REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 141 OF 2010

(From original conviction and sentence in criminal case No. 4625 of 2008 of the Chief Magistrate's Court at Nakuru - (Hon. W. Juma C.M) dated 27th April, 2010)

HELLEN WANJIRU MWANGI ……...……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

The Appellant was charged with the offence of being in possession of forged bank notes contrary to Section 359 of the Penal Code *(Cap 63, Laws of Kenya)*

The particulars were that the appellant with her co-accused and others not before court were found in possession of Ksh.300,000/- forged currency notes knowing them to be forged. The appellant denied the charges, but was on the evidence before the trial court, found guilty, convicted, and sentenced to four years imprisonment without the option of a fine. The appellant has appealed to this court on seven grounds of appeal namely:

(1) That I pleaded not guilty to the charge of being in possession of forged bank notes. Contrary to Section 359 Penal Code.

(2) That the learned trial magistrate erred in law and fact when she held that the prosecution had proved exactly and every ingredient of the charge as required by the law.

(3) That it was a gross miscarriage of justice that learned trial magistrate held the view that the contradiction with regard to the date of arrest given by the arresting officers PW1 and PW2 was no consequence

(4) That it was a further travesty of justice that the learned trial magistrate shifted the burden of proof from the defence to the prosecution through an erroneous application of Section 359 Penal Code

(5) That the learned trial magistrate misdirected herself when she presumed to down play the role of an expert witness the document examiner in contravention of Section 65 of the evidence Act Cap 80.

(6) That the learned trial magistrate erred in law and fact when she rejected my sworn defence testimony without giving cogent reasons as required by the law.

(7) That, in relying on grossly insufficient and inconsistent evidence to convict me and pass an unjustifiably severe sentence the learned trial magistrate erred in law and fact.

And on the grounds prays that

- that the appeal be allowed, the conviction be quashed and the harsh sentence set aside.

When this matter was heard before me, the appellant was presented by Mr. Mugambi while Mr. Nyakundi appeared for the state.

For the appellant, Mr. Mugambi argued that the prosecution failed to prove the offence for which the appellant was charged. Counsel submitted that the prosecution called two witnesses, namely, the arresting officers and no other person. No expert was called to show that the bank notes were fake or forged, and that failure to call such an expert was fatal to the prosecution's case. Neither arresting officers who were both police officers nor the court could be experts within the provisions of Section 248 of the Evidence Act, *(Cap 80, Laws of Kenya).* Counsel also submitted that in the light of the applicant's mitigation the sentence of four was harsh where the applicant is a mother of 6 years and the husband resides overseas.

With these submission, Mr. Nyakundi, learned State Counsel told the court that he was unable to support the conviction.

Firstly there was no evidence by the document examiner to show that the currency was fake or counter-feit. It was consequently impossible to say that the notes were not genuine.

Secondly, counsel argued, the alleged counter-feit notes were seized on 10th September 2008, and were not sent to the Document Examiner until 3rd April 2009 some nearly eight (8) months later. It is not said in whose custody they were, and why it took so long to present them for examination. The court was not told who received the samples at the document examiner's office. Mr. Nyakundi relied on the decision of the Court of Appeal in **Bernard Omondi Odullo -vs- Republic** ***(****Criminal Appeal No. 66 of 2000 at Mombasa)* where an appeal was allowed because of lack of explanation for the delay, unclear custody of the samples, and a breach in the chain of custody.

Counsel also relied on the case of **Swaleh -vs- Republic [2001] KLR 689** where for similar reason, the High Court at Mombasa allowed an appeal on similar grounds.

It is the duty of this court as the first appellate court even where an appeal is conceded by the State, to examine and re-evaluate the evidence before the lower court and make it findings and reach its own conclusions.

The evidence by the prosecution was short and clear. PW1 and PW2 both Police Officers were in civilian clothes on patrol in Nakuru Town and were tipped by an informer that there were four people near Uchumi Supermarket carrying fake currency and were cheating the people. They hurried to the site and found the appellant and a light skinned man - the co- accused who had in their possession a yellow paper bag. The appellant was in actual possession of the yellow bag and inside the yellow bag was a sealed carton, and in the carton was currency amounting to Ksh.300,000/- and 35 plain papers. PW1 and PW2 arrested the appellant and her co-accused, and they were charged as already stated.

PW1 testified that he prepared Memo Form and took the money to the document examiner where it was counted and found to be counterfeit of Kshs.299,965/-, and 35 plain papers. Those items were:

- Paper Bag - MFI - 1

- Carton - MFI - 2

- Plain Papers - MFI - 3

- Fake Currency - MFI - 4

- Memo Form - MFI - 5

- Report MFI - 6

In cross-examination, PW1 reiterated his evidence in - chief and added that when he questioned the appellant why she was carrying fake money, the appellant trembled as she knew it was fake money; and declined to reveal to them where the money was made. The appellant also declined to show the officers her residence.

PW2 reiterated the evidence of PW1 and denied the contention in cross-examination by Mr. Simiyu Counsel for the appellant then, that the appellant had been duped with the carton box containing the fake currency.

Attempts by the prosecution to allow PW3 to testify in place of IP Moinde the Document Executive were objected to by the appellant's counsel although the 2nd accused had no objection. PW3 was stepped down, and witness summons was to issue to IP Moinde to come and testify on 26th October 2009. IP Moinde did not however turn up in court on that date. So the prosecution was granted a last adjournment, and the matter was fixed for hearing on 13th November 2009.

On 13th November 2009, the prosecution informed the court and IP Mande who had been in Nyeri the previous day, had fallen ill, and had a tooth extracted, and was suffering from a swollen face and the prosecution sought another date. This was opposed by the appellant's counsel, and the 2nd accused.

There in lie the danger of or orders of last adjournment. A prospective witness could genuinely be handicapped by illness and unable to attend court on the appointed date. Valuable evidence may thus be lost to the prosecution where an offence could have been proved beyond reasonable doubt. In my view these last adjournment orders have no constitutional or statutory underpinning and fetter the discretion of the trial court to do substantial justice to both the prosecution*(done on behalf of the people),* and the accused, whose liberty is at stake. The discretion should be sparingly exercised. Section 395 of the Penal Code is in these terms.

Section 359 -
"Any person who, without lawful authority or excuse, the proof of which lies on him, imports or purchases, or receives from any person, or has in his possession, a forged bank note or currency note, whether filled up or in blank, knowing it to be forge d, is guilty of a felony and is liable to imprisonment for seven years"

The evidence of PW1 and PW2 clearly showed that the appellant and her co-accused were found in possession of forged currency as bank notes, and paper not filled up. That paper and the currency notes were subjected to examination and were marked for identification by the document examiner. For reasons which will remain unclear, *(except for the orders of last adjournment about which I have spoken above)* the document examiner was never called to testify. It thus gave the appellant and her co-accused perfect opportunity to deny that the notes or currency they were found in possession, was forged or counterfeit currency.

Although the trial court rightly indignant on the enormous economic loss unsuspecting traders would suffer at the risk of exchanging their goods and good currency at the hands of fraudsters, there was at the conclusion of the testimony of PW1 and PW2 no evidence that the currency they found in the possession of the appellant and her co-accused were counter-feit currency notes. That evidence could only have come from the IP Moinde, the document examiner. It is unclear why he was not called or why he was unwilling to come and testify.

The exclusion of this testimony dented the prosecution's case. In **Bernard Ondi Odullo -vs-Republic**(supra), the Court of Appeal explained the consequences of the exclusion of such evidence, IP Moinde did not testify. This report could only be marked for identification, to be produced by him. So the court could not therefore be satisfied in terms of Section 77 of the Evidence Act *(Cap 80, Laws of Kenya)* that the said report was being genuine, or not or that the person signing held the office and qualifications which he professed to hold at the time when he signed it.

From the submission by Nyakundi there was also a delay of eight (8) months before the samples were taken to Document Examiner for analysis. There was thus a break in the chain of storage and custody of the currency notes and consequently analysis thereof. All the factors raise doubt in favour of the appellant.

Whereas the trial court found as a fact that the appellant and her co-accused were found in possession of the forged currency notes, and blank papers, and whereas Section 359 shifts the burden of proof on the accused or appellant in this case, the burden still lies on the prosecution to show that the banknotes or currency were indeed forged. Once that burden is discharged, then it shifts to the accused or appellant to show that they had lawful authority or excuse to possess them.

The prosecution, whether deliberately or unwittingly failed to discharge that burden by failing to adduce the evidence of the document examiner. The trial court could not consequently find the appellant guilty or convict and sentence her to any term of imprisonment.

In this regard therefore I agree with Mr. Mugambi counsel for the appellant and Mr. Nyakundi, learned State Counsel who readily conceded to the appeal.

I therefore quash the appellant's conviction, set aside the sentence and direct that the appellant be released forthwith, unless otherwise lawfully held.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 19th of November 2010

M. J. ANYARA EMUKULE

JUDGE