IN THE HIGH COURT FOR ZAMBIA **HNA/33/2016**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE **APPELLANT**

AND

ANGEL MULENGA **RESPONDENT**

Before The Honourable Madam Justice M.C. Mulanda in Open Court at Ndola the .....day of....., 2017.

FOR THE APPELLANT : Ms. N.T. Mumba, Deputy Chief State Advocate, National Prosecutions Authority.

FOR THE RESPONDENT : Mr. Z. Kaela and Mr. G. Kalandanya, G.M. Practitioners.

JUDGMENT

CASES REFERRED TO:

1. **THE PEOPLE vs. JAPAU (1967) Z.R. 95.**
2. **MWEWA MURONO vs. THE PEOPLE (2004) Z.R. 207.**
3. **MILOSLAV vs. THE PEOPLE Appeal No. 049/2013.**
4. **PATRICK BRIAN BARKE (1977) 65 Cr. App. R. 287.**
5. **CHUBA V THE PEOPLE (1976) Z.R. 272.**
6. **KAMBAFWILE vs. THE PEOPLE (1972) Z.R. 242.**

7. **MOONGA vs. THE PEOPLE (1969) Z.R. 63.**
8. **JOHN NYAMBE vs. THE PEOPLE (1988-1989) Z.R. 110.**
9. **KALEBU BANDA vs. THE PEOPLE (1977) Z.R. 169.**
10. **GILBERT CHILEYA vs. THE PEOPLE (1981) Z.R. 33.**
11. **PETER YOTAMU HAAMENDA vs. THE PEOPLE (1977) Z.R. 184.**
12. **BARROW AND YOUNG VS THE PEOPLE (1966) Z.R. 43.**
13. **PRACTICE DIRECTION NOTE (1962) 1ALL ER 448 at page 1043.**
14. **THE PEOPLE V KOMBE JOSEPH CHAMPAKO (2010) Z.R. 25**
15. **THE PEOPLE v WINTER MAKOWELA AND ANOTHER (1979) Z.R. 290 at page 291.**
16. **DAY v REGINA (1958) R & N 731.**

LEGISLATION REFERRED TO:

1. **PENAL CODE Cap. 87, S. 347, 352.**
2. **CRIMINAL PROCEDURE CODE, Cap. 88, S. 206.**

This is an appeal from a decision of the Subordinate Court of the First Class sitting at Ndola in which the Respondent was acquitted of two counts of Forgery, Contrary to Section 347 and two counts of uttering a false document, Contrary to Section 352 of the Penal Code, Chapter 87, of the Laws of Zambia. Particulars

of offence in the first count alleged that, the Respondent, on the 7th January, 2010, at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, did forge a document namely; Agreement Form, purporting to show that the said form was prepared and signed by **TILAS KABENGELE** when, in fact, not.

In the second count, it was alleged that, the Respondent, on the 13th April, 2010 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, knowingly and fraudulently did utter a document namely Agreement Form Letter to **JOSEPH KAPEWELE**, a Senior Administrative Officer at Ndola City Council.

In the third count, the particulars of offence were that, the Respondent, on the 10th February, 2010, at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, did forge a document namely; a Letter of Consent to assign Plot number KS 4331, Kabushi, Ndola, purporting to show that the said Letter was prepared and signed by **TILAS KABENGELE,** when, in fact, not.

In the fourth count, it was alleged that the Respondent, on the 13th April, 2010, at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, knowingly and fraudulently did utter a document namely Letter of Consent to Assign Plot number KS 4331 Kabushi, Ndola to **JOSEPH KAPEWELE**, a Senior Administrative Officer at Ndola City Council.

The trial Court heard evidence from six prosecution witnesses and at the close of the prosecution's case, in its ruling dated 18th March, 2016, the Court found the Respondent with no case to answer and acquitted him of all the four counts. It is this decision by the trial Court that the Appellant has now appealed against.

The evidence adduced in the Court below by the Complainant, PW2, was that sometime in 2010, he got a loan of K10, 000.00 from the Respondent and he was to repay a sum of K15, 000.00. However, the Respondent only gave him a sum of K8, 000.00 instead of K10, 000.00, saying that K2, 000.00 was to be used for documentation.

The agreement was reduced into writing on a headed paper of "A and C Investments." PW2 indicated his particulars on the said document and pledged to pay back the K15, 000.00 within 30 days from the date of signing. He left the Certificate of Title of his Plot number KS 4331, Kabushi, Ndola, with the Respondent as security for the loan he got. The Certificate of Title was to return to the Complainant on completion of paying back all the money owed to the Respondent.

Before the expiry of the 30 days, the Complainant informed the Respondent that he was unable to pay the whole K15, 000.00. He, however, told him that he was only able to pay K5, 000.00 at that time and asked to pay the balance later and the Respondent agreed. Subsequently, the Complainant paid him K5, 000.00. The Complainant again paid the Respondent another K5, 000.00, bringing the total amount paid to K10, 000.00. He remained with a balance of K5, 000.00. Thereafter, the Complainant paid the Respondent a sum of K2, 400.00, leaving a balance of K2, 600.00 still outstanding. From there, there was no communication between the Complainant and the Respondent. Efforts by the Complainant to call the Responsdent or his friend, Davy Chishimba, failed as their phones were always switched off.

Sometime in 2010, the Complainant's wife told him that the said Davy Chishimba went to his house with another man and had asked to see the plan of the house. When the Complainant tried to enquire from Davy Chishimba why he wanted to see the plan of the house, he remained mute. A few months later the Complainant and the Respondent met, but nothing was discussed in respect of the balance of K2, 600.00 which was still outstanding.

In late 2011, the Complainant's wife again informed him that someone from Eco Bank, Kitwe, had gone to his house, number KS 4331 Kabushi, Ndola and claimed that the owner of the said house was the Respondent. The Complainant went to Ndola City Council to verify the claim. At the Council, he was told that his Certificate of Title was cancelled and that ownership of the house had been transferred to the Respondent. At Ndola Central Police Station where the Complainant went to report the matter, the Complainant was shown an Agreement Form purporting to have been entered into between the Respondent and himself, with a clause that if he failed to pay back the money borrowed, the house was to become the property of the Respondent. The complainant observed that the top part of the Agreement Form

was torn and did not have the inscription, "A and C" Investments" on top. It had instead, the name of the Respondent. He was further shown a Letter of Consent to Assign property number KS 4331 Kabushi, Ndola, to the Respondent. He denied that these two documents were prepared by him. He said that the signatures appearing on these two documents were not his. He told the Court that they were forged documents.

The complainant further testified that he was evicted from his house by Eco Bank as the Respondent had defaulted on a loan he had obtained from the Bank after using the house as collateral.

In cross examination, the Complainant said he would at times sign documents differently depending on his mood and state of health. He admitted that, on default of payment of the loan, the Accused (who is now the Respondent) was at liberty to advertise and sell the house. He said that the Accused, however, did not advertise the sale of the house to himself.

The signatures on the disputed documents were subjected to a forensic examination. According to the handwriting expert, PW5,

the disputed signatures were not signed by the Complainant. He concluded that they were forged documents. When cross examined by the Learned Defence Counsel, PW5 stated that although there are variations between the Complainant's submitted signatures, the said variations were within the acceptable limits. The handwriting expert further told the trial Court, in cross examination, that the Complainant's genuine signature was smooth, because it had no traumas of forgery.

After hearing this evidence, the trial Court, in finding the Respondent with no case to answer, stated that the fact that the Complainant could sign different signatures on different occasions depending on his mood or state of health, he cannot be trusted to sign in the same manner as he previously signed. In the circumstances, the trial Court dismissed the evidence of PW5, the handwriting expert. Relying on the decision in the case of **THE PEOPLE vs. JAPAU** [1], the Court found the prosecution not to have proved all the charges against the Respondent and it subsequently acquitted him.

Having been dissatisfied with the lower Court's decision, the State, which is the Appellant, has now appealed to this Court and filed one ground of appeal that:

> **"The trial Court erred in Law when it failed to give effect to the purport and import of Section 206 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia."**

In arguing this sole ground of appeal, Counsel for the Appellant submitted that for the Court to acquit under Section 206 of the Criminal Procedure Code, the Court should be satisfied that the case was not made out against the accused person "sufficiently" to require him to make a defence. She contended that although the Act does not define what "sufficiently" is, case law provides guidance on what the trial court should take into consideration when reaching the conclusion to acquit under Section 206. She cited the case of **MWEWA MURONO vs. THE PEOPLE** [2] where it was held that:

> **"A submission of no case to answer may properly be made and upheld**

(a) When there has been no evidence to prove the essential element of the alleged offence; and

(b) When evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."

Counsel further relied on the passage in the Magistrate Handbook (6th edition by E.J. Swarbrick) at page 214 as quoted by the Supreme Court in the case of **MILOSLAV vs. THE PEOPLE** [3] where the Learned Author stated that:

> **"At this stage, provided the evidence is not obviously defective, the magistrate should assume that the evidence for the prosecution will be accepted and he should ignore evidence militating against the prosecution case as it could, conceivably, be rejected. The magistrate, therefore, should not concern himself with the quality of the evidence by considering the veracity of the various witnesses and deciding which evidence to accept. Provided that there has been sufficient evidence adduced which, if accepted, would justify a conviction then the**

magistrate should rule that there is a case to answer."

Counsel also referred to the case of **PATRICK BRIAN BARKE** [4] where Lord Widgery, C.J said at page 288 as follows:

"It cannot be clearly stated that the Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks the witness is lying."

It was Counsel's submission that the trial Court deviated from the import and purport of Section 206 of the CPC, Cap. 88, when it only focused on the testimony of the Complainant as to his changing of his handwriting as justification to acquit the Respondent. She contended that at the close of the case for the prosecution, it was established that the Complainant did not sign the Agreement Form and the Letter of Consent to Assign. Further, that, the evidence of the Complainant was corroborated

by the evidence of PW5, the handwriting expert, who testified that the signatures on the two disputed documents did not belong to the Complainant.

Counsel further submitted that it was not the duty of the Court, at case to answer stage, to weigh the testimony of the Complainant and decide whether he was lying or not. According to Counsel, the duty of the trial Court after hearing the prosecution evidence was to assume that the Complainant's testimony was true in its totality and, then, decide whether, on that testimony, all the ingredients of the offence had been established. Counsel submitted that it can only acquit the accused if the prosecution evidence had been so discredited that no reasonable tribunal could safely convict on it.

It was her submission that on the totality of the evidence as adduced by the prosecution witnesses, the essential elements of the offence of Forgery were sufficiently proved by the prosecution. That, firstly, in respect of the Agreement Form, the Complainant testified that the document that the Respondent was relying on was different from the one he signed, in that the document he signed was on a headed paper of "A and C Investments" and it

was of a different colour from the one the Respondent availed to the Police. Further, that, there was no explanation as to why the top part of the document that the Respondent was relying on was torn. According to Counsel, the trial Court did not address its mind as to why the document in question had its top part torn. She submitted that the inference that can be drawn, therefore, was that it was a forged document.

Counsel submitted that the trial Court did not state in its ruling why it chose to disbelieve or reject the opinion of PW5, the handwriting expert. She referred to the case of **CHUBA V THE PEOPLE** [5] where the Supreme Court held that:

> **"The evidence of a handwriting expert is an opinion only and the matter is one on which the court has to make a finding...." .....the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be a guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it."**

She submitted that a perusal of the trial Court's ruling shows that the trial Court completely failed to make a finding on the opinion evidence of PW5, as required by the cited case. Further, that, the Court below completely disregarded the "very strong guide" of the handwriting expert in arriving at the conclusion that the prosecution had failed to raise a *prima facie case* against the Respondent.

Counsel contended that the fact that the Complainant signed differently on some documents, which PW5 still found to have been signed by him, shows the reliability of his evidence. It was her contention, further, that the trial Court did not properly analyse the totality of the prosecution evidence. To that end, Counsel submitted that had the trial Court properly analysed the evidence, it would have found that the prosecution had sufficiently made out a case against the Respondent and would thus have found him with a case to answer.

It was Counsel's submission in conclusion that on the totality of the evidence on record, the failure by the trial Court to find the Respondent with a case to answer, was a misdirection. She urged

the Court to so find and reverse the trial Court's decision to acquit the Respondent.

In response to the submissions on behalf of the Appellant, Learned Counsel for the Respondent submitted that Section 206 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, provides guidance to a court as to when or how an Accused may be found with no case to answer and consequently acquit him. He further submitted that for an accused to be found with no case to answer under S. 206, the prosecution must have failed to make a case against him, sufficiently to require him to make a defence. It was his submission that although the Act does not specifically provide how the Court is supposed to reach such a conclusion, precedent had shown what factors are needed to be taken into consideration. Counsel noted that some of the factors the Court has to take in consideration are: failure to prove vital ingredients of the offence; where the evidence of the prosecution has been so discredited; and lack of corroboration, among other considerations. He contended that the Court has discretion when reaching the conclusion that an Accused has no case to answer, after taking into account the circumstances of the case. He referred to the case of **MWEWA MURONO vs. THE PEOPLE** as

authority for the submission. It was his submission that the trial Court was on firm ground when it found the Respondent with no case to answer.

Counsel submitted that it is a settled principle of criminal law that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies on the prosecution from beginning to end, as was held in the **Mwewa Murono Case**, and that the standard of proof is beyond reasonable doubt. The cases of **KAMBAFWILE vs. THE PEOPLE** [6] and **MOONGA vs. THE PEOPLE** [7] were also cited as authorities for the submission. He contended that the prosecution failed to prove essential ingredients of the offences the Accused was charged with. Counsel referred to the evidence of PW3, Daphne Soko Chabu, in cross examination, that she prepared the Assignment at her office and was executed by the Complainant before her secretaries. This evidence, according to Counsel, was proof that the document in question was never forged. It was his contention that the prosecution neglected to call PW3's secretaries to disprove the evidence of PW3 that the Assignment was executed by the Complainant before them. He further contended that this failure by the prosecution to call the

secretaries must be resolved in favour of the Accused as was held in the case of **JOHN NYAMBE vs. THE PEOPLE** [8]. In that case the Supreme Court held, *inter alia,* that:

> **"Where evidence available only to the police is not placed before the Court it must be assumed that had it been produced it would have been favourable to the accused."**

He further submitted that the failure to call the secretaries to PW3 amounted to dereliction of duty on the part of the State. The cases of **KALEBU BANDA vs. THE PEOPLE** [9], **GILBERT CHILEYA vs. THE PEOPLE** [10], and **PETER YOTAMU HAAMENDA vs. THE PEOPLE** [11] were cited as authorities for the submission.

Counsel noted that the Accused was not charged with the forgery of the Assignment. He submitted that the failure to charge him with the said offence only goes to show that the Complainant executed the Assignment in question. He further noted that the Appellant conceded in its submissions that the Complainant appends different signatures, but offered explanations for the differing signatures. It was Counsel's submission that the

explanation for the difference was irrelevant as what was crucial was the fact that the complainant signs differently each time he signs. He argued that the evidence of the handwriting expert was in the circumstances, rendered irrelevant as the Complainant signs differently depending on his mood or state of health.

Counsel submitted that the evidence of the complainant cannot be said to have been corroborated by the evidence of the handwriting expert, because the Complainant changes his signatures each time he appends his signature. He contended that the various signatures of the Complainant on various documents shown in the Court below were clearly different.

He submitted that the trial Court was on firm ground when it found that the Complainant had signed the Agreement which was the true and correct reflection of what was agreed between the parties. It was Counsel's submission that what was in dispute was the fact that the agreement form was torn on top and that the dispute on the signature was not raised until trial commenced. He submitted that it was, therefore, an afterthought on the part of the Complainant. Further, that the prosecution failed to lead evidence in support of the allegation that the

Agreement Form was forged, other than merely alleging that the Agreement that the Complainant signed was on a headed paper. He submitted that the prosecution failed to produce any copy of the alleged true Agreement Form on a headed paper to support their claim.

Counsel for the Respondent contended that the trial Court was on firm ground when it dismissed the findings of the handwriting expert, because the witness did not examine documents signed by the Complainant prior to the alleged commission of the offence, such as National Registration Card and other old documents. These documents, according to Counsel, would have helped to determine the reliability of the handwriting expert's evidence. He submitted that failure to submit the NRC and other old documents was dereliction of duty which ought to be resolved in favour of the Accused. Counsel contended that the prosecution, both before the trial Court and in its submissions, misled the Court that the said documents were submitted for forensic examination as only the specimens taken at the Police Station and the disputed documents were handed over to the handwriting expert for examination.

He maintained that the prosecution evidence was so unreliable that the trial Court could not convict the Accused. He referred to the case of **BARROW AND YOUNG VS THE PEOPLE** [12] where it was held that:

> **"A submission of no case to answer may properly be made and upheld when there has been no evidence to prove the essential element of the alleged offence and when evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."**

The case of **THE PEOPLE VS JAPAU** was also relied on by Counsel. The words of Lord Lane, C.J in **Practice Direction Note (13)** were further relied on. Lord Lane stated *inter alia* that:

1. *If there is no evidence that the crime has been committed by the Defendant, there is no difficulty. The Judge will of course stop the case.*
2. *The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
3. *Where the Judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could not*

properly convict upon it, it is his duty, upon submission being made, to stop the case.

From the foregoing authorities, Counsel submitted in conclusion, that the trial Court was on firm ground by finding that the prosecution failed to make a case against the accused and acquitted him in accordance with Section 206 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, and that, in the circumstances of the case, the trial Court did not fail to give effect to the purport and import of the said Section 206.

I have considered the evidence, arguments and submissions as well as authorities cited. It is not in dispute that following the lending of a sum of K10,000.00, by the Respondent, to the Complainant, an agreement was signed between the parties that the Complainant was to pay the Respondent the principal amount plus interest of K5, 000.00, bringing the total amount to K15, 000.00. It is also not disputed that accordingly, the agreement form was prepared and signed by the parties. It is equally not in dispute that the Complainant used his house, Plot No. KS 4331 Kabushi, Ndola, as collateral for the debt and, consequently, surrendered the Certificate of Title to the

Respondent, and that ownership of the house was later changed from the Complainant to the Respondent.

It is not further disputed that the alleged forged Agreement Form was uttered to PW1, a Senior Administrative Officer, Deeds Registry, at Ndola City Council. It is also not in dispute that the alleged forged Consent to Assign property number KS 4331 Kabushi, Ndola, to the Respondent, was uttered to PW3, Counsel who prepared an Assignment in respect of the said property.

What is in dispute, however, is whether the agreement form, "P6", was the same as the one executed by the parties and, in relation to this, whether it was the Complainant who prepared and signed, "P2", the Letter of Consent to assign Plot number KS 4331 Kabushi, Ndola, or not.

According to the evidence on record as adduced by the Complainant, he denied that the signatures appearing on the Agreement Form and the subsequent Letter of Consent to Assign Plot number KS 4331 Kabushi, Ndola, was his. He told the trial Court that the Agreement Form he had signed when he obtained the loan from the Respondent was on a headed paper of "A and C

Investments" unlike "P6" which was torn on top and had the names of the Respondent. The Complainant admitted that on default of payment of the loan, the Accused was at liberty to advertise and sell the house. He said that the Accused, however, did not advertise the sale of his house to himself. He denied preparing a letter of Consent to assign his house to the Respondent.

When cross examined by the Defence, the Complainant said he would at times sign documents differently depending on his mood and state of health. The signatures on the two disputed documents were subjected to forensic examination by a handwriting expert, PW5. After examining the documents, PW5 told the trial Court that the disputed signatures were not signed by the Complainant. He concluded that they were forged documents. When cross examined by the Learned Defence Counsel, PW5 stated that although there were variations between the Complainant's submitted signatures, the said variations were within the acceptable limits. The handwriting expert further told the trial Court in cross examination that the Complainant's genuine signature was smooth, because it had no traumas of forgery.

On the evidence by the Complainant that he would at times sign different signatures depending on his mood or state of health, the trial Court opined as follows at page 6 of the Ruling:

> **"When a witness gives different signatures on different occasions because of one form of physical sickness or mood, can he be trusted on a future signature, as to whether it was the same as one he made in the past or not? In the case of The People vs. Japau cited above the answer is no."**

The trial Court further dismissed the evidence of the Handwriting Expert, PW5, stating that it could not believe his findings based on the Complainant's signatures which were not consistently signed in the same manner. In finding the Accused with no case to answer, the trial Magistrate stated at page 6 and 7 of the Ruling that:

> **"I therefore find that the State have not proved the charges in the indictment before the Court on the prima facie basis and I accordingly find accused with no case to answer in connection with (1) Forgery in Count 1 and 3 and uttering a**

false document in count 2 and 4, Contrary to Section 347 and 352 of the Penal Code Cap. 87 of the Laws of Zambia, and acquit him of all the four counts in the indictment."

The question that requires determination by this Court is whether the evidence adduced by prosecution witnesses failed to make out a case against the accused person sufficiently to require him to make a defence.

The starting point in considering this question is Section 206 of the Criminal Procedure Code Cap. 88, of the Laws of Zambia which provides that:

"If, at the close of the evidence in support of the charge it appears to the Court that the case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him."

Counsel for both parties, are in agreement that the Act does not define the meaning of the word "sufficiently" in S. 206. Lisimba,

J, in the case of **THE PEOPLE V KOMBE JOSEPH CHAMPAKO** [14], stated his understanding of the words "sufficiently to require him to make a defence" in Section 206 of the CPC in the following passage:

> **"The section uses the words "sufficiently to require him to make a defence". My understanding of this section is that at the stage of the close of the case for prosecution, the Court is not required to find the prosecution has proved its case beyond reasonable doubt; neither is it supposed to determine the issue of the reliability or otherwise of the witnesses. These are matters to be determined by the Court in its composite role both as a trier of fact and of law, after a careful evaluation of evidence. I have been guided on this point by the pronouncement of Lord Widgery, C.J., in the case of R. v Barker (1977) 65 Cr. App 12. 287, where it was stated as follows:**
>
> ***"It cannot be too clearly stated that the judge's obligation to stop a case is an obligation which is concerned primarily with***

those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh all the evidence, to decide who is telling the truth, and to stop the case merely because he thinks that the witness is lying."

In this respect it is appropriate to refer to "The Practice Note of [1962] 1ALL E.R. 448" which is in the following terms:

"The decision (to uphold or reject the submission) should depend not so much on whether the adjudication tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict."

In this respect the views expressed in Miller v Minister of Pensions [1947] 2 ALL E.R. 372, are also instructive. In that case it is stated as follows:

"A prima facie case does not mean proving each and every ingredient of the offence

> ***charged, if there is evidence to prove one of the elements then there is a prima facie case."***

In construing the meaning of the same words "sufficiently to require him to make a defence" in Section 206 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia , Muwo, J, in the case of **THE PEOPLE V WINTER MAKOWELA AND ANOTHER** [15] cited, with approval the case of **DAY V REGINA** [16], where **Spencer Wilkinson, CJ** stated that:

> **"The words a case made out sufficiently to require him (ie the accused) to make a defence cannot be equated with a case sufficient to warrant a conviction.....and if the crown has made out a prima facie case the Court is entitled to call for the accused to make a defence".**

In the present case, the Complainant told the Court that "P1", the Agreement Form and the Letter to Assign Plot number KS 4331 Kabushi, Ndola, were not signed by him. His evidence was supported by the evidence of PW5, the Handwriting expert, who

found the signatures on the two said documents not to have been signed by the Complainant. PW5 testified that although there seems to be variations in how the Complainant signs his signatures, the said variations were within the acceptable limits and that they did not have any traumas of forgery. My understanding of the findings of the Handwriting Expert is that although the signatures of the Complainant may look different to an ordinary eye, they were substantially signed by him as the variations in his signatures were within the acceptable limits. He told the trial Court that the Complainant's signatures did not have traumas of forgery. I do not, therefore, accept the submission by Counsel for the Respondent that the evidence of PW2 and PW5 was discredited in cross examination.

Further, a perusal of the record does not support the claim by Counsel for the Respondent that PW3 said she saw the Complainant executing the Assignment before her secretaries. What she said at page 30 of the record of proceedings, when cross examined, was as follows:

> **"I did not possibly witness whether the assignment was signed by the complainant**

and his witness at our Firm. It is possible that our support staff witnessed the signing of the said assignment at the Firm but the problem which they raised was that they were not able to remember because it took place 4 years ago."

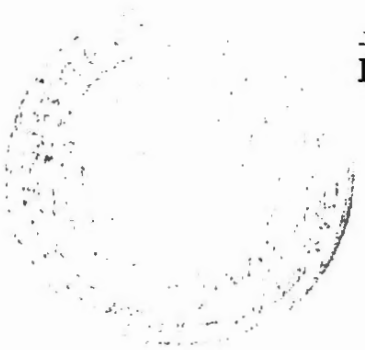
From the foregoing response by PW3, even if her support staff had been summoned as witnesses, their evidence would not have been helpful since they could not remember seeing the Complainant executing the Assignment. It cannot, therefore, be said that there was dereliction of duty on the part of the State.

It appears to me that the trial Court fell in grave error when it failed to distinguish the difference between the words "a case made out sufficiently to require him to make a defence" and the requirement that the prosecution proves its case against the Accused beyond reasonable doubt. The latter is for the trial Court to determine *"in its composite role both as a trier of fact and of law, after a careful evaluation of evidence"* as was observed by Lisimba, J, in the **CHAMPAKO CASE**.

I am satisfied that a prima facie case was made out against the Accused who is now Respondent in this matter, as the evidence

was sufficient for the Court to have found the Accused with a case to answer and put him on defence on all the four counts. Accordingly, the appeal is allowed. I order that this matter be referred back to the Subordinate Court for retrial before another Magistrate.

DATED AT NDOLA THIS 24th **DAY OF** April **2017.**



M.C. MULANDA.
JUDGE.