



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL CASE NO. 31 OF 2012**

**NELSON WAINUKU MAINA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*Being an appeal from the judgment of the Principal Magistrate's Court (J. N. Mwaniki), Barichu  
Criminal Case Number 421 of 2011 delivered on 13<sup>th</sup> January, 2012)*

**JUDGMENT**

1. **Nelson Wainuku Maina** the appellant herein was charged with being in possession of paper of forgery contrary to **Section 367 (a)** of the **Penal Code** vide Baricho Criminal Case No. 421 of 2011. The particulars of the charge as per the Charge Sheet were that on the 29<sup>th</sup> day of June, 2011 at Kagio Township in Kirinyaga West District within the then Central Province without lawful authority or excuse had in his possession papers of forgery of 221,000 in 1000 denominations intended to resemble and pass as special paper such as is provided and used in making bank notes.

2. The Appellant denied the charge and the case went for full trial where the prosecution called four witnesses in support of their case. The Appellant on his part gave unsworn defence and called one witness in his defence. After the trial the Appellant was found guilty by the trial court and convicted and sentenced to serve five years imprisonment. The appellant was dissatisfied with the conviction and preferred this appeal listing the following 7 grounds in his petition of appeal;

- (i) That his arrest was unlawfully carried out by a single policeman without following the regular procedure.*
- (ii) That the government analyst summoned to testify did not demonstrate his expertise and experience in the field he was testifying on.*
- (iii) That the learned trial magistrate erred in law and fact in not giving his independent opinion on the report tabled before him.*
- (iv) That the learned magistrate erred in law and fact in contradicting his opinions in that at one time he believed the appellant and on the other he believed the prosecution.*
- (v) That the learned magistrate erred in law and fact by not considering the defence.*

**(vi) That the learned magistrate erred by not giving weight to the evidence tendered by the defence.**

**(vii) That the conviction was against the weight of evidence adduced.**

3. The prosecution case in my view mainly rested on the evidence of A.P.C. Antony Wachira (P.W. 1) and Inspector Geoffrey Channia (P.W.3). A.P.C. Antony Wachira (P.W.1) told the trial court that on 27<sup>th</sup> June, 2011 he acted on some information given to him by an informer and acting upon the information, he went up to where the Appellant lived and found him alone in his house in possession of fake currency (221 papers of Kshs.1000/- denominations) which were on the table together with some liquids contained in two bottles. He arrested the Appellant and later charged him with the offence aforesaid. P.W.2 (P.C. Christopher Wahome) produced the 221 fake currency in 1000 denominations as Prosecution Exhibit 1 and two bottles which were said to contain some liquid as Prosecution Exhibit 2. The trial court was informed by Inspector Geoffrey Chania (P.W. 3) the forensic expert summoned to testify for the prosecution that the 221 papers recovered from the Appellant were found to be counterfeits or fake currency after forensic examination which he confirmed he conducted as per the analyst report which he produced as Prosecution Exhibit 3. He further confirmed to the trial court that the 221 papers forwarded to him for examination were all in 1000/- denominations and had no serial numbers.

4. In his unsworn defence, the Appellant conceded that he was found with the fake currency but told the trial court that the currency were in a black polythene bag left behind by a person called Alex and that he was waiting for the said Alex to come and pick his luggage when the Police bounced on him and arrested him. He called his mother as a defence witness who told the trial court that the Police called her after arresting her son and demanded money to release him but that she resisted the extortion and that is why the Appellant was taken to court to face the charges.

5. The trial court evaluated the evidence and found that the 221 papers produced in court were counterfeits and found that the Appellant had conceded that the fake currency and the two bottles were found in his possession. The trial court found that the person named Alex was fictitious as there was no evidence adduced to show that such a person ever existed or was involved in the crime. The trial court further found that even if it was true that the Police had tried to extort some money from the Appellant, they could not have made up the case against him. On the basis of the above the appellant was convicted.

6. The Appellant has contended in his first ground of appeal that he was unprocedurally arrested by one Police officer. In the first place though it is true that the Appellant was arrested by one Police Officer, in his defence, he told the trial court that he was arrested by two police officers. I find the ground a bit contradictory but nevertheless I do not find any merit on the ground since it matters not whether a suspect is nabbed by a single officer or several. In fact a suspect can even be arrested by any member of public and taken to a police station so long as he is reasonably suspected to have committed an offence. I therefore do not find any basis that his arrest was irregular just because it was effected by a single police officer.

7. Mr. Macharia, counsel for the Appellant at the hearing of this appeal introduced a new angle to this ground by alleging that the arrest breached the Appellant's constitutional rights under **Article 49** because he was not informed of the reason why he was being arrested. This Court agrees with the Respondent through Mr. Sitati learned counsel from the Director of Public Prosecution, that the issue of infringements on the constitutional right under **Article 49** is a new ground as the same was not among the grounds listed in the petition of appeal. I agree with the Respondent that the ground is incompetent for want of leave pursuant to **Section 350 Criminal Procedure Code**. If the Appellant had wanted to raise a new or additional ground of appeal, he was required under the law to first seek leave as provided in the cited law.

8. On the 2<sup>nd</sup> ground, the Appellant in his written submissions contended that the evidence of the expert should not have been taken as the gospel truth and that the trial court ought to have evaluated the evidence and come up with an independent opinion. Mr. Macharia also added in his oral submissions at the hearing of this appeal that the experts called to testify never satisfied the trial court that they were

experts in the field they were testifying and pointed out that one Catherine Sera Murambi did not prove her expertise. The following authorities were cited in support of this contention:

**(i) Mutonyi –Vs- R (1982) KLR.**

**(ii) Elizabeth Gathoni Kibiku -Vs- R (2007) eKLR**

I have gone through the record of proceedings at the lower court and did not find an expert by the name Catherine Sera Murambi who was called to testify for the prosecution at the trial court. The only expert who was called to testify for the prosecution at the trial was Inspector Geoffrey Channia (P.W.3) who gave the trial court information on his expertise which was the fact that he had a bachelor's degree as a forensic document examiner from LIPORT UNIVERSITY in SUDAN. He further told the court what his duties were and in my view satisfied the trial court concerning his expertise in the field he had been summoned to testify about. The Appellant at the trial did not express any reason to doubt his credentials. Under **Section 48 (1) of Evidence Act**, the law provides as follows:

***“When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.”***

The trial court was in my view entitled to admit the evidence of I.P. Geoffrey Channia (P.W.3) as an opinion of an expert but I agree with the Appellant's counsel that it was important for the trial court to evaluate the evidence and find basis or reasons upon which to accept the opinion expressed by the said expert witness. In the case of **DAVID MUSYIMI NDETEI T/A OASIS MINERAL WATER COMPANY & ANOR -VS- SAFEPAK LTD [2005] eKLR** the Court of Appeal made the following guiding observations:

***“It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts.....Such evidence must be considered along all other valuable evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so..... A court cannot simply say ‘because this is evidence of an expert, believe it.’.....”***

In the present case, the trial court did not indicate that it had evaluated or analysed the evidence of the expert alongside any other evidence for example that it had observed the fake currency that were produced as exhibits. Mr. Sitati, counsel for the State contended that the trial court was persuaded by the evidence of the expert but I find that the trial court did not expressly say so. The same in my view was not fatal as this Court being first appellate court is entitled to re-evaluate the evidence and come up with its own independent opinion. I have looked at the evidence tendered (Prosecution Exhibit 3) and I am satisfied that there was nevertheless basis for the trial court to rely on the evidence.

I am however, not satisfied with the way the court treated the evidence of P.C. Antony Mosei (P.W. 4). The Police officer took the liquid contained in the two bottles recovered from the Appellant to government Chemists for analysis and brought back a report which for all intents and purposes was an expert opinion. The Police officer P.W. 4 told the trial court that he was based at Baricho Police Station but did not indicate to court whether he was an expert to know exactly if the contents found in the bottles were iodine and sodium thiosophate and what the liquid was used for. The evidence in my view was hearsay and should have been rejected by the trial court. The trial court in his judgment relied on this evidence and made the following findings:-

***“The liquids were found to be iodine and sodium thiosophate which is an oxidizing agent.”***

With due respect to the trial court there was no basis for this expert finding because there was no expert called by the prosecution to confirm to the trial court about the findings made after subjecting the liquid found to some chemical analysis. The trial court in my view erred by basing his opinion in so far as the

liquid recovered was concerned, on the evidence tendered by a witness who was not competent as an expert witness to tender the evidence.

9. I have considered the 4<sup>th</sup> and 5<sup>th</sup> ground in the petition of appeal and I am not satisfied that there were any material or significant contradictions apparent in the judgment of the learned trial magistrate. The trial court just said that the prosecution's case had been conceded partly by the Appellant, who admitted that the fake currency was found in his possession. The trial court therefore said to this extent he believed both the Appellant and the 1<sup>st</sup> prosecution witness. In this regard I find no inconsistency on the part of the trial court.

10. Finally this Court considered the evidence tendered in regard to the charge and the particulars contained in the Charge sheet and although the issue was not addressed by the Appellant or the respondent in the appeal or at the hearing of the appeal, I cannot disregard it as the issue is an important one for the interest of justice. It is trite law that an accused person has a constitutional right to a fair trial which include the right to be informed of the charge facing him with sufficient detail to answer it. This is clearly provided for under **Article 50 (2) (b)** of the **Constitution**. I have looked at the particulars contained in the amended Charge Sheet. I have also looked at the manner in which the charge was drafted and I must say the same left a lot to be desired. In the first place, the charge as indicated above showed that the Appellant was being charged under **Section 367 (a)** of the **Penal Code** and a look at the section clearly shows that the offence described therein is different from what the Appellant was charged with. Of course the same is not fatal since it is curable under **Section 382** of the Criminal Procedure Code and the trial court for good measure indicated in his judgment that he was convicting the Appellant under **Section 367** of the **Penal Code** which is the correct section of the law that defines the offence for which the Appellant was charged with. However, the particulars in the Charge Sheet apart from being untidy due to some alterations does not in my view clearly disclose the offence over which the Appellant was charged with. The particulars stated in part that the appellant had in possession;

***“papers worth of 221,000/= in 1000 denominations intended to resemble and pass as a special paper such as is provided and used in making a bank notes.”***

This segment of particulars in my view really does not give a clear description of facts that discloses that an offence was committed and this was fatal to the prosecution case because their case hinged on the charge and the particulars of the offence as read to the Appellant. This Court finds that the prosecution's case was hinged on a defective charge in light of the cited constitutional requirements which demands that an accused person has a right to be informed of charge facing him with sufficient detail to answer to it. When the particulars in the charge sheet give a value of Kshs.221,000 to the counterfeit paper currency, it is misleading because in the real sense the papers are most probably worthless leave alone the value assigned to them (Kshs.221,000/-).

It is on the basis of this and the fact that the part of the evidence (Prosecution Exhibit 4) was tendered by a unqualified person that I find merit in this appeal. The evidence ought not to have been admitted or relied on by the learned trial magistrate and it was erroneous to do so. In the premises I allow this appeal. The conviction is quashed and the sentence is reversed. The Appellant is set free forthwith unless lawfully held.

***Dated and delivered at Kerugoya this 27<sup>th</sup> day of September, 2016.***

**R. K. LIMO**

**JUDGE**

27.9.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Appellant present.

Interpretation English/Kiswahili

Nelson Wainuku Maina present.

Omayo for State present.

**COURT:** Judgment signed, dated and delivered in the open court in the presence of appellant Nelson Maina and Omayo for State.

**R. K. LIMO**

**JUDGE**

27.9.2016