

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA**

2SPG/2012/2016

(Criminal Jurisdiction)

THE PEOPLE

VS.

CHISENGA CHRISTOPHER

BEFORE:

**G. MALUMANI
(SENIOR RESIDENT MAGISTRATE)**

FOR THE PEOPLE:

MR. R. MALAMA, PUBLIC PROSECUTOR

FOR THE ACCUSED:

IN PERSON

JUDGMENT

CASE LAW REFERRED TO:

1. Muvuna Kambanja Situna V. The People (1982) ZR 115 (S.C)
2. Machipisha Kombe V. The People (2009) ZR (S.C)

LEGISLATION REFERRED TO:

1. Sections 4, 342, 344, 347, 348 and 309 of the Penal Code Cap 87 V. 7 of the Laws of Zambia.

OTHER WORKS REFERRED TO:

1. The Archbold 38th Edition.

In this case the accused stands charged with 4 counts namely:

Count 1: Forgery contrary to section 342 and 347 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of the offence allege that Chisenga Christopher on unknown dates but between 1st January, 2016 and 2nd February, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia with intent to defraud or deceive did forge a document namely an NRC No. 909790/47/1 in the names of Mustered Simumba by purporting to show that it was genuinely issued by National Registration and signed when in fact not.

Count 2: Forgery contrary to section 342 and 347 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence allege that Chisenga Christopher on the unknown dates but between 1st January, 2016 and 2nd February, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia with intent to defraud or deceive did forge a document namely a title deed No. 71748 on stand No. 30860 in the names of Mustered Simumba by purporting to show that it was genuinely issued and signed when in fact not.

Count 3: Uttering a false document contrary to section 344(b) and 348 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence allege that Chisenga Christopher on 2nd February 2016 in the Lusaka Province of the Republic of Zambia knowingly and fraudulently did utter false documents namely NRC No.909790/47/1 and title deed No. 71748 both in the name of Mustered Simumba to Harrison Phiri.

Count 4: Obtaining money by false pretences contrary to section 309 of Penal Code Cap 87 of the Laws of Zambia. The particulars of the offence allege that Chisenga Christopher on 2nd February, 2016 at Lusaka in the Lusaka district of the Republic of Zambia with intent to defraud or deceive jointly and whilst working together with other persons unknown did obtain K90,000 from Harrison Phiri by falsely pretending that he had a plot for sale when in fact not.

The accused denied all the 4 counts.

I warn myself at the outset, that the burden lies with the prosecution to prove the guilt of the accused beyond all reasonable doubt. The accused has no onus to prove his innocence. Any doubt cast in my mind upon considering all of the evidence may be treated for his benefit.

Turning to the evidence, the prosecution led evidence from a total of 6 witnesses. The accused was the only witness for the defence. The details are on record.

In brief the evidence is this: PW1 was Harrison Phiri an accountant of Chalala residential area in Lusaka. He testified on oath that on 31/1/2016 he saw an advert on the post newspaper advertising a property in Chalala. He called the number. A gentleman who said was Mustered Simumba picked up the call. He gave him a direction to plot No. 30860. When he asked for the description on the ground, he was told there was a semi-detached slab. Using the same phone No. he asked for the purchase price and was told it was being sold at K90,000. Through the said person's nephew he got a copy of title deeds. He paid through his lawyer Mr. Ngoma but later discovered that the property was on a wrong plot. And that the NRC had the name of Mustered Simumba but with the photo of Christopher Chisenga the now accused.

He identified the said NRC and title deed for stand No. 30860. The accused declined to cross examine this witness. It is also noted that PW1 never met the accused person. He only spoke to the purported vendor on phone who sent his nephew to hand over the said NRC and title deed for the property on sale. He later left the purchase price with his advocates and signed the contract of sale.

PW2 was Borniface Wilson Mulimbika a businessman of house No. 30860 Chalala. He testified on oath that he bought the said plot from a Mr. Miti who had also bought from a Mr. mustered Simumba. He recalled that he could not obtain a title deed because the first owner Mustered Simumba lost his NRC. And when he obtained another copy from

Nakonde numbers did not tally. But that when they went to Ministry of Lands at some point they were told the title deed was ready in 2007.

PW2 stated that in February/March 2016 a Mr. Phiri told him he had bought the plot referring to PW1 yet he had built and even living there.

The accused declined to cross examine this witness, suffice to note that this is the owner of the property the person who introduced himself as Mustered Simumba to PW1 claimed to own.

PW3 was Mustered Simumba a businessman of Mtendere east. He testified on oath that he sold the plot in question being 30860 to Mulimbika at K9000. And that when he lost his NRC, he went to Nakonde to obtain one. This was NRC No. 909790/47/1. He was told it had a mistake. He went to get another one being No. 209790/47/1.

PW3 recalled that when he was shown the forged NRC the only difference he saw was the photo and signature which he identified in court. The accused declined to cross examine this witness.

PW4 was Chama Wilfred Kapaya a Legal Assistant at Messrs Lungu, Simwamba and Company. He testified oath that between 1st and 23rd February, 2016 he was called to Mr. Osborn Ngoma's office his boss. He was introduced to 2 gentlemen one of them being Mustered Simumba. He was supposed to do conveyancing on property No. 30860 Lusaka. He was given copies of the NRC and title deeds by Mr. Simumba Mustered.

At Ministry of Lands he did a print out to tell the legitimate owner. The name on the NRC was Mustered Simumba the same as on the print out. The plot was 30860. He was convinced he was the original owner of the property. Two days later he proceeded to prepare the contract of sale between Harrison Phiri (referring to PW1) and Mustered Simumba. Adding that they later called Mr. Mustered Simumba to the law firm to sign the contract. He went with the same gentleman he was with at first. He signed the contract.

That they later paid Mr. Simumba less K5000 legal fees. This was after the said Simumba went with the original title deed. From the evidence this was the 3rd time the said Mustered Simumba went to PW4's work place a law firm. And According to PW4 the purchaser Mr. Phiri and them were later not able to reach Mustered Simumba using the mobile numbers they were communicating with him. He disappeared after getting the money.

PW4 identified the title deed in issue on property No. 30860 and the NRC in issue. He also identified the contract of sale and the land register copy.

PW4 further identified the person they dealt with as Mustered Simumba touching the accused in the accused dock. He recalled that when he went to Kabulonga police post he identified the accused whom he later came to know as Christopher Chisenga.

Under cross examination by the accused, PW4 disputed taking pictures of the accused at the police station. This was after the accused was apprehended following the contract of sale signed at the law firm for sale of property NO. 30860 owned by Mulimbika PW2 and living there at the time.

PW5 was Patrick Phiri an Assistant Registrar with the department of National Registration, Passport and Citizenship office. She testified on oath that she verified the 2 copies of NRCs No. 909790/47/1 and 209790/4/1 at their records room. She found that NRC No. 209790/47/1 belonged to Mustered Simumba born in 1977 while No. 909790/47/1 was non existent (ID1 exhibit P1). She identified both NRC in court.

PW6 was the arresting Officer Richard Sianjomba from Kabulonga police post. He testified on oath that on 15/2/2016 he received a report of obtaining money by false pretences from Harrison Phiri (PW1). He was told the person obtained K90,000 through the law firm he used.

He recalled that during investigations, he came across a letter of sale in Phiri and Mustard Simumba's names. The correct spelling actually is "**Mustered**" not Mustard for the first name. He saw the 2 copies of NRCs and other exhibits in this matter. Through his

informers he found the suspect now accused at house No. 11 Kabwata and apprehended him. He came to know his name as Christopher Chisenga not Mustered Simumba.

According to him, he was told the accused claimed he did not know how the NRCs were tempered with. Under a warn and caution statement, the accused denied each of the 4 counts. PW6 identified the title deed being No. 71748 Registered on No. 30860/2 which is exhibit P5, NRCs Numbers 909790/47/1 which is P1, 209790/47/1 P4, the land register copy P2 and contract of sale P3.

Under cross examination by the accused, PW6 disputed the allegation that he took people to point at him while in custody.

At the close of the prosecution case, the accused was found with a first case to answer and placed on defence. He elected to speak on oath and led no other evidence. He testified that he was apprehended on 14/11/2016 around 03 hours and taken to Kabulonga police. In the morning the arresting officer went there asking for the money he got. He said he did know about the money. He was told to sell the house if he wanted to survive on the case. After one day he was taken to reception and pointed at him to 4 people he was with. One of them told him to bring the money he got even K50000 if not he would be convicted.

He was later put on parade and pointed at by some of the people the arresting office earlier brought.

He disputed that he lived at house No. 11 Kabwata but at No. 118 Kabwata. He argued that if they knew him they would have conducted an identification parade.

Under cross examination and evidence in chief, the accused seems to raise some form of defence that PW4 Chama Wilfred Kapaya did not properly identify him as the person they dealt with at Lungu, Simwamba law firm sometime in February, 2016. He alleges that he was merely pointed at by the arresting officer sergeant Sianjomba during investigations. He alleges that he took pictures of him and can't know what he used them for much as he does not work at National registration office. He argues that he saw him for the first

time at Kabulonga police. That he didn't deal with him at the said law firm. He denies ever receiving the K90,000 from the law firm.

I have very carefully examined all the evidence adduced and the defence raised. From the evidence adduced, I find no disputed and therefore a fact that plot No. 30860 as indicated on exhibit P5 a purported title deed stands on a complete dwelling house. This is a house which belongs to PW2 Mulimbika. At no time did it belong to Mustered Simumba PW3 who sold it to a Mr. Miti and Miti sold to Mulimbika who built a house. The transaction from Miti to pw2 does not show clearly because from the evidence title did not change from Miti to Mulimbika, so the actual change of ownership was from Simumba to Mulimbika.

It is not in dispute, that NRC No. 909790/47/1 in the names of Mustered Simumba but with the accused's photo is non existent. This is an NRC PW3 first got but had an error. The photo on it does not belong to Mustered Simumba, his is NRC No. 209790/47/1. Undoubtedly somebody else put the accused's photo on PW3's NRC with an error. This is the NRC submitted to PW4's law firm for the purpose of a conveyance transaction on property No. 30860 to PW1 Phiri.

It is not infact in dispute that Phiri paid K90,000 to PW4's law firm which was paid out to the purported vendor. It is however, not in dispute that at no time did Phiri ever see the accused as earlier intimated. Notwithstanding, the person who purported to sell plot No. 30860 still went to his lawyers with an original purported title deed and copy of an NRC being No. 909790/47/1.

Further it is not in dispute that PW4 works at a legally existent law firm being Messrs Lungu, Simwamba and company in Lusaka. There is evidence that the law firm had received instructions from PW1 Phiri and drew a contract of sale which was signed by both parties (exhibit P3). An examination of the contract of sale shows that PW4 signed as a witness for the vendor. So, I have difficulties to accept that he did not see the vendor. I need not belabour the fact that it is within the province of the court to observe issues of fact that arose before it.

The dispute as earlier alluded is on the involvement of the accused as the purported vendor. The evidence adduced anyhow shows a clear connecting link on the person who dealt with Phiri PW1 from inception way up to when the purchase price of K90,000 less K5000 fees was obtained from PW4's law firm.

I will now deal with the accused's defence. He argues that PW4 Chama did not properly identify him. Admittedly, there is no evidence of an identification parade adduced. I believe the prosecution had no reason to conduct it anyway. I earlier indicated that the person who purported to be Mustered Simumba went to PW4's law firm a number of times. At each occasion it wasn't a few moments dealings. They spent time together. The first time was when he found that person in his boss's office, next it was when he was called to sign the contract after he drew it in the course of his duties as assistant legal officer and when they paid him. And as the trial court, I observed his demeanour when he testified. I was satisfied that he is a creditworthy witness.

PW4 does not fall in the category of a single identifying witness illuminated in the case of **Mavuna Kambunja Situna V. The People (1)**. He deal with the said person a number of times and came to know him. It would be different if he had dealt with him once.

The allegation that he was merely pointed at to him by the arresting officer PW6 and asked to return the money he got is non-sequitur. The arresting officer from the evidence did not exhibit any signs of malice on his part. He dealt with the accused only in course of duty.

Further, I perceive corroboration on the evidence of PW4. The corroboration is on what I would call an odd coincidence. This is on his portrait or photo on exhibit P1 the non-existent NRC. All this long from 5/12/2016 to now I have been seeing the accused and came to know his features. I do not have any doubt that the photo on exhibit P1 is his. It bears his likeness. Now, it has not been explained how from nowhere of all people in Lusaka his photo could find itself on an NRC submitted for sale of a plot to PW1.

In the case of **Machipisha Kombe V. The People (2)**, the principle established is that odd coincidences constitute evidence of something more. They provide a support of an accomplice or any other witness whose evidence requires corroboration.

As noted above, I have no reason to doubt the evidence of PW4. I will accept that it is the accused he dealt with. He is the person who went to their law firm with another person to enter into the contract of sale of land to PW1 Phiri and got the purchase price of K90,000 less K5000 fees.

The evidence is clear that he avoided meeting PW1 in order to defeat identity. I draw an inference that he put his photo on NRC No. 909790/47/1. I will thus dismiss his defence. It is not only hollow with no substance but an after thought calculated to mislead this court.

Turning to the law, the offence of forgery contrary to section 342 and 347 of the Penal Code Cap 87 of the Laws of Zambia is premised on 2 essential elements namely:

- (i) Making of a false document.
- (ii) Doing so with intent to defraud or deceive.

In terms of section 344 (b) of the Penal code, a person makes a false document when he alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document. Secondly, in terms of section 344A of the Penal Code intent to deceive exists when one person induces another to believe a thing is true which is false which he knows or believes to be false. In terms of the Archbold 38th edition at paragraph 2185 to defraud means to deprive by deceit, it is by deceit to induce a man to act to his injury for example.

In terms of evidence it is a fact that the accused as found is the person who went to PW1's law firm and entered into a contract for sale of plot No. 30860 which wasn't his. I did draw an inference that he is the one who put his photo on NRC No. 909790/47/1 which he then gave to PW1 and PW4's law firm. He also submitted the title deed for the said plot. Doing all these acts undoubtedly establish the two essential elements in this

matter. The NRC in issue became false the moment he put his photo on it. The title deed was also false because the plot it related to was not his. The two were false documents. Secondly, his intention was very clear. He wanted to and in fact did succeed to portray himself as Mustered Simumba the owner of the said NRC and title holder to plot No. 30860 Lusaka.

To this effect, I will hold that the prosecution have proved the guilt of the accused beyond all reasonable doubt in respect of both counts 1 and 2 of forgery contrary to section 342 and 347 of the Penal Code Cap 87 of the Laws of Zambia.

I find him guilty of forgery and convict him accordingly.

Turning to the count of uttering (count 3), the ingredients to be proved are that:

- i) Knowingly, and
- ii) fraudulently
- iii) uttered the false documents.

In terms of section 4 of the CPC Cap 87, a person "**utter**" something when he is using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question. "**Knowingly**" means that the accused must have knowledge of the falsity of the document when he utters it and "**fraudulently**" means an intent to defraud. I have already dealt with the meaning of intent to defraud and deceive.

On the matter before me, I have found it a fact that the accused did use the 2 false documents. He submitted them to PW1 and PW4 who acted on them by entering into a conveyance contract. It cannot be doubted that he had knowledge that the 2 documents were false because the NRC and the title were not his. The intent to defraud is very clear because he finally obtained proceeds on the conveyance contract. Am to this effect satisfied that all the 3 essential elements on the count of uttering have been established. I thus hold that the prosecution have proved the guilt of the accused beyond all

reasonable doubt. I find him guilty of uttering a false document contrary section 344 (b) of the Penal Code Cap 87 of the laws of Zambia. I convict him accordingly.

Turning to the count of obtaining money by false pretences contrary to section 309 of the Penal Code Cap 87, the essential element from what can be deciphered is making of false representations with intent to defraud. The thing obtained must be anything capable of being stolen.

What was obtained in this case is money to the sum of K90,000 less K500 fees. So this establishes that the thing obtained was capable of being stolen. The evidence proves the fact that the accused did present himself to PW4 's law firm as the owner of plot No. 30860 situate in Lusaka, that he was holder of NRC No. 909790/47/1 when in fact not. This establishes the aspect of false representations. On the need to prove intent to defraud, I earlier defined the term to **"defraud"** in terms of the meaning assigned by the law under paragraph 2186 of the 38th Edition of the Arhbold, to deprive by deceit or to induce another person to act to his detriment. So, as can be noted, intent to defraud is occasioned the moment one deprives another person by deceit.

On the matter before me, this element is established because the accused did obtain K90,000 from the complainant knowingly by presenting himself as the owner of a property which wasn't his.

To this end, I hold that the prosecution have proved the guilt of the accused beyond all reasonable doubt in respect of this charge too. I find him guilty of obtaining money by false pretences contrary to section 309 of the Penal Code Cap 87 of the Laws of Zambia and convict him accordingly.

DELIVERED IN OPEN COURT AT LUSAKA THIS 4TH DAY OF MAY, 2017.



G. MALUMANI ESQ

SENIOR RESIDENT MAGISTRATE

