



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 172 OF 2011

TERESIA WAWIRAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 74 of 2011 at the Resident Magistrate's Court at Karaba by HON. E.K. NYUTU – RM on 26/9/2011

J U D G M E N T

1. **TERESIA WAWIRA** the appellant herein was charged with the offence of being in possession of papers of forgery contrary to section 367(a) of the Penal Code.

The particulars stated in the charge sheet were to the effect that on 7th day of June 2011 at Wachoro Secondary School, Wachoro location in Mbeere District within Embu County the appellant without lawful authority was found being in possession of 3 notes of kshs.200/= denomination being forged currency notes all serial number BE 4786404.

2. The appellant pleaded not guilty and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant elected to remain silent in her defence. She was finally convicted and sentenced to three (3) years imprisonment.
3. Both the State and M/s Rose Njeru for the appellant agreed to dispose of the appeal by written submissions. I have read both submissions carefully.
4. Section 367(a) of the Penal Code provides as follows;

Any person who without lawful authority or excuse the proof of which is on him;

“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”

The particulars in the charge herein omitted the word “**KNOWINGLY**”. The word knowingly connotes being aware that the papers/documents were a forgery which is key in a charge of this nature.

5. What the witnesses concentrated on was possession alone. Possession *per se* is not sufficient proof

of such knowledge. One may possess documents or items they genuinely believe to be lawful items. I can't blame the witnesses because they were misled by the particulars in the charge sheet which did not have the word "**knowingly**". The possession must be with full knowledge that the said document or item is a forgery or an unlawful one.

6. I therefore find the charge upon which the appellant was convicted to have been defective. The defect is not curable under section 382 Criminal Procedure Code. The conviction is therefore null and void and it is quashed. The sentence is also set aside.

The appellant to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF JULY 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Miiru for State

Mr. Mugo for M/s Njeru for Appellant

Appellant

Njue – C/c