REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Criminal Appeal 52 & 54 of 2005

FRANCIS MURIUKI MUTHEE ....1ST APPELLANT
FRANCIS NDERITU KIEMA.............................. 2ND APPELLANT

VERSUS

REPUBLIC... RESPONDENT

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JUDGEMENT

This appeal has been filed by the 1st Appellant Francis Muriuki Muthee against the decision of the learned Senior Resident Magistrate Voi Law Courts. The Appellant had been charged on a first count of Making a False Document without Authority, contrary to Section 347(a) of the Penal Code Cap 63, Laws of Kenya and a second count of Uttering a False Document, contrary to Section 353 of the Penal Code**.** The Appellant was charged before the lower court on 17th February 2005. The facts were duly read out to him and he pleaded guilty to those facts. He was then duly convicted upon his own plea of guilty. After hearing mitigation the learned trial magistrate sentenced the first Appellant to a prison term of three (3) years on each count of the charge with further orders that the sentences run concurrently.

Following his conviction and sentence the 1st Appellant did file this present appeal. Mr. Kadima who argued the appeal on behalf of the 1st Appellant told the court that the 1st Appellant had abandoned his appeal against his conviction and only wished to appeal as against his sentence, which he termed ***"harsh and excessive"*** in the circumstances. Mr. Onserio, learned State Counsel appeared for the Respondent State and he did concede the appeal against sentence.

The 1st Appellant was charged under S. 347(a) of the Penal Code. The penalty for offences under S. 347(a) is provided for under S. 349 of the Penal Code which provides –

> ***"349. Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years"***

Thus it is very clear that the maximum sentence provided for this offence is three years imprisonment. This in fact was the sentence imposed upon the Appellant by the trial magistrate. Did the Appellant merit this maximum sentence? Ordinarily the maximum sentence is reserved for the vilest of offenders who commit the worst possible manifestation of the offence in question. This can hardly be said to be the case in these present circumstances. The offence to which the Appellant pleaded guilty and was convicted involved the manipulation of a delivery note. As Mr. Kadima rightly pointed out the ultimate beneficiary of the offence would have been the Appellant's employer and not the Appellant himself, who was merely the driver hired to transport the goods in question. The court prosecutor did certify the Appellant to be a first offender. The trial court ought to have taken note of this. A first offender would not ordinarily merit the maximum sentence. Further the Appellant did not deny the offence and cause an unnecessary trial. He saved the courts time by pleading guilty at the first instance. This is another factor which the learned trial magistrate ought to have taken into account whilst considering what sentence to impose. The Appellant

did mitigate by saying –

> ***"Accused 1: I have a wife and five children. Three are in secondary school. I take care of my mother. I am 52. I ask for forgiveness. I committed the offence"***

The learned trial magistrate in imposing sentence gave no indication that this mitigation was given consideration. I am very mindful of the fact that sentencing lies at the discretion of the trial magistrate. However there do exist certain basic principles that a court ought to adhere to in imposing sentence. One of these is that a court should consider where appropriate, alternatives to imprisonment, such as fines, community service orders, probation and other non-custodial sentences. I am of the opinion that the circumstances of this present case did call for an alternative sentence. The maximum sentence was certainly uncalled for. S. 349 of the Penal Code provides that an offender under S. 347(a) is ***"liable to three years imprisonment"***. In my view the term ***"liable"*** does not exclude the imposition of a fine as an alternative sentence as it is not a mandatory term. S. 349 does not provide that an offender ***"shall"*** be liable to a term of imprisonment for a period of three years. As such I am of the opinion that the learned trial magistrate ought to have considered a fine as an alternative sentence.

The upshot of the above is that the imposition of the maximum sentence was in my view ***"harsh and excessive"*** in the circumstances. In my view the three year term of imprisonment was not appropriate and I find that an imposition of an alternative sentence of a fine would have sufficed. As such I do hereby allow this appeal against sentence and I substitute a fine of Kshs.50,000/- in the alternative ten (10) months imprisonment on each of counts 1 and 2. The earlier sentence of three (3) years imprisonment is hereby set aside.

Dated and Delivered at Mombasa this 8th day of December 2009.

M. ODERO
<u>JUDGE</u>

Read in open court in the presence of:
Ms. Odhiang holding brief for Mr. Kadima

M. ODERO
<u>JUDGE</u>
8/12/2009