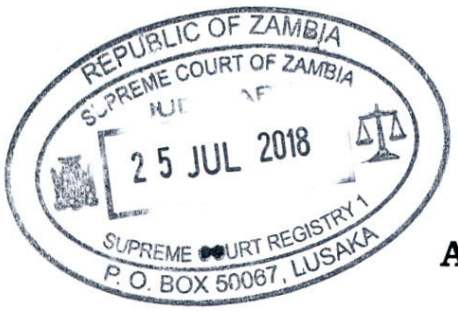
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 82/2017**

HOLDEN AT KABWE

(Criminal Jurisdiction)



BETWEEN:

CHANDA SIMWABA **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: Mambilima CJ, Wood and Malila, JJS.

On 10th April, 2018 and 25th July, 2018.

For the Appellant: *Mrs L. Mushota of Lillian Mushota & Associates and Mrs Mbaluku of Mbaluku & Company*

For the Respondent: *Mrs M. Kapambwe - Chitundu, Deputy Chief State Advocate - National Prosecution Authority*

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

Cases Referred to:

1. *Harris v DPP [1952] AC 694*
2. *R. v Z [2009] EWHC 336*
3. *Sensenta v The People (1976) Z.R. 184*
4. *Sithole v State Lotteries Board (1975) Z.R. 106*
5. *Charles Ogbonnia Nwume v The People (1980) Z.R. 238*
6. *Ngoma v The People (1978) Z.R. 369*
7. *Kazoka v. The People (1972) Z.R. 251*

8. *Charles Phiri v The People (1973) ZR 160*
9. *Simon Malambo Choka v The People (1978) ZR 243*

Legislation Referred to:

1) *Sections 342 and 347 of the Penal Code Cap 87 of the Laws of Zambia*

Other Works Referred to:

1) *Archbold Criminal Pleading Evidence & Practice 42nd Edition at page 1525*
2) *Paragraph 606. Vol. 11(1) of Halsbury's Laws of England 4th Edition*

The appellant was charged with two counts in the subordinate court. The first count, of which she was acquitted, was giving false information to a public officer contrary to section 125 (a) of the Penal Code. The second count, of which she was convicted, was forgery contrary to section 342 and 347 of the Penal Code. She appealed to the High Court against her conviction and sentence of one year simple imprisonment. The High Court dismissed her appeal against both. She has now appealed to this Court.

The particulars of the offence for which she was convicted allege that the appellant between 16th June, 2007 and 30th June 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, with intent to defraud or deceive, did forge a false document, namely title deed No. 66790 for Stand No. 3612

Lusaka, by purporting to show that it was genuinely issued and signed by authorized signatories at Ministry of Lands when in fact not.

The evidence that was adduced in the subordinate court is relatively simple to discern. The appellant, who had been previously widowed, was married to a Colonel in the Zambia National Service by the name of Edward Freedom Simwaba *(hereinafter called 'the complainant').* It is necessary to point out early in this judgment that the prosecution of the appellant was based, to a large extent, on a complaint the complainant made to the police in connection with the alleged forgery prior to his death and also, on the handwriting expert's evidence of the writings on the lease attached to the certificate of title in issue.

The complainant was a beneficiary of the Presidential Housing Initiative Scheme. On 2nd May, 2006, he was offered a house known as No. 1 Njoka Road Olympia Park on Stand No. 3612, Lusaka as a sitting tenant. The consideration was K9,000,000.00 (K9,000.00). He paid for it through monthly installments, with the last payment being made on 16th February, 2007.

The complainant started having marital problems with the appellant and they eventually divorced in the Local Court on 30th September, 2008.

He stated in his complaint to the police that he had initially agreed to a joint tenancy but had a change of heart and hid the letter he had addressed to the Ministry of Lands in the house. The complainant did not remember taking the letter to the Ministry of Lands. He further stated that the appellant took the letter to the Ministry of Lands, forged his signature on the lease and collected the title deeds from the Ministry of Lands without his knowledge.

PW1, the handwriting expert, testified that he examined Certificate of Title No. 66790 for Stand No. 3612 bearing the disputed signature alleged to have been signed by the complainant. He also examined specimen samples of signatures from the complainant, the appellant, PW2 and DW3. He concluded that there were dissimilarities which showed that the complainant did not append his signature to the document as he did not sign like that and that the specimen signatures for the appellant were very

similar to the disputed writing. He therefore concluded that it was a mere forgery.

According to the appellant's evidence, the complainant asked her when he was applying for title deeds to be a joint owner of the house. She had earlier on, in 1994, been retrenched from Zambia Railways Limited. She used her benefits to extend the house. Due to the extensions she had made to the property, the complainant suggested that she should be made a joint tenant or a joint owner. One day, they went together to the Ministry of Lands as he wanted her to be included on the title deeds. At the Ministry of Lands, they saw Idah Chipili who referred them to Hellen Mwanza (DW4). Hellen Mwanza told them to write an application. Hellen Mwanza gave the complainant a plain piece of paper on which he addressed a letter to the Ministry of Lands asking the Ministry of Lands to include the appellant on the title deeds. In her evidence in chief, the appellant does not specifically state that her husband signed the letter in the presence of Hellen Mwanza. After the letter was written, the earlier lease issued in 1997 in the sole name of the complainant was cancelled and the Ministry of Lands issued

another offer letter in the joint names of the appellant and the complainant sometime between October 2006 and January 2007. The appellant's evidence goes on to state that she signed the lease and that the complainant signed it as well. Their signatures were witnessed by Grace Tembo and Mulenga Matandiko. Grace Tembo, whom she described as her former tenant and one who had an affair with the complainant, witnessed her signature while Mulenga Matandiko (DW3) witnessed the complainant's signature. Mulenga Matandiko is the appellant's elder sister with whom they had been living for five years. She testified that two other properties in Kanakantapa and Libala were held jointly with the complainant. The appellant denied that she had forged any document and instead accused the complainant of wanting to deprive her of the benefit of the house when he married a younger wife. She had refused to move out of the house because of the contribution she had made. She admitted in cross examination that the complainant never signed letters after writing them. She denied that she had forged any documents and instead blamed the complainant for leaving her and marrying another woman six months after getting his pension. In cross-examination she told the court that she had

married the complainant in 1994. Prior to that she had had been married to her first husband who was now deceased. They had three children with her late husband. Later on, in cross examination, she stated that the complainant was framing her in order to deny her the house. She told the court that the complainant had the habit of not signing his letters after writing them. She admitted collecting the title deeds but explained that she was entitled to do so as a joint tenant.

The appellant's third witness was her sister, Mulenga Matandiko, DW3. She testified to the effect that she was the complainant's sister in law and had signed as a witness to the complainant's signature on the certificate of title at the Ministry of Lands and then she left. She insisted in cross-examination that she witnessed the complainant's signature at the Ministry of Lands after being given a lift by the complainant with the accused to the Ministry of Lands. She also explained that she had initially been asked to witness the appellant's signature but was advised not to do so as she is her sister.

DW4, a retired civil servant, is the appellant's other sister. She was a typist at the Ministry of Lands at the material time. She told the court in examination in chief that sometime in 2006, the complainant went to her office at the Ministry of Lands and told her that he wanted the appellant to be on his title deeds. DW3 told him the procedure to follow. The following day the complainant went to her office with the appellant. DW3 took them to see the Lands Officer who advised him to write a letter to the effect that he wanted the appellant to be a joint tenant with him. She was not aware if the letter was ever written.

DW6 also corroborated the appellant's evidence that the complainant had told her that he was at the Ministry of Lands with the appellant to sign the lease for title deeds to be issued to them. She however conceded in cross-examination that she had not seen the complainant sign the lease.

The magistrate discounted most of the appellant's evidence including that of her witnesses some of whom she treated as having an interest to serve, such as DW3, who was her sister and who had at one time lived with her. DW3 was alleged to have witnessed the

complainant's signature on the title deeds. She discounted the evidence of DW4 who was also her sister who had worked at the Ministry of Lands at the material time. The magistrate found that DW3 and DW4 were shielding the truth and that in certain portions of their evidence they were strangers to the truth.

She disbelieved the appellant's evidence that Grace Tembo witnessed her signature and came to the conclusion that Grace Tembo was a figment of her own creative mind and simply did not exist otherwise she would have testified on her behalf. She also wondered how the title deeds ended up with the appellant's advocates without the complainant being aware of their whereabouts. This, she concluded, showed that the complainant had no hand in the creation and movement of the title deeds.

The magistrate relied heavily on the expertise of the handwriting expert who had come to the conclusion that the complainant had not signed on the lease to the title deeds. The handwriting expert was of the view that the signatures appearing thereon were the work of the appellant and as such a forgery. The Magistrate also relied on her own assessment of the signatures and

other documents including the evidence of how the title deeds were obtained in the joint names of the complainant and the appellant and stored with the lawyer. It is again necessary at this point to mention that one of the documents upon which the magistrate placed reliance on in reaching her verdict was the statement the complainant made to the Police prior to his death. The claimant passed on before testifying in court. His statement to the Police was produced by PW3 and admitted into evidence without any objection by the appellant's counsel. As a consequence thereof, the magistrate accepted that the complainant had changed his mind about making the appellant a joint tenant of the property. She also accepted that the complainant hid the letter and that contrary to the appellant's assertion that the complainant was in the habit of not signing his letters, the complainant had in fact signed a number of letters that had been exhibited. As a result of this, and coupled with the evidence of Hellen Mwanza (PW4) who expressed surprise as to why the letter to the Ministry of Lands was not signed by the complainant but acted upon, she concluded that the complainant did not intend to submit the letter to the Ministry of Lands.

With regard to the handwriting, the magistrate held that despite being a lay person in so far as handwriting was concerned, she had carefully examined and compared the signatures on P1 (the certificate of title) and a letter on the file dated 12th November, 2008 addressed to the Commissioner of Lands relating to the complaint on the issuance of joint title and other letters and noted that the signature on P1 was the only one that was different from the others. She therefore concluded that the signature on P1 was a forgery and found that the appellant was the one who signed on P1 purporting to be the late complainant when in fact not. She accordingly found her guilty and convicted her.

On appeal to the High Court, the learned judge dismissed all the ten grounds of appeal which had been filed in support of the appeal and strongly supported the conviction by the magistrate. The appellant was dissatisfied with the dismissal of her appeal and has now filed ten grounds of appeal against conviction and sentence.

The grounds of appeal and heads of argument as presented in this appeal can only be described as haphazard. The problem has

been precipitated by the two law firms representing the appellant who do not appear to have coordinated the record, grounds and arguments. To start with, the record of appeal filed on 30th March, 2017, contains five grounds of appeal. On 3rd January, 2018, the appellant's advocates filed amended grounds of appeal, increasing the grounds to ten. The appellant's advocates then separately filed heads of argument and additional heads of argument on 3rd January, 2018 together with a supplementary record of appeal. The additional heads of argument are not paginated and jump from the first ground to the sixth ground without any explanation. The end result of this multiple filing is that the appeal is being presented in a very untidy and uncoordinated fashion. We shall in view of the amended grounds of appeal filed on 3rd January, 2018, ignore the earlier grounds of appeal in the record filed on 30th March, 2017 which have, in any event, been replicated in the amended grounds of appeal.

The first ground of appeal relates to reliance by the subordinate court on the complaint made by the complainant which was not signed by the recorder and which was not subjected to

cross-examination and without considering the complainant's credibility, circumstances and possible motive at the time.

The appellant has argued in respect of this ground that the statement was hearsay and did not fall within the well known exceptions to the hearsay rule. The statement was accepted into evidence as evidence of the truth of the matter in question leading to the conviction and sentence. This, it has been contended, was an error on the part of the trial court as it was not made on oath; was a mere statement and was not subjected to cross-examination by the appellant to test its truthfulness. According to the appellant, the primary aim of the statement was to start investigations and was not itself proof of the allegation made therein. As such, the trial court wrongly admitted the statement made out of court but tendered into evidence as evidence of what had transpired.

The appellant has relied on the case of *Harris v DPP*[1] to demonstrate that evidence is only admissible if it is lawfully adduced at trial. In the case of *Harris,* a series of eight larcenies having common characteristics occurred in May, June and July, 1951, in a certain office in an enclosed and extensive market at

times when most of the gates were shut and in periods during part of which the accused, a police officer, was on solitary duty there. The precise time of only one larceny, the last, which occurred in July, was known and then the accused was found to be in the immediate vicinity at the office. He was charged on indictment with all larcenies and, having been tried on all eight counts simultaneously, he was acquitted on the first seven and convicted on the eighth, that relating to the larceny in July. It was held that that, as regarded the larceny of July, the evidence of the previous larcenies, which occurred when he was not proved to have been near the office, should have been excluded from the consideration of the jury and, the judge having omitted to direct them to that effect, the conviction should be quashed.

The respondent has combined grounds 1, 2, 6, 7, 8, 9 and 10 and has argued that the conviction was based on the totality of the evidence adduced and not merely on the statement made by the complainant outside court, and neither was it based on the magistrate's own assessment through her naked eyes.

The respondent has referred us to an affidavit in opposition sworn by the complainant which was filed in the High Court. In that affidavit the complainant stated that the joint title was a forgery and that he had lodged a complaint with the Police. In addition the complainant wanted the appellant to vacate the house. The respondent has argued that it is clear from the complainant's affidavit that he was convinced that the appellant had forged the joint certificate of title and he had reported her to the police. It was therefore not true for the appellant to allege that the complainant signed the joint certificate of title. Had the complainant been the one to change the certificate of title, he would not have signed the affidavit which was produced in the High Court where he alleged that the appellant forged the title. The affidavit was proof before Court of what had been sworn therein. The appellant in producing the affidavit was trying to show the Court that the contents therein were made. In the same vein, it was the respondent's submission that just as the affidavit was relied on by the appellant, the respondent wished to rely on the same affidavit in which the complainant denied having signed the purported letter to include the appellant on the certificate of title. The respondent submitted

that the statement made out of court by the complainant is not hearsay and it is admissible. This is so because the statement proposed to establish the fact that it was made.

To support the conviction further, the respondent has submitted that the complainant's evidence showed that although he admitted writing the letter at home, he thereafter hid it in the bedroom having had a change of mind owing to marital disputes that arose between the complainant and the appellant. The appellant on the other hand said the complainant wrote the letter while in the office of PW4 at the Ministry of Lands in the presence of DW4 and herself. Meanwhile DW4 said that she merely ushered the appellant and the complainant into PW4's office and left them without witnessing anything. Thereafter the two passed through her office and the complainant informed her that he had been told to submit his application in writing. The respondent has argued that PW4 did not allude to a letter being written in her office by the complainant. PW4 could not recall who presented the letter to her office. She however observed that the letter was peculiar because the complainant did not sign the letter although her office acted

upon it. Further evidence, the respondent argued, was that the complainant complained to the Commissioner of Lands concerning the certificate of title in issue but it was later discovered that the appellant had collected it while in the High Court after their divorce. It was then that he discovered that the said certificate of title had his signature when he did not sign it. The respondent pointed out that the appellant admitted collecting the certificate of title from the Ministry of Lands and deposited it with her lawyer without informing the complainant. This action by the appellant was suspicious and confirmed the complainant's evidence that he only saw the certificate of title in the High Court during the proceedings. The appellant maintained that the complainant signed the certificate of title but she did not explain how and in what circumstances she found herself having custody of the certificate of title which has disputed writing and signatures.

With regard to the argument that the complainant was not in the habit of signing his letters, the respondent has argued that the complainant did not sign the letter to the Ministry of Lands because he changed his plan of including his wife on the title deeds and

instead hid the letter in the house. The evidence also showed that the complainant signed all his official letters. The only exception was the letter to the Ministry of Lands. He had no intention of presenting this letter to the Ministry of Lands nor did he want it to be acted upon.

To counter the argument that the lower court did not uphold the conviction only on the basis of the complainant's complaint, the respondent has drawn our attention to the evidence regarding handwriting. The respondent has argued that the handwriting expert concluded from all the disputed writing on the certificate of title and the handwriting samples provided, that the appellant was one and the same person who forged the complainant's signature and wrote the names of the witnesses. The forgery was so blatant that even a lay person could deduce that the appellant is the person who signed on behalf of the complainant and Grace Tembo.

With respect to the other witness who is alleged to have signed the certificate of title as Grace Tembo, the investigations revealed that Grace Tembo was never a teacher at the private school she claimed to have been a senior teacher at. The only Grace Tembo

who was known to the proprietor of the school was her daughter who is an accountant and was not in the country at the material time. The evidence from the arresting officer was that the appellant had failed to avail the purported Grace Tembo. Further it was odd that the appellant did not know the school the purported Grace Tembo taught at when they seemed to get on well, at least before the complainant purportedly had an affair with Grace Tembo. It was also odd that there was no house number or tenancy agreement of the elusive Grace Tembo. It was therefore argued that Grace Tembo only existed in the appellant's imagination. A further oddity was that there was a Grace Tembo who was the daughter of the owner of the school where the appellant was the PTA chairlady. Coincidentally, the address given by the elusive Grace Tembo was that of a school the appellant served as PTA chairlady for a period of two years, and as board member for another two years. The respondent submitted that the appellant knew full well that this Grace Tembo was not resident in Zambia and it would be difficult to trace her. These odd coincidences confirm the handwriting expert's opinion that it was the appellant who wrote the disputed writing.

The respondent argued that although the appellant's sister testified before court that she in fact witnessed the complainant sign, she was rightly found to be a witness with an interest to serve by the trial court. In any event, the appellant's sister could not have acted as witness on behalf of the complainant because relations were very strained between them owing to the differences between the complainant and the appellant.

We have considered the arguments by the appellant in connection with the first ground of appeal. We have also considered the combined response by the respondent relating to grounds 1, 2, 6, 7, 8, 9 and 10. We find no relevance of the *Harris* case to the case at hand.

There is however a paragraph in Phipson on Evidence 17th edition which clearly stipulates that an out-of-court statement is admissible if oral testimony from the witness is unavailable. Paragraph 30-19 at page 928 under the heading "Reasons for unavailability that results in admissibility of an out-of-court statement without leave" reads as follows:

"The out-of-court statement, oral or written, of a potential witness is made admissible on behalf of the prosecution or defence if oral testimony from the witness is unavailable for certain specified reasons."

One of the reasons given for a witness being unavailable is death. In *R. v Z*[2] the Court of Appeal said that when the statement of a dead witness is offered no leave is required. It cannot therefore be argued by the appellant that the complainant's statement should not have been allowed as no leave was required and in any event was not objected to and as such it is admissible in accordance with paragraph 30-12 of Phipson on Evidence at page 924. There is no merit in the first ground of appeal.

The second ground of appeal is that the court below erred in law and in fact when it upheld the conviction based on the magistrate's own assessment through her naked eyes and her conclusion that the certificate of title was a forgery and that it was the convict that forged the signature through the same process, a conclusion which was not possible even with the examination by the handwriting expert. We shall deal with this ground of appeal as well as with all the other grounds which make a reference to the High Court judgment on the basis that it was an appeal against the

magistrate's decision as appeals to this court from the High Court in cases such as this one are essentially appeals from the subordinate court which convicted the appellant. This is in accordance with the case of *Sensenta v The People*[3] in which we held as follows:

> *"Despite the fact that the Supreme Court Act, section 14 provides that there shall be an appeal against a High Court judgment, in practice such an appeal is against the judgment of the lower court which convicted the appellant. There are exceptions to this where the High Court in its appellate jurisdiction has made an order for a substitution of a conviction or an alteration of a sentence, but generally the facts and the law relating to the appeal emanate from the lower court which convicted the appellant."*

We shall also combine this ground of appeal with the arguments relating to the analysis of the handwriting expert (PW1) with regard to the handwriting on the lease which formed part of the title deeds.

The thrust of the appellant's argument under the second ground of appeal is that the subordinate court upheld the conviction of the appellant based on the misstatements made by the handwriting expert with exaggerated conclusions directing and misleading the court. It was contended that the court wrongly rated

the capacity of the handwriting expert. In his evidence PW1 stated that:

> *"My duty is just to examine expert witness is always 100% correct. This is a mere forgery."*

The argument advanced by the appellant is that the conviction was made on the wrong premise that the handwriting expert was 100% correct since he had found that it was the appellant who had forged the complainant's signature.

We are of the view that this argument ignores the context in which the magistrate dealt with the evidence of PW1. The record shows that while the magistrate accepted the evidence of PW1 as a handwriting expert she did not abdicate her responsibility as a magistrate. While we accept that PW1 clearly went overboard by categorically stating in his evidence that an expert witness is always 100% correct; that the document was a mere forgery; that it was written by the appellant and not the complainant, we do not accept the argument that the magistrate was influenced by the handwriting expert. The handwriting expert did not follow the guidance given in *Sithole v State Lotteries Board*[4] which is 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 those similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion to the significance of these factors."

The case of *Sithole* goes on to state that:

"Where an appellate court is in as good a position as a trial court to draw inferences it is at liberty to substitute its own opinion which the trial court might have expressed."

In the case at hand, the magistrate in her judgment points out that she had carefully examined and compared the signatures and had noted that the only signature that was different was that of the complainant on P1. This reasoning shows that while she accepted the evidence of PW1 she drew her own conclusions from the documents that were produced as exhibits and concluded that the complainant could not have signed on the lease. Her reasoning also shows that she accepted the handwriting expert's evidence as a mere opinion and that the expert's opinion was not substituted for a judgment of the court. It cannot therefore be argued that she blindly accepted what the handwriting expert asserted.

We have also examined the various documents in the supplementary record of appeal and agree with the views expressed

by the trial court. The specimen signatures that had been provided included the various documents the complainant had signed over the years clearly show a distinct dissimilarity with the signature on the lease attached to the certificate of title. We therefore agree with the trial court's ocular observation that the signature could not have been signed by the complainant.

In the case of *Charles Ogbonnia Nwume v The People*[5] we held that:

> *"Where a question is purely one of inference from facts about which there is clearly no dispute (such as the documents in this case) this court has both the right and the duty to substitute its own views from those of the trial judge."*

We went further and examined the two specimen of handwriting in the *Nwume* case and came to the conclusion that it was impossible to say beyond reasonable doubt that both specimen were written by the same hand. In the present case, that is not the case as it is quite clear that the complainant could not have possibly signed P1.

This brings us to the question of who then signed the document? The case of *Ngoma v The People*[6] provides the answer to this question. In that case this Court held as follows:

> *"(1) 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 the 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 the event a conviction on a count of forgery is proper.*
>
> *(2) On the facts it was abundantly clear from the evidence before the trial court that the appellant either forged the two letters himself or was privy to their forgery and the appeals on the two forgery counts should not therefore have been allowed in the High Court."*

The appellant collected the title deeds from the Ministry of Lands and handed them over to her lawyers without the complainant's knowledge and they were only produced later. When all the evidence leading to the signing, collection and storing away of the certificate of title is considered, the only reasonable inference that can be drawn from the facts is that the appellant either forged it or was privy to the forgery. The second ground of appeal is accordingly dismissed.

The third ground of appeal is that the court below erred in law and in fact when it convicted the appellant after shifting the burden of proof onto the appellant contrary to the rules of evidence.

The principle that it is for the prosecution to prove its case and at no time should that burden shift on to an accused person, is ingrained in criminal jurisprudence and requires no further elaboration. The issue that needs to be resolved is whether or not the burden did indeed at any time shift to the appellant.

The appellant has argued that the burden lay on the deceased complainant to prove that he did not submit P7 to the Ministry of Lands and to explain why a letter on plain paper had lines in its copy. The appellant argued that the burden of proof to contradict the evidence of PW4, DW4 and the appellant's own version of events lay with the complainant. In addition to that, there was hardly any time to write the letter then go home, and hide it, as title was issued barely one month thereafter. This only meant that the appellant did not lie that the complainant had left the letter at the Ministry of Lands. The appellant also argued that she was entitled to remain silent and the prosecution had a duty to prove its case. As far as

the appellant was concerned, Grace Tembo existed and was acknowledged by the complainant who described her as the appellant's sister.

There is no doubt that there were two versions as to what transpired. The complainant's version in his statement was that initially he had agreed to a joint tenancy with the appellant but later changed his mind after writing the letter to the Ministry of Lands. He hid the letter but the letter later surfaced at the Ministry of Lands and was acted upon contrary to his wishes. The argument by the appellant that the complainant recognized Grace Tembo as a witness is not correct because the statement itself simply refers to the two sisters who signed. Grace Tembo is not the appellant's sister and the statement cannot be taken as an admission by the appellant that they were witnesses as he is simply stating that the certificate of title was signed by the sisters but this does not imply that it was signed in his presence.

The appellant's version was that the lease was signed at the Ministry of Lands in the presence of DW3 and Grace Tembo. The trial court was entitled to weigh the evidence that was before it and

see whether or not it was credible. The inference drawn by the trial court that Grace Tembo was a creation of the appellant did not in any way amount to shifting the burden of proof onto the appellant but merely arose after the analysis of the evidence and the magistrate was entitled to draw that inference. This ground has no merit.

The fourth ground of appeal is that the court below upheld the conviction without considering the full evidence of the defence witnesses in a material particular. Under this ground of appeal, emphasis was placed on the evidence of PW4 who had testified that the complainant and the appellant had gone to her office to ask that the property be put into their joint names. PW4 asked the complainant to put it in writing and that was done. PW4 testified that the old offer was withdrawn as it was in the complainant's name and another was made in their joint names. What this submission omits and is significant, is the evidence of PW4 to the effect that what was peculiar about the file was that the letter was not signed by the complainant. The appellant has of course argued that the complainant was not in the habit of signing his documents

but we have indicated above that the record shows that he in fact used to append his signature on numerous documents. The appellant has argued that there was no contradiction between her evidence and PW4. We agree with the argument that the evidence of the defence witnesses appears to have been corroborated and is not contradictory but this evidence should be considered in the context of what is alleged to have transpired. The evidence can be broken into three broad segments. The first segment deals with the intention by the complainant to make the appellant a joint tenant. The second segment covers the visit to the Ministry of Lands and the writing of the letter. The third segment relates to the signing of the lease in the presence of witnesses and collection of the title deeds. The complainant's statement to the police leaves us in no doubt that he had at some point wanted to include the appellant as a joint tenant and that he wrote an unsigned letter to that effect. There is however no direct evidence showing that he left the unsigned letter at the Ministry of Lands. PW4 mentions in cross-examination that she did not read (presumably from the Lands file), whether the claimant came back with the appellant to bring the letter, which evidence confirms that the letter was not left on their

joint visit to the Ministry of Lands and lends credence to the complainant's statement that he hid the letter in the house.

The fifth ground of appeal is that the court below erred in law and fact when it dismissed the appellant's appeal without considering the evidence on record that the complainant had in fact paid for the offer letter which came in their joint names and his subsequent offer to the appellant of a share of the house.

The appellant has argued in respect of the fifth ground that the evidence of PW4 was that the original offer to the complainant was cancelled and replaced with the one in their joint names. The complainant accepted the offer by going to the Ministry of Lands where he paid for the acceptance. The appellant has referred us to the evidence of PW4 to confirm the payment by the complainant. A perusal of the evidence shows that PW4 told the court that *"The offer was paid for and subsequently a lease was prepared."* The evidence of PW4 does not specifically state that the complainant made the payment although the appellant in her evidence stated that it was the complainant who paid.

The other limb of the argument under this ground is that the complaint of forgery was an afterthought because the offer to share Stand 3612 Olympia Park in the proportion of 60/40 was made on 29th January, 2009. In addition, the appellant has argued that it did not make sense that two years later, the complainant who divorced and got married again in that period should go back to the Ministry of Lands to question the whereabouts of the title deeds if he never signed for the lease. The appellant does not consider in her argument that the complainant was pursuing the initial title deeds as he had refused to sign the letter converting the offer to a joint tenancy. There was therefore a valid reason for him to make enquiries at the Ministry of Lands, particularly in the light of the fact that even the title deeds that were issued in their joint names were concealed from the complainant by the appellant. Additionally, as argued by the respondent in respect of the fourth and fifth grounds, the evidence of PW4 corroborates the prosecution's evidence that the appellant and the complainant went to enquire at the Ministry of Lands on the procedure to acquire joint tenancy. This was the initial intention of the complainant but he later changed his mind and did not submit the letter he wrote to the

Commissioner of Lands for the joint tenancy. This was the letter that was found in the Ministry of Lands records as attested to by PW4, and it was not signed. The Ministry of Lands acted on this unsigned letter. The letter to both the appellant and the complainant was missing from the records but there was a receipt indicating that the offer was accepted. There is also evidence on record that one of the joint tenants to the certificate of title may be allowed to collect it. There is evidence that it was the appellant who in fact collected this joint certificate of title and handed it over to her lawyer. We therefore find no merit in this ground of appeal and dismiss it.

The appellant's sixth ground of appeal is that the lower court erred in law when it upheld the conviction of the appellant based on the misleading and exaggerated evidence of the handwriting expert who presented a wrong conclusion that it was the appellant who forged the complainant's signature when such a conclusion could not possibly be made by a handwriting expert. We dealt with this aspect of the appeal in the earlier part of our judgment when we dismissed the argument that the magistrate was misled by the

exaggerated evidence of the handwriting expert. We found that the magistrate had considered all aspects of the case including her own ocular observation and came to the conclusion that the document was indeed a forgery. We therefore do not see the need to dwell on this argument again. For the reasons we have given earlier, we dismiss the sixth ground of appeal.

The seventh ground of appeal is that the lower court erred in law and fact when it convicted and sentenced the appellant on the charge of forgery of a certificate of title duly issued by the Ministry of Lands which charge was wrong in law. The argument in support of this ground was anchored on the holding of Scott, J. in the case of *Kazoka v. The People*[7] in which he held that for a document to be false it must tell a lie about itself and not about something else.

The facts in the *Kazoka* case were that the appellant was charged on two counts. The first was forgery contrary to section 312 of the Penal Code, and the particulars read: William Kazoka on the 14th day of June, 1971, at Kabwe with intent to deceive, forged a document namely, the Standard Bank cheque number ZC284205 purported to contain K235 cash in his account when in fact he had

no account with Standard Bank, Kabwe. The second count was uttering contrary to section 325 of the Penal Code, the particulars alleging that on the same day he knowingly and fraudulently uttered a forged document, namely the Standard Bank cheque number ZC284205 to Chinubhai Patel which purported to contain K235 cash.

The learned judge considered this to be very poor drafting and ignorance of what is meant by these offences. He held that according to section 308 (now 342) of the Penal Code, forgery is the making of a false document with intent to defraud or deceive. He added that for there to be forgery a document must tell a lie about itself. He further held that the cheque was what it appeared to be, namely a cheque drawn by the appellant on a bank for K235. It was not a forgery and the appeal was allowed on both counts and an acquittal entered. It is this reasoning that the appellant is using in aid of her argument in support of the seventh ground of appeal.

We agree with the holding in the *Kazoka* case. What we do not however agree with is its application to the present case. The appellant has argued that the certificate of title was issued by the

Ministry of Lands. It did not therefore become a forgery even if there was an allegation of someone else appending a signature. It was still a certificate of title with a disputed signature. As such, it is not a false document as it is still a certificate of title duly issued by the Ministry of Lands. The appellant has gone on to argue that she was wrongly charged in this matter and she should be acquitted. In addition, the appellant has relied on the case of *Charles Phiri v The People*[8] which held that a document purporting to be what it is, but which contains a false statement, is not false within the meaning of s. 344 of the Penal Code; to be a false document it must tell a lie about itself. The appellant, in arguing this ground, is saying the document is what it is. It is a certificate even if it contains an alleged lie it does not become a false or forged document. The appellant is missing the point. The preparatory steps leading to the issuance of the certificate of title should be considered as well. It will be seen from the evidence that the lease attached to the certificate of title is signed by someone purporting to be the complainant. The evidence in the court below all pointed to the appellant as the one who signed and was responsible for the writing on the lease. The document tells a lie about itself in the

sense that it purports to be made by the complainant who did not make it. This meets the definition of forgery set out in Archbold in paragraph 19-121 of Archbold Criminal Pleading Evidence and Practice 42nd Edition which states as follows at page 1525 in relation to forgery.

> *"The concept of forgery and the rationale of the offence were summarized in paragraphs 41-43 of the Law Commission Report: "By the middle of the nineteenth century it was established that for the purpose of the law of forgery the fact that determined whether a document was false was not that it contained lies, but that it told a lie about itself. It was in R. v. Windsor (1865) 10 Cox 118, 123 that Blackburn J. said: 'Forgery is the false making of an instrument purporting to be that which it is not, it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing.' This test was applied in the Court of Appeal in R. v. Dodge and Harris [1972] 1Q.B. 416, which makes it clear that any dicta to the contrary in R. v. Hopkins and Collins (1957) 41 Cr. App. R. 231 do not correctly state the law...As we have said...the primary reason for retaining a law of forgery is to penalize the making of documents which, because of the spurious air of authenticity given to them are likely to lead to their acceptance as true statements of the facts related to them. We do not think that there is any need for the extension of forgery to cover falsehoods that are reduced to writing....The essential feature of a false instrument in relation to forgery is that it is an instrument which 'tells a lie about itself' in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise*

purports to be made or altered in circumstances in which it was not made or altered."

Paragraph 606. Vol. 11(1) of Halsbury's Laws of England 4th Edition Reissue states as follows in relation to forgery:

*"**Forgery.** If a person makes a false instrument, with the intention that he or another will use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, he is guilty of forgery and liable on conviction on indictment to imprisonment..."*

The signed lease was accepted as genuine by the Ministry of Lands and as a result a certificate of title was issued in the joint names of the complainant and the appellant. This was plain and simple forgery which falls within the definition of forgery as set out in paragraph 606 above and sections 342 and 347 of the Penal Code Cap 87. We do not therefore find any merit in the seventh ground of appeal.

The eighth ground of appeal is that the court below erred in law and in fact when it upheld the outright dismissal of the evidence of all the defence witnesses even when it was confirmed by PW4. The appellant has argued that the court erred when it dismissed the evidence of DW3, the appellant's sister who was

alleged to have witnessed the complainant's signature. The court below dealt with this witness as a witness who had an interest to serve. The court had an opportunity to examine the witnesses first hand and came to the conclusion that while DW3 and DW4 appeared to be truthful, their demeanor was of people shielding the truth and that in certain portions of their evidence they were strangers to the truth. We see no difficulty with that approach by the court below as it was entitled to do so. DW3 was properly treated as a witness with a possible interest of her own to serve as was held in the case of *Simon Malambo Choka v The People*[9]. There is no merit in this ground of appeal.

The ninth ground of appeal is that the lower court erred in law and fact when it failed to consider the issues and circumstances in which the complainant formulated the allegations against the appellant and other issues showing the motive to deprive her of her right to the property as co-owner.

The argument in relation to this ground seeks to persuade us to accept that the court below failed to consider that the complaint only arose when the marital problems started and that the

complainant had earlier pretended to have sold the jointly owned property to his son. While we accept that their marriage may not have been the happiest of marriages, we do not accept the argument that the forgery complaint arose as a result of their unhappy marriage. The evidence we have referred to above in some detail shows why the complainant filed a complaint with the police. The complaint had nothing to do with the marriage and had everything to do with the complainant's signature which had been forged. We therefore do not find any merit in this ground.

The last ground of appeal is that the court below erred in law and fact when it concluded that the complainant was the one who forged the certificate of title because she collected it and it was in her possession when the evidence showed that in a joint tenancy any co-owner can collect the certificate of title.

There is no dispute that any co-owner can collect title deeds from the Ministry of Lands and the fact that when one collects title deeds from the Ministry of Lands it is not proof of forgery. What however lends credence to the evidence of the complainant in connection with the allegation of forgery is the fact that the

certificate of title was surrendered to the appellant's lawyers upon collection without informing the complainant. This cannot amount to securing possession of the certificate of title when the couple started having marital problems. These actions go to show the motive of the appellant with regard to the title deeds. An innocent party would rejoice and inform her partner that she had managed to retrieve the joint title deeds from the Ministry of Lands and not conceal them with her lawyer and keep quiet about it. There is no merit in the last ground of appeal.

This appeal was against conviction and sentence. Counsel, when asked during oral arguments when the appeal was heard, submitted that this was an appeal against conviction and sentence. The appellant was sentenced to one year simple imprisonment. This sentence is in our view on the low side considering the nature of the document forged. A certificate of title is no doubt a very important document and there is therefore need to preserve the authenticity of certificates of title issued by the Ministry of Lands and protect unsuspecting members of the public who may wish to use such document for buying, selling or as security. We

accordingly set aside the sentence of one year and sentence the appellant to two years simple imprisonment. The net result is that all the grounds of appeal have been dismissed.

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I.C MAMBILIMA
CHIEF JUSTICE

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A.M. WOOD
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE