In the opinion of this court, the evidence was sufficient to support the conviction and the appeal must be dismissed.

Appeal dismissed.

ALLIE and OTHERS *v.* ALHADI (OFFICIAL ADMINISTRATOR)

WEST AFRICAN COURT OF APPEAL (Blackall, P., Hallinan, J. (Nig.) and Hyne, J. (G.C.)): November 28th, 1950
(W.A.C.A. Civil App. No. 8/50)

[1] **Civil Procedure—order for new trial—no order unless miscarriage of justice:** On appeal, a new trial will not be ordered unless, in the opinion of the court of appeal, some substantial wrong or miscarriage of justice has been occasioned at the first trial (page 74, lines 1–3).

[2] **Civil Procedure—stay of proceedings—proceedings to be stayed to enable prosecution of felony—rule does not apply in action against innocent third party:** The rule that a person must prosecute a felony before bringing a civil suit in respect of the same acts does not apply where the action is against a third party innocent of the felony (page 73, lines 33–39).

The plaintiffs (now the appellants) brought an action against the defendant (now the respondent) in the Supreme Court for the revocation of a will.

A dispute arose as to the genuineness of one of a series of wills allegedly left by the same testator. The plaintiffs, as executors named in one of the wills, instituted the present proceedings against the Official Administrator, who had undertaken the administration of the estate, on the ground that one of the beneficiaries had suppressed the will as originally drafted and substituted a forged one in its place.

The Supreme Court (Beoku-Betts, Ag.C.J.), after hearing the evidence adduced for the plaintiffs, adjourned the proceedings and directed the record to be forwarded to the Attorney-General to consider whether a *prima facie* case existed for a prosecution for forgery. The Attorney-General decided not to prosecute; and the Supreme Court then dismissed the action for the revocation of the will.

On appeal by the plaintiffs to the West African Court of Appeal, it was contended that: (a) the trial judge erred in staying the pro-

ceedings before the Supreme Court because the obligation which the law imposes on a person to prosecute does not apply where the action is against an innocent third party, and therefore a new trial should be ordered; and (b) the trial judge's decision was against the weight of the evidence, and he was influenced in reaching it by the opinion of the Attorney-General that there was no *prima facie* case for a prosecution.

Case referred to:

(1) *White* v. *Spettigue* (1845), 13 M. & W. 603; 153 E.R. 252.

Hotobah-During for the plaintiffs-appellants;
Zizer for the defendant-respondent.

BLACKALL, P., delivering the judgment of the court:

This is an appeal against the judgment of Beoku-Betts, Ag.C.J. dismissing a claim to have the will of one Mormodu Allie, dated August 30th, 1946, revoked. The plaintiffs originally made a similar claim in respect of a codicil dated July 19th, 1947, but they abandoned this in the course of the case. This was not the only instance where the plaintiffs shifted their ground, for at the outset of the case they denied the existence of any will in 1946. Later, this assertion was watered down, and the plaintiffs rested their case on an allegation that if there had been a will in August 1946, a forged will was substituted for it after the testator's death. When, at the hearing, evidence was adduced in support of these allegations the trial judge considered that he should stay the proceedings in order that the Attorney-General might decide whether a *prima facie* case existed for a prosecution for forgery. He therefore directed that the record be forwarded to the Attorney-General for that purpose, and adjourned the proceedings until the Attorney-General's reply was received.

Now this action was against the Official Administrator, and there was no allegation that he had forged the will; neither was there in the evidence anything to support this. I think therefore that the learned judge was wrong in staying the proceedings in the circumstances of this case, because the obligation which the law imposes on a person to prosecute does not apply where the action is against a third party innocent of the felony: see *White* v. *Spettigue* (1). I agree therefore with Mr. Hotobah-During's submission on this point to that extent. But he went further, for he submitted that this error

was a ground for granting a retrial. A new trial is not however granted unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been occasioned, and I therefore invited Mr. During to say how his client was in fact prejudiced. The learned counsel in a courageous argument attempted to surmount this obstacle. He submitted that the learned judge had in consequence of his mistake misdirected himself, in that he was influenced by the opinion of the Attorney-General that there was no *prima facie* case for prosecution. But unfortunately for counsel's argument the judge set out in very plain terms that he was in no way bound by the Attorney-General's opinion. He stated:

> "If those who are in charge of the criminal machinery would not prosecute or think no case exists for criminal prosecution, that does not relieve the judge in the civil action from applying his mind to the facts and decide whether the allegation has in fact been proved. That duty the judge has to perform irrespective of the opinion of the Attorney-General."

It is, in my view, perfectly clear from this passage that the judge was in no way influenced by the Attorney-General's opinion, and that this ground of appeal therefore fails.

I now pass to grounds 1 and 3, which were argued together and which were in effect a submission that the decision was against the weight of evidence. The plaintiffs' case rested mainly on the evidence of one Wurie. The witness read the will in February 1948 and he did not see it again until 18 months later. However, he stated definitely that in his opinion the will sought to be propounded is not the will that he read in February 1948. The reasons he gave were these: in the first place, he says that in the will which he then read the testator signed only on the last page, whereas in the will exhibited he also signed on the other pages. I think however that the witness might well have overlooked the signatures, other than the last one, when he read the will in 1948, because when one examines the will, it will be found that the intermediate signatures are not at the bottom of the page but written along the margin. The other reason which Wurie gave in support of his view was that the will that he read was on thick paper like the codicil. But again when one looks at the papers one finds that the codicil was not written on thick paper; it was written on paper which was very slightly thicker than that on which the will in dispute was written, and in this connection it must be remembered that the codicil was not prepared at the same time as the will, so one would not expect it to be written

on exactly the same kind of paper. I think therefore that the learned judge's comment, that it would be difficult for a person who saw this will only once and had no special reason for scrutinising it closely to be able to remember very exactly the texture of the paper upon which the document was written, was justified.

Besides Wurie, the plaintiff called Ibrahim Allie who gave evidence in support of the allegation that the will was forged. Now, Ibrahim Allie was the son of the testator and what he says about the signature is simply this—that it was "similar to but not like" his father's signature. Well, I am afraid that is a distinction without a difference.

For the defendant, the two attesting witnesses of the will were called and there is nothing to suggest that those witnesses had anything to gain by giving false evidence. One of them was Mr. Dougan, who stated that he had actually prepared the will of 1946. The learned judge apparently did not approve of his action in poaching upon his master's preserves by acting as a solicitor, but he did accept him as a truthful witness who impressed him favourably. His evidence was corroborated by the other attesting witness, Mr. Macauley. Much stress was laid by Mr. Hotobah-During on the judge's remark that Macauley was a very unsatisfactory witness. But when one reads the passage as a whole it appears that the reason why the learned judge made that remark was simply that Mr. Macauley is suffering from loss of memory owing to advancing years. For my own part, I think the learned judge's comment on this score was not altogether justified. In any event the important point is that Macauley definitely stated that the will was attested by him and it is worthy of note that both these witnesses attested the will and the codicil. Furthermore, Wurie has stated that their names appear on the will that he read in February 1948.

I do not think it is necessary for me to recapitulate the evidence any further, as the learned judge had done so very exhaustively.

This is a case which depended very largely on oral evidence, and the trial judge had the great advantage of seeing the witnesses and hearing them. He accepted the evidence of the defendant's witnesses on material questions in issue and, having considered the evidence on both sides, I am of opinion that there was sufficient evidence to justify the conclusions at which the court below arrived, and I see no reason for interfering with the decision. In my opinion, therefore, the appeal should be dismissed.

Appeal dismissed.