

PROSECUTION v. BEZA ET AL.

[Rwanda SUPREME COURT – RS/INJUST/RP 00008/2018/SC (Ntezilyayo, P.J., Mukamulisa, Hitiyaremye, Nyirinkwaya and Rukundakuvuga, J.) February 28, 2020]

Criminal law – Offence of forgery and use of forged documents – On the offence of forged documents, no fraudulent intention possible in the absence of the gain that can benefit the perpetrator, it is important that in making a forged document there must be fraudulent objectives.

Criminal law – Offence of selling a property of another person – The power of attorney – Regarding the offence of selling a property of another person, this offence is not possible for a person who has been given the full power of attorney.

Facts: This case was initiated in the Intermediate Court of Nyarugenge, the Prosecution indicted Uwamahoro, Niyitegeka and Beza for the offences of forgery and use of forged documents and selling a property of another person, this case happened after Mukarugwiza gave the full power of attorney to Uwamahoro as evidenced by the power of attorney of 05/02/2008. On basis of that power of attorney, Uwamahoro sold to Beza and Niyitegeka the cars of Mukarugwiza, they entered into sale contracts but in their drafting, on one contract (concerning the contract with Beza), Uwamahoro appears as Mukarugwiza and she signs on her behalf, on the other one (concerning the contract with Niyitegeka) she appears as the owner of the car. As a result of such drafting of contract, the Prosecution charged all of them with the offence of forgery and use of forged documents, but Uwamahoro was also charged with the offence of selling a property of another person, and the Intermediate Court of Nyarugenge ruled that they were acquitted.

The Prosecution appealed against the case before the High Court which ruled that the contract referred to in the case constituted itself a forged document, it found Niyitegeka, Beza and Uwamahoro guilty of complicity in forging and use of forged documents and it found Uwamahoro guilty of selling a property of another person and it sentenced Niyitegeka and Beza to the imprisonment for a term of two (2) years for each one, while Uwamahoro Alphonsine was sentenced to the imprisonment for a term of six (6) years.

Beza and Niyitegeka applied for review of the case rendered by the High Court due to injustice, and it was heard by the Supreme Court. The latter examined the injustice and decided about it, but it also examined the charges against Uwamahoro even though she did not file a claim and she was not present in the hearing, pursuant to article 63 of the Law determining the jurisdiction of the courts. With regard to the offence of forged documents, the debate was based on determining whether there was conspiracy to commit such offence for the accused.

In the case before the Supreme Court, although the defendants (Beza and Niyitegeka) do not deny that they signed on the sale contracts with the so-called property owner (Uwamahoro) knowing that she was not, they insisted that the buyer had full power of attorney and proved that the payment reached to the owner (Mukarugwiza).

The Prosecution sustains that their intent to commit the offence is based on the fact that they willingly and knowingly signed the forged documents. It also states that forgery and use forged documents is a formal offence, so it is not necessary to take into account the prejudice caused even

if it exists, because, as it states, the constitutive element of the offence is to knowingly and intentionally sign on a forged sale contract.

Held: 1. On the offence of forged documents, no fraudulent intention possible in the absence of the gain that can benefit the perpetrator, it is important that in making a forged document there must be fraudulent objectives, thus the defendants are not guilty of that offence.

2. For a person who has been given the full power of attorney, he/she may act before the parties who are making the contract as the one who he/she represents him/herself (représentation parfaite) or he/she may act as if he/she is the self-representing (représentation imparfaite), thus nothing precluded Uwamahoro from drafting contract in such a way it was drafted because it is also allowed.

3. Regarding the offence of selling a property of another person, this offence is not possible for a person who has been given the full power of attorney, thus, Uwamahoro is not guilty of that offence.

**Application for review due to injustice has merits;
Judgment number RPA00764/2016/HC/KIG overruled;
Defendants are acquitted.**

Statutes and statutory instruments referred to:

Law n°68/2018 of 30/08/2018 determining offences and penalties in general, article 276.

Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 63.

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article 614.

No case referred to.

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Judgment

I. BACKGROUND OF THE CASE

[1] Beza Kevin bought a car type Toyota Carina E with plate number RAB 187 K, Chassis SB 153 BK00E034920, for five million five hundred thousand Rwandan francs (5,500,000 Frw) as per the sale contract of 31/12/2009, he paid the price of that car through bank account no. 409-1017206-11 in the Banque Populaire du Rwanda in the name of Mukarugwiza Janvière who is also the owner of the car. On 21/12/2009, Niyitegeka Emmanuel also bought a car type Toyota Carina E with plate number RAB 174 S for four million and six hundred thousand Rwandan francs (4,600,000 Frw). Both vehicles were sold by Uwamahoro Alphonsine who had the full power of attorney to the property of Mukarugwiza Janvière and to represent her in her absence, according to the power of attorney of 05/02/2008.

[2] In 2016, in the case RP00272/2016/TGI/NYGE, the Prosecution indicted Uwamahoro Alphonsine, Niyitegeka Emmanuel and Beza Kevin for the offence of forgery and use of forged documents and selling of a property of another person in the Intermediate Court of Nyarugenge basing on the sale contract of the cars referred to in the preceding paragraph drafted in the names of Mukarugwiza Janvière but signed by Uwamahoro Alphonsine; the latter acted as if she was Mukarugwiza Janvière who signed on it while she was not present.

[3] Niyitegeka Emmanuel and Beza Kevin pleaded not guilty, and on 20/09/2016, the Intermediate Court of Nyarugenge, after analyzing the Prosecution's elements of evidence and their defense, acquitted them on the offence of forgery and use of forged documents and selling of a property of another person, it upheld that no evidence proves that the power of attorney given by Mukarugwiza Janvière to Uwamahoro Alphonsine for running her business is a forged document, it was the same to Uwamahoro Alphonsine who was tried in absentia.

[4] The Prosecution was dissatisfied with the decision, and appealed to the High Court, the application was registered under number RPA00764/2016/HC/KIG. The Prosecution, in its submissions and pleadings, argues that it challenges the procedure in which the defendants were acquitted on the ground that there is no evidence that the power of attorney given by Mukarugwiza Janvière to Uwamahoro Alphonsine was a forged document, while in fact the forged documents for which they are accused are the contract between Niyitegeka Emmanuel and Uwamahoro Alphonsine, and the contract between Beza Kevin and Uwamahoro Alphonsine; it requests for the correction of that fact.

[5] In the High Court, Niyitegeka Emmanuel and Beza Kevin pleaded admitting that the agreement was really concluded. Niyitegeka Emmanuel also admits that in his contract of the car sale signed with Uwamahoro Alphonsine, the latter affixed her names as the owner of the car and she signed, he states that he knew that the car did not belong to Uwamahoro Alphonsine, but that it belonged to Mukarugwiza ; however, basing on the power of attorney in possession of Uwamahoro Alphonsine, he accepted to conclude the sale contract with her. Beza Kevin also admits that he bought the car from Uwamahoro Alphonsine knowing well that it belonged to Mukarugwiza Janvière, but that he accepted to buy it because he realized that she had the power of attorney. He also admits that he knew that Uwamahoro Alphonsine signed on behalf of Mukarugwiza Janvière as a seller, but for the bank to grant him a loan to buy a car, the contract was necessary. Uwamahoro Alphonsine was tried in absentia after being summoned with unknown residence in accordance with the law.

[6] On 13/07/2017, the High Court, in case n° RPA 00764/2016 / HC / KIG, basing on the fact that:

- there has been a forged signature on a document and forgery of contract in general;
- there has been use of that contract for the purpose of securing the right on a loan from the bank, and this deprived Mukarugwiza Janvière from her rights on the property;

It held that the contract itself constitutes a forged document. It found Niyitegeka Emmanuel, Beza Kevin and Uwamahoro Alphonsine guilty of complicity in forgery and use of forged documents and it found Uwamahoro Alphonsine was convicted of selling a property of another person and it sentenced Niyitegeka Emmanuel and Beza Kevin to the imprisonment for a term of two (2) years for each one, while Uwamahoro Alphonsine was sentenced to the imprisonment for a term of six (6) years; it ordered that the cars Toyota Carina E with plate number RAB 174 S and Toyota Carina E with plate number RAB 187 K should be returned to their owner Mukarugwiza Janvière.

[7] Beza Kevin and Niyitegeka Emmanuel were dissatisfied with that court ruling, and they wrote to the Office of the Ombudsman requesting that the case should be reviewed due to injustice.

[8] After examining the issue, the Office of the Ombudsman wrote to the President of the Supreme Court requesting that the case RPA 00764/2016/HC/KIG rendered by the High Court on 13/07/2017 be reviewed due to injustice, and The President of the Supreme Court based on the report of the Inspectorate General of Courts decided that the case should be reviewed and it was registered under n° RS / INJUST / RP 00008/2018 / SC.

[9] On 06/02/2020 the case was called, Niyitegeka Emmanuel and Beza Kevin appeared both represented by Counsel Gashagaza Philbert, Uwamahoro Alphonsine did not appear while she was summoned in accordance with the law, while the Prosecution was represented by Niyonzima Vincent, and the hearing was conducted.

[10] As explained in their submissions and pleadings, Niyitegeka Emmanuel and Beza Kevin argue that the injustice for them is based on the following points :

- The fact that in ruling, the Court only relied on the drafting of the contract disregarding the fact that Uwamahoro Alphonsine had the full power of attorney which had been issued by the car owner granting to her full rights including the sale of the cars they bought
- The fact that Mukarugwiza Janvière received the price of the cars which were managed by Uwamahoro Alphonsine, which means that she knew what had been done and consented to their purchase.

[11] Counsel Gashagaza Philibert argues that his clients, Niyitegeka Emmanuel and Beza Kevin, had no intention of committing the offence of forgery and use of forged documents and that in case a person does not intentionally act illegally this is not considered as offence commission.

[12] The Prosecution submits that the issue was not about the power of attorney, rather it was about the nature of the sale contract they signed as concluded by the owner knowing that it was

not true, without threat, mentally fit; it is clear that they were aware of what they were doing and their intent and that the act itself of contracting with the wrong owner so that his names and signature appear on the contract while she was present in the place where it was concluded, is sufficient to constitute an offence.

[13] The Court finds that the issue to be examined in this case is to determine whether there was an intent to commit forgery and use of forged documents in the formation of a contract between Beza Kevin, Niyitegeka Emmanuel and Uwamahoro Alphonsine.

II. ANALYSIS OF LEGAL ISSUE

Whether there was an intent to commit forgery and use of forged documents in the formation of a contract between Beza Kevin, Niyitegeka Emmanuel and Uwamahoro Alphonsine.

[14] Counsel Gashagaza Philbert states that, in convicting Beza Kevin and Niyitegeka Emmanuel with the offence of forging and using forged documents because they knew that the car they were going to buy belonged to Mukarugwiza Janvière even though it was written and signed by Uwamahoro Alphonsine as she is Mukarugwiza Janvière, and his clients signed them, the High Court did not properly analyse the situation. He argue that due to the fact that Uwamahoro Alphonsine behaved this way instead of writing that she represented Mukarugwiza Janvière, she should be held responsible instead of Beza Kevin and Niyitegeka Emmanuel because they bought after being shown the power of attorney given to Uwamahoro Alphonsine on 05/02/2008 and the contract of 10/01/2007 for running the business of Mukarugwiza Janvière.

[15] Counsel Gashagaza Philbert states that Beza Kevin and Niyitegeka Emmanuel had no intention of committing the offence of forgery, this is reinforced by the fact that in paying the price of the cars based on that contract Beza Kevin deposited it on the account number 409-1017206-11 in the Banque Populaire du Rwanda in the names of Mukarugwiza Janvière; while Niyitegeka Emmanuel paid for it in cash and Mukarugwiza Janvière did not deny that she received the money.

[16] Counsel Gashagaza Philbert submits that the fact that the buyers were well aware that the money reached to the owner had increased their confidence that what they were doing was not illegal, he adds that the contract did not have a negative effect on anyone because they bought the cars and the price was paid to the owner, who is Mukarugwiza Janvière.

[17] The Prosecution sustains that Beza Kevin and Niyitegeka Emmanuel had an intention of forging and use of forged documents because according to the nature of the sale contract they signed, the contract is drafted if it was made by the owner, therefore the Prosecution finds that the contract is a forged document signed by Beza Kevin and Niyitegeka Emmanuel knowing that it is false.

[18] The Prosecution argues that the exculpatory elements of evidence do not address the issue of having signed on a false document well knowing that it is forged :

- The fact that Beza Kevin deposited the money on the account of Mukarugwiza Janvière happened later, the offence of forgery wa already committed ;

- The fact that Uwamahoro Alphonsine had a power of attorney and employment contract given by Mukarugwiza Janvière is not the issue under litigation because it does not itself explain why Beza Kevin and Niyitegeka Emmanuel knowingly signed on a forged document ;
- The fact that Mukarugwiza used to come back in the country but did not file a claim and she lodged it after Uwamahoro Alphonsine departure, except that it is not true because she filed complaint since 2012, also that fact does not constitute a defence because it does not contradict the fact that they knowingly signed on a forged contract.

[19] The Prosecution submits that the offence of forgery and use of forged documents is a formal offence, so it is not necessary to take into account the prejudice incurred even if it exists, because the constitutive element of the offence is to knowingly and intentionally sign on a forged sale contract.

[20] The Prosecution concludes that the offence of use of forged document was also committed because the contract served as basis for application for bank loan by Beza Kevin and the transfer was done, the cars were transferred from its owner Mukarugwiza Janvière and registered to their names.

[21] The Court finds that the main issue is that the defendants and their counsel Gashagaza Philbert, think that the fraudulent intent for forgery is complete so as to constitute an offence when the purpose in forging such document is an illegal document while the Prosecution understands that the fraudulent intent is complete when a person willingly and knowingly signs on a forged document.

[22] The offence of forgery is not specifically defined by the law determining offences and penalties in Rwanda. Rather, it is inserted in the definitions of the crime of forgery and use of forged documents in general. The Decree-Law establishing the Rwanda Penal Code which was into force when the offence was committed in 2009, in its article 202, punishes a person who forges a contract or the structure of some of its articles, including or removing some of its responsibilities; whereas this is currently punishable by Law n°68/2018 of 30/08/2018 determining offences and penalties in general, in its article 276 where it provides that "Any person who, with fraudulent intention, produces a false written document, causes to write false statements or produces a conflicting declaration, is considered to commit the offence of forgery". This article replaces the article 614 of the Organic Law n ° 01/2012 / OL of 02/05/2012 instituting the penal code which punished any person who: 1° knowingly issues a document containing materially incorrect facts; 2° falsifies or modifies, in any way, an original document; 3° knowingly uses an inaccurate or falsified document.

[23] Regarding the intention to commit the offence of forging a document, this article 276 of the law determining offences and penalties in general provides that the person sentenced for forgery and use of a forged document is any person who acts with fraudulent intention¹ whereas such was not clearly stated in the previous laws. Although this law was not into force at the time

¹ See where it tates «Any person who, with fraudulent intention, produces a false written document, causes to write false statements or produces a conflicting declaration, is considered to commit the offence of forgery »

the defendants were being prosecuted as expounded, the Court finds that this provision should be construed as interpreting what have not been interpreted in the provision of article 202 of the aforementioned Law because it did not change the same offence.

[24] There are legal scholars who assert that the intent to commit the offence of forgery is complete as long as the one who forges or plays a role in forging a false document does it knowing that its content is false without considering that it is intended to jeopardize or harm someone². Proponents of this position argue that they rely on the fact that the forged document is an offence committed against the public rather than being an offence that harm a person and it is punished for the purpose of public interest even if it has been committed as regards the individual contract³. This position is also supported by the Prosecution to uphold that a forged document is a formal offence, this means that the fact that the document is false is reflected in its content regardless of any other consideration.

[25] The Court finds, however, that this position is not commonly supported. For example, the French Court of Cassation has ruled that a person who forged a signature of another by mutual agreement does not commit a crime⁴. Proponents of this position rely on the fact that there is no fraudulent intent in case there is no benefit for the perpetrator⁵. Although there are opponents of this position⁶, this Court concurs with it because it also finds that it is necessary that forgery must be fraudulent as defined in Article 276 of the law determining offences and penalties in general into force. The Court also finds that the fraudulent intent in forgery is manifested in forging a document for the purpose of undue interest/right which he/she can only gain by forging such document. In other words, there is no fraudulent intent in case the content of the so-called forged document does not profit nor disadvantage the perpetrator in comparison to the normal drafting of the document to secure its value.

[26] In this case, Uwamahoro Alphonsine was given the full power of attorney by Mukarugwiza Janvière and it is not questionable. It is in this context that she sold her cars and the money had reached to the owner. Beza Kevin indicated that she deposited the money on the account of Mukarugwiza Janvière while Niyitegeka Emmanuel, even though he paid in cash, no one denies that the money reached to the owner. In the sale contracts of cars concluded with Uwamahoro Alphonsine, the latter appears as the owner of the car (for the case of Niyitegeka Emmanuel) and on the other hand she appears as Mukarugwiza Janvière (for the case of Beza Kevin). However,

² « ...il est certain qu'une intention de nuire n'est plus requise pour justifier l'infraction que son absence serait de nature à justifier ». Bull.crim. 11 dec.1974, 366 cités par Michelle Laure Rassat, *Droit Pénal Spécial*, 7^{ème} éd. 2014, p. 1181, No1087.

³ « Même s'il est commis dans le document purement privé, le faux n'est pas une infraction commise entre particuliers dans le cadre de laquelle il serait logique d'exiger que le faussaire cause un préjudice à celui auquel le document pourrait être opposé, c'est une infraction contre la foi publique par laquelle on veut que la collectivité assure la sécurité juridique de ses membres ». voir Jean Pradel & Michel Danti-Juan, *Droit Pénal Spécial, Droit Commun des affaires*, CUIJAS, 4^{ème} éd. 2007/2008, P.750, No1223

⁴ Voir *Crim.6nov.1989, Dr. Pénal 1990, No 85* cité par Michelle Laure Rassat, *op.cit.*, p 1181, No1087

⁵ « L'intention frauduleuse se définit comme étant le dessein ou l'intention de se procurer ou de procurer à autrui un avantage illicite quelconque. ... L'intention frauduleuse se restreint à la seule volonté d'introduire dans les relations juridiques un document que l'on sait inauthentique ou mensonger pour obtenir un avantage, même légitime en soi, que l'on n'aurait pas pu obtenir ou que l'on n'aurait obtenu que malaisément en respectant la vérité ou l'intégralité de l'écrit». Voir UNODC *Sherloc, des crimes et délits contre la foi publique*, https://sherloc.unodc.org/res/cld/document/lux/2014/criminal_code_of_luxembourg_html/cp_L2T03.pdf

⁶ Michelle Laure Rassat, *op.cit.* p.1181, No1087

even if Uwamahoro Alphonsine could have drafted the contract as usual, stating this "I, Uwamahoro Alphonsine, representing Mukarugwiza Janvière ..." such would not change anything on the sale contract because in one way or another (drafting the contract as they did or drafting it as usual), the purpose (sale contract of the car and deliver its cost to Mukarugwiza Janvière) could be attained to some extent. The Court finds that there was no fraud in the formation of the contract, either in the case of Beza Kevin, or in the case of Niyitegeka Emmanuel, and therefore, they are not convicted of forgery and use of forged documents.

[27] Concerning Uwamahoro Alphonsine, the Court finds that, pursuant to article 63 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, although the hearing was held in absentia, it must consider the charges against her and take a decision because she is also a party⁷. Regarding the contract alleged to be forgery and concluded with Beza Kevin, as well as that of Niyitegeka Emmanuel, the Court finds that she had not committed any fraudulent intent during their formation, because, as explained to others, and to her, in consideration of the signing of that contract in the manner she did there was no interest nor additional right she would gain in comparison to the rights she would gain in case she had drafted it indicating that she represented Mukarugwiza Janvière. The purpose was clearly that after selling the cars, she had to send the money to the owner, and no one denied the payment and for Beza Kevin, it is clear that she spent the money according to the bank statements⁸.

[28] In particular, regarding the contract between Uwamahoro and Niyitegeka Emmanuel, Uwamahoro Alphonsine is accused of appearing to be the owner of the car, and she signed on it as such. The Court finds that for the person who was given the full power of attorney, like the one given to Uwamahoro Alphonsine, nothing could preclude her from drafting it as she did because it is also allowed. Indeed, a person with power of attorney can appear before the contracting parties as perfect or imperfect representation⁹. The Court finds that, apart from the fact that she had no intention of forging a false document because there was no fraud behind it as described in the preceding paragraph, the contract concluded with Niyitegeka Emmanuel could not be taken as a forged document, because its drafting is not prohibited as explained above.

[29] The Court also finds that she is not convicted of the offence of selling of a property of another person because, as expounded by the Prosecution, there is no problem on the power of attorney that Mukarugwiza Janvière had given to Uwamahoro Alphonsine. It means that she had the right to sell anything of Mukarugwiza Janvière as long as she did not go beyond her mandate. In this judgment also, usurpation of the mandate she was given cannot be understandable because she was given the full power of attorney. The abuse of the power of attorney also did not happen because, as explained, the cost of cars was given to the owner and she spent it.

⁷ That article state that: « When the Supreme Court or any other court designated by the President of the Supreme Court receives an application for review of a judgement on grounds of being vitiated by injustice, it examines the merits of the case anew and in the presence of all parties.»

⁸ An example is the money that Mukarugwiza Janvière debited on that account on January 4, 2010

⁹ « Lorsque le représentant déclare agir pour le compte d'autrui mais contracte en son propre nom, il est personnellement engagé à l'égard du tiers contractant ». Où l'on en induit qu'un représentant, s'il agit toujours pour le compte d'autrui, le fait tantôt au nom d'autrui, tantôt en son nom propre. La doctrine évoque souvent cette distinction en opposant la représentation parfaite à la représentation imparfaite ». Voir Nicolas Dissaux, La représentation: notion, in Dalloz, blog dédié à la réforme du Droit des obligations, accessible à <http://reforme-obligations.dalloz.fr/2015/04/29/la-representation-notion/>

III. DECISION OF THE COURT

[30] Holds that the application for review due to injustice of the case n° RPA 00764/2016/HC/KIG filed by Beza Kévin and Niyitegeka Emmanuel is well-founded ;

[31] Holds that the ruling of the judgment n° RPA00764/2016/HC/KIG rendered by the High Court on 13/07/2017 is overruled in all its parts ;

[32] Holds that Beza Kevin, Niyitegeka Emmanuel and Uwamahoro Alphonsine are not guilty of the offence of forgery and use of forged document ;

[33] Holds that Uwamahoro Alphonsine is not convicted by the offence of selling of a property of another person.