IN THE HIGH COURT FOR ZAMBIA **HTA/ 08/2017**

HOLDEN AT MONGU

(CRIMINAL JURISDICTION)

BETWEEN:

BRIAN MUTOIWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Before the Hon. Mr Justice W. S. Mweemba in Open Court on the 21st day of December, 2017 at Mongu.

For the Appellant: Mr. Inambao – Messrs ICN Legal Practitioners.

For the State: Mr C. Moonga & Mr M. Sakala –State Advocates Anti-Corruption Commission

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JUDGMENT

CASES REFERRED TO:

1. ***Chuba v the People (1976) ZR 136.***
2. ***Chabala v the People (1976) ZR 14 S.C***
3. ***Mushemi v the People (1982) ZR 71.***
4. ***Joseph Mulenga And Albert Phiri v The People (2008) ZR 1 Vol 2.***
5. ***Adam Berejena v The People (1984) ZR 19***
6. ***Anderson v The People (1968) ZR 46***

STATUTES AND OTHER WORKS REFERRED TO:

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

This is an appeal by the Appellant against the Judgment of the Subordinate Court of the First Class at Mongu which was delivered on the 7th day of April,

2017 in which the Appellant was convicted on two counts. On Count One he was convicted of the offence of **Forgery of a Judicial Document** contrary to **Section 349 of the Penal Code Chapter 87 of the Laws of Zambia**. On Count Two, he was convicted for the offence of **Uttering of a False Document**, contrary to **Section 352 of the Penal Code, Chapter 87 of the laws of Zambia**.

The particulars of the offence on Count One allege that the Appellant on dates unknown but between 1st May, 2014 and 31st December, 2014 at Mongu in the Mongu District of the Western Province of the Republic of Zambia, did forge a document namely a Warrant of Committal to undergo sentence for Mubita Situmbeko Moyo by purporting that the said document was signed by Honourable Webster Milumbe when in fact not.

It is alleged on Count Two that the Appellant on dates unknown but between 1st May, 2014 and 31st December, 2014 at Mongu in the Mongu District of the Western Province of the Republic of Zambia did knowingly and fraudulently utter a False document namely warrant of Committal to undergo Sentence for Mubita Situmbeko Moyo to Nawa Nalumango a prison officer at Mongu Central Prison.

The Appellant filed a Notice of Appeal on the 7th day of April, 2017 in which he advanced three grounds of appeal as follows:

1. That the trial Court erred in law when it found that the Prosecution proved their case beyond all reasonable doubt when the conviction was not supported by weight of evidence.
2. That the trial Court erred in Law and fact when it held that the Appellant did forge a committal warrant against the weight of evidence.
3. The trial Court erred in Fact and law when it held that the Appellant uttered the forged committal warrant when in fact not.

I have carefully perused the case record and analyzed the Appellants grounds of Appeal as well as the Respondent's Grounds of Response. In determining this appeal the grounds I find to be relevant and of merit are Grounds two and three.

This is because ground one raised the issue that the trial Court erred in law when it found that the prosecution proved their case beyond all reasonable doubt when the conviction was not supported by weight of evidence, an issue which has been dealt with in both Grounds 2 and 3.

Counsel for the Appellant argued ground two as follows. He stated that the trial Court erred in law and fact when it held that the Appellant did forge a committal warrant against the weight of evidence.
He also stated that the offence of forgery was not proved beyond reasonable doubt and the Court fell into error when it convicted the Appellant against the weight of evidence before it.
According to Counsel, for such an offence to stand there must be no doubt as to who actually forged the document in question and the state had not brought any witness to attest to the fact that the Appellant was seen forging the document. Instead it relied on the evidence of one Thomas Phiri a handwriting expert.

Counsel contended that a Court was not obliged to follow expert evidence as gospel truth because it merely guided the Court. That the expert failed to guide the Court on how he eliminated the handwriting samples of Boyd Likando or that of Webster Milumbe.

Counsel cited the case of **CHUBA V THE PEOPLE (1)** where the Supreme Court stated that:

> ***"(i)The evidence of a handwriting expert is an opinion only and the matter is one on which the court has to make a finding. In addition to his opinion the expert should place before the court all***

the materials used by him in arriving at his opinion so that the court may weigh their relative significance.

(ii) The principle is that the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be a guide."

He also added that the signature of A2 which was purportedly forged kept changing continuously even from a layman's perspective as was shown by the committal warrant for Namushi Nyambe, Mubita Waluka and Situmbeko Mubita Moyo which were all produced as P6.

In response, Counsel for the Respondent argued that the trial Court was on firm ground when it held that the Appellant forged a judicial document and the same is not against the weight of the evidence.

That in arriving at a decision she began by establishing that the judicial document in contention was forged and then considered the evidence of a handwriting expert whose evidence was that the signature on the judicial document purporting to be that of Webster Milumbe was forged by the Appellant.

It was submitted that the trial Court demonstrated that she had warned herself not to place total reliance on the opinion of an expert and she even cited **CHUBA V THE PEOPLE (1).** That she also analysed the forged document and compared it with the original warrant to undergo sentence of imprisonment signed by Webster Milumbe and arrived at her own conclusion.

I also note from her judgment that in her analysis she stated as follows:

"As demonstrated by A1 via the attachments to P8, A2's signing is not consistent. It varies from time to time. Thus prima facie mere examination with the naked eye can tempt one to conclude that the signature on P2 is A2's. However, I have observed that the

signature is, as asserted by A2, not smooth. On the letter identified in Court by A2 as the letter 'b' it is clear to see that whoever signed did break off or stop and then continued signing. This feature was characteristic of simulation, that is to say whoever signed was trying to mimic the way A2 signs. All the signatures in the exhibits attached to P8 albeit slightly different are smooth, a clear indicator that they were signed with confidence and there was no perfection sought."

I have considered the arguments on ground two. In my view the trial Court was on firm ground when it warned itself of the fact that total reliance could not be placed on the opinion of an expert and that this could not be substituted for the judgment of the Court.

Moreover her decision to analyse the forged document and compare it with the original warrant to undergo sentence of imprisonment signed by Webster Milumbe to arrive at her own conclusion indicates that she went an extra step and did not convict solely on the evidence of the expert.

As quoted by Counsel for the Respondent she stated on pages J39 to J40 that:

"It is clear from the evidence before me that A1 either forged P2 or was privy to its forgery and in accordance with this Supreme Court decision ought to be found guilty of forgery. I find that there is no other reasonable inference to be drawn from the facts therein."

Regarding the drawing of inferences I find the case of **CHABALA V THE PEOPLE (2)** to be instructive. The Supreme Court stated that:

"Involved in this statement of the law are matters concerning the general principles applicable to inferences in the criminal law... The inference must be the only reasonable inference."

I therefore find that the trial Court was on firm ground when she arrived at her own conclusion by relying on the only reasonable inference from the facts and evidence before her which made her conclude beyond reasonable doubt that it was the Accused person that forged the judicial document contrary to **Section 349, cap 87 of the Laws of Zambia**.

On ground three it was submitted by Counsel for the Appellant that the only testimony that tried to implicate A1 was that of PW3 James Mulembe and PW5 Imbuwa Nawa Nalumango who stated that A1 took the disputed warrant P2 to prison on the material day.

According to Counsel these witnesses from their very demeanor were of doubtful credibility and were not to be relied upon. Further that they were witnesses with an interest to serve as they were suspects in the manner they released the convict Mubita Situmbeko Moyo.

Counsel for the Appellant based his argument of PW3 and PW5's credibility on the case of **MUSHEMI V THE PEOPLE (3).**

In response to this, Counsel for the Respondent stated that the trial Court was on firm ground when it held that the Appellant uttered the forged judicial document as the prosecution presented cogent evidence establishing this.

It was stated that the trial court relied on the evidence of the two prison officers who stated that A1 went and uttered the forged judicial document to them when he went to prison. According to Counsel the trial Court addressed her mind to the possibility of the two having an interest to serve and went to great lengths to establish that this was not the case herein.

In addition to this the Court also relied on the circumstantial evidence on record to prove this point. That she considered the events that had occurred in A2's chambers where A1 when asked whether he had taken the false judicial document to Mongu correctional facility remained silent in the presence of Boyd Likando **PW1, PW2** and **PW5** and A2.

That she also noted that the Appellant did not challenge their testimonies during cross examination.

In my view the trial Court was on firm ground when she found that A1 uttered the false judicial document to both **PW3** and **PW5** at Mongu Correctional facility. Apart from the arguments set out by Counsel for the Respondent I am satisfied of this because of the way she analyzed the evidence and addressed her mind to the pertinent issues that were raised on the allegation that PW5 and PW3 were suspect witnesses and falsely accused the Appellant of uttering the warrant.

I agree with the trial Court that there was no way that the two **PW3** and **PW5** the prison officers could have been suspects in the matter as if they were, I believe they would not even have gone to the trouble of following A2 to the lodge just to enquire if the warrant had been signed by him if they were suspects in the matter. In my view it would have been sufficient for them to release the person from custody on the authority of the second warrant that was brought by the Appellant.

In addition on the issue of the Appellant failing to challenge the testimonies of **PW1, PW3, PW5** and A2 on the incidence that occurred in A2's chambers during cross examination I have relied on the case of **JOSEPH MULENGA AND ALBERT PHIRI V THE PEOPLE (3)** where the Supreme court held that:

> **"cross examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences the accused must challenge these facts which are disputed."**

The fact that A1 did not cross examine all these witnesses on this particular aspect indicates that he remained silent over a straight forward issue which implicated him as the one that uttered the warrant to PW3 and PW5 at the correctional facility.

I agree with the trial Court on this point when she stated that:

> ***"in light of the foregoing evidence therefore it would not be farfetched to conclude that A1 could not react to the question asking him where he found P2 because he was the source. Had it been true that he had nothing to do with the warrant from the onset, he would have, in no uncertain terms, denied its knowledge during the meeting in A2's chambers."***

I also note that the trial Court addressed her mind to a further issue where the Appellant A1 refused to give **PW3** and **PW5** the phone number of A2. This evidence was not disputed by Appellant who had exchanged numbers with A2 when he just arrived at the Mongu Subordinate court as was the common practice by Magistrates of exchanging numbers with the person responsible of having custody of all criminal records such as the Appellant.

Moreover she also addressed her mind to the fact that if the Appellant had given them the phone number, this would have immediately blown his cover and the prison officers were not even going to release the convict on the warrant uttered by him.

According to the trial Court this case had both direct and circumstantial evidence to prove that A1 took the warrant P2 to prison, a finding I agree with.

In the circumstances I therefore find that the trial Court was on firm ground when she convicted the Appellant of uttering a judicial document contrary to **Section 352 of the Penal Code Cap 87 of the Laws of Zambia**.

The appellant also advanced a fourth ground of appeal against the sentence that was imposed by the trial Court. It was argued that the trial Court erred in law and in fact when she imposed a severe sentence of 3 years imprisonment without noting that the Appellant was a first offender who deserved the leniency of the Court.

Moreover, that this sentence was wrong in principle as it did not reflect the leniency that should be accorded to first offenders. Counsel invited this Court to consider a suspended sentence.

I have considered these arguments on the sentence and in arriving at my decision I have noted the decision of the Supreme Court in the case of **ADAM BEREJENA V THE PEOPLE (4)** where it was held that:

> **"An appellate court may interfere with a lower courts sentence only for good cause. To constitute good cause, the sentence must be wrong in law, in fact or in principle or it must be so manifestly excessive or so totally inadequate that it induces a sense of shock or there must be exceptional circumstances as to justify interference."**

Still on the issue of an appellate court interfering with a trial courts sentence, in the case **of ANDERSON V THE PEOPLE (5)** the High Court held that:

> **"An appellate Court may only override the discretion as to sentence vested in the trial court when the discretion is exercised on a manifestly wrong basis.**
>
> **If the trial Court exercises its sentencing discretion on a manifestly wrong basis, the Court of appeal has power to fix an appropriate sentence."**

I have also considered the fact that the Appellant was convicted on two counts whose maximum sentence is 7 years imprisonment each is something to be considered.

Section 347 of the Penal Code, cap 87 of the Laws of Zambia which creates the offence of forgery of a judicial document and sets out its punishment states that:

"Any person who forges any judicial or official document is liable to imprisonment for seven years."

Whilst **Section 352 of the Penal Code Cap 87 of the Laws of Zambia** which provides for the offence of uttering false documents states that:

"Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind, and is liable to the same punishment, as if he had forged the thing in question."

Applying the aforementioned authorities to this case, I am not satisfied that the lower Court exercised its sentencing discretion on a manifestly wrong basis, or that the sentence imposed was wrong in law and in principle for me to interfere with it.

I am also satisfied that the sentence of 3 years imprisonment on count one and 2 years on count two which sentences were ordered to run concurrently was meted out fairly considering the maximum punishments for the two counts as outlined above.

The appeal is therefore dismissed in its entirety.

Delivered at Mongu this 21st day of December, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE