IN THE APPELLATE DIVISION OF THE HIGH COURT
OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI, ABUJA

BEFORE THEIR LORDSHIPS:

1. **HON. JUSTICE U.A. OGAKWU – PRESIDING JUDGE**
2. **HON. JUSTICE A. I. KUTIGI – JUDGE**

THIS THURSDAY, THE 28TH DAY OF NOVEMBER,2013

APPEAL NO: FCT/HC/CRA/64/12

BETWEEN:

FELIX ANYAWU.....APPELLANT

AND

COMMISSIONER OF POLICE.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Chief Magistrate Court of FCT delivered by His Worship A.O. Oyeyipo on the 17th day of September, 2012. The Accused/Appellant was charged for forgery and attempt to cheat punishable under **Sections 364 and 95 of the Penal Code Law (PCL).**

The prosecution called three (3) witnesses (PW1 to 3) to prove its case, while the Accused/Appellant in his defence testified as the sole witness. At the conclusion of the evidence by both parties, the honourable trial magistrate delivered his judgment and found the Accused/Appellant guilty of forgery of a cheque and attempting to cheat punishable under the already cited sections of the Penal Code Law.

The brief facts of this case is that the Accused/Appellant on the 14th February, 2012, was arrested at Fidelity Bank Plc Wuse Zone 3, Abuja branch for presenting a forged cheque of One Million Eight Hundred Thousand Naira (₦1,800,000.00) only for payment. On presenting the cheque to PW1 in the bank and on the usual clearance or verification of the cheque to ascertain its authenticity, the cashier (PW1) discovered that the cheque has been tampered with. On passing the cheque through the mercury light, she discovered that there were alterations on the cheque. Consequently, she reported the issue to the bank's Internal Auditor (PW2) for further verification and confirmation.

The PW2 and the transaction department head officer also reviewed the complaint of PW1, consequently the Mobile Police Unit of the bank was contacted and the Accused/Appellant was taken to the Police Station at Wuse for interrogation and proper investigation of the allegations. During the investigation it was allegedly discovered that the cheque was forged and was not issued by the holder of the account. Then on the 17th February, 2012, the Appellant was arraigned before the Honourable Trial Magistrate.

For purposes of clarity and to precisely determine the crux of this appeal, this is the conclusion of the learned magistrate on page 26 of the record:

"I have weighed all the testimonies before me on the imaginary scale of justice, and I have come to the irresistible conclusion to which I must come based on the consent (sic) compelling evidence establishing the guilt of the Accused person beyond reasonable doubt I accordingly convict Felix Anyanwu for the offence of forgery contrary to Section 364 Penal Code Law and I also convict Felix Anyanwu for the offence of attempt to commit the offence of cheating contrary to Section 95 Penal Code Law."

The Accused/Appellant was dissatisfied with the judgment of the trial court and has filed this appeal.

The appeal in total is predicated on five (5) grounds of appeal which without their particulars read as follows:

GROUND 1

The Trial Magistrate erred in law when he relied on hearsay evidence in a criminal trial, to find the appellant guilty of the offence of forgery thereby leading to a miscarriage of justice.

GROUND 2

That the Trial Chief Magistrate erred in law when he convicted the appellant for forgery without seeing the cheque from which ***Exhibit B*** *was cloned.*

GROUND 3

The Trial Magistrate Court erred in law when he misdirected himself by convicting the Appellant for a matter with "No complaint."

GROUND 4

That the decision is against the weight of evidence.

GROUND 5

That Fidelity Bank Plc is not the proper person to complain against and prosecute the Appellant for the owner of the account is not Fidelity Bank Plc.

We only wish to briefly state that a ground of Appeal in criminal cases which contends that the **"decision is against the weight of evidence"** is not tenable in criminal appeals because the standard or threshold is proof beyond reasonable doubt. The balance of the weight of evidence is only of consequence in civil matters where the standard of proof is decided on the weight of evidence or the balance of probability. See **Enitan & Ors V. State (1986)6 S.C 11 at 23.** Ground 4 will as a result be discountenanced.

The Appellant in his brief of argument raised only two issues as arising for determination:

1. *Whether the trial court was right in convicting and sentencing the Appellant without properly evaluating the evidence before the court.*
2. *Whether Fidelity Bank Plc had the locus standi to arrest and prosecute the Appellant for allegedly forging a cheque leaf Not belonging to the account of Fidelity Bank.*

The Respondent in their brief of argument framed the following issues for determination:

1. *Whether in consideration of the evidence before the learned trial court the prosecution proved its case beyond reasonable doubt.*

2. *Whether citizens of Nigeria owe a court duty to report/complain to the police or any law enforcement agency of any commission or attempt to commit an offence."*

We wish to briefly comment on the issues as formulated by parties before proceeding to the crux of the Appeal. We had earlier reproduced the relevant portion of the decision of the trial court convicting the Accused/Appellant and the grounds of complaint against the decision as contained in the Notice of Appeal. Now issue (1) as formulated by Appellant is couched in general terms directed at the decision of the trial court to convict the appellant for both the offences of forgery contrary to **Section 394 of the Penal Code Law** and the offence of attempt to commit the offence of cheating contrary to **Section 95 also of the Penal Code Law.**

However a perusal of the grounds of Appeal shows clearly that the complaint was essentially only on the conviction for forgery. It is trite principle of general application that before an issue in an appeal can be valid, it must be derived from the ground of Appeal and the ground of appeal must necessarily relate to the decision against which an appeal is lodged. It therefore follows that an issue which is not formulated from a ground of Appeal is incompetent and liable to be struck out. See **Oniah V. Onyia (1989)1 N.W.L.R (pt.99)514; Okpala V. Ibeme (1989)2 N.W.L.R (pt.102)208; Schmidt V. Umanah (1997)1 N.W.L.R (pt.479)73 at 82**

It follows logically that any issue or issues to be argued in a brief must reflect and be circumscribed by the grounds of Appeal. Anything outside it would lack any significance or value in the context of the Appeal which remains to be resolved by court. Here learned counsel to the Appellant conceded at the hearing of the Appeal that there was indeed no ground of complaint or appeal against the conviction on attempt to commit the offence of cheating. The implication is that the crux of the Appeal is limited to the conviction on forgery.

Secondly, learned counsel on sound reflection at hearing similarly abandoned issue (1) relating to the alleged locus standi of Fidelity Bank to arrest and prosecute appellant. This issue will accordingly be discountenanced in the consideration of this appeal together with issue (II) in the Respondent's brief predicated on it.

Having properly streamlined the crux of this appeal to one of proof of forgery, we shall now briefly summarise the positions of parties on both sides of the aisle.

The Appellant on this issue contends that in criminal trials, the standard is that of proof beyond reasonable doubt. The case of **Ilodigwe V. State (2012)51 N.S.C.Q.R 288** was referred to. That in this case, PW1 who said she discovered the alteration on the cheque never told the court what the nature of the alteration was. Learned counsel then drew attention to the evidence of PW2 who reviewed the cheque but that all he told court was what PW1 told him which is hearsay evidence and inadmissible.

Learned counsel also submitted that an unnamed accounting officer allegedly met a man who claims to be the owner of the account where as the account is a corporate account. He submitted that the I.P.O (PW3) apart from recording the statement of accused did not give evidence that he contacted the company who owned the cheque to confirm if any cheque was issued by them.

Learned counsel further submitted that if the learned trial court had properly evaluated the evidence on record, he would have not reached the decision

subject of the appeal. He finally submitted that the prosecution has not proved the case beyond reasonable doubt and that the appeal be allowed.

The Respondent on its part submitted that the prosecution has proved the essential ingredients of the offences charged and that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The case of **Ebeinwe V. State (2011) F.W.L.R (pt.566)413 at 425.**

Learned counsel submitted that the ingredients of the offence which prosecution must establish to succeed are:

"a. (i) That the accused made, signed sealed or executed the document in question or any part thereof; or
(ii) That it was made by someone else.
b. That it was made under any of the circumstances stated in **Section 363**
c. That the accused made it dishonestly or fraudulently or with any of the specific intents enumerated in **Section 362."**

It was submitted that the prosecution witnesses have clearly by their evidence proved the above ingredients and that by virtue of **Section 149(a) of the Evidence Act** there is a presumption since accused was found with a forged/cloned cheque that he either forged it or knew the person that forged it. That the burden was on the accused to show by strong admissible evidence how he got the cheque if he does not know who forged same.

Learned counsel further submitted that the accused failed to tell the bank or I.P.O or even the court who gave him the cheque until much later during cross-examination when he mentioned a name, one Obi Micheal, long after investigations have been concluded. Further he submitted that the accused failed to call the person who gave him the cheque and that the implication is that no such person exist.

Learned counsel finally submitted that the prosecution has proved the case beyond reasonable doubt; consequently that the decision of the lower court be affirmed.

At the hearing, learned counsel on both sides of the aisle adopted the submissions contained in their briefs of argument.

We have on our part read the record of appeal and the briefs of arguments filed by learned counsel and we are of the considered opinion that the narrow issue that arises and which requires the most circumspect of consideration is simply:

"Whether the trial judge was right in finding the Appellant guilty of the offence of forgery."

It is not a matter for dispute that the charge the accused faced at the trial court involved the alleged commission of a crime. Under our criminal justice system and here both sides are in agreement, the burden or onus is clearly on the prosecution to prove the guilt of the accused person beyond reasonable doubt. This is understandably so because proof beyond all reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. Indeed by **Section 35(6) of the 1999 Constitution,** every person charged with a criminal offence shall be presumed innocent until he is proved guilty. The cardinal principle of law therefore and as already alluded to is that the commission of a crime by a person must be proved beyond reasonable doubt. See **Section 135(1) of the Evidence Act.** This primary burden which is on the prosecution does not shift and if on the whole of the evidence, the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof cast upon it by law and the accused person will be entitled to an acquittal. See **Ibrahim V. State (1995)3 NWLR (pt.381)35 at 47; Ukpe V. State (2001)18 WRN 84 at 103; Majekodunmi V. Nig Army (2002)31 WRN 138 at 147; Ochiba V. State (2011)17 NWLR (pt.1277)663 at 685.**

Now the aspect of the appeal we are concerned with is related to the offence of forgery punishable under the provision of **Section 364 of the Penal Code Law.**

The offence is however defined under **Section 363** as follows:

"Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that may be committed, commits forgery; and a false document made wholly or in part of forgery is called a forged document."

Also relevant to properly appreciate the import of the above provision is **Section 362** which provides thus:

"A person is said to make a false document-

(a) Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document or makes any mark denoting the execution of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed or at a time at which he knows that it was not made, signed, sealed or executed; or

(b) Who without lawful authority dishonestly or fraudulently by cancellation or otherwise alters a document in any material part thereof after it has been made or executed either by himself or by any other person whether such person be living or dead at the time of such alteration; or

(c) Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document knowing that such person by reason of unsoundness of mind or intoxication cannot or that by reason of deception practised upon him he does not know the contents of the document or the nature of the alteration."

The above provisions are clear in their import on the essential ingredients that must be present to sustain an offence of forgery. On the authorities, the critical elements or ingredients that must be established beyond

reasonable doubt by the prosecution as required by **Section 135(1), (2) and (3) of the Evidence Act** for the offence of forgery are:

1. That there was a document or writing.
2. That the document or writing was forged
3. That the forgery was by the accused person, in this case accused.
4. That the accused knew the document or writing to be false; and
5. That the accused intended the forged document to be acted upon to the prejudice of the victims in the belief that it was genuine.

See **Babalola & Ors V. State (1989)4 N.W.L.R (pt.115)264 at 277; Smart V. State (1974)11 SC 173; Michael Alake V. Anor V. State (1991)7 N.W.L.R (pt.205)567 at 593.**

The delicate task to undertake now is to examine the evidence led by the prosecution witnesses in the light of the legal ingredients required to establish the offence for which the accused was charged. It is settled that the before a conclusion can be arrived at that an offence has been committed by an accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the accused person come within the confines of the particulars of the offence charged. See **Amadi V. State (1993)8 NWLR (pt.314)646 at 664.**

The burden as stated earlier is proof of these elements beyond reasonable doubt. Was this threshold met? The substance of the case of the prosecution is straightforward. In all the prosecution called three witnesses. The PW1 is a banker and works with Fidelity Bank, Wuse Zone 3. Her testimony is that in the course of her job, the accused came with a cheque of N1.800,000(One Million, Eight Hundred Thousand Naira) and she demanded for his I.D card. She then passed the cheque through the U.V. light i.e the mercury light and discovered an alteration to the cheque and at that point she handed it over to her auditor.

PW2 is the internal auditor and the relevant part of his testimony on page 4 of the record is as follows:

"...I was seated in the banking hall going about my normal duties officially the working hour of the bank is 8am-5pm but at times it could be 7.30am till after 7pm yes I know the accused person on the 14th February, 2012. The accused walked into Fidelity Bank with a cheque drawn in the sum of N1.8Million in favour of Anyanwu Henry, the accused and the cheque was drawn on Mucken Int'l Ltd a corporate Account domiciled in or branch located at Matori Lagos State the Accused approached our teller named Nkiruka (PW1) with the cheque and a National I.D card and in line with our procession method the PW1 reviewed the cheque, the amount, date, name after which she passed the cheque under the U.V. light to ascertain the genuiness and thereafter she discovered that most of our security features and the cheque number was altered so she approached me with the cheque and because of the thrush hold (sic) of the amount there was need for confirmation from the customer myself and the transaction support department head, cash officer equally reviewed the cheque under the U.V. light having sent for confirmation and the customers line was not going the accused gave me his phone and somebody who was claiming to be the owner of the cheque was telling me that we should go ahead and pay but since I did not know the voice of the owner of the cheque I could not pay and Lagos office could not read the value finally the account officer of the man met the owner of the account to know if he issued the cheque for N1.8Million in favour of favour of Henry and he said no so he went to our branch in Lagos and we had to contact the mopol unit in our bank and we took the Accused to the police our discovery on our cheque is that there is a watershed and where the cheque number is written was altered and we have even our staff close by and we discovered that the number of the cheque had been used before and that was why the owner was surprised."

PW3 is the I.P.O and his testimony on pages 7-8 of the record went thus:

"...I know the accused person it was on 14th February, 2012 at about 17.05 hours (5pm) one Awajionvo Randolph male of Fidelity Bank Plc Abuja reported at Wuse Police Station that on the same date at about

1400 hours the accused person walked into the branch of the bank situated in Wuse Zone 3 with a forged cheque which he suspected to have been stolen from the owner and attempted to withdrawn the sum of N1.8Million form the account the case was accepted for investigation and statement of the accused was recorded cautionary and scene of crime was also visited and after painstaking investigation the following facts emerged:

1. **That on that said date, the accused walked into Fidelity Bank Plc Wuse Zone 3 Abuja with a cheque belonging to Mucken International Limited.**
2. **That the information on the cheque bears Henry Anyanwu for the sum of N1.8Million dated 12th February, 2012 that the accused attempted to withdraw the said amount from the account to Mucken International Limited.**
3. **That the said cheque was not written by the owner of Mucken Int'l Ltd.**
4. **That the accused person acted fraudulently and dishonestly.**
5. **That the accused person here attempted to cause wrongful gain to himself and wrongful loss to the owner.**
6. **That the accused person also presented a National I.D card which is also suspected to be forged."**

The learned Trial Magistrate in his judgment on pages 24-25 of the record stated thus:

"...The prosecution in this case led oral evidence and tendered documentary evidence which was credible consistent and unassailable and I hold the firm view that that Accused person indeed acted fraudulently by dishonestly presenting a cloned cheque belonging to Mucken International Limited with cheque number 04770663 and attempted to withdraw the sum of N1,800,00(One Million, Eight Hundred Thousand Naira Only).

The story of the Accused person that he does not know that the said Obi Michael who issued him the cheque where about appears more

imaginary than real and his contention that he was not the maker of the cheque was not substantial as he failed to call the said Obi Michael who he alleged issued him with the cheque.

From the above narrated evidence in totality can it be said that the prosecution in this case has discharged the onus of proof beyond reasonable doubt. It must be stated that proof beyond reasonable doubt is not one that must be beyond all shadow or lot (sic) of doubt and if the evidence is strong that it leaves only a remote probability in his favour which can be dismissed with the sentence "of course, it's possible but not in the least probable" the case is proved beyond reasonable doubt. See Akalezi V State (1993)2 N.W.L.R (pt.273)1 at 13....The prosecution witnesses impressed me as witnesses of truth this is because their testimonies where essentially consistent and corroborative of each other unlike the Accused person who quibbled and prevaricated while he testified and did not impress me as a witness who spoke the truth his testimony was fraught with a lot of inconsistencies he appeared to me to be a desperate man who employed all means to wriggle out of criminal liability and he must not be allowed to he obviously knows more than what he has told this court, his story to this court that he was given the said cheque appears to be his imagination he was arrested in possession of a Mucken International Limited cheque which was confirmed by Fidelity Bank not to have been issued by the authorized signatory of the said corporate account the offence of forgery is clearly an (sic) unambiguously established and I so hold.

The presentation of the said cheque in the Fidelity Bank to the teller (PW1) is a fraudulent attempt to commit the offence of cheating this is because if the cheque had been honoured the accused person would have caused wrongful loss to the bank and wrongful gain to himself through his intentional act of deception and inducement."

We have above and *in-extenso* referred to the evidence of the prosecution witnesses and the judgment of the trial magistrate. Does the evidence on record support the above findings? That is the question we shall be

resolving. The law is settled that an appellate court does not ordinarily disturb the findings of fact made by a trial court, particularly where such findings and conclusions are supported by credible evidence. This principle is premised on the fact that the duty of appraising of evidence is a function of the trial court that had the preeminent position of seeing, hearing and watching the witnesses. See **Ezeanuna V. Onyema (2011)WRN 21 at 60-61.**

It is however equally settled law that where a trial court fails to properly evaluate the evidence on record or erroneously does or the conclusion reached is not supported by the evidence on record, then a Court of Appeal in the interest of justice must exercise its own powers of reviewing those facts and drawing appropriate inference from the proved facts particularly where such evaluation does not involve the issue of credibility of witnesses. See **Anyanru V. Mandilas Ltd (2007)vol. 147 LRCN 1036 at 1058.**

Now it clear from the evidence of PW1 that when she got possession of the cheque, she passed it through the U.V light (mercury light) and discovered an alteration on the cheque and at that point she handed the cheque over to the auditor informing him of the alteration. From the evidence of PW1, it is doubtless that what these alteration(s) were and in relation to what was not stated by this witness who discovered the alteration(s). Apart from this unclear evidence as to alterations(s), there is no other direct evidence of the nature of the alterations or what was really forged on the face of the cheque.

PW2 on the other hand who is the auditor simply re-echoed what PW1 told him with respect to the alterations on the cheque. He personally did not carry out any investigations but stated that PW1 told him that the alterations related to the security features and numbers on the cheque. He similarly added that a certain cash officer who did not give evidence also reviewed the cheque.

Of importance is that because of the threshold of the amount on the cheque, PW2 sought for confirmation from the accounts holder and that using the phone of the accused, he spoke to someone who claimed to be

the account holder and who instructed that payment be made but he could not confirm the genuiness of his voice since he does not know the owner of the account but that finally an accounts officer in their bank met the owner who denied issuance of the cheque and that in addition to the alterations, they found that the number of the cheque had been used before.

Flowing from the above evidence, it is clear that the nature of the alterations on the features on the cheque described specifically by PW2 was not a product of his own investigations but what he was informed first by PW1 and a certain cash officer who reviewed the cheque and who was not called to give evidence.

Secondly he could not confirm whether the person he spoke with on phone and who agreed that payment should go on was the genuine owner of the account but that another accounts officer met with this owner who confirmed that he did not issue such cheque in that amount. The accounts officer did not give evidence in court on this critical point particularly since nobody gave evidence on behalf of the corporate accounts holder.

Finally PW2 added that they discovered that the cheque number had been used before but who discovered this and what was the basis of this discovery was not put in evidence. The end product of the totality of the substance of the evidence or narrative of this witness is one premised on hearsay evidence which in law is inadmissible. See **Section 126 of the Evidence Act and the case of Jolayomi V. Alaoye (2004)12 N.W.L.R (pt.887)322.**

The final witness was the I.P.O. We had earlier stated the relevant part of his testimony. We need not repeat same. The conclusions he reached, he claimed was a product of painstaking investigations but what the nature of the investigations were and parameters utilised in reaching the far reaching conclusions were not given in evidence. For example he stated that they found that the cheque was not written by the owner of the account, Mucken Int' Ltd. What the basis of this critical finding was, was no where indicated. Mucken Int' Ltd appears to be a corporate body and certainly can only act through a human being. Like the unknown accounts officer who said he

spoke to an unnamed owner, who was it that the police met and spoke to and who confirmed that the company did not issue the cheque? What is the relationship of this person with the company? Under cross examination PW3 agreed that the accused did not write the cheque, so the question remains as to who issued the cheque and what was it that was forged? Still under cross examination, he said the bank confirmed to him that the cheque was fake but the question is what actions did the police take to confirm the alteration of the features of the cheque beyond what they were told? These are all issues that have been left to conjecture. A court's duty does not however include that of speculations.

It must be appreciated that this is a case of forgery which necessarily must involve the dishonest execution of a document; here it is a cheque of a corporate institution. On the authorities, for a prosecution to make out a *prima facie* case on a charge of forgery, it needs call a hand writing analyst to show that the handwriting of the person who is alleged to have forged the document is the same as the one on the forged document where the supposed alteration was made. See **Aituma V. State (2007)5 N.W.L.R (pt.1028)466 at 483E-F.** We are aware of the position in law that it is not only the person who writes or signs a forged document that may be convicted for forgery and that all persons who are *participes criminis* whether principals in the first degree or as accessories before or after the fact may be culpable. See **Agwuna V. A.G. Fed. (1995)5 N.W.L.R (pt.386)418 at 438.**

In this case PW3 conceded under cross-examination that the Accused did not write the cheque, therefore here by parity of reason, it is our considered opinion that if specific allegations of alterations relates only to the peculiar features on the cheque, then somebody competent from the bank or any competent source must demonstrate in court what a genuine cheque is *vis-a-vis* the fake or altered cheque containing the altered features. There must be evidence showing that the fake cheque was not issued by the bank or if as PW2 stated that the number of the cheque presented by accused had been used before, then evidence to support such positive assertion must be presented.

Perhaps let us put it another way. In the circumstances of this case, the prosecution was obligated beyond bare viva voce evidence to call a competent witness to show or demonstrate what was manipulated or altered on the cheque leaf. This it can do in many ways including but not limited to producing a genuine cheque leaf from the company or the bank as they issued the cheque book and then marry it with the manipulated copy and then precisely show or bring out the discrepancies. Indeed if as the learned trial judge believed the evidence of PW2 who said that the owner of Mucken Ltd confirmed that the cheque was cloned, even when there is no evidence that he, the owner saw the fake cheque, this simply meant that the original copy from which the cloned copy was made exists somewhere and is available and can easily be produced by the company for purposes of comparison. The question then is why was it not produced? In the **Oxfords Advanced Learners Dictionary (8th Ed.) a** clone was defined as: **"a person or thing that seems to be an exact copy of another."** There is here clearly no basis for this finding that the cheque was cloned.

In addition, it is also settled law that the person whose handwriting is forged is a material witness. In this case the cheque allegedly forged belongs to a corporate body, Mucken Int. Ltd. It is a notorious fact that when corporate accounts are opened with any bank, the corporate body supplies all necessary particulars of the corporate body including signatories to the account. In our opinion if the company's account cheque was forged or any of its features altered, it is critical that the signatories of the account are called as material witnesses to give evidence, afterall there cannot be any withdrawal without their signatures. The evidence of the signatory or signatories to the account would have in our opinion gone a long way to settle this issue on the genuiness or otherwise of the cheque.

In **Alake V. State (1992)9 N.W.L.R (pt.265)268 at 270,** The Supreme Court instructively stated as follows:

" I ought to add that I agree with Prof. Kasunmu that Ajadi and Lawsweerde were vital and material witnesses in the case. They were persons whose signatures were alleged to have been forged. I think

failure to call them to deny or confirm their signatures on the cheques was clearly fatal to the case of the prosecution the evidence of handwriting analyst (PW6) notwithstanding. Their evidence would have settled the point in issue once and for all (see R. V. Kuree WACA 175; Wambal V. Anor. V. Kano N.A. (1965) N.M.L.R 15). Appellants conviction for forgery cannot therefore stand."

In this case, nobody was called from Mucken Int. Ltd to say whether they at any time issued the disputed cheque. Indeed nobody gave evidence from the company beyond the hearsay evidence that they did not issue the cheque which in law is inadmissible. If this was done, among others, the prosecution would have shown or provided beyond any reasonable doubt basis to infer forgery in the circumstances and the burden will then automatically shift to the defendant to prove reasonable doubt or how he got the cheque. See **Section 135(3) of the Evidence Act.**

Now we agree with the prosecution that proof beyond reasonable doubt does not mean proof beyond the shadow of any doubt. That is correct and settled principle. See **Mufutau Bakare V. The State (1987)3 SC 1 at 32; Sule Ahmed (Alias Eza) V. The State 8 NSC R 273; Miller V. Minister of Pensions (1947)2 All ER 372.**

It is however firmly established that the burden of the prosecution is only discharged when the essential ingredients of the offence have been established and the accused is unable to bring himself within the defences or exceptions countenanced by the law generally or the statute creating the offence. See **Oteki V. A.G Bendel State (1986)2 NWLR (pt.24)658.**

Therefore while proof beyond reasonable doubt needs not attain the degree of absolute certainty, it must however attain a high degree of probability excluding any other conceivable hypothesis than the accused guilt. The authorities are clear that the accused be acquitted if the set of facts elicited in evidence is susceptible to either guilt or innocence in which case doubt has been created. Mere allegations, no matter how believable, does not amount to proof required in law to prove such allegations. In

Mbanengen Shande V. The State 22 NSCQR 756 at 772-773; *Pats Acholonu J.S.C of blessed memory* instructively stated as follows:

"When an accused is being tried for any case whatsoever, because of the principle of law ingrained in our Constitution that he or she shall be presumed innocent, it behoves of the Court to subject every item of facts raised for or against him to merciless scrutiny. Nothing should be taken for granted as the liberty of the subject is at stake. Where there is a doubt in the mind of the Court either as to the procedure adopted or failure to address on very important latent issues that assail or circumscribe the case, the Court should acquit and discharge. Although the standard of proof is not that of absolute certainty (that should be in the realm of heavenly trials) the Court seised of the matter must convince itself beyond all proof that such and such had occurred. It is essential to stress times without number that the expression proof beyond all reasonable doubt- a phrase coined centuries ago and even ably applied by the Romans in their well developed jurisprudence and now verily applicable in our legal system, is proof that excludes every reasonable or possible hypothesis except that which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusions. Therefore it is safe to assume that for evidence to warrant conviction, it must surely exclude beyond reasonable doubt all other conceivable hypothesis than the accused's guilt. The accused should be acquitted if the set of facts elicited in the evidence is susceptible to either guilt or innocence in which case doubt has been created".

We only need add that any scenario which is vague or nebulous and which gives room for speculation will not suffice and would amount to failure of proof.

We have carefully gone through the evidence of the prosecution and we cannot see our way through what **"oral evidence and tendered documentary evidence which was credible and consistent"** that the learned trial magistrate relied on to convict appellant. If there was any forgery, relating to alterations of features of the cheque, there is absolutely

no scintilla of evidence to support any such alteration(s). If the case was that the document was cloned or executed without authority of the corporate account holder, nobody testified on behalf of the company on the credibility of this complaint(s). It is sad to note that the evidence relied on to convict is mostly founded on hearsay evidence, and where it is not hearsay, it is evidence without a firm basis and lacking in credibility. As already stated, where there is a failure in the basic duty of evaluation of evidence and findings of facts by the trial court as in this case, the failure signifies an open invitation to the appellate court to make its own findings from the evidence available on record and interfere with the findings of the trial court.

This is what the dictates of justice has compelled us to do in this case. We have also read **Exhibit A, t**he statement of the accused to the police which appears to be another basis for the decision of the trial court.

In law, the Accused/Appellant's statement to the police is simply evidence of the fact that it was made but being an extra judicial statement, it is not necessarily evidence of the truth of its contents. See **M.A Sanusi V. State (1984)10 S.C 166 at 198/199.** A trial court can use the statement of an accused person to test his consistency and thereby his credibility. See also **Adelumola V. State (1988)N.W.L.R (pt.73)683.**

In this case, there is no material difference between the statement (**Exhibit A)** and the accused sworn testimony in court. It is correct that it was only during trial that he mentioned one Obi Michael as having issued the cheque but it is clear from the evidence on record that the accused has been consistent with regard to the story that the cheque was given to him and that when he was arrested initially PW2 spoke with the alleged owner of the cheque who instructed that the payment be made. PW2 confirmed this but that he was not able to accede to the request because he could not confirm the voice as that of the true owner. PW3 in his evidence also conceded that the accused did not issue the cheque. We do not therefore see **Exhibit A** as a positive confession of guilt and we do not see any material contradiction between the two as to have affected the substance of the narrative of accused or that would lessen the threshold of proof on the part

of the prosecution to prove the key ingredients of the offence. Even if the failure to mention a name in good time is such material point, that cannot be evidence of commission of crime of forgery, without more. The holding by the learned magistrate that the failure of accused to call the said Obi Michael to give evidence operated to his disadvantage appears to us a strange proposition and an attempt to upturn the known standard of proof in criminal trial by seeking to call the accused to prove his innocence. What we see in this approach and indeed by the way this case was presented is that the basic constitutional presumption of innocence in favour of the accused was discountenanced or jettisoned by tending to suppose that it is for the accused to prove his innocence, rather than for the prosecution to prove his guilt beyond reasonable doubt. This should not be so, as much more, we are afraid could have been done by the prosecution in this case.

There are myriads of authorities to the effect that an accused person cannot be called to prove his innocence as the constitutional presumption that he is innocent remains inviolate. See **Section 36(5) of the 1999 Constitution.** In **Okoro V. State (1989)12 SCNJ 199,** the Supreme Court stated thus:

"It is both the constitutional duty imposed on the court and the right conferred on accused by the constitution to ensure the purity of the criminal justice administration, that the innocence of the accused is maintained inviolate... where no case has been made out by the prosecution, asking him to answer to the charge against him is a reversal of the constitutional provision by asking him to establish his innocence. The protection of the accused, presumed to be innocent cannot be curtailed by the strength of the case founded on suspicion, however strong. A conviction must be founded on evidence establishing the guilt of an accused beyond reasonable doubt. See also Garba V. State (2011)14 N.W.L.R (pt.1266)98."

The principle is settled that where the prosecution has not discharged the burden placed on it by law such that there are elements of doubt, such doubt must necessarily be resolved in favour of accused.

The effect of failure by the prosecution to proved or establish the essential ingredients of a charge is the dismissal of the charge and the accused being given the benefit of the doubt, by being discharged and acquitted. See **Garba V. State (supra); Okoro V. State (supra); Onofowokan V. State (1987)3 N.W.L.R (pt.83)538.**

We therefore resolve the sole raised issue in favour of Appellant. The appeal on conviction for the offence of forgery has considerable merit and it is allowed. For avoidance of doubt, we affirm the conviction for the offence of attempt to commit the offence of cheating contrary to **Section 95 Penal Code Law** while the conviction and sentence of the Appellant by the Trial Magistrate with respect to the offence of forgery is set aside and the Appellant is discharged and acquitted of the charge.

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HON. JUSTICE U.A. OGAKWU ***HON. JUSTICE A.I. KUTIGI***
(PRESIDING JUDGE) ***(JUDGE)***

Appearance:

1. ***T.O. Anyira, Esq., for the Appellant.***

2. ***Omobighe Omoadoni (Miss) for the Respondent.***