

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 47 of 2008

BRIAN KIHANYA TERENCE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant together with others two of whom were acquitted were charged with the offence of preparation to commit a felony contrary to section 308 (3) (b) of the penal code. The particulars of the offence state that on the 25th day of July 2007 at about 9.20 p.m. at Marigat Shopping Centre in Baringo District within Rift Valley Province jointly were found in a building namely Saisai Enterprise shop at night with intent to commit a felony therein to wit forging of currency notes. After the trial the appellant was convicted and sentenced to five (5) years imprisonment. Being dissatisfied with the conviction and sentence the appellant appealed.

The State conceded to this appeal and rightly so, for reasons that the charge against the appellant was defective. This being a first appeal this court is mandated to re evaluate the evidence before the trial court and arrives at its own independent determination of whether or not to allow the appeal. The evidence that led to the conviction and sentence of the appellant was principally adduced by three prosecution witnesses.

According to the prosecution's case the appellant were arrested in the course of trying to forge currency notes. They were arrested with blank papers and some real currency notes and some other paraphernalia which would be taken to resemble or pass for a special paper that is used for making a currency note.

Upon consideration of the evidence before the trial court, and the charge that the Appellant faced, the charge as preferred against the appellant does not disclose the offence that was committed. I am in agreement with counsel for the appellant and the counsel for the State that the charge is fatally defective. The charge is not supported by the evidence on record. Going through the evidence on record, the proper charge against the appellant would have been a charge contrary to **section 367(a)** and not the particular charge before the court.

Without belabouring the matter any further, this appeal should be allowed. The conviction and sentence imposed by the trial court is hereby set aside unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

It is so ordered.

Judgment read and signed on 24th day of July, 2008

M. KOOME

JUDGE