REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 170 of 2010

KOSSAM OKIRU……..……..…….APPELLANT

VERSUS

REPUBLIC ……..…...….RESPONDENT

J U D G M E N T

The appellant was charged with the offence of being in possession of papers for forgery contrary to **Section 367(a)** of the **Penal Code**.

The particulars of the offence were that on the 22nd day of March, 2006 at Bukolwe area, Mutoma sub location, Marama Central Location of Butere/Mumias District within Western Province, the appellant was found being in possession of 889 papers of Ksh.1000/= denomination for forgery. He was found guilty and sentenced to serve 7 years imprisonment.

The grounds of Appeal are that there was no sufficient evidence to warrant the conviction, the prosecution evidence was fraught with inconsistencies and contradictions and that the sentence of 7 years is both illegal and excessive.

The appellant had an advocate on record but decided to argue his appeal. He filed written submissions and made oral submissions as well. The oral submissions are a summarized version of the written submissions. The appellant's contention is that the evidence of PW1 ought to have been treated with caution as he had worked with him before or that he and been arrested and taken to Kondele police station, Kisumu. The appellant further state that there was no evidence that the fake papers were found in his possession and even the number of the alleged papers is contradictory. The essential ingredients of possession were not proved as it involves custody, physical possession and knowledge. Further, there was need for expert evidence and no expert was called to tell whether the recovered papers were fake money. The appellant submits that his defence was dismissed and that he was a first offender and was given an excessive sentence,

The appellant relied on the following cases:

1. **Ndungu Kimani v Republic [1979] KLR 282**

2. **Kimani v Republic C.A. NRB [1984]**

3. **Bukaya v Uganda [1972] E.A.C.A. 341**

4. **Richard Apela v Republic [1981] E.A.C.A. 945**

5. **Ruwala v Republic [1937] E.A.C.A. appl. 570**

6. **Ekegi Okaba v Republic [1965] E.A. 555**

Mr. Limo, learned state counsel opposed the appeal and submitted that the evidence on record was analyzed by the trial court, that the burden of proof was not shifted to the appellant and that the sentence was proper:

The prosecution case was made up of the evidence of five witnesses. **PW1, LEVI WETENDE** used to work with the appellant at Coco-Cola Company. On 5th February 2006 he was at Kisumu when he met the appellant who told him that he prints money. PW1 had Ksh 10,000/= and had 42,000 at his Butere home. They went to Butere that evening. PW1's Ksh 52,000 was put on the table and a process of minting the money began. PW1 was told to take the printed money that had been tied in a bunch to Kisumu the following day. No money came out of the process and in an effort to follow up what happened, PW1 kept on meeting the appellant with his colleques in Kisumu. On 21/2/20906 PW1 was arrested and taken to Kondele Police Station but was later released. On 22/2/2006 PW1 met the appellant who asked him to look for another person to con. According to PW1, the police at Kondele police station were in the appellants group. PW1 told his story to PW2. The two agreed to lay a trap.

On 22nd March, 2006 PW1 went with the appellant and his co-accused to PW1's home in an effort to mint money for a customer. PW2, the chief of Marama Central Location notified PW3 and PW4 who were Administration police officers at the Ibokolo District Officer's office. On that day, 22/3/2006 at about 8.30 a.m. while in PW1's house PW3 and PW4 went in and arrested the appellant and his co-accused, Jack Onyango Otieno. PW3, APC, Evans Luyoyi and PW4 Sergeant John Ongoro had been notified by PW2 about the money minting process, they laid the trap that led to the arrest of the appellant. They recovered the items the appellant was charged with. PW5, Sergeant Samuel Muraya received the appellant from PW3 and PW4 at Butere Police Station. He also got a bunch of white papers in size of KShs.1000 notes and some material allegedly used to multiply money, syringes, ink, Tissue paper and rubber tapes. He counted the bunch of black and white papers and found they were 889 in number.

In his sworn testimony, the appellant testified that he used to work with PW1 at Coca Cola Company. Sometimes in 2000 PW1 had mental problems and wanted to be assisted with KShs.5000/= which he did. PW1 could not repay the amount and asked the appellant to lease land left for him by his father to cultivate sugar cane. They agreed to go and see the land and went to PW1's home. While in PW1's home the appellant was arrested and taken to the DC's office. He was later taken to Butere Police Station and charged with the offence. The appellant further testified that he didn't know where the papers came from and that he had hired a taxi from Kisumu. DW2, Edwin Olalo, his evidence was that PW1 wanted some financial assistance in 2001 and the appellant assisted him. PW1 couldn't repay the loan and agreed to lease some land. PW1 and the appellant went to Butere and DW1, later heard that the appellant had been arrested.

The main two grounds of appeal are that the prosecution evidence was not sufficient to warrant the conviction and that it was full of inconsistencies. From the proceedings of the trial court, it is established that PW1 was a victim of an alleged money minting business. He lost KShs.52, 000/=. In the process of trying to establish what had happened to his money he was arrested and taken to Kondele Police Station but later released. PW1 knew the appellant having been his work mate at the Coca Cola Company. The appellant in his defence admitted that he worked with PW1 at Coca Cola Company. Having lost his money, PW1 knew that the entire process was a con game and the appellant told him to look for someone to con.

The prosecution evidence further established that PW2, PW3 and PW4 together with PW1 laid a trap that led to the arrest of the appellant on 22/3/2006. According to PW4, when he went to PW1's home on 22/3/2006 they found a vehicle outside. The drive drove away on seeing them. They arrested the appellant, his co-accused, PW1 and PW2. PW4's evidence is that he recovered from the appellant's pocket a brown cello tape and from his co-accused he recovered black papers that had been wrapped and sealed. PW4 found on the table syringe, one container of liquid, one cello tape and a bunch of white papers. The black papers resembled KShs.1000/= notes, had writings of KShs.1000/= with the portrait of the president on it and indeed looked like KShs.1000/= notes. There were 889 pieces.

The appellant contends that the prosecution evidence does not prove that he was in possession of the alleged recovered exhibits as possession includes custody, physical possession and knowledge. **Section 4** of the **Penal Code** (Cap 63 Laws of Kenya) defines possession as follows:-

(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 case established that PW1 left Kisumu with the appellant and his co-accused for Butere. The purpose of that visit was to print money. PW4 recovered some of the papers to be used in printing the money from the appellant's co-accused. Some of the items were on the table. From the provisions of Section 4 of the Penal Code on the definition of possession, I do find that the appellant was found in possession of the papers recovered from his co-accused and those found on the table inside PW1's house. It was the appellant and his co-accused who had planned to use those papers for purposes of printing the alleged money. I further do hold that there was no need for expert evidence on the recovered exhibits. PW4 described what he recovered from the appellant. The papers had the portrait of the president and a label of 1000/=. They appeared to resemble KShs.1000/= notes but were not. The prosecution did establish that the papers were fake and meant for forgery.

The appellant's defence establishes that he was arrested in PW1's home. The appellant's explanation is that he had gone to see a farm so that he could lease and plant sugar cane as PW1 had failed to return his KShs.5000/= .

The trial court did not believe that explanation – DW2's evidence is on the loan of KShs.5000/= only. DW2 was not present during the time of arrest.

The prosecution evidence does establish a chain of events. It is not the only incident of arrest. PW1 had been a victim of a money printing syndicate and was therefore looking for ways of having those people arrested and managed to do so. I do find that there are no inconsistencies or contradictions in the prosecution case. The prosecution did prove its case beyond reasonable doubt.

Section 367 (a) of the Penal Code states as follows:-

367. ***A 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 notes or currency."

The prosecution evidence does establish that the papers recovered from the appellant were meant to pass as Kenya currency notes. This was just a ploy to take genuine money from the victims and give them fake currency. Although PW1 was arrested by the police at Kisumu, he was not the appellant's accomplice as alleged by the appellant. PW1 was a victim and wanted to have the perpetrators arrested.

As for the sentence, the maximum sentence under Section 367 of the Penal Code is seven (7) years. The appellant in his mitigation stated that he had two children who go to school and rely on him for school fees. The appellant contends that the sentence is excessive. The trial court, in sentencing the appellant to a maximum sentence noted that the offence required a deterrent sentence. I do find that the sentence was lawful. I will however, reduce the sentence to five years imprisonment from the date of conviction.

In the end, the appeal has no merit and the same is disallowed. The trial court's sentence is set aside and replaced with a sentence of five (5) years imprisonment from the date of conviction.

It is so ordered.

Delivered, dated and signed at Kakamega this 27th day of March 2012

SAID J. CHITEMBWE

J U D G E