

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL 115 OF 2007

CALVIN ODHIAMBO LANDO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with possession of papers for forgery contrary to **Section 367 of the Penal Code**. The particulars of the offence were that on the 29th day of October 2005, at Mbita Township, Suba District, without lawful authority, he had in his possession 662,000 papers intended to resemble and pass as special papers as those used for making currency notes. The appellant was tried and convicted and sentenced to five years' imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court.

During the hearing only two police officers testified. Their evidence was to the effect that on 29th October 2005, a report was made at Mbita police station that a certain man had been arrested by members of the public at Rusinga Ireland with papers used for making false currency and the man had been boasting to the public that he could make money by imagic. The two police officer proceeded to Rusinga Ireland where they found the appellant tied with ropes inside the home of **Eric Odoyo**, one of the reportees. Eric Odoyo was not called to testify as a witness. The police officers said that they found the appellant sited down surrounded by a large crowd of people. The appellant had a kaki envelope beside him. The same contained white and black papers in denominations of Kshs. 1,000/= . He was escorted to Mbita police station where upon investigations it was established that he was residing at a lodge known as Patroba's lodgings at Mbita. The police proceeded to the said lodgings and in one of the rooms where the appellant was alleged to be occupying the police recovered several items allegedly used for making vague currency notes. A total of 662 vague notes were also recovered.

In his defence, the appellant alleged that he had been framed up by Odoyo Amimo who was his agent in a fish selling business. He alleged that he had given the wife of the said Odoyo Kshs. 50,000/= and which he demanded for delivery of the fish or refund of the same. The money was not refunded and the said Odoyo tied him with a rope and called the police on allegations that he was having an affair with his wife.

When the appeal came up for hearing, Mr. Kemo, Senior Principal Prosecution Counsel, told the court that he was not opposing the appeal. He stated that the prosecution evidence contained material contradictions and several key witnesses were not called. I agree with Mr. Kemo.

The prosecution did not call any of the people who made a report to the police. The circumstances under which the appellant was tied and held at the home of Odoyo are unclear. The police should have called Odoyo to testify. Alternatively, one of the many people who were allegedly found surrounding the appellant should have been called as a witness. The owner and/or manager of Patroba Lodgings should have been called as a prosecution witness.

In the absence of all those potential witnesses and in the light of the appellant's plausible defence, I find and hold that the appellant's conviction was unsafe. I allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court. The appellant is set at liberty otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 22 DAY OF July 2009.

D. MUSINGA

JUDGE.