



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

In the matter Between:

Criminal Case No.41/2020

**THE KING**

**VS**

**1. ASHRAF LUPIYA**

**2. NTOMBIKAYISE MASILELA**

**3. DUMILE NKWANYANA**

Neutral citation : ***The King vs Ashraf Lupiya and two others (41/2020)***  
***[2020] 56 (31<sup>st</sup> March, 2020)***

Coram : **M. Dlamini J**

Heard : **17<sup>th</sup> March, 2020**

Delivered : **31<sup>st</sup> March, 2020**

- [1] The Director of Public Prosecutions has arraigned the three accused persons under section 5 read with section 14 of the Passport Act of 1971 in the following:
- [2] Accused 1, 2 and 3 are guilty of the offence of Contravening section 5 as read with section 14 of the passport act of 1971. In that upon or about the 3<sup>rd</sup> February 2020 and at or near Sicunusa Border post in the Shiselweni Region, the said accused persons each or all of them acting in furtherance of a common purpose and accused no. 2 and no. 3 in their official capacity as Immigration officers within the scope and course of their employment did unlawfully for purposes of obtaining an endorsement in respect of a passport of one **Lloyd Siame Chad**, knowingly made a false representation or statement that is false in a material particular.
- [3] **Alternatively** accused 1,2 and 3 are guilty of the offence of Contravening Section 14 (1) (a) (j) of the Immigration Act of 1982 in that upon or about the 3<sup>rd</sup> February 2020 and at or near Sicunusa Border Post in the Shiselweni Region, the said accused persons each or all of them acting in furtherance of a common purpose and accused no.2 and no.3 in their capacity as Immigration officers within the scope and course of their employment did unlawfully and corruptly or ‘improperly issue or give an entry permit document or approval to one **Lloyd Siame Chad** by there and then stamping his passport while the said **Lloyd Siame Chad** was not present at the stamping point and did thereby Contravene the said Act.

### **Plea**

[4] On their plea, each of the accused persons pleaded not guilty to both the main and the alternative charges.

### **Evidence on behalf of the Crown**

[5] The first witness was **Nozipho Alice Dlamini (PW1)**. She testified under oath. She is employed by the Government of the Kingdom in the Ministry of Home Affairs. She occupies a senior office as a Senior Immigration Officer, based at the headquarters, Mbabane. Among her duties, she manages the activities at all the border gates and posts around the country. She testified on the duties and procedure officers stationed at the border gates and posts.

[6] She proceeded to narrate that on the 14<sup>th</sup> February, 2020 police officers arrived at her work station. They requested her to provide them with the travel itinerary of accused No.1 (A1). She obliged. She presented to court the said printout. The police officers requested a second printout for the travelling itinerary of **Lloyd Chad Siame**. She retrieved it from her main system. She handed the same to court. No objection was taken on behalf of the defence for PW1's request to hand the said printouts. By reason that PW1 compiled them as one document, the court having admitted them, marked them as annexure "A".

[7] PW1 was cross-examined. I shall capture her evidence under adjudication herein.

- [8] The second witness was **Ndumiso Nimrod Dube** (PW2). Having taken the oath, he told the court that he was in charge of Sicunusa Border Post as an officer of Home Affairs, Immigration department.
- [9] On the 3<sup>rd</sup> February, 2020, he was on the exit side. He was working with accused person number 3 (A3). While working, a group of about four to five Malawian arrived and approached his desk. At that time, A3 was busy fiddling with her computer as if it were malfunctioning.
- [10] When he finished attending to the group of Malawian, one Malawian gentleman who had stood at a distance while he was attending to his countrymen, came closer to his desk. This was accused person number 1 (A1). A1 produced two passports. One belonged to A1 while the other was for a person who was not within the vicinity. He endorsed one passport which belonged to A1. He handed back the second passport whose owner was not visible. He gave A1 a gate pass after recording that it was for a single pedestrian. A1 did not leave. He stood by with the two passports and the gate pass. Other emigrants arrived. He attended to them. He then saw A3 beckoning A1 to come to her desk. A1 obliged and handed a passport to A3. At the noise of a stamping, he concluded that A3 was endorsing the passport given to her by A1. He was advised later by the police that a crime had been committed and was requested to record the events of that day in relation to A1 and A3.

[11] **6080 Constable Dlamini**, PW3, was the police officer stationed at Sicunusa Border Post manning the boom gate on 3<sup>rd</sup> of February 2020. On oath, he testified that A1 approached the boom gate. He decided to take his time talking or chatting with him and his other colleague. His companions entered. He then produced a gate pass. His passport had been stamped. At that juncture, PW3's supervisor came and requested to interview A1 on suspicion of carrying two passports. PW3 was not cross-examined. He was excused by the court.

[12] PW4 was **3767 Inspector Sicelo Freedom Dlamini**. He is the Post Commander at Sicunusa Border Post. On the 3<sup>rd</sup> February 2020 he was on duty. He decided to conduct visible policing at the entry side of Sicunusa Border Post. The time was about 1500 hours. While discharging his visible policing, his attention focused on A1 who produced two passports to A2. A1 was not accompanied by anyone. He positioned himself to observe if a second person would join A1. No one came.

[13] He saw A2 stamping both passports and issuing A1 with a gate pass. His suspicion was aroused by the manner A1 took back the two passports from A2. He snatched them while looking side by side. He quickly tucked them into his right hand pocket and carried the gate pass in his hand. A1 proceeded to the boom gate. He monitored him. He gave PW3 the gate pass. He quickly went to PW3 and took the gate pass from him. He inspected it and noted a number "1934" an indication of an entry into the kingdom. It read that it was for a pedestrian.

[14] At that time A1 was at a spaza within the country. They waited for his return. He arrived. They introduced themselves to him as police officers. He was cautioned in accordance with the judge's rules. A1 requested for permission to go and speak to his friends. He was excused. He was however, monitored in order that he did not hand the passport to his friends. He returned and they all proceeded to the police office at the border post. He was cautioned. He freely and voluntarily produced the passports.

[15] He noted that one passport number 112814 was endorsed with a stamp both entry and exit. The entry stamp had the same number as that reflected on the gate pass, 1934.

[16] Turning to the second passport handed to him by A1, he testified that it was passport number MA 385151 belonging to **Lloyd Chad Siame**. It reflected an entry and exit stamp. The entry stamp was 1934. The exit stamp was 1933. A1 was asked to identify the owner of passport. He failed. His investigation led to the arrest of all three accused.

[17] PW4 was cross-examined at length. In order not to burden this judgement his cross-examination, like the other witnesses, shall be captured later herein.

[18] The Crown closed its case and the defence led in evidence A1 and A3. A2 opted to remain silent. Their testimonies shall be revealed under adjudication.

## Adjudication

[19] Sections 5 and 14 of the Passport Act No: 19 of 1971 read:

*“5. Any person who, for the purpose of obtaining a Swaziland passport or a renewal, endorsement or visa in respect of a passport, knowingly makes any false representation or any statement that is false in a material particular shall be guilty of an offence.*

*14. Any person who commits an offence under this Act shall be liable on conviction to a fine not exceeding five hundred emalangenis or imprisonment not exceeding two years, or both.”*

[20] The Crown’s case is that A1, A2 and A3 falsely made representation. The immediate notable question is, “To who is this false representation made?” The answer is obvious. It is made to an immigration officer. This section therefore quickly removes A2 and A3 from the charge by reason that:

- they could not have made a false representation to themselves,
- they according to the Crown made the desired endorsement and not the **“false representation”** as envisaged in the section.

[21] This means that the main charge as far as A2 and A3 is non-existent. In the result A2 and A3’s Counsel ought to have moved for the quashing of the indictment instead of taking a plea. This was not done. Why? I do not know except to point out that a wrong procedure was adopted at the

instance of A2 and A3. As a result unnecessary burden was laid to the court. This does not serve justice, I must send a warning.

[22] That as it may for the above reasons A2 and A3 are acquitted on the main charge. Now in the main charge, A1 is left alone.

[23] I now consider if the evidence adduced on behalf of the Crown *vis-à-vis* that of A1 supports the charge. I am very much alive to the standard of proof expected of the Crown, namely, proof beyond reasonable and not any doubt. No evidence adduced by PW1 turns on A1's main charge. PW2 testified that A1 decided to take the last position in a queue of about four to five Malawian. He testified that he attended to all the Malawian who were before A1.

[24] He testified that there was a gab or a pause of attendance to this queue. When A1 eventually approached his desk, he produced two passports. In as much as he thought that A1's companion was held up in the rest room, he did not endorse the passport. He only endorsed A1's passport. He handed back to A1 both passports. A1 remained adamant. He would not move without the endorsement. However, at the instance of A3, A1 achieved his unlawful intent i.e. of "obtaining a Swaziland endorsement."

[25] Now how did A1 "knowingly" made "a false representation?" According to the evidence serving before me, A1 represented **Lloyde Chad Siame's (Siame)** passport in his absence. PW2 testified that **Siame** was not within visible vicinity when A1 presented his passport to him. He was still not within the vicinity when he presented the same



passport to A3 for endorsement, the evidence went further as adduced by PW4.

[26] PW4 witnessed A1 presenting two passports to A2. The second holder of the passport was not present. Upon his arrest, he was requested to produce **Siame**. A1 failed to do so despite that he had presented and “obtained Swaziland endorsement” of **Siame’s** passport. He obviously made “a false representation” as per the wording of the enactment.

[27] He was at the exit point given the opportunity to desist from his unlawful conduct. This is when PW2 handed back to him the unendorsed passport of **Siame**. This however, did not deter A1. He persisted until he achieved his intention when he presented the same passport to A3.

[28] Turning back to his own evidence in defence, A1 testified that he arrived at the Sicunusa border post on 3<sup>rd</sup> February, 2020 around 1500 hours. His purpose was to extend his stay in South Africa. He joined the queue as they were many Malawians. When his turn arrived, he handed the immigration officer two passports. One passport belonged to him while the other to his brother. He did have the two passports endorsed even on the exit side.

[29] A1 decided to go to a spaza shop. On his return a police officer greeted him and requested that they proceed to his office. The police officer said that he was suspecting him of carrying two passports. He produced the two passports. He was at the end arrested. He did tender his

apology for carrying two passports and presenting the second one for purposes of obtaining an endorsement. He did explain that the owner of the passport was left behind in Piet Retief in South Africa as he was ill.

[30] In essence A1 did not dispute his unlawful conduct. He however pleaded lack of intention to commit the offence on the ground that he did not know that such was an offence.

[31] It is trite law that in statutory offences all that the prosecution has to establish is the unlawful conduct which violates the provisions of the statute or in line with the statutory charge. A prosecutor need not prove intention where the offence is statutory, unless the wording of the provision so directs. The adage, “Ignorance of the law is no excuse”, emanates from this perception.

[32] In the result, I find that A1 is guilty under the main charge *viz.* that on 3<sup>rd</sup> February, 2020 at Sicuniusa Border Post, in the Shiselweni region, he unlawfully presented a passport belonging to **Lloyde Siame Chad** for purposes of obtaining a Swaziland endorsement and by so doing made a false representation as the said **Lloyde Siame Chad** was not within the premises or vicinity of the Sicunusa Boarder Post. In brief, according to immigration procedure and regulations (Regulation 3 Part 1 as per PW1’s evidence) **Lloyd Siame Chad** was not entitled to the endorsement of his passport by virtue of his absence.

[33] I now turn to the alternative charge. Does the evidence support the alternative chargeas against A2 and A3?

[34] PW2's evidence was that on the 3<sup>rd</sup> February 2020, he was on duty with A3. A1 approached his desk and produced two passports. One belonging to him and the other to a person who was not within sight. He attended to A1 by endorsing the passport which belonged to him. He did not endorse the other passport. He handed them back to A1. However, A1 would not move. He stood still until he was beckoned by A3, PW2's colleague. A1 approached A3's desk and gave A3 the passport. As already highlighted, he heard the noise of an endorsement and concluded that A3 stamped the passport of the person who was out of sight.

[35] PW2 testified in chief "*At the time A3 endorsed the passport, the system (internet) was well.*" However, from the evidence of PW1 this endorsement was not captured in the immigration system. Under cross-examination on behalf of A3, it was pointed that A3's computer was malfunctioning as follows:

**Counsel B.Z. Dlamini** : "*Do you confirm that A3's computer was problematic such that she had to bend down under the table to reboot it?*"

**PW2** : "*Yes.*"

[36] Now the following cross-examination informed the court the position of A3 in so far as to whether she admitted or denied ever making the endorsement on the second passport carried by A1 on that day:

**Counsel B.C. Dlamini** : “A3 says at one instance after she had finished attending to her computer she got up to find a familiar face of **Lupiya (A1)**.”

**PW2** : “He was standing at the desk.”

**Counsel B. C. Dlamini** : “She instructs me that since A1 is a well known person at the border, she assisted him.”

**PW2** : “Yes”.

[37] From this evidence, it is clear that A3 did not deny that she made the endorsement on the second passport carried by A1 belonging to **Lloyd Siame Chad**. The following question clears any doubt on the evidence that A3 admitted to making the endorsement on **Siame’s** passport:

**Counsel B.C. Dlamini** : “A3 says she was not able to upload the passport as her computer was malfunctioning.”

**PW2** : “I do not know whether her computer was malfunctioning.”

[38] The evidence that A3 signalled A1 to come to her desk was not disputed under cross-examination. It stands to be accepted.

[39] A3 decided to exercise her right to remain silent in her defence. It follows that the only evidence serving before court is that adduced by the Crown and under cross-examination of the Crown's witness.

[40] The evidence of PW1 is to the effect that an immigration officer presented with a passport must compare the photograph in the passport to that of the presenter. Obvious in *casu*, A3 did not do so for she would have noted that the face of **Siame** did not match that of A1 who was the bearer of the passport on that day. A3, in the language of section 14 (1) (j) improperly issued or gave an authority or approval to A1. She is guilty on the alternative charge.

[41] Evidence of what transpired on the fateful day of 3<sup>rd</sup> February, 2020 pertaining to the alternative charge faced by A2 was mainly adduced by PW4, the arresting officer. He testified that A2 was stationed as an immigration officer on the entry side at Sicunusa Border Posts. He confirmed that something was amiss when A1 quickly seized from A2's desk two passports and tucked them into his pocket. Both passports had been stamped by A2 by then. A gate pass was also handed to him by A2. PW4 followed A1. He saw A1 handing the gate pass to the police officer, PW3. He requested PW3 to keep it separate. His evidence was further that in as much as both passports were stamped, there was only one immigrant. The gate pass also indicated one pedestrian. It was his evidence that he saw A1 presenting the two passport and A2 endorsing

them and handed them back to A1 with the said gate pass. He then explained that in order to verify his testimony, the two passports indicated an entry stamp bearing the same number. This stamp number was also reflected in the same gate pass carried by A1 later handed to PW3 for purposes of entering into the Kingdom.

[42] Under cross-examination, he clarified that since he witnessed the entry endorsement at the instance of A2 the stamp number reflected on the two passports and the corresponding gate pass were used by A2 on that day.

[43] In his cross-examination, it was not specifically denied that A2 made the said endorsement and issued the said gate pass. Instead it was put to PW4 that he had put up criminal charges against A2 and A3 because A2 had denied him sexual advances. PW4 profusely denied the same. It was not specifically said that these charges were trumped up. It was further said that as he could not tell the number of Malawians who were at the border, he could not say whether **Siame** was at the border.

This question, I must point out was belated as it was never put to any of the witnesses that gave testimony before PW4 that **Siame** was at the border. It was common cause as testified by PW2 that **Siame** was not in the vicinity in as much as he had thought that he might be in the rest room.

[44] A2 gave evidence under oath. She was cross-examined as follows:

**Counsel S. Mdluli :** *“Do you confirm that on 3<sup>rd</sup> February, 2020 you endorsed two passports produced by A1?”*

**A2 :** *“Yes.”*

**Counsel S. Mdluli :** *“Did you enquire from A1 where was the owner of the other passport?”*

**A2 :** *“I tried to ask him?”*

**Counsel S. Mdluli :** *“What did he say?”*

**A2 :** *“Although he had difficulty with the language he said he was in the car.”*

[45] Now let us for a second accept that **Siame** was in the car. This evidence contradicts A2’s very testimony under cross-examination where he was asked:

**Counsel S. Mdluli :** *“Were you oriented to work at the border?”*

**A2 :** *“Yes, after employment I went for training.”*

**Counsel S. Mdluli :** *“What were you oriented about?”*

A2 : “How to work at the border”

**Counsel S. Mdluli :** “Can you tell the court the procedure.”

A2 : “At the gate when an immigrant enters, he must give you the passport. **You look at him to see if he is the one appearing on the passport.** If it is valid and if it does not need a visa. If he qualifies on all these, you endorse it and give it back with a gate pass.”

**Counsel S. Mdluli :** “What do you do if the person who gives you the passport is not one on the passport?”

A2 : “**I tell him the passport is not his. He must go and get his passport.**”

[46] Now in *casu*, the evidence by A2 is that she endorsed **Siame’s** passports who according to her testimony was supposedly in the car. The question, “Why did she endorse the passport of a person who was not before her according to her own evidence? Why did she endorse the passport of a person she did not confirm her facial appearance with the passport?” These question can only be answered with one reference and that is Section 14 (1) (j) that is she improperly gave approval on the



document presented to her, in accordance with her charge. She stands to be found guilty on her own testimony under oath. Her defence that she is facing the present criminal charges because she declined sexual advances by PW4 stands to be rejected in its entirety.

[47] What fortifies the verdict of guilt is the evidence that she endorsed in the gate pass that there was one pedestrian. She did not say that there were two passengers as she sought the court to believe. This court has no reason to reject the evidence of PW4 who testified that she saw A2 endorsing two passports in respect of one immigrant, A1 and further giving him a gate pass. The corresponding numbers in the two passports and the gate pass corroborates A2's evidence in cross-examination as she admitted to endorsing the two passports borne by A1.

[48] Her evidence that **Siame** was in the car stands to be rejected further for the reasons that it was heard for the first time under cross-examination and that it was never put to any of the Crown's witnesses. It is further not supported by the gate pass she issued.

[49] In the final analysis, the verdict of guilty must be entered against A1 in the main charge and on the alternative charge, against A2 and A3.

### **Sentencing**

[50] **A1:** Your attorney has just informed me that you are a married man. This means you are a responsible citizen albeit of Malawi and that is a credit to you. You are further the only source of means of living for your family as you also have two minor children who are all depended

on you to provide food on your table. When you gave evidence, I do recall that you informed the court that you are a teacher of the Islamic faith. All this information is credit to you for purposes of sentencing.

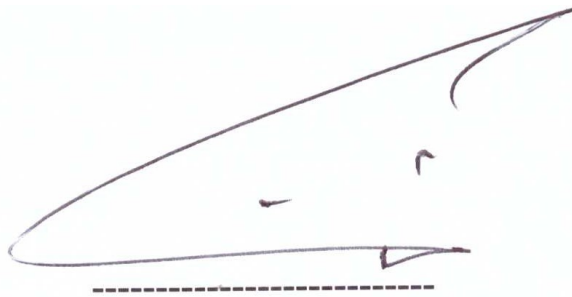
[51] Added to what your attorney has submitted during the trial, I do recall that when the plea was first put to you, you pleaded guilty but for your instruction to your attorney, a plea of not guilty was entered. When you took the witness stand, you were very apologetic and did not deny the offence. You related the events of 3<sup>rd</sup> February, 2020 as they unfolded. You did not lie before court. That again must minimize your sentence.

[52] I sentence you to one year imprisonment with an option of a fine of E1000.00. Your sentence is backdated to the date of your arrest being 3<sup>rd</sup> February, 2020.

[53] **A2 and A3:** I consider mainly that the evidence adduced on behalf of the Crown shows as per the judgment that you “*improperly gave approval*” and not that you “*corruptly gave approval.*” In other words, no iota of evidence shows corruption on your part. This goes to your credit. I am however, much alive to the evidence of PW1 that the procedure is that you ought to compare the faces of the presenter. This, together with A3’s evidence that a training on the same procedure was undertaken at the instance of your employer is not to be overlooked when passing sentence. I accept that you both have minor children, each three and with regard to A2 only two of them attend school while the third one is too young for that. All three children for A3 are at school. A custodian sentence might deny you the opportunity to work for your

children. You have further faithfully and promptly attended court. You have not violated your bail conditions in any way. This goes to your credit again. Nothing has been submitted by the Crown in dispute of your mitigation factors.

[54] I sentence each one of you to one year imprisonment with an option of a fine of E2000.00. As per your Counsel's application, your bond of E1000.00 each is converted to your part payment as fine.

A handwritten signature in dark ink, appearing to be 'M. Dlamini', written over a horizontal dashed line.

**M. DLAMINI  
JUDGE**

**For the Applicant:** M. Simelane of Piliso, Simelane & Partners  
**For the Crown :** Sandile Mdluli Prosecuting Counsel