payment was authorised by the Permanent Secretary. He denied assuring the other signatory that the cheque had been drawn on the "Compensation and Awards Fund". He also denied instructing his co-accused to cash the cheque or receiving the money after it was encashed. In addition, he denied admitting to the Permanent Secretary that he had collected the money after the cheque was cashed; the undertaking to pay the money back; and submitting the two deposit slips.

In his defence, the appellant's co-accused confirmed cashing the cheque and said it was on the appellant's instructions. He also confirmed the Permanent Secretary's testimony that the appellant admitted having received all the money and promised to pay it back. In addition, he confirmed that the appellant took the two deposit slips to the office of the Permanent Secretary.

The trial magistrate found that both the forgery and the theft had been proved. She found that although the cheque was a genuine document, it contained false information. It showed that it had been drawn on the "Compensation and Awards Fund" and was payable to the accounts assistant, when it was not the case. As regards the theft, she found that although the appellant denied receiving the money, the fact that he got it was confirmed by his refunding some of the stolen money.

Following his conviction, the appellant was sentenced to 2 years imprisonment on each count. The sentences were to run concurrently.

Dissatisfied with the Subordinate Court's decision he appealed to the High Court, arguing that the case against him was not proved beyond all reasonable doubt. He also argued that the court placed the burden of proving his innocence on him; that he was convicted on the evidence of suspect witnesses; that there was no proof that he had received the money; and that expert evidence was not called to prove that he authored the deposit slips.

The High Court dismissed the appeal and upheld the conviction after finding that the case was proved beyond reasonable doubt. Applying the holding in **Yokonia Mwale v The People**[1], the judge found that the prosecution witnesses could not be classified as suspect witnesses merely because they were connected to the transaction. He also noted that the appellant failed to prove his allegation that the Permanent Secretary was involved.

Further, the High Court judge observed that it is possible that the appellant's co-accused could have been acting on the appellant's instructions or was party to

the transaction and the stolen money was split between them. He referred to the case of **Dorothy Mutale and Another v The People**[2] and held that even if he was required to draw an inference favourable to an accused person, he was satisfied that the appellant was properly convicted.

Three grounds of appeal have been advanced in support of this appeal. They revolve around two issues, that both the forgery and the theft, were not proved beyond all reasonable doubt.

However, before we deal with the arguments advanced by counsel in support of, or against this appeal, it is necessary that we comment on the manner in which the statement of offence in the forgery count was drawn. It reads as follows:

> **"Forgery contrary to section 342 and 347 of the Penal Code Chapter 87 of the Laws of Zambia"**

Section 134 of the Criminal Procedure Code sets out the information that is supposed to be included in a statement of offence. It provides that:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

From this provision it is clear that the only statutory provisions that are supposed to be included in a statement of offence are those that set out the offence and the sentence. If the offence and the sentence are set out in one section, only that provision should be included in the statement of offence.

In this case, the drafter of the charge included **Section 342 of the Penal Code**, a provision that defines what a forgery is. The provision does not create any offence or prescribe any penalty. Since both the offence of forgery and the penalty are set out in **section 347 of the Penal Code**, it is the only statutory provision that should have

been referred to in the statement of offence and not **Section 342.**

Notwithstanding the defective manner in which the statement of offence was drawn, we find that the appellant was not prejudiced in any way. He knew the charge he was facing and the sentence likely to be imposed on him in the event that he was convicted.

Getting back to the charge of forgery, Mr. Simposya submitted that an essential ingredient of the offence is the making of a false document. In this case, no false document was made because the cheque was signed by the authorised signatories. Even if it was signed without authority, it cannot be a false document, he further submitted.

In response, Ms. Kashishi submitted that the cheque was a forgery because it was not signed by the payee and was issued without her authority. In addition, it was not

typed on a typewriter that the Ministry of Justice ordinarily used for typing cheques.

Section 342 of the Penal Code defines a forgery as follows:

> **"Forgery is the making of a false document with intent to defraud or to deceive"**

The making of a false document is explained in **section 344 of the Penal Code.** It reads as follows:

> **"Any person makes a false document who-**
> **(a) makes a document purporting to be what in fact it is not;**
> **(b) alters a document without authority in such a manner that if the alteration had been authorised it would have altered the effect of the document;**
> **(c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorised would have altered the effect of the document;**
> **(d) signs a document-**
> **(i) in the name of any person without his authority whether such name is or is not the same as that of the person signing;**
> **(ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;**
> **(iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person;**
> **(iv) in the name of a person personated by the person signing the document, provided that the**

> **effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be."**

In the case of **Charles Phiri v The People**[3], the Court of Appeal considered the import of the provision. At page 169, Baron, DCJ, observed as follows:

> **"The definition cited by the magistrate is a statement of the common law definition of forgery in England expounded by Blackburn, J. in Ex Parte Windsor [1]. In that case Blackburn, J. went on to say:**
>
> > **''[Forgery] 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 forgery because it is reduced into writing."**
>
> **The matter is put thus by the learned author of the eighteenth edition of Kenny's Outlines of Criminal Law at page 375:**
>
> > **"The simplest and most effective phrase by which to express this rule is to state that for the purposes of the law of forgery, the writing must tell a lie about itself. Hence a conveyance which contains false recitals or states incorrectly the price paid is not thereby 'false'. And a letter or telegram sent to a newspaper containing false news is not a forged document: although it would be if it were sent falsely in the name of one (e.g. an official reporter) who did not send or authorise the sending of it, for in such a case it would purport to be his message, which it is not. So also if a cashier or foreman makes out a pay sheet so as to receive A greater amount of money from his employer than he has to disperse to subordinate members of**

> **the staff, this is not forgery, for, although it tells a lie about the men, it does not tell a lie about itself, since it is a pay sheet which that man has prepared and rendered."**
>
> **This passage, and particularly the last example given therein, makes it clear that the vouchers made out by the appellant were not forgeries; they contained false statements but they did not tell lies about themselves. It follows that the convictions for forgery were bad."**

In this case, although the trial magistrate found that the cheque was "genuine", she came to a conclusion that it was a forgery because it contained false information. The false information being that it was drawn on "the Compensation and Awards" fund and was payable to the accounts assistant. This was a misdirection. As was ably explained by Blackburn, J. in **Ex Parte Windsor**, the fact that a document contains false information does not make it a forgery. It must lie about itself or to use the wording in **section 344 of the Penal Code**, "purport to be what it is not".

The cheque was not a forgery because it did not contain any alterations nor was any information introduced that altered its effect after it had been prepared. Further,

it was not signed in the name of any other person without the authority of that person. It was signed by two signatories who signed it in their own names.

The fact that it was typed using a typewriter other than the one ordinarily used by the Ministry of Justice, was of no consequence, because the kind of typewriter used did not affect the genuineness of the cheque. The same can be said about what the second signatory was told before he signed, that the cheque was drawn on "the Compensation and Awards" account. He signed a cheque that was drawn on the "Laws of Zambia" account and the money was drawn from that account.

We agree with Mr. Simposya, that having not proved the "making of a false document", an essential ingredient of the offence of forgery was not proved. This ground of appeal succeeds. The appellants conviction for the offence of forgery is set aside and the sentence is quashed.

Coming to the theft charge, Mr. Symposia submitted that it was wrong for the trial court to find that the appellant did not prove the allegation that the Permanent Secretary was involved, because the onus was on the prosecution to prove all the ingredients of the offence. He referred to **Article 18 (2) (a) of the Constitution** and submitted that even though the provision allows placing the burden of proving certain facts in a criminal charge on an accused person, it is not the case with the offences of forgery and theft.

Mr. Simposya also submitted that the trial magistrate's finding that it was possible that appellant's co-accused was either a co-conspirator or innocent participant, equally applied to the appellant. That being the case, the trial magistrate should have so found and proceeded to draw an inference favourable to the appellant, that is, that he was an innocent participant.

In response, Ms. Kashishi submitted that the onus of proving the case was not shifted to the appellant because

the prosecution proved all the ingredients of the case. Coming to the application of the case of **Dorothy Mutale and Another v The People**[2], she submitted that an inference that the appellant could have acted innocently, was not tenable because his co-accused acted on his instructions.

In his defence, the appellant told the court that the cheque was drawn on the instructions of the Permanent Secretary. It is this claim that the trial magistrate found that the appellant failed to prove.

We have looked at the record of appeal and find that the trial magistrate did not place the burden of disproving the commission of the offence on the appellant. What she was referring to was the burden of adducing evidence; having claimed, in his defence, that the cheque was prepared on the instruction of the Permanent Secretary, it was incumbent on him to place, before the court, evidence in support of the claim. She found that he had not done so and thus rejected the claim.

We are satisfied that the trial magistrate cannot be faulted for coming to that conclusion. We agree with Ms. Kashishi's submission that the prosecution proved all the ingredients of the offence. The fact that K247,250.00 was stolen was proved by evidence that the amount was drawn from a Ministry of Justice account at the instance of the appellant.

In addition, we agree with Mrs. Kashishi's submission that in the face of evidence from the appellant's co accused, that the cheque was drawn on his instruction and the evidence from the Permanent Secretary that he agreed to pay back the money, it cannot be said that he was an innocent participant. In the light of this evidence, we find that the High Court judge's finding that two possible inferences could be drawn on the evidence was not correct. The evidence conclusively proved that he was at the heart of the fraud and could not have been an innocent participant.

We find no merit in the appeal against the conviction for theft by public servant. We uphold his conviction for the offence and the sentence of 2 years imprisonment.

However, this does not end the matter. **Section 171 of the Criminal Procedure Code** provides as follows:

> **(1) The court before which any person employed in the public service is convicted of a prescribed offence shall enter judgment, and civil jurisdiction is hereby conferred upon it for that purpose, for the amount of the value of the property in respect of which the offence was committed-**
>
> **(a) in favour of the Attorney-General where such property is the property of the Government or of any corporation, body or board, including any institutions of higher learning, in which the Government has a majority or controlling interest**
>
> **(2)** .....
> **(3)** .....
> **(4)** .....
> **(5)** .....
> **(6) In this section, unless the context otherwise requires-**
> **"prescribed offence" means an offence under Chapter XXVI, XXVII, XXX, XXXI or XXXIII of the Penal Code where the property in respect of which the offence is committed is the property of the Government or any corporation,**
> .....
> .....

As earlier indicated, the appellant was convicted of the offence of theft by public servant which is in **Part XXVI of the Penal Code.** He was able to access and steal the money, which was the subject of the charge, by virtue of

being an Accounts Assistant employed by the Government and the money belonged to the Government.

That being the case, **Section 171(1) of the Criminal Procedure Code** made it mandatory for the trial magistrate to enter statutory judgment in favour of Attorney General for the amount stolen. The failure by the trial magistrate to do so was a misdirection. Notwithstanding, **Section 16(5) of the Court of Appeal Act** provides that as an appellate court, we have the power to impose an order that the trial court could have imposed.

Since K247,250.00 was stolen, ordinarily, we would have entered statutory judgement in that amount. However, in this case we will enter judgement in the sum of K118,250.00 because following the discovery of the theft, the appellant was encouraged and did pay back K129,000.00. The essence of this provision is for the Government to recover stolen money without having to institute civil proceedings. To order that he pays back

K247,250.00, which was the amount stolen, would be unjust given the refund.

For the avoidance of doubt, we have allowed the appeal against the forgery charge but dismissed the appeal against the theft by public servant charge. The sentence of 2 years has been maintained. In addition, we have entered statutory judgment in the favour of the Attorney General in the sum of K118,250.00.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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J.Z. Mulongoti
COURT OF APPEAL JUDGE

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J. Chashi
COURT OF APPEAL JUDGE