REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 20 OF 2018

KATIKIT NGOLEKENY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Mutomo Senior Principal Magistrate's Court Criminal Case No. 390 of 2016** by **Hon. Z. J. Nyakundi (SPM)** on **15/11/17)***

J U D G M E N T

1. **Katikit Ngolekeny,** the Appellant, was arraigned for the offence of **Being in Possession of Papers Intended to Resemble Kenya Currency** contrary to **Section 367(a)** of the **Penal Code.** Particulars of the offence were that on the **21st** day of **September, 2016** at **Ikutha Town** in **Ikutha Sub-County** within **Kitui County** without lawful authority was found in possession of One Million, Four Hundred Thousand and Sixty Six (1,400,066) fake papers of one thousand denomination intended to resemble Kenya Currency and pass as special paper such as one provided and used in making bank notes or currency notes.

2. Facts as presented by the Prosecution were that on the **21st September, 2016,** PW1 **Mwikali Musyoki** was at her shop sweeping, at **7.30 a.m.** when a person she identified as the Appellant herein approached her and requested if she would charge for him a cellphone. She notified him that there was no electric power. He left and returned 5 minutes later and requested her to keep for him a bag that he carried as he wanted to repair punctures that his motor-vehicle had. She allowed him to place on top of bags that contained sugar. In the meantime, PW3 **No. 218054 C.I. Aden Abdul** acted on a report of an alleged theft of the motor-vehicle that the Appellant had and moved to arrest him. PW1 on seeing the Appellant being taken away informed PW2 **John Kimengele,** a Community Policing Agent about the bag that the Appellant left at her shop. PW3 rang PW4 **No. 2214220 Inspector Ambrose Mutuku** and made a report of the bag that had been left at PW1's shop. PW5 **No. 100350 P.C. Martin Ochola** was assigned duties of taking the Appellant and a co-suspect to the shop. On arrival PW1 identified the Appellant as the one who took the bag to the shop. He claimed the bag contained his personal effects but when the bag was opened it contained clothes, socks and papers that were intended to resemble 1,466,000 Kenya Currency. The Appellant was taken to Mutomo Police Station. Investigations continued where some of the papers were submitted to the Government Chemist for analysis. **I.P. Vincent Chelongo,** the Forensic Document Examiner who analyzed the papers formed the opinion that the papers were counterfeits and not genuine papers for making Kenya Currency. Hence the case.

3. Upon being put on his defence the Appellant stated that he was arrested while repairing a puncture on allegations of the motor-vehicle having been stolen at Mumias. A parade was organized for purposes of identifying a black man who had taken a bag to some shop. The people were communicating in English and Kikamba. He was taken to Mutomo and subsequently charged. He denied the allegations. On cross examination he admitted that PW1 identified him but urged that because he was in handcuffs.

4. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant was identified by recognition, a mode of identification that was positive. He found him guilty of the offence, convicted and him sentenced him to **four (4) years imprisonment.**

5. Aggrieved, the Appellant appeals on grounds that: Inordinate weight was placed on evidence of a single witness regarding ownership of the exhibits without any warning by the Court of relying on such evidence and the need for corroboration. That the Court relied on evidence of a document examiner who was not called as a witness; The conviction and sentence were against the weight of evidence; the burden of proof was shifted to the Appellant; the cogent defence put up was rejected and the sentence imposed was excessive and harsh.

6. The State through learned Counsel, **Mr. Mamba** opposed the Appeal but conceded that the Expert was not called to testify. Regarding the time spent in custody he urged that the Appellant did not seek to be released on bail.

7. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

8. It is urged that evidence of PW1, a single witness should not have been given any weight and in fact it should have been corroborated.

Section 143 of the **Evidence Act** provided thus:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

9. In the case of **Ogeto vs. Republic (2004) eKLR** it was stated thus:

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."***

Therefore, a fact can be proved by a single witness. What is called for is caution since some witnesses may be honest but mistaken.

10. Corroboration is generally evidence that is offered to strengthen evidence adduced. It is evidence that supports or confirms initial evidence. **(See DPP vs. Kilbourne (1973) 1 AER, 440)**

11. This was not a case where corroboration was required as a matter of law, all the Court was required to ensure was that circumstances that prevailed favoured positive identification. In his considered Judgment the trial Magistrate was cautious in accepting evidence of the single witness to the act of possession of the bag that contained the exhibits. He gave reasons why the testimony was not in doubt namely:

> ***"- The incident occurred at 7.30 a.m., that means that PW1 had a clear view of the Accused person.***
>
> ***- The Accused person appeared first to request for a charger, he went away and came after 5 minutes, that means that the Accused person spent some time with PW1 to enable her recognize the Accused.***
>
> ***- The Accused was repairing a puncture beneath a tree outside her shop from where he was arrested, that means that PW1 had taken note of the Accused and what he engaged in at the time of his arrest.***
>
> ***- PW1 described the Accused as being tall and black, the Court takes notice of the fact that the Accused is tall and black.***
>
> ***- At 2 pm when the Accused person was escorted back to the ship, PW1 was able to identify the accused by recognition."***

The visual identification of the Appellant in the circumstances was cogent.

12. It is further contended that the document examiner was not called as a witness but it was not alleged whether or not the Appellant was prejudiced following failure by the Prosecution to avail the witness. PW7 **No. 60468 Corporal John Ndubia** the Investigation Officer submitted the exhibits to the Government Chemist for analysis. He prepared an exhibit memo form that was used to submit the exhibits which were one hundred pieces of paper being part of a bundle of papers that intended to resemble Kenya Currency. Thereafter he collected a report prepared by the Forensic Examiner which he adduced in evidence. The Appellant did not object to production of the document evidence.

13. **Section 77** of the **Evidence Act** provides thus:

> ***"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."***

14. This is a case where by conduct the Court presumed that the signature on the document to have been for the maker who was qualified to do the analysis and sign it hence admitting it in evidence. In a case where a P3 form (Medical Report) as envisaged by **Section 77** of the **Evidence Act,** where the author of the document was not availed to testify the Court had this to state:

> ***"That in short means that if the Appellant wanted the medical report to be produced by a doctor he had to apply to Court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by P.C. Ann Wambui as she did." (See Joshua Otieno Oguga vs. Republic KSM CA Criminal Appeal No. 183 of 2009 (2009) eKLR).***

15. In the instant case, had the Appellant requested for the author of the Report to be summoned for cross-examination and was denied the opportunity, he would have had reason to complain. But this was not the case.

16. In forming the opinion that the papers were counterfeit and not genuine for making Kenyan Currency, the document examiner found that:

> ***"- The paper quality and texture of the questioned papers when felt with ordinary hands is poor and does not conform to the paper quality of genuine Kenyan Currency Bank Notes.***

- The characteristic surface of the intaglio printing and micro-printings has not been incorporated in the questioned papers.

- The ink and paper used in the questioned papers is not resistant to circulation hazards.

- The security thread, serial numbers and watermark present in genuine bank notes have not been incorporated in the questioned papers.

- The printings are visibly faint, dull and blurred which is not characteristic of printings found on genuine bank notes.

- As a last step I subjected the questioned note to ultra-violet illumination spectra and the papers fluoresced brightly and failed to reveal security features present in genuine bank notes."

17. The trial Magistrate has been faulted for shifting the burden of proof the Appellant and disregarding his defence. **Section 367(a)** of the **Penal Code** provides thus:

"Any person who, without lawful authority or excuse, the proof of which lies on him—

(a) makes, uses or knowingly has in his custody or possession any paper intended to resemble and pass as a special paper such as is provided and used for making any bank note or currency note; or"

The Prosecution had the duty of proving beyond any reasonable doubt the fact of possession of the papers in issue. **Section 2** of the **Penal Code** defines possession thus:

"(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person; (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"

The Prosecution proved that prior to the Appellant keeping the bag that contained personal effects and the papers in issue at the shop of PW1 he was in personal possession of it. In disregarding the defence put up, the learned Magistrate gave reasons therefore it is true to allege that he casually dismissed the defence put up.

18. The Prosecution having discharged the duty bestowed upon it, as required by the provision of **Section 367** of the **Act,** the onus was upon the Appellant to explain whether he had the authority or excuse of possessing the papers. This duty was not discharged therefore the trial Magistrate did not fall into error in reaching the decision to convict him.

19. It is contended that the sentence imposed was harsh and excessive. Principles upon which an Appellate Court can act by interfering with a sentence imposed by a trial Court were enunciated in the case of **Ogolla s/o Owour vs. Republic (1954) EA CA 270** where the East African Court of Appeal stated thus:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

20. A person who is found guilty of the instant offence is liable to imprisonment for **seven (7) years.** I do note the number of papers that were in possession of the Appellant that were intended to pass as **Kshs. 1,400,066/=.** In the circumstances a sentence of **four (4) years imprisonment** was not excessive.

21. In total, I find the Appeal lacking merit. It is dismissed in its entirety.

22. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **25th** day of **April, 2019.**

L. N. MUTENDE

JUDGE