



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS**

CRIMINAL APPEAL 347 OF 2009

JOSEPH ALUMASA OYASI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case No. 424 of 2007 of the Chief Magistrate’s Court at Nairobi)

JUDGMENT

The Appellant, Joseph Alumasa Oyasi, was charged in the Chief Magistrate’s Court, Nairobi, with four counts of being in possession of papers intended to resemble and pass as special papers for making bank notes contrary to **Section 367 (a)** of the **Penal Code**. After a full trial during which the prosecution called 6 witnesses and the Appellant gave sworn testimony in self defence, he was found guilty as charged and sentenced to imprisonment for 2 years on count 1, 1 year on count 2, 1 year on count 3, and 2 years imprisonment on count 4, with no option of a fine on all the four counts. The sentences were to run concurrently. He appealed to this court against both conviction and sentence.

In a nutshell, the prosecution case was that on the 5th day of March, 2007 at Three Way Building along River Road in Nairobi within Nairobi Province, without authority or excuse, the Appellant had in his possession 4841, 549, 22 and 104 papers intended to pass and resemble special papers such as is provided and used for making Kshs. 1,000/=, 200/=, 500/=, and TZs. 10,000/= bank notes, respectively. The first prosecution witness (PW1), Joseph Kiruki Kimemia, testified that he was a tenant in the Three Way Building. He had subdivided the room which he had rented into 4 rooms and sublet one of the four rooms to the Appellant. However, he did not know what business the Appellant was carrying on in the sublet room. He identified the Appellant as a person to whom he sublet the premises.

James Ngare Wamba, who testified, has PW2, told the court that he was the son and caretaker of the owner of the building. He confirmed that he rented out two rooms to one Peter Njoroge who, in January 2007, without the consent of the witness, partitioned one of the rooms and sublet the partitioned rooms directly without involving the witness. In March the same year, the police visited him and told him that one of the sub tenants in Mr. Peter Njoroge’s office was arrested for being in possession of fake money. He said he had not dealt with the sub tenant as he usually dealt with Peter Njoroge, the main tenant.

Both PW3 and PW5 were police officers. PW3, Cpl Elias Kariuki, adduced evidence to the effect that accompanied by one Pc Chepkwony and a police informer, they proceeded to Three Ways Building where the informer showed them a person who was standing outside the building between two people. The two officers approached the two people and identified themselves as police officers before informing the suspect, who is the Appellant herein, the offence they were investigating into. They also

asked him to accompany them to his offices. The Appellant agreed and took them to his office where a search was conducted and the exhibit in the form of the fake currency notes were recovered in a polythene paper. He then arrested the Appellant and escorted him to their office where Cpl Japheth Muthsimi interrogated the Appellant and finally charged him with the offence now before the court. Cpl Japheth Muthsimi (PW6) adduced similar evidence and confirmed that the police officers had recovered the money in a polythene paper bag. He helped in sorting out the recoveries and prepared an inventory which was produced by the prosecution duly signed by the police officers and also by the Appellant.

PW4, Chief Inspector John Muinde, told the court that he was attached to Criminal Investigation Unit as a forensic document examiner. His evidence was that he had examined the documents which form the basis of the charge against the Appellant in this matter and found that they were not genuine bank notes.

In self defence, the Appellant gave sworn evidence in which he told the court that he did printing work at Luthuli Avenue and that his offices were in Three Way building. On the material date, he was in his office when one of his customers came in carrying some documents in a paper bag. He wanted the Appellant to print for him some business cards. He gave the Appellant Kshs 1,500/= as a deposit to buy the cards and said he was going to do type setting then bring it to the Appellant for the actual printing. He left his bag and left the paper bag in the Appellant's office. As he was going to buy the cards, he saw the customer coming back with some three people who told him they were police officers. They told him to accompany them to his office. As they were going upstairs, the customer was behind them. However, by the time they reached his office, the customer had escaped. In the office, the police checked the documents of the customer in the bag. They found documents resembling bank notes which are the subject of the charge in this case. The customer's name was Peter Kamau and he left the bag without telling the Appellant the contents thereof.

The Appellant did not know the contents of the paper bag. It was his case that if he knew, he would not have allowed the customer to keep the paper bag in his office. In cross-examination by the prosecutor, he said that he was the one who had opened the door to his office and that when the police officers entered; they went straight for the paper bag. They opened it in his presence and found fake notes. When the prosecutor put it to him that what was contained in the paper bag was part of the work which he was doing for the customer, the Appellant answered-

“Not true. If that was part of the work, I would not have kept it in my office; I would have kept it away. Mr. Kamau ran away I do not know why he disappeared...”

Against the backdrop of the above evidence, the trial magistrate found the testimony of the prosecution witnesses ***“consistent and credible. The same was not shaken by cross-examination by counsel for the accused. In particular the expert opinion by the document examiner (PW4) was elaborate and uncontroverted. The explanation by the accused that a customer had left the paper in his office by the name Peter Kamau is inconceivable and an afterthought. The said Peter Kamau was not called as a witness despite being his customer. The said Peter is a fertile imagination only existing in the mind of the accused. I therefore find that the prosecution have established its case beyond reasonable doubt and hereby convict the accused on all the four (4) counts as charged.”***

It can not be gainsaid that the prosecution evidence in this case was, *prima facie*, fairly convincing. However, I note that the Appellant's defence was that he did not know the contents of the black polythene paper. On that note, it became imperative that the prosecution should produce evidence to prove that the Appellant indeed knew the contents of that polythene paper. Knowledge of the presence of the fake money was an essential ingredient of possession. Unfortunately, no evidence was adduced at all to prove that knowledge. Indeed, I would go a step further and opine that to that extent, the charge of Appellant was defective. **Section 367 (a) of the Penal Code** is worded as follows-

“367. 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...

(b)

In this case, the word “**knowingly**” was completely forgotten when the charge against the Appellant was drafted. It reads as follows-

“Joseph Alumasa Oyasi on the 5th day of March, 2007 at Three Way Building along River Road in Nairobi District within Nairobi Province, without authority or excuse had in your possession 4841 pieces of papers meant to Pass and Resemble 1000 Kenya Shillings Notes.”

To the extent that the word “**knowingly**” is pivotal to a charge under **Section 367 (a)** of the **Penal Code**, and that it is missing from the charge against the Appellant, I find that the charge was defective. For that reason, the conviction of the accused was improper and should not be allowed to stand. The contention by the prosecution that the Appellant did not call the person whom he alleged to have left the bag in his office cannot hold sway. Suffice it to say that he also testified that that person was the same one who set him up for arrest. Consequently, the Appellant and his friend, if a friend he was, could not have logically testified on the same side. I accordingly allow the appeal, quash the conviction and set aside the sentence of imprisonment. The Appellant is accordingly set free forthwith, unless he is otherwise lawfully held.

DATED and **DELIVERED** at **NAIROBI** this 20th day of July, 2012

L. NJAGI
JUDGE