



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HIGH COURT CRIMINAL CASE APPEAL NO. 228 OF 2012

AGGREY OMUNG'ALAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of E. S. Olwande PM,

Butere, criminal case no 358 of 2011)

JUDGEMENT

The appellant herein Aggrey Omung'ala was originally charged with the offence of being in possession of forged bank notes contrary to section 359 of the Penal Code. Upon conclusion of the hearing, the appellant was found guilty and sentenced to serve five years imprisonment.

The prosecution's case was that, the complainant one Yvounne Osimbo was at her home. The accused person who was known to her came to buy milk from her. He paid for the milk with a 1000/= note. She asked him to wait for change. In the meantime, she realized that this note was not real as its texture felt different. She called the police who came and arrested the appellant. The police conducted a search on him and recovered 3 more 1000/- notes which were bearing the same serial numbers. The complainant was cross examined by the appellant and she maintained that the appellant committed the offence and paid her with the fake currency, she also maintained that she was present when the police searched him and recovered the other fake notes. She denied that the case was a frame up.

The policemen who arrested the appellant were P.W 1 and P.W 2. They gave evidence before court and explained how they arrested the appellant after the complainant Yvounne called them. Upon searching him, they recovered three more fake notes. They then took him to the police station and charged him accordingly. In cross examination, the witness P.W 1 maintained that they were called by the complainant and on reaching her house they found the appellant. They searched him and recovered the three fake notes and one from the complainant which she said the appellant was using to pay for the milk he had come to buy.

The prosecution also called an analyst from the Government Chemist Department. He said that he received the exhibit four 1000/= notes from PC Josphat Papai. He analyzed them and found them to be fake. They were bearing serial numbers AG 8635077 and BF 8635076. He produced the report as exhibit.

In his defence, the appellant told the trial court that he was going to visit his uncle when he met a friend Kizito. Kizito offered to buy him some changaa at the home of one Hellen Osimbo. After the drink, the

two discovered that they were both having an affair with the said woman. The appellant made a decision on stop her relation with the said woman Hellen. The woman then decided to lock him up in her house and called police who arrested him. The policemen took the money he had and Helen brought some currency which she said the appellant had. He was then taken to the police station and charged with this offence. In cross examination, the appellant admitted he first mentioned the name of Kizito during his evidence in chief. He also told court that the money produced in court was not his. He however admitted that he had recently been released from jail for a similar offence.

The appellant has now filed this appeal on the following grounds

1. The learned trial magistrate failed to consider that his constitutional rights were violated by the prosecution given that, he was held at the police station for more than 24 hours having been arrested on the 22/9/2011 and being charged on the 27/9/2011. That rendered the whole trial, conviction and sentence null and void
2. That the prosecution P.W 1 did not prove that the fake currency note was given out by him
3. That in cross examination, P.W 2 said that they did not find the appellant with the money
4. That there is confusion on whether the appellant paid the money and left and came back for change later or paid and waited for the change at the same point
5. That the trial magistrate failed to consider the contradictions in the evidence of P.W 1 and P.W 2 whereby P.W 1 said they found nothing on the appellant and P.W 2 said they found CSO forms on him

The State through the State Counsel Miss Opiyo opposed the appeal on the grounds that the prosecution had proved its case having noted that the learned magistrate noted that the serial numbers on the fake notes were the same

Having heard the submissions from both sides, the issues for determination are as follows;-

1. Whether the appellants right to fair trial were infringed upon for being kept in police custody for more than 24 hours before being presented to court
2. Whether the prosecution's witnesses contradicted one another in any aspect.
3. Whether the learned trial magistrate's findings were reached upon consideration of proper facts and law.

On the first issue, it is apparent from the charge sheet that the appellant was arrested on the 22nd day of September 2011 a Thursday and arraigned in court on the 27th day of September 2011, on a Tuesday. Under Art 49 (1) (f) of the Constitution of Kenya

“An arrested person has the right to be brought before court as soon as reasonably possible but not later than;

- I. ***Twenty-four hours after being arrested, or;***
- II. ***If the twenty-four hours ends outside ordinary court hours or on a day that is not an ordinary court day, the end of the next court day”***

The prosecution did not provide an explanation as to why the appellant was kept in police custody for five days before being arraigned in court. The trial magistrate did also not question this aspect. Indeed the rights of the appellant as enshrined in this article were trampled upon and I find so.

The next issue concern the evidence adduced before court. In the court proceedings at page 6, P.W 1 told court that the complainant told them that the appellant was paying a debt for the milk he had taken previously. The evidence of P.W 2 on the other hand at page 7 is different. P.W 2 said that the complainant told them that the appellant had gone to buy 2 cups of milk and he was paying with the 1000/= fake note. She then fooled him to stay on pretending that she was looking for change. She then called the police who arrested him. The two witnesses therefore contradicted one another in this aspect and it is therefore not clear whether the appellant was paying an old debt or was buying milk at the time

of the offence. This contradiction causes doubt in the prosecution's case which should have been considered by the trial court.

On the last issue, in the judgment by the trial court, the court was quick to state that the witness P.W4 was a Government Analyst and not a document examiner and was therefore not a competent witness to analyse the authenticity of the alleged fake notes or not. She went ahead and rejected that evidence. What then was the basis of her determining that the notes were fake? After rejecting this evidence, it follows that there was no proof that the notes that appellant was found with were fake and she should have proceeded to acquit him.

For the reasons given therefore, I find the appellant's appeal has merit and I allow it. I therefore set the appellant free henceforth unless otherwise held lawfully.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 11TH DAY OF DECEMBER 2013

HELLEN WASILWA

JUDGE

DELIVERED THIS 11TH DAY OF DECEMBER 2013

S. J. CHITEMBWE

JUDGE