

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

1SPA/161/2013

THE PEOPLE

V.

FREEMAN MWELA CHAMA & JOHN MWABA BWALYA

Before Mrs Mwaaka Chigali Mikalile -PRM

For A1: Mr E. Banda – Messrs BCM Legal Practitioners

For A2: Messrs Legal Aid Board

JUDGMENT

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. Criminal Procedure Code, Chapter 88 of the Laws of Zambia

CASES REFERRED TO:

1. David Zulu v. The People (1977) ZR 151
2. Shawaza Fawaz and Prosper Chelelwa v. The People

The accused were jointly charged with thirteen counts of which six are forgery, six are uttering and one is obtaining credit by false pretences.

In count 1, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the Laws of Zambia. Particulars of the offence allege that on 5th September, 2011, the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to

defraud did make a false document namely letter of offer, purporting to show that Scholastic Chifumbano had offered stand number 12 block 50, Chawama Compound Lusaka for sale to John Mwaba Bwalya at K 140,000.00 (rebased) when in fact not.

In count 2, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 1st September, 2011 and 31st May, 2012, the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, knowingly and fraudulently did utter a false document namely letter of offer to Ruth Kazoka Siluonde knowing the same to be false.

In count 3, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the Laws of Zambia. Particulars of the offence allege that on a date unknown but between 17th February, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to defraud did make a false document namely Contract and Conditions of Sale, purporting to show that the said document was executed between Scholastic Chifumbano and John Mwaba Bwalya when in fact not.

In count 4, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 17th February, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, did utter a false document namely Contract and Conditions of Sale to Ruth Kazoka Siluonde knowing the same to be false.

In count 5, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the

Laws of Zambia. Particulars of the offence allege that on a date unknown but between 9th May, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to defraud did make a false document namely Provisional Return for Property Transfer Tax, purporting to show that the said document was executed by Scholastic Chifumbano when in fact not.

In count 6, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 9th May, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, did utter a false document namely Contract and Conditions of Sale to Ruth Kazoka Siluonde knowing the same to be false.

In count 7, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the Laws of Zambia. Particulars of the offence allege that on 24th May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to defraud did make a false document namely Zambia Revenue Authority (ZRA) Application Form for Ownership Document and Change of Ownership, purporting to show that the said document was executed by Scholastic Chifumbano when in fact not.

In count 8, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 24th May, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, did utter a false document namely Zambia Revenue Authority Application Form for Ownership Document to Ruth Kazoka Siluonde knowing the same to be false.

In count 9, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the Laws of Zambia. Particulars of the offence allege that on dates unknown but between 24th May, 2012 and 24th June, 2012, the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to defraud did make a false document namely Authority to deposit money in joint account number 043070000002062 domiciled at ZANACO Mufulira Branch, purporting to show that the said document was executed by Scholastic Chifumbano when in fact not.

In count 10, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 24th May, 2012 and 31st May, 2012 the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, did utter a false document namely Zambia Revenue Authority Application Form for Ownership Document to Joseph Zulu knowing the same to be false.

In count 11, the accused are charged with **Forgery** contrary to sections 342 and 344 as read with section 347 of the Penal Code CAP 87 of the Laws of Zambia. Particulars of the offence allege that on 25th May, 2012, the accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, with intent to defraud did make a false document namely Permission to deposit money in Barclays Bank Account number 0161785288 domiciled at Mutaba Branch, Lusaka purporting to show that the said document was executed by Scholastic Chifumbano when in fact not.

In count 12, the accused are charged with **uttering a false document** contrary to section 352 of CAP 87. It is alleged that on a date unknown but between 25th May, 2012 and 31st May, 2012 the

accused at Lusaka in the Lusaka District, jointly and whilst acting together with others unknown, did utter a false document namely Permission to deposit money in Barclays Bank Account number 0161785288 domiciled at Mutaba Branch, Lusaka to Joseph Zulu knowing the same to be false.

In count 13, the accused are charged with **obtaining credit by false pretences** contrary to section 312 of the Penal Code Chapter 87. Particulars of offence allege that on 29th June, 2012, the accused persons at Lusaka in the Lusaka District jointly and whilst acting together with other persons unknown did obtain K 140,000.00 cash credit from the Public Service Pensions Fund (PSPF) by falsely pretending that Scholastic Chifumbano had offered house number 12 block 50, Chawama Compound Lusaka to John Mwaba Bwalya when in fact not.

The accused pleaded not guilty in all counts.

I warn myself at the outset that the onus is upon the prosecution to prove the case beyond all reasonable doubt and there is no onus on the accused to prove his innocence. If after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the accused, then the accused must be given the benefit of that doubt.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offences charged.

Counts 1, 3, 5, 7, 9 and 11 are on forgery. Section 342 of the Penal Code defines forgery as the making of a false document with intent to defraud or deceive. The prosecution, therefore, must establish:

1. that the accused made false documents as alleged in counts 1, 3, 5, 7, 9 and 11 and that they did so with intent either to defraud or to deceive

Section 344 of the Penal Code lists the circumstances in which one may be considered to have made a false document. It states as follows:

Any person makes a false document who-

- (a) makes a document purporting to be what in fact it is not;*
- (b) alters a document without authority in such a manner that if the alteration had been authorised it would have altered the effect of the document;*
- (c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorised would have altered the effect of the document;*
- (d) signs a document-*
 - (i) in the name of any person without his authority whether such name is or is not the same as that of the person signing;*
 - (ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;*
 - (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person;*
 - (iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.*

The prosecution, therefore, must establish that the accused made a false document within the meaning of section 344.

Intent to deceive is defined in the Penal Code section 344A:

"An intent to deceive exists when one person induces another person-

*(a) to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false;
or
(b) to believe a thing to be false which is true, and which the person practising the deceit knows to be true;
and in consequence of having been so induced does or omits to do an act whether or not any injury or loss is thereby suffered by any person.*

A definition of the word “fraud” can be found in Archbold, 38th Edition at paragraph 2186. The text says:

“...to defraud is to deprive by deceit; it is deceit to induce a man to act to his injury.”

If therefore, there is intent to deprive another person of a right, or to cause him to act in any way to his detriment or prejudice, intent to defraud is established.

Thus, the prosecution has to prove that when the accused made the documents in issue, they did so with the intention of defrauding someone.

Turning to count 2, 4, 6, 8, 10 and 12 the ingredients to be proved are that the accused

1. knowingly, and
2. fraudulently
3. uttered a false document.

The word “utter” is defined in the Penal Code, section 4 as follows:

“utter includes 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 intent to defraud which has already been explained.

As regards count 13, section 312 of Cap 87 provides that;

Any person who-

(a) in incurring any debt or liability, obtains credit by any false pretence or by means of any other fraud; or

(b) with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery, or transfer of or any charge on his property; or

(c) with intent to defraud his creditors or any of them, conceals, sells or removes any part of his property after or within three months before the date of any unsatisfied judgment or order for payment of money obtained against him;

is guilty of a misdemeanour and is liable to imprisonment for one year.

Section 308 of the Penal Code defines a false pretence. This section states that:

Any representation made by words, writing or conduct, of a matter of fact or of law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.

Thus, it must be established that:

1. the accused made a representation that Scholastic Chifumbano had offered house number 12 Block 50 Chawama, Lusaka for sale to A2

2. that the accused, when making this representation knew it to be false or did not believe it to be true
3. that through this fraudulent representation, the accused did incur a debt and obtained credit in the sums of K 140,000.00 (rebased) from PSPF.

In support of its case, the prosecution called 9 witnesses. The following is the gist of the evidence heard.

PW1 was 55-year-old Scholastic Chifumbano whose evidence was that on 11th July, 2003, she sold her house known as house number 12 Block 50, Chawama to Mr John Thomas Bwalya, the father to A2, at K 29 million now K 29,000.00. On 21st May, 2013, she was called by Drug Enforcement Commission (DEC) for interviews in connection with the said house. She was shown a file which contained documents with her name purporting to show that she had written them when in fact not. These documents were a letter of offer (ID1), a passport photo (ID2), a document showing that she has an account with Barclays when she only has one with ZANACO and an Occupancy Licence bearing her name (ID3). According to PW1, she told the DEC officers that the portrait was not of her. She disputed ID1 saying that the letter of offer she signed had the sum of K 29 million. She however could not show court the said offer letter because she had misplaced her copy.

PW1 further testified that after the sale to A2's father, she proceeded to ZRA for property transfer tax and was given a document to that effect in the sum of K 870,000 (unrebased). She also visited Lusaka City Council (LCC) where she was given a document to show that she had transferred the house to Thomas Bwalya. Thereafter, she handed over documents including original Occupancy Licence to him. PW1 identified the documents given Thomas Bwalya in court. A copy of the letter of sale was marked ID4, property Transfer Tax Certificate was

marked ID5, LCC Notification was marked ID6, change of ownership document was marked ID7 and the certificate of receipt of the K 29 million by PW1 from Thomas Bwalya was marked ID8.

In concluding, PW1 said she only transacted once with Mr Thomas Bwalya and only learnt later, through the DEC, that the house was sold again. She also said she does not know the woman on the portrait (ID2).

PW2 was 38-year-old Megan Mwasha, A Valuation Assistant working for Bitrust Real Estates whose duties include selling and letting property as well property valuation and management. It was her testimony that on 16th June, 2011, they received instructions from Public Service Pensions Fund (PSPF) to value a property in Chawama. On the very day, she contacted John Bwalya, who was the purchaser of the said property but he informed her that he was committed and would get back to her. A month later, he called to say he would send people to take her since he was busy. According to PW2, three men came to their offices to pick her up, one of whom was the now A1. She was taken to plot 12 block 50 in Chawama and she did her inspection. Back at the office, she compiled a report which was signed by the Chairman Mr Holland Mulenga and thereafter she transmitted it to Pensions. The valuation report was marked ID9. It was also her testimony that she never met the said Mr John Bwalya but did call him to inform him that the report was ready.

When cross examined by counsel for A1, PW2 stated that A1 did not introduce himself as the owner of the property in issue. He was just a representative sent by John Bwalya to show her the property.

When cross examined by counsel for A2, PW2 stated that the use of a PSPF letter head for the valuation reports was a PSPF directive. She also stated that Mr Holland Mulenga is the only signatory at Bitrust

as he is the registered surveyor. Thus, a report can only be signed by him.

PW3 was 51-year-old Joseph Zulu, Investment Manager at PSPF. He ran court through the procedure for acquisition of loans for purchase of a home. He said PSPF requests for an offer from the vendor, a title deed and letter of introduction from the employer among other things. A valuation is then done after which a decision sheet is produced indicating that the person named therein is entitled to a loan. The loan is then approved either by himself or his superior after which it is paid out and the Fund retains the title.

It was PW3's testimony that on 16th February, 2012, he received a file under the name of John Bwalya Mwaba and he approved a decision sheet in order that the loan could be granted. Necessary documents were drawn up to the point of payment. Two instructions were then issued by the vendor. The first was 'pay in my account' dated 25th June, 2012 and the next was an instruction to deposit in the joint account. The money was then paid to what the Fund thought was the vendor, Scholastic Chifumbano when in fact not. PW3 identified the decision sheet he signed and it was marked ID10.

When cross examined by counsel for A1, PW3 stated that the two letters of instructions were received by Doris Namakobo. He said the two letters were not stamped hence he did not know whether they were received on the same day or not. PW3 also stated that he had no idea who delivered the two letters. He further stated that prior to the loan being granted, a search of the property was conducted and it was found not to be encumbered. PW3 said they do not pay to a person that is not the registered owner of the property. He also said A1 is not the vendor of the property herein and there is nowhere on the file where he is mentioned. PW3 stated that the property has not been

registered in A2's names but the Fund has continued deducting from him.

When cross examined by Counsel for A2, PW3 stated that he does not know which documents A2 forged and uttered. Had he known, he would not have approved the loan.

PW4 was 50-year-old Violet Mweemba, a Secretary at Bitrust Real Estates whose evidence was that she typed the report (ID9) drafted by PW2 after which Holland Mulenga, her superior, signed it and it was delivered to Pensions.

PW5 was 41 year-old Ruth Kazoka Siluonde, a Credit Officer at PSPF. She testified that in 2010, she was Loans officer and her duties included preparing files for approval by the Investments Manager. She told court that the front officer, of which Ms Doris Namakobo was a part, would receive loan applications. They would open a file and request for a valuation report for the property to be purchased or built. If the value was okay, the front office would forward the file to her and she would prepare a decision sheet that she would then submit to Mr Zulu (PW3) for final approval. Once approved, she would prepare offer of advance informing client of the loan approval.

It was her testimony that on 11th February, 2012, she received from front office, a file for Mr John Bwalya for her to prepare the decision sheet. According to PW5, she verified that all necessary documents were on file and forwarded the decision sheet to PW3. After the approval by PW3, she prepared the offer of advance. She identified these documents in court and they were marked as follows: Application form ID1, Introduction letter from employer ID12, Attestation paper ID13, applicant's NRC ID14, offer of advance ID15, NRC for vendor ID16 and applicant's payslip ID17. She also identified the decision sheet (ID10).

When cross examined by counsel for A1, PW5 stated that ID1, the offer letter, was uttered to her by front office and not A1. She denied the assertion that A1 uttered the contract and condition of sale to her or the provisional return of property transfer tax or the ZRA form for change of ownership. She said she never received any documents from either accused. She also stated that it was her duty to ensure that bank details of the vendor were correct. She said the vendor gives the instructions as to where the payment is to be deposited and only in exceptional circumstances does the applicant provide those instructions.

PW6 was 33-year-old Phaless Miti, a Soldier with the Zambian Army. She testified that in July, 2012, the now A1, who is a close family friend visited her home with the intention of seeing her husband. Unfortunately, her husband was not home. A1 mentioned that he wanted her husband's bank account number and went on to ask her if she could help him with hers instead. A1 explained that he was receiving money from a friend in Mufulira. PW6 gave A1 her account number 0400010000097013 domiciled at Zanaco main branch. After 4 days, A1 phoned her asking her to check if money had hit her account. She did and informed him that K 70 million, now K 70,000.00 was sitting in her account. A1 asked her to meet him at Woodlands Zanaco branch from where she withdrew K 25 million (now K 25,000.00). This was on 5th July, 2012. She said she gave him the money plus her ATM card and pin number. On 6th July, 2012, she again withdrew K 25 million (now K 25,000.00) and gave it to him. According to PW6, A1 withdrew the rest of the money using the ATM card. She identified in court the 2 withdrawal slips and they were marked ID18a and ID18b.

When cross examined by Counsel for A1, PW6 stated that she did not see the need to ask A1 why he was not using his own account to receive the money as she did not know the reason for the money. She

also stated that she informed neither her husband nor A1's wife about the K 70 million. She said she never informed anyone about this transaction. She also said she did not make A1 sign for receipt of the money. Her husband only learnt about it after she was summoned by DEC. She further stated that since A1 is like family, she did not expect anything from him. She insisted that she gave A1 the money.

When cross examined by counsel for A2, PW6 denied the assertion that she knew where the money was supposed to go and that is why she did not inform her husband and A1's wife about it.

PW7 was 71-year-old Major John Thomas Bwalya (RTD), A2's father. He testified that following his retirement, he decided to buy a house. In 2003, he bought house number 50/12 Chawama from Mrs Scholastic Chifumbano at K 29 million (unrebased) which he still occupies to date. Following the purchase, he was given the Occupancy licence and he obtained from Council land clearance letter (letter of sale) and a certificate of change of ownership. It was his evidence that towards the end of 2010, his son, the now A2, approached him and asked him if he could get a loan from the bank using the occupancy licence. According to PW7, he gave A2 the licence and told him to first change ownership into his name before obtaining the loan. PW7 showed court the letter of sale between him and PW1 and it was marked ID19. He also identified the occupancy licence (ID3). He further told court that after giving A2 the documents, he never heard from him.

PW8 was Mutelo Mabenga, a Banker with ZANACO whose duties are to coordinate current and savings accounts and also to process instructions. It was his evidence that they received an enquiry from DEC to look at 2 accounts for Kingford Kabandama held at Mufulira branch and Phaless Miti held at Cairo road branch. The DEC's interest was the K 130 million (unrebased) which had been received by

Kingford and a transfer of K 75 million (unrebased) made to Phaless Miti from Kingford's account. PW8 with the help of his supervisor printed the statements for the 2 accounts. PW8 produced Kingford Kabandama's statement of account and it was marked P20. Phaless Miti's statement was tendered in evidence and marked P21. On P20, PW8 directed court to the transfer from PSPF dated 29th June, 2012 and the transfer from Kingford's account to Phaless Miti's account in the sum of K 70,500.00 (rebased) dated 7th July, 2012 following an instruction issued on 5th July, 2012 by the account holder. The statement for Phaless Miti shows cash withdrawal of K 25 million (Unrebased) on the same day and a further withdrawal of same amount on 6th July, 2012.

PW9 was 52-year-old Ammon Nkhata, Assistant Investigations Officer of the DEC whose testimony was that on 12th July, 2012, he received suspicious transactions report from ZANACO that one of its customers Kingford Kabandama whose account is domiciled at Mufulira branch had received a transfer of K 130.2 million (unrebased). The transaction was deemed out of character with the normal operations of the account. According to PW9, he prepared search warrants and requested for bank statements and mandate file for Kingford Kabandama. He analysed the statement and discovered the credit of K 130.2 million on 29th June, 2012, order of PSPF through Indo (Z) Bank where the institution has its account. PW9 then wrote to PSPF requesting details of the K 130.2 million payment to Kabandama and documentation relating to the same transaction. PSPF's response was that the said amount was a payment to Mrs Scholastic Chifumbano who had sold a house to John Mwaba Bwalya, an Army Officer and further that they never had any transaction with Kabandama. PW9 then interviewed PW3 who explained the procedure under the home ownership scheme. PW9 requested for the John Mwaba Bwalya's file in which he discovered an offer letter purportedly written by Scholastic Chifumbano, property transfer documents from ZRA

purportedly completed by Chifumbano, a change of ownership from Chifumbano to John Mwaba Bwalya, a payment voucher of K 130.2 million, a letter of authority instructing PSPF to transfer the proceeds to Chifumbano's account domiciled at ZANACO Mufulira. After all this, PW9 was left wondering how money went to Kabandama and not Chifumbano. He travelled to Mufulira to interview the said Kabandama but his wife informed him that he had left for DRC Congo 4 months earlier. He also learnt that Kabandama was related to A1 whom PW9 did not know at the time.

PW9 testified that on the bank statement were 2 withdrawals on 4th and 5th July, 2012 in the amounts of K 24,800 and K 21,200. He was availed the 2 withdrawal slips and he seized them as part of his evidence. Further there was a transfer instruction by Kabandama to Phaless Miti's account held with ZANACO Cairo road. Back in Lusaka, he applied to court to inspect Phaless Miti's account. The account reflected a credit transfer from Kabandama of K 70.5 million (unrebated). Additionally there were 2 cash withdrawals of K 25 million on 5th and 6th July, 2012. PW9 then summoned Phaless Miti for interviews and she explained how the money came about. Interviews with Scholastic Chifumbano revealed that she sold plot 12/50 Chawama to John Thomas Bwalya in 2003. When shown the offer letter purportedly written by her, she denied it. She also denied the letter of authority to transfer money into her account and the passport size photo of a lady found on the mortgage file. She said she was not the person on the photo. Interviews with John Thomas Bwalya confirmed that he purchased the house from Scholastic and that she handed over the occupancy licence. He also confirmed not having changed ownership of the house and that his son asked him to use the occupancy licence to apply for a loan. PW9 went on to interview the son, A2, who confirmed having asked for the title to get a loan. He also revealed that he gave the title to A1 to help him process the loan application. According to A2, A1 was an agent who helped

fellow officers access loans from PSPF. On 17th August, 2012, he signed a stop order at PSPF in order for his employer to effect deductions from his salary. He then begun waiting for PSPF to hand over property to him but as at the time of the interview in October, 2012, he had not received anything or benefited from the K 130.2 million transferred to Kabandama's account.

Under warn and caution, A1 denied committing any offence. Not satisfied with their responses, he made up his mind to charge and arrest the now accused persons for the subject offences.

PW9 identified in court the following documents: the bank statement (ID20); warrant to search Kingford's account (ID22); Bank Mandate (ID23); instruction to transfer amount to Phaless Miti (ID24); response from PSPF to DEC signed by PW3 (ID25); payment voucher (ID26); authority to deposit money (ID27); stop order (ID28); warrant to search Phaless Miti's account (ID29); withdrawal slip in Kabandama's name (ID30) and; the documents already identified, i.e. IDs 1 to 21. As custodian of these documents, PW9 tendered them in evidence and they were admitted marked P1 to P19 and P22 to P28 and P30. P20 and P21 were produced by PW8.

When cross examined by A1, PW9 stated that A1 stole money from PSPF. He was not an employee of PSPF. He acted as agent between A2 and PSPF when A2 applied for the loan and he gave PSPF the account number of a person who was not the vendor of property. The said person namely Kingford Kabandama is still at large. When money hit Kabandama's account, A1 facilitated movement of the money to his workmate Phaless Miti and he withdrew the money from her account. A1 acted as an agent and many people approached him for mortgage applications. PW9 said he got this information from the victims. A2 is not the only victim. PW9 also stated that A1 connived with PSPF officers.

When cross examined by counsel for A2, PW9 reiterated that A1 forged documents. He stated that A2 got the occupancy licence from his father to use as collateral for a loan. A2 followed the procedure. He did not receive any money from PSPF. PSPF has been deducting from A2's salary. PW9 also stated that A2 has been eliminated from the forgery by the forensic report. P11, P12, P13, P15, P23 and P24 are not forged documents. A2 did not author any of them. P28 is not a forged document either. It was filled in by A2 for PSPF to start recovering from his salary. PW9 said he was not alleging that A2 instructed that money goes into Kabandama's account. He said A2 was just a victim.

At the close of the prosecution's case, A1 was found with a case to answer in all counts except the uttering ones being counts 2, 4, 6, 8, 10 and 12. Pursuant to section 206 of the Criminal Procedure Code, he was acquitted in these counts. A2 was found with a case on all counts and accordingly placed on his defence.

Both accused opted to give evidence on oath. A1 called no other witness. A2 called two other witnesses. The following is the evidence in defence.

DW1 was A1, Freeman Chama, a Retired Officer whose evidence was that he has no knowledge of the letter of offer purported to have been prepared by him. He denied knowledge of the contract of sale saying he heard about it for the first time in court. The same applies to the provisional return for property transfer tax. A1 equally denied knowledge of the change of ownership document. He said he has never prepared any letter to transfer funds. He also denied preparing a document for depositing money. As regards count 13, A1 told court that he knows Phaless Miti (PW6). She is his wife's friend. He denied having transacted with her in relation to the matter at hand and disputed her evidence before court.

It was A1's evidence that while he was still with the Army, he got a loan from Pensions. He cleared it by 2013.

Further on the allegations levelled against him, A1 testified that he used to work with A2 in the same unit. A2 told him about the house he wanted to buy in Chawama and asked for his assistance in finding someone to value the house. Because A2 was very busy, he asked A1 to accompany the people to view the house. He said he stood at a distance as the house was valued.

When cross examined by counsel for A2, A1 denied ever helping anyone to obtain a loan. He said he was never an agent. He denied the assertion that he unceremoniously left the camp where he was staying because people were upset with him for chewing their money from Pensions. A1 denied helping one Sgt Mwangata, Mr Bubula and Sgt Kiyomakiyoma to get loans and then duping them of their money. A1 also stated that A2 did not give him documents in the names of Scholastic Chifumbano in order to help him process a loan using a house belonging to his father. He denied knowledge of the fact that A2's salary is still being deducted for the K 140,000.00 loan that he never got.

When cross examined by the prosecutor, A1 stated that he led the lady from Bitrust to the house in Chawama in his capacity as A2's friend and because A2 asked him to do that. He denied the allegation by PW6 that she gave him K 70,000.00. He said he does not know why she lied against him.

DW2 was A2 John Mwaba Bwalya, now retired Army Officer. It was his testimony that A1 was helping a lot of soldiers to get loans. He was acting as an agent. He was introduced to him by late Sgt Mubanga who informed him that A1 could help him get a loan from Pensions. According to A2, A1 told him to avail and he did avail the

attestation paper, copy of a payslip, letter from employer, copy of NRC and title deed which he got from his father. It was in the names of Scholastic Chifumbano from whom his father bought the house. After about 2 months, A1 called him to tell him that he would receive a phone call from one lady from Bitrust. True to his word, a lady called telling him that she wanted to view the property and that he should accompany her. According to A2, he could not as he was too busy at the office. It was his evidence that he never took A1 to his father's house. He was actually surprised that A1 denied having worked with his father (PW7). An hour after the call from Bitrust, he was surprised to receive a call from his father informing him of the visit by the people to view the house as he had wanted to be present during the visit. According to A2, the letter of offer (P1) and P4 came from A1 and he did not see them. He, however, completed the application form (IP11), the offer of advance (P15) and the stop order (P28) for Pensions to start deducting from his salary. To date, he has not been informed of the loan approval. He was just surprised that Pensions effected deductions despite that he did not receive the money. To prove the on-going deductions, A2 produced as part of his evidence 43 payslips ranging from 2011 to January, 2017 and they were admitted marked D1.

He also testified that he was summoned by the arresting officer and interviewed. According to A2, he told him that he had no knowledge of that money and that A1 helped him compile the documents for the loan application. It was his testimony that before he met the DEC, A1 had called him telling him to expect a call from DEC. A1 went on to say that A2 should inform DEC that the owner had collected the money. According to A2, he had no idea the person A1 was referring to as owner. A1 then went on to ask for time within which he could give A2 the money that he had obtained from Pensions using his (A2's) name.

A2 denied uttering documents to Ruth Kazoka (PW5). He denied making the Contract and conditions of sale document later on presenting it to PW5. He also denied making the ZRA property transfer tax document saying he has never been to ZRA. A2 denied making the ZRA application form for ownership documents and change of ownership later on uttering it to PW3. He said he recalls A1 and his colleagues approaching him asking him to fill the document as it was one of the requirements. A2 denied knowing Kingford Kabandama. He said he never prepared a document allowing money to be deposited to Scholastic's account or indeed to an account at Barclays Bank. He also said he did not utter such authority to PW3. As for the money stated in count 13, A2 told court that he is still waiting for it. He said he was surprised to hear from Phaless Miti (PW6) that she withdrew K 70,000.00 and gave it to A1 and that the rest of the money entered A1's uncle's account in Mufulira which uncle is on the run.

When cross examined by Counsel for A1, A2 stated that he did sign a document called contract of sale which came from A1. He also stated that when the deductions begun, he made a follow up at PSPF and was advised to see his agent, A1.

When cross examined by the prosecutor, A2 confirmed having completed the application form (P11). As regards P1, he said he saw this document for the first time at DEC but he had seen a similar document with A1 earlier.

DW3 was 46-year-old Stanslous Mwangata, a soldier. It was his testimony that A1 used to be a soldier but not anymore because of the moneys concerning the loans. According to DW3, A1 was an agent for Pensions. He testified that A1 got a loan of K 109,000 from Pension on his behalf. When he learnt this, he confronted A1 who admitted having the money in his account and asked him to wait for the

vendor. DW3 reported the matter to the Provost but A1 denied knowledge of this matter. His boss then took him to DEC and later A1 called him asking him why he was being difficult. He insisted that he would give him the money or the house. From that time however, A1 has just been evading him. It was DW3's evidence that the proof that A1 was his agent is that he signed his covering letter from work and also that he secured the title deed from Mufulira. DW3 produced his payslip and offer of advance that he claims he completed with help of A1 and the documents were marked D2 and D3 respectively. He also produced a letter from MZ Mwandenga and company advising Loans officer at PSPF to proceed with payment and it was marked D4.

When cross examined by A1, DW3 reiterated that A1 was an agent in the sense that PSPF was sending him to help soldiers get loans. He also reiterated that A1 stopped work because of the scandals he made. He stated that PSPF gave A1 his money because he was an agent. DW3 further stated that A1 admitted having collected his money in the presence of the purported vendor, Mr Ntolopa at Lumumba filling station.

DW4 was 42-year-old Ladicious Bubala also a soldier. He told court that he was one of the victims at the hands of A1. It was his testimony that when A1 was transferred to their station, he was fond of getting passes to stay off work. When asked where he went, A1 explained that he did not come to work only as catering officer but as an agent. A1 told him that he was helping soldiers to buy houses via Pensions and he could do the same for him. DW4 said he did not trust him there and then and decided to investigate at Pensions. He found a gentleman called Francis Mwewa who explained the requirements. DW4 thought the process was tedious and as he was about to leave, the said Francis informed him that there was a person called Freeman Chama, A1, who dealt with such issues and there was no need for him to even go to Pensions. The following day, A1

approached him and after he explained what happened said "I told you so". A1 then asked him to gather the necessary documents which he did after which he informed him that his role was done and the rest was his. Eventually, he was asked to go to Pensions to sign a document and he met the vendor from Mufulira. Later, A1 informed him that everything was on course. In September, 2012, he noticed a deduction on the payslip and he asked A1 about it. A1 told him that Pensions had lost too much money in the past and would only release the money after 2 or 3 deductions. After the October deduction, he called the vendor from Mufulira who denied having received the payment. DW4 said he then went to Pensions and showed Francis Mwewa the payslips with deductions. Francis informed him that money was paid in July, 2012. DEC was involved and subsequently, A1 told him not to trouble the vendor from Mufulira as she did not get the money. A1 said the gentlemen he was working with are the ones who got the money and ran away. Further, A1 informed him that he was retiring to join politics and would use the benefits therefrom to pay back the money.

When cross examined by A1, DW4 stated that he is sure that A1 was an agent not only because he told him so but also because Francis Mwewa of Pensions confirmed it. He reiterated that A1 and the purported vendor came to his house and A1 confirmed that he got the money and not the vendor.

When cross examined by the prosecutor, DW4 stated that Pensions is still deducting from him. He is paying for the house which he has not taken up as the vendor refuses to leave because she has not received the purchase price.

Having considered the evidence and written submissions on behalf of A1, I now state my findings of fact. I find that both accused, at the material time, were Zambia Army Officers. A2 did apply for a house loan from PSPF in 2011. In furtherance of this application, he availed

the occupancy licence for his father's property known as House number 12 block 50 Chawama (P3), introductory letter from Zambia Army (P12), attestation paper (P13), a copy of his NRC (P14) and his payslip (P17). Having fulfilled the requirements, PSPF went ahead to pay the loan in the sum of K 130,200.00 (rebased) as per payment voucher, P26. As far as PSPF were concerned, they were paying to the vendor of the property Scholastic Chifumbano. It is undeniable that during the transaction leading up to the disbursement of the funds by PSPF, Scholastic Chifumbano, the original owner of plot 12 block 50 Chawama was not involved. She never transacted upon the property after selling it to A2's father, PW7 back in 2003. Thus, I am satisfied that any documents purporting to show that they were signed by her for purposes of the loan in this matter are not genuine documents.

The judgment will now address each and every count.

As regards count 1, I ask myself if on the evidence before court the two accused can be said to have forged the letter of offer P1. This is a document which indicates that it is between Scholastic Chifumbano (PW1) as seller of plot 12 block 50 Chawama and A2 as buyer of the said plot. It is dated 5th September, 2011. As found, PW1 did not execute this document. She sold the property in issue in 2003. The fact that P1 was signed in the name of PW1 makes it a forgery within the meaning of section 344 (d) (i) for it was signed in her name without her authority.

A determination as to who forged the document shall be made later in the judgment.

Turning to count 2, I ask myself if A2 did utter P1 to Ruth Kazoka, PW5. There is no evidence on record regarding who uttered any of the documents in contention. PW5 told court that she is not the one that received the documents but that front office did. As such she was not

in a position to say who brought the documents to PSPF. No officer of the front office at PSPF was called to testify regarding this aspect. As such, count 2 fails. Consequently, A2 is also **not guilty** and **acquitted** in this count.

As regards count 3, I ask myself if the accused forged the contract and conditions of sale. Strangely enough, the said document was not produced in evidence. Its existence therefore is not certain. In my view, it would be absurd to hold that this document was forged when I have not had sight of it.

As regards count 4, that is, uttering of the contract and conditions of sale, I find that it cannot stand. This so not only because PW5, the person named as the one to whom the document was uttered, denied receiving this document from either accused but also because forgery ought to have been established first. As stated above, this court will never know whether the document existed in the first place. As such, A2 is acquitted in count 4.

Turning to count 5, I ask myself if the accused forged the Provisional return for property transfer tax. Again no such document was produced in evidence. Its existence was not established. The only property transfer tax document on record is P5 which is a genuine tax clearance certificate issued to Lusaka City Council by ZRA in 2003 when PW1 sold the property in issue to A2's father, PW7.

In light of this, the state has not proved the forgery alleged in count 5 and I accordingly find both accused **not guilty** and I **acquitt** them.

Count 6 is on uttering of the contract and conditions of sale document to PW5. I must mention here that this appears to be replication of count 4. The only difference is that in count 4, the uttering is alleged to have occurred between 17th February, 2012 and 31st May, 2012

while in count 6, it is alleged to have occurred between 9th May, 2012 and 31st may, 2012. Whatever the case however, the fact is that no contract and condition of sale between PW1 and A2 was produced in evidence. Since forgery of that document has not been proved, uttering must fail. I accordingly find A2 **not guilty** and **acquit** him in count 6.

Turning to count 7, I ask myself if the prosecution has proved that either accused forged a ZRA application form for ownership and change of ownership. As in counts 3 and 5, this document was not produced in evidence. Its existence therefore has not been proved. The only change of ownership document on record is P7 which is a genuine document issued by LCC in 2003 during the transaction between PW1 and PW7. Count 7 thus fails and both accused are forthwith **acquitted**.

Turning to count 8, as previously found, I cannot find that there was uttering without first establishing that the document, that is, ZRA application form for ownership, was indeed a forgery within the meaning of section 344. I accordingly find A2 **not guilty** and **acquit** him in count 8.

As regards count 9, I ask myself if the accused forged the authority to deposit money in an account domiciled at Zanaco (P27). This document is a letter purportedly written by Scholastic Chifumbano to Loans officer at PSPF for them to deposit money in account number 0430700000020621 Zanaco Mufulira. As stated earlier, Scholastic Chifumbano, PW1, did not author this document. She did not append her signature on P27. I am therefore satisfied that P27 is a forgery within the meaning of section 344(d)(i) for it was authored and was signed by a person other than PW1.

Count 10 is uttering of ZRA application form for ownership and change of ownership to PW3. As in count 8, I needed to be satisfied that this document was false in fact before concluding that it was uttered. As stated earlier, it has not been produced to court making it difficult to make the necessary conclusion. As such, I find A2 **not guilty** and **acquit** him in this count.

As for count 11, the state has equally failed to establish forgery of the permission to deposit into a Barclays Bank account. Firstly, this document was not tendered in evidence so it cannot be concluded that it is a false document. For the same reason as before, uttering of the said document must also fail. As such, both accused are **not guilty** and are **acquitted** in count 11 and A2 is **acquitted** in count 12.

Before I address count 13, I will first revert to the two counts of forgery that were left hanging. What ought to be determined is – who forged these documents namely the letter of offer (P1) and authority to deposit money in the joint account(P27)?

I have carefully considered all of the evidence on record. There is of course no direct evidence regarding the forgery. There was no prosecution witness that testified as having seen either accused make these documents. The application for a loan was by A2 and this makes him a great suspect. He however denied knowledge of this document. His evidence is that he availed all relevant documents pertaining to the loan application to A1 who was acting as agent on behalf of Army officers who were applying for house loans. A1 vehemently denies this assertion but A2 has been corroborated by the two defence witnesses DW3 and DW4 who all said A1 did help a lot of Army officers obtain loans from PSPF and the two witnesses were amongst those that were ultimately cheated out of their money by A1.

With this evidence, I am satisfied that A1 did in fact get involved in the loan acquisition process for A2. He even went as far leading the valuator to the plot in issue. There is also damning evidence from PW6, Phaless Miti to the effect that A1 used her account to receive money from Mufulira. It is undeniable that the loan approved in the sum of K 130,200.00 in respect of A2 ended up in one Kingford Kabandama's account at Zanaco Mufulira branch and the said Kingford Kabandama issued an instruction to the bank to transfer K 70,500.00 to PW6. This instruction is P24.

A1 attempted to deny the fact that he received money through PW6 and even went as far as saying PW6 lied against him. However, I do not for a minute entertain this bear denial by A1. There is no way PW6 could have made up such a story against A1. From the evidence on record, I have not deciphered any motive that PW6 could possibly have to fabricate a story against A1. What she said in court is what happened. There was no nexus established between her and the PSPF transaction that could make me conclude that she received that K 70,500.00 in her own right. She received that amount in her account by virtue of A1. I also have no reason to disbelieve her testimony that she withdrew K 50,000.00 and gave it to A1 while A1 withdrew the rest of the money via the ATM.

During cross examination of PW6, it was implied that the fact that PW6 did not tell anyone including her husband and A1's wife about the money was highly suspicious and that PW6 in fact did not give A1 any of that money. However, much as I agree that it was strange for PW6 to behave in that manner toward her husband in relation to this transaction, I will not speculate on it. There is obviously more to the transaction that meets the eye. Nevertheless, I have no doubt in my mind that A1 received this money from PW6. Furthermore, there is unchallenged evidence that Kingford Kabandama, from whom the money came is A1's relative.

Thus, the prosecution has established beyond reasonable doubt, a connection between A1 and the loan from PSPF. Further, there is no evidence on record to show that A2 in any way benefited from this loan which he has continued to pay back to date.

With the outcome of the whole transaction, that is to say, money ending up in the hands of A1 and his relative Kingford Kabandama, the evidence of A2 and his witnesses DW3 and DW4 to the effect that A1 is the one that was pushing loans for fellow soldiers and ultimately duped some of them has received corroboration.

There being no direct evidence to show that the two accused forged the two documents, I am left to look at the circumstantial evidence. A2 said he simply submitted the required documents to A1 and A1 did the rest. There is nothing on record to discredit this evidence. As such, as much as suspicion may attach to A2 regarding his involvement, that suspicion is not sufficient to render him guilty. As was stated in the case of **David Zulu v. The People (1977) ZR 151** at 153 it is *incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.*

However, the circumstances of the case, that is A1 benefiting from the transaction is sufficient to show that he had interest in the matter and therefore knew about the forgery. It is important to note that P27 contains Kingford Kabandama's account number and as established, Kingford Kabandama is A1's relative. There is no evidence that A2 knows this person and his account for him to have been in a position to author P27 and sign it in the name of Scholastic Chifumbano.

The foregoing is such a compelling situation that it is impossible to accept that the forgery was not made by or at the instigation of A1. Thus the only reasonable inference from the circumstances is that A1 either forged the two documents himself or procured another to forge them for him. If he procured, it would constitute procuring the commission of the offence of forgery. Under section 21(2) of the Penal Code, a person who procures another to commit an offence may be charged with the actual commission of that offence and convicted and punished as though he had committed that offence.

Taking into account the David Zulu case, I find A2 **not guilty** of forgery of the two documents in counts 1 and 9 and I **acquit** him accordingly. However, I have no doubt that A1 is **Guilty** of the offence of forgery and I accordingly **convict** him in **both** counts.

I now revert to Count 13. As found, A1 ended up with the money from PSPF, money which should have benefited A2. The evidence has sufficiently established that A1 used genuine documents furnished by A2 such as the occupancy licence (P3), introductory letter from Zambia Army (P12), Attestation paper (P13), Surveyor's report (P9), application form completed by A2 (P11), a copy of A2's NRC and offer of advance signed by A2 to obtain the loan. Using false documents such as the offer letter (P1) and authority to deposit money in his relative's account (P27), A1 managed to obtain the loan and facilitated the transfer of the money to his relative Kingford Kabandama. His relative in turn sent the money to him through Phaless Miti's account at Zanaco.

One need not be a rocket scientist to see the fraud orchestrated by A1. Scholastic Chifumbano did not offer plot 12 block 50 Chawama to A2. A1 knew this fact and incurred a debt of K 130,200.00 at the expense of A2 by virtue of the false representation. A1 obtained credit by fraud contrary to section 312 of the Penal Code.

In the circumstances, I find A1 **guilty** in count 13 and in **convict** him accordingly.

There being no proof that A2 was privy to the fraud, I do hereby give him a benefit of the doubt. In the case of **Shawaza Fawaz and Prosper Chelelwa v. The People** (1995) Z.R the Supreme Court quashed the convictions of the appellants despite acknowledging that a great of deal of suspicion attached to the appellants. The appellants received this favour because there was a doubt arising from the evidence.

Similarly in this case, in as much as I have my suspicion regarding the level of involvement of A2, there are lingering doubts created by absence of concrete evidence incriminating A2. There is a greater possibility that he is a victim rather than an accomplice.

As such, I find him **not guilty** and **acquit** him accordingly.

For the avoidance of doubt, A1 is Guilty in counts 1, 9 and 13 and A2 is acquitted of all charges.

DELIVERED IN OPEN COURT THIS 6TH DAY OF OCTOBER, 2017.



PRINCIPAL RESIDENT MAGISTRATE

