IN THE HIGH COURT OF ZAMBIA **HPA/03/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

HANIF MOHAMMED BHURA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 17th DAY OF OCTOBER, 2017

For the Appellant : *Mr J. Katolo, Milner and Paul Legal Practitioners*

For the Respondent : *Mrs M.H. Kayombo, Senior State Advocate, NPA, with Mr S. Mbewe, Keith Mweemba Advocates*

JUDGMENT

CASES REFERRED TO:

1. ***R V Marcus 1846 175 ER 147***
2. ***Jutronich, Schutte and Lukin V The People 1965 ZR 9***
3. ***Mutambo and five others V The People 1965 ZR 15***
4. ***Anderson V The People 1968 ZR 46***
5. ***Chimbini V The People 1973 ZR 192***
6. ***Kalunga V The People 1975 ZR 72***
7. ***Sithole V The State Lotteries Board 1975 ZR 106***
8. ***Alubisho V The People 1976 ZR 11***
9. ***Mwape V The People 1976 ZR 160***
10. ***Davies Jokie Kasote V The People 1977 ZR 75***
11. ***Patterson Ngoma V The People 1978 ZR 369***
12. ***Felix Silungwe and Shadreck Banda V The People 1981 ZR 286***
13. ***Attorney General V Marcus Achiume 1983 ZR 1***
14. ***Winfred Sakala V The People 1987 ZR 23***
15. ***S V Shlakwe 2012 1 SACR 16 SCA***
16. ***Charles Phiri V The People SCZ No 53/2014***

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

This is an appeal from a Judgment of the Subordinate Court of the 1st Class at Lusaka delivered on 21st October, 2016. Before that court the Appellant stood charged with five counts. In the first count he was charged with the offence of making a false document contrary to Section 344 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence alleged that the Appellant on 19th August, 1996 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, with intent to deceive or defraud did make a false document, namely a deed of gift dated 19th August, 1996, purporting to show that it was genuinely signed and approved by Yusuf Ibrahim Issa Ismail, when in fact not.

In the second count he was charged with the offence of forgery contrary to Sections 342 and 347 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence were that the Appellant on a date unknown, but in October, 1997, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, and with intent to deceive or defraud, did make a false document, namely a Deed of Gift dated 15th October, 1997, purporting to show that it was genuinely signed and approved by Yusuf Ibrahim Issa Ismail, when in fact not.

In the third count the Appellant was charged with the offence of uttering a false document contrary to Section 352 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that the Appellant on a date unknown but between 15th October, 1997 and 21st

March, 2001, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, knowingly and fraudulently did utter a false document, namely a Deed of Gift in the names of Mehrunisha Bhura to the Principal Registry of the High Court of Zambia.

The offence in the fourth count was uttering a false document contrary to Section 352 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that the Appellant on a date unknown but between 15th October, 1997 and 21st March, 2001, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, knowingly and fraudulently did utter a false document namely a Deed of Gift in the names of Mehrunisha Bhura to the Principal Registry of the High Court of Zambia.

The Appellant in the last count stood charged with one count of perjury contrary to Section 104 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that the Appellant on a date unknown but between 15th October, 1997 and 21st March, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did give false testimony on oath in the High Court, and instituted judicial proceedings alleging that a document namely Deed of Gift in the names of Mehrunisha Bhura was genuinely signed and approved by Yusuf Ibrahim Issa Ismail, when in fact not.

According to the evidence of the prosecution the Appellant was deported from Zambia to the United Kingdom in 1996. That whilst there his late daughter had informed him that his two properties being Plot number 6867 Chainama Road and Plot 6887 Bende Road in Olympia had changed hands. That when his deportation was revoked and he returned to Zambia in 2002, a check at the Ministry of Lands had revealed that

two Deeds of Gift had been executed allegedly by him, giving both properties to Mehrunisha Bhura.

The Appellant was convicted on the second and fifth counts, and acquitted on the rest of the counts. He was sentenced to eighteen months imprisonment with hard labour on the second count, and six months imprisonment with hard labour on the fifth count. The sentences were effective 26th October, 2016, and were to run concurrently. Dissatisfied with the judgment and sentences, the Appellant lodged this appeal arguing in ground one that the conviction was unsafe and against the weight and totality of the evidence.

The second ground of appeal is that the sentence was excessive considering that the Appellant was a first offender, and thirdly that the court erred in law and in fact when it held that the Appellant had forged a Deed of Gift dated 15th October, 1997, in the absence of a finding of fact whether the said document, namely the Deed of Gift was a forgery. Lastly that the court erred in law and in fact when it concluded that 'P2' was a forgery when the same was a document duly prepared by an advocate, who admitted on oath.

At the hearing of the appeal the parties indicated that they would rely on the heads of argument filed. The Appellant in the said heads of argument argued with respect to ground one of the appeal that the conviction was unsafe and against the weight and totality of the evidence. It was their submission that the evidence on the record does not support the conviction for either forgery in count 2 or perjury in count 5. That the essential elements of forgery had not been proved, which the court at page J4 of its judgment had outlined. The elements were named as:

1. *That the accused made false documents namely Deeds of Gift for Stands No 6867 and 6887 within the meaning of Section 344*
2. *That he did so with intent either to defraud or to deceive*

That it was clear from the above ingredients that it was necessary to prove that the Appellant was the one who made the Deeds of Gift. It was argued that there was no such evidence on record, and that the evidence before the court was that the two documents were prepared by the lawyers on the instructions of PW1, who was Yusuf Ibrahim Issa Ismail. That the evidence of DW2 and DW3 who were the advocates that prepared the Deeds of Gift was uncontroverted, and therefore the court misapprehended the evidence when it held that the Appellant forged the Deed of Gift relating to Stand No 6887, Lusaka.

It was further argued that no one saw the Appellant prepare the Deed of Gift in issue, and it was therefore their submission that the misapprehension of the evidence was the failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence. That this resulted in an unreasonable verdict, an incurable error in law, and a miscarriage of justice. Reliance was placed on the case of ***S V SHLAKWE 2012 1 SACR 16 SCA.***

The Appellant argued that in this case the court did not consider whether on the totality of the evidence there was anything to show that the Appellant forged the Deed of Gift. That *Blackstone's Criminal Practice 2004, Oxford University Press* at page 379 paragraph B6 states that ***"making a false document includes falsifying an existing one, but however it is made, it must be proved that it was made with specified double intention: it must be proved that the accused***

person intended both that the instrument would be accepted as genuine and that someone would therefore act to his own or another's prejudice. It has a specific intent".

That the court in this matter relied on assumptions and inferences that the Appellant forged the Deed of Gift relating to Stand No 6887, Lusaka to establish intent on the Appellant's part. The case of ***ATTORNEY GENERAL V MARCUS ACHIUME 1983 ZR 1*** was relied on to submit that an appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any evidence, or upon misapprehension of facts, or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.

The Appellant's argument was that this is a proper case where the findings of fact made by the trial magistrate should be reversed, as the same were made under a misapprehension of facts and evidence, and also on assumptions and inferences. The case of ***CHIMBINI V THE PEOPLE 1973 ZR 192*** was also relied on, and it was argued that in that case the Supreme Court stated that;

> ***"where the evidence against an accused person is purely circumstantial, and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless that is the only inference which can reasonably be drawn from the facts. In such cases the fact that an accused person has elected not to give evidence on oath may, in certain circumstances, tend to support the case against him, but will certainly not do so unless the inference was one which could properly be drawn in the first place".***

That based on the above case, an inference of guilt is not the only inference that can be drawn in this case, because when one takes into account the evidence of DW2 who testified that he was instructed by PW1 to prepare the Deed of Gift, it cannot be inferred that the Appellant forged the said Deed of Gift. That the court at page J19 lines 28-29 had stated that;

> ***"Thus the accused may not have signed as PW1 but i am satisfied that he was privy to the forgery, that is to say, to the signing of the document in the name of PW1".***

The Appellant's argument was that the above finding clearly exonerates the Appellant of the instances spelt out in Section 344 of the Penal Code with regard to what constitutes the making of a false document. That the Appellant was not charged with being privy to the forgery, but for the offence of forgery. Further in the arguments, the Appellant argued that the conviction for the offence of perjury follows from the finding in count two, and that if count 2 succeeds, then count 5 must equally fail.

That the proper court that should have dealt with the perjury was Hon Mr Justice Kajimanga who heard and saw the demeanour of the witnesses. That Mr Justice Kajimanga did not find the Appellant guilty of lying before his court or at all, and it was therefore incompetent for the court below that had no benefit of seeing the Appellant testify before the Judge to find him guilty of perjury with respect to evidence given in cause number 2001/HP/262. That the judgment in that cause went as far as the Supreme Court, and even that court did not comment that the Appellant lied in his testimony before the High Court. Therefore in the premises, the convictions in both counts 2 and 5 are unsafe, and ought to be set aside forthwith.

Ground two is that the sentence was excessive considering that the Appellant was a first offender. The Appellant was sentenced to eighteen months imprisonment with hard labour in count 2, and six months imprisonment with hard labour in count 5. It was argued that the sentence of eighteen months imprisonment with hard labour in count 2 was wholly excessive, and came with a sense of shock.

That the maximum punishment for forgery is three years, and the Appellant was sentenced to half of the said maximum punishment, when there were no aggravating circumstances, warranting such a heavy sentence. The argument was that the heavy sentence was premised on bad record, where the Appellant's guilt was premised on assumptions, notwithstanding that the court found that he did not sign for PW1 on the Deed of Gift. The arguments were further that the Appellant as a first offender, should have been accorded leniency by the court, and the case of ***FELIX SILUNGWE AND SHADRECK BANDA V THE PEOPLE 1981 ZR 286*** was relied on.

That in that case it was held that the bad record must not be the basis for imposing a heavier sentence than the offence itself warrants. That the first decision must always be what is the proper sentence for the offence?, and then the court should proceed to consider to what degree that sentence may be properly reduced because of the absence of mitigating factors.

The Appellant argued that in the absence of the legislature prescribing a minimum sentence in Section 347 of the Penal Code, there was nothing that precluded the court from imposing any other sentence which might include community service or even suspending the sentence. The court was urged to interfere with the sentence, in the unlikely event that the appeal did not succeed.

Ground three is that the Court erred in law and in fact when it held that the Appellant forged the Deed of Gift dated 15th October, 1997, in the absence of a finding of fact whether the said document namely the Deed of Gift was a forgery. The argument was that the court will note from page 610 line 16 to page 611 line 6, being an extract of the Supreme Court judgment in Appeal No 148 of 2005, that the evidence of DW1, Suliman Patel (DW1) who testified as DW2 in the court below, was that he was instructed by the Appellant (PW1) to transfer Stand No 6887, Lusaka to his wife, the Respondent, via a Deed of Gift.

That the Appellant had gone to DW1's office and personally gave him the instructions, and acting on those instructions DW1 had applied for consent to assign the property, and prepared the Deed of Gift which he gave to the Appellant for execution. That the said evidence further states that there was no response for a year, and in December, 1997, DW1 received a fax from Bolton UK, instructing him to register the property in the name of his wife, and at the same time, the Appellant returned the Deed of Gift that DW1 duly registered at the Lands and Deeds Registry.

It was argued that this evidence shows that DW2 in the court below personally gave the Deed of Gift to PW1 who returned the Deed of Gift, and then it was duly registered. Therefore there was no opportunity for the Appellant to commit the offence of forgery in respect of the Deed of Gift, and that the evidence did not show that DW2 got the Deed of Gift from the Appellant. The other argument was that the fact that the Appellant signed as a witness does not make him guilty of the offence of forgery of the Deed of Gift, as the evidence of DW2 was that he did not get the Deed of Gift from him.

Further that taking all the evidence into account, there was no evidence to show that 'P2' the Deed of Gift was a forgery, because the document

does not tell a lie about itself. This is because PW1 instructed Mr Suliman Patel to prepare it in favour of his wife, and there could therefore be no lie about the document. The case of ***R V MARCUS 1846 175 ER 147*** was relied on where a prisoner, a stockbroker, was indicted for forgery and uttering a deed of transfer of ten shares, and he bought one hundred shares from R in L's name, without authority from L, counterfeiting L's signature.

He then transferred ten of those shares to B, again counterfeiting L's signature. On acquittal, Creswell J noted that he could not discover anyone who could conceivably be defrauded, not R because Marcus paid him for the shares, not L because under no circumstances could he be required to pay any money, not B because he received the shares he paid for, nor the company because the shares being fully paid, the substitution of the credit of another person could not harm the company. It was observed in that case that there must at all events be a possibility of someone being defrauded by the forgery.

That in this case PW1 could not be said to have been defrauded because he gave instructions for the preparation of the Deed of Gift, and the instructions were executed. Therefore there was no forgery. It was prayed that ground three be allowed, and the conviction and sentence with regard to count 2 be set aside.

Ground 4 states that the court below erred in law and in fact when it concluded that 'P2' was a forgery, when the same was prepared by an advocate who admitted on oath. The arguments in support of this ground were that the evidence of DW2, Suliman Patel, which was at page 91 states that he acted on Mehrunisha Bhura's instructions, and that this evidence was contrary to the evidence of DW2 on the same subject at page 799 where he stated that he was instructed by Yusuf Issa to

transfer his share in Stand No 6887 Lusaka which he jointly owned with his wife to her, and that he had personally gone to the office. That as the transaction was done over twenty years ago he could not recall exactly how the instructions were obtained.

That the above evidence is contradictory to the evidence that he gave in the High Court case under cause number 2001/HP/262 at page 798-799 of the supplementary record, and what he stated at page 91 in cross examination, that the instructions were given by Mr Issa, and later on the same page is on record as stating that he acted on the instructions of Merunisha Bhura. It was argued that based on these inconsistencies, the court should have taken great care to analyse the said inconsistencies, and also take into account the fact that DW2 did not recall details about the transaction, before she held as she did on page J19 that;

> ***"it is no wonder he lied about DW2 giving him the go ahead to sign"***

That based on the fact that DW2 had admitted that he was not able to recall all the details of the transaction, the same having occurred over twenty years ago, the court should have given the benefit of doubt to his evidence that he did not instruct the Appellant to sign as a witness. Further that at page 96 of the record of appeal on lines 18 to 19 is the evidence of DW3 Joyce Mulunga who testified that ***"I dont know about the other property. He just told me that he took it to Solly Patel. I don't know what happened".***

The Appellant's argument was that this evidence shows that PW1 confirmed to DW3 that there were instructions about another property which were taken to Solly Patel, and when one goes to page 95, lines 1-4 they will note that DW3 testified that she recalled that he wanted to do

another Deed of Gift, but when he went to the office he did not find her, and he later phoned her, and told her that he had given Mr Solly Patel to do the other deed of gift.

That this evidence from DW3 corroborated DW2's evidence that PW1 gave him instructions to prepare the Deed of Gift. That flowing from this the circumstances under which the deed of gift was prepared by DW2 could not be said to be a forgery because it captured the real intention of PW1 to execute the Deed of Gift. The court was urged to note that PW1 had even denied the Deed of Gift prepared by DW3 which he had signed, and thus there was nothing to stop him from denying that he gave instructions to DW2. On that premise I was urged to allow this ground of appeal, and acquit the Appellant on count 2 and set aside the sentence accordingly.

The Respondent in the heads of argument filed in response by both the State and Keith Mweemba Advocates, stated that they supported the conviction and the sentence imposed on the Appellant, and argued grounds 1 and 2 separately and grounds 3 and 4 together.

Their arguments with regard to ground 1 were that this ground must fail as the court properly evaluated the evidence that was placed before it. That forgery is the making of a false document with intent to defraud or deceive, as provided in Section 342 of the Penal Code, while Section 344 defines what constitutes a false document, and Section 344A of the said Penal Code provides the instances where an intent to deceive is deemed to exist. That to prove the offence of forgery the prosecution had to prove that the Appellant did make a false document, namely a deed of gift relating to Stand No 6887 Bende Road Olympia, and that he did so with intent to defraud or deceive.

That PW1 had shown through the deportation order produced as 'P3' that he was deported to the United Kingdom in November, 1996, and that he only returned to Zambia in 2002 after he was issued an exemption certificate dated 17th April, 2002. Upon his return he discovered that Plot 6867 Chainama and Plot 6887 Olympia had changed hands through Deeds of Gift allegedly signed by him to Mehrunisha Bhura. He denied having signed both Deeds of Gift, which was confirmed by the handwriting expert PW5.

That the Appellant had signed as a witness to the Deed of Gift for Plot No 6887 Olympia, and he did not deny this fact. Further that he did not testify that PW1 had asked him to be his witness to the same document, and that DW2 had denied that he had asked the Appellant to sign as PW1's witness. The arguments went further to state that the court had at page J19 lines 28-29 and page 20 lines 1-2 of the judgment observed that the accused (now Appellant) may not have signed as PW1 on 'P2', but was satisfied that he was privy to the forgery, and in line with Section 21 of the Penal Code, this brought him within the category of parties to offences. To this end the case of ***CHARLES PHIRI V THE PEOPLE SCZ No 53/2014*** was relied on.

Further that the Appellant had deliberately chosen to disregard or ignore Section 22 of the Penal code by virtue of which he was convicted. That on the basis of common purpose or intent, the unchallenged evidence adduced before the lower court justified the conviction of the Appellant for the offence of forgery.

It was argued that this was on the basis that the Appellant and his sister Merunisha Bhura formed the common intent to forge the Deed of Gift, 'P2', with intent to defraud Issa Ibrahim Ismail Yusuf of his interest in the property known as Stand No 6887, Lusaka. That the legal effect of

Section 22 of the Penal Code was considered in the case of ***MUTAMBO AND FIVE OTHERS V THE PEOPLE 1965 ZR 15,*** although a murder case, where the court stated that the formation of the common purpose does not have to be by express agreement, or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him, and the other/s, and each does so with the intention of participating in that prosecution with the other/s.

Further that it is the offence which is actually committed in the course of prosecuting the common purpose which must be the probable consequence of the prosecution of the common purpose.

The case of ***MWAPE V PEOPLE 1976 ZR 160*** was also relied on where Silungwe J held that ***"in law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal".*** The other case relied with regard to the common purpose principle was ***WINFRED SAKALA V THE PEOPLE 1987 ZR 23.*** It was argued that based on the above authorities the evidence relied upon and evaluated by the lower court as to the circumstances in which the Deed of Gift was executed, was that the Appellant and his sister joined in the prosecution of a common purpose to forge the Deed of Gift, and secondly that they unlawfully transferred the interest of Issa Ibrahim Ismail Yusuf to Merushina Bhura, the Appellant's blood sister.

That the lower court in arriving at the conclusion to convict the Appellant for the offence of forgery at pages J18 to J20 of the judgment reasoned that PW1 had disputed the signatures attributed to him, and this evidence was corroborated by the handwriting expert (PW5), whose opinion was that PW1 did not append his signature to 'P2'. That unlike 'P1', 'P2' was drawn at the time when PW1 was out of the country having

been deported. The lower court had gone further to state that the evidence of DW2 was that 'P2' was left at the reception, and he did not see PW1 append his signature to the document.

That the accused (now Appellant) told the court that he did not see PW1 sign 'P2' but that he signed as a witness because the lawyer DW2 told him that it was okay for him to sign as a witness. The court had stated that this assertion was denied by DW2, and that DW2 had under cross examination stated that he only came to know the accused (now Appellant) in early 2000, and the question is what motivated the accused to tell such a lie?

The Respondent argued that the lower court had concluded that the lie was because of the accused's (now Appellant) involvement in finalizing the document 'P2', and that it was not about who prepared the document, but about who executed it. That the document was executed when PW1 was out of the country, and there was no evidence on record to suggest that he was seen appending his signature to the document, or that he was heard to confirm having done the same.

Further that the lower court had noted that DW2 had not advised the accused (now Appellant) to sign 'P2', and this evidence went to show that the Appellant and his sister were bent on seeing that the document was registered at the Ministry of Lands, and therefore the accused person (now Appellant) was well aware of the fact that PW1 did not sign it, and he acted together with his sister to commit the forgery, and he was a willing participant.

The Respondent argued that the reasoning of the lower court properly directed itself in arriving at the decision to convict the Appellant and the

decision of Silungwe J in the case of ***MWAPE V PEOPLE 1976 ZR 160*** was argued as fortifying this position.

It was also argued that the evidence of DW2 Suliman Patel who testified as DW1 in cause number 2001/HP/262, and Appeal No 148 of 2005 at pages J4 and J5 was also taken into account when arriving at the decision to convict the Appellant. That DW2's evidence was that PW1 did not sign the Deed of Gift in his presence, and that he could not recall when it was signed, as it was left at the reception. That the accused person (now Appellant) who testified as DW3 had stated that he saw the Deed of Gift relating to Stand No 6887 with his sister when she went with him to her lawyer's (DW2) office.

The Respondent argued that this evidence justified the conviction of the Appellant, as he acted for the purpose of enabling or aiding his sister to commit the offence of forgery, and he therefore had the necessary mens rea or intent. That it is trite that anyone who aids another to commit an offence is deemed to have taken part in committing the offence, and may be charged with actually committing it, and that Section 21 of the Penal Code speaks to this.

That there was also other evidence showing the Appellant's intention to defraud PW1 of the property, as he had placed a caveat on Stand No 6887 claiming that his sister owed him money, which was not sufficient ground for placing a caveat. Then there was also the evidence on 'P3' that PW1 had suffered deportation at the time the Deed of Gift was executed, and therefore he did not authorize it, and it was therefore a forgery, and as a result of a common purpose shared by the Appellant and his sister.

The case of ***DAVIES JOKIE KASOTE V THE PEOPLE 1977 ZR 75*** which established that where the document had not been signed by person by

whom it purported to have been signed, it was clearly a forgery, was relied on. That the only question was whether the Appellant knew that it was a forgery. The Respondent applying the principles laid down in that case argued that the court below was on firm ground when it found as a fact that the Appellant in this case knew that PW1 did not sign 'P2', and his subsequent actions were done as a willing participant in the forgery.

That this is why there was the questionable affidavit dated 2nd September, 1998 which was only commissioned on 6th September, 2002, when his sister was already based in the United Kingdom, which does not mention Stand No 6887, as security for the money allegedly owed by his sister, and the caveat being placed on the property, thereby assuming interest in it.

That the Appellant was party to the signing of 'P2', and his conviction should be upheld, and the argument that there was no direct evidence to the effect that the Appellant signed 'P2' could not stand, and that the South African case of ***S V SHILAKWE*** cited by the Appellant should be ignored as it is not binding on this court, and not helpful to this appeal.

With regard to the arguments surrounding the conviction of the Appellant in ground 5 for the offence of perjury, it was argued that under this count the prosecution had to prove that;

1. *The accused person gave false testimony in judicial proceedings*
2. *That he knew or must have known that the testimony was false*
3. *That the said testimony touched on a matter that was material to a question pending in the said judicial proceeding*

That in this matter the Appellant did not dispute having testified as a defence witness in the High Court in cause number 2001/HP/262,

wherein he testified that is the one who signed the Deed of Gift for Stand No 6887 Olympia. That this evidence touched on a matter material to the question to be determined in those proceedings, which was whether the signature was genuinely that of PW1. Therefore he was rightly convicted of the offence of perjury, and the convictions in counts 2 and 5 should stand.

The arguments in response to ground two, which is that the sentence was excessive considering that the Appellant was a first offender, were that the ground lacked merit. It was argued that the lower court rightly took the view that the Appellant was a first offender, and that leniency would be exercised when sentencing him. However the court had observed that forgery is a serious offence, which can have a serious or negative impact on the victim. That the lower court had observed that detriment had been suffered by PW1, as he had lost proprietary interest in the property, and it was only just that the Appellant received punishment for his deeds.

The arguments went further to state that the case of ***JUTRONICH, SCHUTTE AND LUKIN V THE PEOPLE 1965 ZR 9*** was instructive when considering appeals against sentences imposed. That three questions are asked in determining this, which are;

1. *Is the sentence wrong in principle?*
2. *Is it manifestly excessive so that it induces a sense of shock?*
3. *Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?*

That if one or more of these questions is answered in the affirmative, the appellate court should interfere with the sentence. The Respondent also argued that the above case went further to state that when sentencing,

the courts are guided first and foremost by the public interest, as criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. Further that an appellate court may only override this discretion to sentence vested in the trial court when the sentence is manifestly wrong in principle. The case of ***ANDERSON V THE PEOPLE 1968 ZR 46*** was also cited as authority.

The other cases relied on were ***KALUNGA V THE PEOPLE 1975 ZR 72*** and ***ALUBISHO V THE PEOPLE 1976 ZR 11,*** where it was stated that an appellate court should not alter the sentence passed at the trial merely because it thinks that it might have passed a different one. That in this case the trial court took into account the mitigating factors including the fact that the Appellant was a first offender, and it could not be said that the court exercised its discretion on a wrong basis. It was argued that the trial court was on firm ground when it took into account the seriousness of the offence when arriving at the sentence of eighteen months for the forgery.

Further that the court properly observed that there were aggravating circumstances in that PW1 had lost his interest in Stand No 6887, Lusaka. Therefore the eighteen month sentence did not come with a sense of shock, given the gravity of the offence, and the loss suffered by the complainant. On that basis the argument was that the ground of appeal should be dismissed, as the sentence could not be said to be wrong in principle or was manifestly excessive.

The arguments in response to grounds 3 and 4 which are that the court erred in law and if fact when it convicted the Appellant for the offence of forgery in the absence of a finding of fact that the said deed of gift was in fact a forgery, and that the court erred in law and in fact when it concluded that 'P2' was a forgery when the same was duly prepared by

an advocate who admitted so on oath, were that the lower court correctly directed itself to both issues.

It was argued that the lower court correctly directed itself to the question of whether 'P2' was a forgery when it stated that it was not about who prepared 'P2' but about who executed it. That the arguments with regard to ground one applied to these two grounds, and the appeal on these grounds should fail. The Respondent went further to argue that the Appellant had opportunity to commit the offence at the time 'P2' was executed because PW1 had been deported, and was unable to execute the Deed of Gift in favour of his wife.

I have considered the arguments. I will deal with grounds 1, 3 and 4 together as they are related. The first ground is that the conviction is unsafe and against the weight and totality of the evidence. The third ground is that the court erred in law and in fact when it held that the Appellant forged the Deed of Gift dated 15th October, 1997 and in the absence of the finding of fact whether the said Deed of Gift was a forgery.

The last ground is that the court erred in law and in fact when it concluded that 'P2' the Deed of Gift was a forgery when the same was prepared by an advocate who admitted on oath.

Section 342 of the Penal Code Chapter 87 of the Laws of Zambia defines forgery as;

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

Section 344 of the said Penal code sets out instances that are deemed to make a document false. It states that;

> ***"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".

Intent to deceive on the other hand is stipulated in Section 347 of the Penal Code as;

"344A. An intent to deceive exists where one person induces another person-

(a) to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false; or

(b) to believe a thing to be false which is true, and which the person practising the deceit knows or believes to be true;

and in consequence of having been so induced does or omits to do an act whether or not any injury or loss is thereby suffered by any person".

Therefore in this case the starting point is whether the offence of forgery was proved. Looking at the offence as defined in Section 342 of the Penal Code, it must have been proved that the Deed of Gift relating to Stand No 6887 Lusaka was a false document, and that it was made by the Appellant.

PW1 the complainant testified that he did not sign as donor of the said property vesting it in Mehrushina Bhura, and the basis for this argument was that he had suffered deportation to the United Kingdom, by virtue of the deportation order which was produced as 'P3' before the lower court. The Deed of Gift 'P2' was executed on 15th October, 1997. PW1's evidence that he did not sign the said Deed of Gift was found by the lower court to have been corroborated by the handwriting expert, PW5, who testified that the signature on the document was a simulation of PW1's signature.

The said Deed of Gift was prepared by a law firm Solly Patel Hamir and Lawrence, and Counsel from that firm Suliman Patel testified as DW2 in the lower court. This witness testified that he obtained instructions from PW1 and then prepared the Deed of Gift, but that he did not witness PW1 sign it as the document was left at the reception. This witness did not tell the court that PW1 had instructed him and based on the evidence on record which was not disputed that PW1 had been deported

when the document was executed, DW2 did not raise doubt on PW1's evidence that he did not sign the document.

In fact the accused person in his defence testified that he saw 'P2' when he went with sister, Mehrunisha Bhura, to the advocates Solly Patel Hamir and Lawrence, and he was asked to sign as a witness.

As rightly observed by the lower court, there was no direct evidence of the Appellant having signed as PW1, the donor on 'P2'. The issue is whether the lower court did make a finding that indeed 'P2' was a forgery? A perusal of the judgment of the lower court shows that at page J18 the court found that 'P2' was drawn at the time that PW1 was out of the country due to the warrant of deportation.

The court also found that DW2 the advocate from Solly Patel Hamir and Lawrence who prepared the said 'P2' told the court that after he prepared it on PW1' instructions, he gave it back to PW1 to sign. That later it was returned with PW1's signature, and was left at the reception. That this witness admitted that he did not see PW1 append his signature to the document, and the court found that the assertion by the Appellant that DW2 asked him to sign as a witness on that document was denied by DW2.

The court in my view believed DW2 over the Appellant on the basis that DW2 had testified that he never saw the Appellant in 1997 when the document was executed, but only came to know him in early 2000. Further, on that basis the lower court concluded that 'P2' was a forgery, and that the Appellant was privy to the forgery, as DW2 did not advise him to sign 'P2'. That the court below found that 'P2' was prepared by DW2, but that the issue was not about who had prepared the document, but about who executed it. The Respondent in the arguments in

response submitted that these conclusions by the lower court were arrived after the evidence was correctly evaluated.

Going by what amounts to a false document as provided in Section 344 of the Penal Code, the circumstances of this case would bring the forgery within Section 344 (a) or (d) of the Penal Code, which is making a document purporting to be what in fact it is not, or signing in the name of any person without his authority whether such name is or is not the same as that of the person signing. I say so because PW1 testified that he did not sign 'P2' as at the time it was executed he was out of the country, having been deported. PW1 testified that there was no communication of any kind between him and the lawyers. In cross examination PW1 testified that he had challenged Solly Patel on the Deed of Gift several times.

Therefore if PW1 had been deported when 'P2' was executed, it was a document purporting that PW1 had executed it when in fact not. Further that if 'P2' was signed in his name without his authority, then it was a false document, and this is what he alleged. The witness who was key to establishing that 'P2' was a false document within the meaning of Section 344 of the Penal Code was DW2 who is the lawyer that prepared the document.

Whilst it has been established that 'P2' was prepared by DW2, and was executed when PW1 had been deported from Zambia, DW2 was not cross examined on how PW1 had indeed signed 'P2'. He was just asked to confirm that he had found 'P2' at the reception, which he did. The onus was on PW1 through his advocates who prosecuted the matter to prove beyond all reasonable doubt that even whilst deported there were no means by which PW1 could have executed 'P2', as it a matter of common

knowledge that documents can be executed in one country, and sent to another to be acted upon.

DW2 in his evidence stated that he prepared 'P2' and it was sent for execution. DW2 was not cross examined on whether or not he had dealt with PW1 as his lawyer, and thereby establish that there was no basis upon which DW2 could have prepared 'P2'.

However the Appellant in the arguments in reply made reference to the evidence that DW2 gave before the High Court wherein he had testified that after PW1 had given him instructions to draw up the deed of gift, about a year passed before he received a fax from PW1 from Bolton England instructing him to register the property in his wife's name and that the assignment was also at the same time returned to him to register. This evidence was not before the court below when DW2 testified.

The evidence given by the Appellant that he only saw 'P2' when he went with his sister Mehrushina Bhura to DW2's office, and that PW1 had already signed the document at the time, was in fact cross examined on. The fact of the Appellant having signed 'P2' in the absence of PW1 was found by the lower court to be evidence that the Appellant was privy to the forgery, as after stating that DW2 had denied that he had asked the Appellant to sign as a witness on 'P2', the court at observed at page J19 that;

> ***"after careful consideration of the evidence, I am without a doubt in my mind that the untruth is as a result of the accused's involvement in the finalizing of the document".***

The lower court then concluded that the Appellant and his sister Mehrushina Bhura acted together to commit the forgery.

I do agree that a person may be convicted of an offence pursuant to Sections 21 and 22 of the Penal Code where the offender is not the person who committed the offence, but on the basis that the person either aided, abetted, counsel or procured another to commit an offence, or where two or more persons form a common intent to prosecute a common unlawful purpose, and in the prosecution of such unlawful purpose an offence is committed which was a probable consequence of the commission of such unlawful purpose.

With regard to the offence of forgery the case of ***PATTERSON NGOMA V THE PEOPLE 1978 ZR 369*** held that;

> ***"The mere possession of a document proved to be a forgery does not necessarily lead to the inference that the person in possession of it forged it; it is however perfectly valid for a court to draw the inference, as the only reasonable inference from all the facts in a case, that the person in possession of a forged document and who actually utters it either forged it or was privy to the forgery, and in that event a conviction on a count of forgery is proper".***

Thus the question is whether it was proved beyond all reasonable doubt that by the Appellant signing as a witness on 'P2' he aided his sister to commit the offence of forgery? The evidence on record shows that the Appellant did not deny that he signed 'P2' when PW1 was out of the country, and he admitted that PW1 did not ask him to sign as his witness. Does this evidence prove intention on his part to aid his sister?

I have already noted that a document can be signed anywhere in the world and sent to any country to be acted upon. Therefore the mere fact that the Appellant signed as a witness to PW1's purported signature on

its own does not establish that he was privy to the forgery. There was need for something more to prove that privity to the forgery. The Respondent in the submissions referred to the fact of the Appellant having placed a caveat on the property on no reasonable or legal basis as evidence of his intent. In cross examination the Appellant admitted having placed the said caveat, and he also testified that his sister granted him a Power of Attorney to administer Stand no 6887 when she left for the United Kingdom.

The execution of 'P2' was done in 1997, and the Appellant placed the caveat on the property on 6th September, 2002. This caveat was entered against the property after Mehrunisha Bhura the "donee" of the property had left for the United Kingdom, and had appointed the Appellant to administer the property by virtue of a Power of Attorney. The reason for registering the caveat is that Mehrushina Bhura owed the Appellant money.

In as much as I agree that the said debt was not secured by a pledge of the property for payment, and that the caveat had no legal basis for being entered, this does not establish any intent to aid Mehrushina Bhura in the forgery. Perhaps what it does establish is that no one could deal with the property without the Appellant's knowledge as caveator, and thereby protect Mehrushina Bhura's interest in the property.

Further looking at the fact that the document was executed in 1997, and the caveat was placed on the property almost five years later, this is too remote in establishing intent to aid in the forgery. The placing of the caveat could have been motivated by other factors that arose after the Appellant had the Power of Attorney to administer the property. The prosecution of an unlawful common purpose was therefore not established.

The other basis of finding that PW1 did not sign 'P2' was the evidence of the handwriting expert PW5. This witness testified that after he compared the disputed signature with the requested samples from PW1 and had concluded that PW1 did not sign 'P2', as the signature on that document was just a simulation of his signature meaning that it was a representation of his signature.

This witness in cross examination admitted that he did not obtain specimen signatures from PW1, and that the ones that were examined were merely availed to him. He stated that they do request specimen samples to be taken in their presence, and in this case as it was not done, there is no evidence authenticating the same. PW5 did not even tell the court how the specimen signatures were obtained.

In the case of ***SITHOLE V THE STATE LOTTERIES BOARD 1975 ZR 106*** it was held that;

> ***"The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors"***.

Therefore the lower court had a duty to come to its own conclusion based on the findings of the expert witness PW5 after evaluating the evidence. In view of the fact that PW5 testified that he did not obtain the specimen signatures from PW1 that were used to compare with the disputed signature on 'P2', this should have been a factor that the lower court

should have considered when it come to the conclusion that PW1 did not sign 'P2'.

I have pointed out that the provided specimen signatures in this matter were not authenticated, and therefore the basis upon which PW5 came to the conclusion that PW1 did not sign 'P2' was merely his conclusion, which did not establish beyond all reasonable doubt that PW1 did not sign the document. There was insufficient evidence to prove that fact.

In the case of ***AUGUSTINE KAPEMBWA V DANNY MAIMBOLWA AND THE ATTORNEY GENERAL 1981 ZR 127*** it was held that;

> ***"The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed: That:***
>
> ***"(a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or***
>
> ***(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or***
>
> ***(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or***

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

Having found that the lower court in its evaluation of the evidence did not take into account the fact that the provided specimen signatures for PW1 were not authenticated as it is not known how they were obtained, and the fact that there were other means by which 'P2' the Deed of Gift could have been sent to DW2, even if PW1 had suffered deportation, there was misdirection, and this is a proper case in which the findings of the lower court with regard to 'P2' being a forgery should be interfered with.

There was insufficient basis to conclude that 'P2' was in fact a forgery, and the court below erred it found that 'P2' was a forgery, and that the Appellant was privy to it. Ground 3 succeeds. Having found that there was insufficient evidence to establish that 'P2' was a forgery, the conviction in count 5 which is for the offence of perjury cannot stand as the count alleges that the Appellant gave evidence before the High Court that the Deed of Gift was genuinely signed by PW1 when in fact not. It follows therefore that ground 1 equally succeeds, as the totality of the evidence does not establish the forgery or that the Appellant was privy to it.

With regard to ground four, it was argued that the lower court erred when it found that 'P2' was a forgery when it was prepared by a lawyer who admitted having done so on oath. The forgery alleged in this matter was that the Appellant signed as a witness to PW1's signature on 'P2'. The issue was not about who had prepared 'P2', as rightly found by the

lower court, but about who executed it. There was no contention about DW2 having prepared 'P2'.

The dispute was on PW1 having signed it. DW2 admitted that he did not witness PW1 sign as donor of the property, as his evidence was that he sent the document for signing after he prepared it, a defence that was not successfully rebutted. As the issue surrounding the commission of the forgery revolved around who signed as PW1 on 'P2', ground 4 of the appeal has no merit, and it is dismissed.

The appeal having succeeded on grounds 1 and 3, the convictions on both counts 2 and 5 are quashed, and the sentence in the two count is accordingly set aside. The parties are informed of the right to appeal to the Court of Appeal.

DATED THE 17th DAY OF OCTOBER, 2017

Skaunda

S. KAUNDA NEWA
HIGH COURT JUDGE