



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 10 of 2012**

**MBOULA CALONGA EDY ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 2038 of 2009 in the Chief Magistrate's Court at Makadara – Mrs. E. G. Nderitu (SRM) on 31/12/2010)*

**RULING**

- 1.** The applicant herein **Mboula Calonga Edy**, was charged with being in possession of papers intended to resemble and pass as currency notes contrary to **Section 367(a)** of the **Penal Code**.
- 2.** The particulars were that on the 10<sup>th</sup> day of November 2009 at Ruaka area in Nairobi within Nairobi area, jointly with others not before court, without lawful authority or excuse had in his possession papers intended to resemble and pass as 3.5 million U.S. dollars in one hundred denominations knowing them to be fake.
- 3.** Upon conviction he was sentenced to a fine of Kshs.1 million in default to serve four years imprisonment.
- 4.** The applicant filed an appeal which he abandoned on 12<sup>th</sup> November 2012 when he appeared in court to prosecute it. Instead the applicant prayed and was allowed to offer mitigation against the sentence.
- 5.** In mitigation the applicant submitted that the lower court did not consider the 15 months he spent in remand during trial. He was sentenced to four years in prison, out of which he has now served 23 months. Cumulatively therefore he has spent 37 months in custody. He also submitted that he has suffered a lot, and that his father passed away while he was in remand.
- 6.** The conviction was on account of being in possession of fake currency, but that a friend who deals in the business brought him to Nairobi to play music in his club and he was not involved in the fake currency business.

7. The applicant further submitted that in prison he was teaching fellow inmates to speak French, and had himself learnt Kiswahili, carpentry and how to make ketchup. He intended to start a business when he returns to Congo. Finally that he is a family man with two children.

8. The state opposed the appeal through learned state counsel Mr. Mulati stating that the applicant was charged with being in possession of papers intended to serve as currency contrary to **Section 367(a)** of the **Penal Code**. He was fined Kshs. 1 million in default to serve four years imprisonment.

9. It was urged that this offence attracts a maximum of 7 years, imprisonment and that therefore the four years imposed against the applicant are within the law. Further that the sentence starts to run on the date it is pronounced and does not necessarily take into account the period spent in remand.

10. From an analysis of the evidence on the record, I find that the appellant was properly convicted on the two counts with which he was charged. The sentence which was imposed by the learned trial magistrate was lawful by virtue of; **Section 367(a)** of the **Penal Code** which provides that:

*“Any person who, without lawful authority or excuse, the proof of which lies 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 is guilty of a felony and is liable to imprisonment for seven years.*

11. An appellate court will not interfere with the sentence imposed by the trial court unless it is found to be illegal or manifestly excessive, in the circumstances of the particular case. The sentence imposed in this case was four years imprisonment.

12. The sentence was not illegal, and the applicant has not advanced this ground, nor can it be said to be manifestly harsh or excessive, in the circumstances of this case. The sentence as imposed by the learned trial magistrate reflects the gravity of the offence for which the applicant was convicted and is not in appropriate in any way, considering amount of fake currency involved.

For the foregoing reasons, I decline to interfere with the sentences as imposed by the learned trial magistrate by way of revision as prayed.

I dismiss the appeal.

**SIGNED DATED and DELIVERED** in open court this **6<sup>th</sup> day of December 2012.**

**L. A. ACHODE**

**JUDGE**