REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 622 of 2006

OLUSEYE OLADEJI SHITTU…….…….....…...APPELLANT

-AND-

REPUBLIC……...…..…….…….……RESPONDENT

(An appeal from the judgement of Principal Magistrate M. Muigai dated 3rd October, 2006 in Criminal Case No.2360 of 2004 at Nairobi Law Courts)

JUDGEMENT

The appellant was the first accused, among three who were charged on several counts, though the count facing him specifically was that of *being in possession of implements of forgery* contrary to s.367(b) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant and his accomplices, on 20th September, 2004 at Norwich Union Towers in Nairobi, within the Nairobi Area, jointly and without lawful authority or excuse, knowingly had in their possession a skimmer, and an instrument of forgery in credit card fraud.

The appellant was convicted and sent to jail for a period of *three years*, and he appealed on a number of grounds:

(i) that he should not have been convicted as the prosecution called no hand-writing expert to prove that certain documents produced in Court, bore his signature;

(ii) that the Police who conducted a search, found no incriminating material on him;

(iii) that the prosecution evidence which was relied on by the Court, was highly contradictory;

(iv) that the trial Court failed to consider the appellant's sworn defence;

(v) that the conviction entered by the trial Court was against the weight of the evidence on record;

(vi) that the trial Court erred in imposing upon the appellant a harsh sentence even as that court imposed a non-custodial sentence against his co-accused.

On the occasion of hearing this matter, learned counsel ***Mr. Mulanya*** appeared for the appellant, while learned counsel ***Mr. Makura*** appeared for the respondent.

Mr. Mulanya urged that the charge in question was defective, because the offence provided for under s.367(b) of the Penal Code was *a coining offence*; and it had not been alleged that the appellant had been found with an instrument for the preparation to forge bank notes or coins. It had not been proved, counsel urged, that the appellant was found in the course of preparing to forge bank notes and coins: his case was said to be related more to *credit cards.*

Counsel urged that the prosecution evidence was contradictory: PW1 said that appellant was arrested outside Norwich Union House, while PW2 said the appellant was arrested at Nbinet cybercafé – yet the two said they were together while arresting the appellant.

Counsel also raised a language issue: while it is stated that PW2 had testified in Kiswahili, the interpreter was not named. But the appellant is a Nigerian and does not understand the English language; in which case, it was urged, there was a violation of the appellant's rights under s.77 of the Constitution.

Counsel urged that conviction had been arrived at on the basis of hearsay evidence: for information had been attributed to an informer who was not identified, and was not called as a witness. Counsel urged that the instruments which were found by witnesses, and which formed the basis of the charge, could be used for innocent and for criminal purposes, but the learned Magistrate had ignored this fact.

Learned counsel submitted that the offence attributed to the appellant, had not been proved at all; and so there was no basis for entering a conviction.

Learned counsel ***Mr. Makura*** conceded to this appeal on a technicality: that it was not shown that the evidence given in Kiswahili had been interpreted to the appellant in a language that he understood – and so there was a violation of the appellant's language rights under s. 77 of the Constitution, and this would render the trial a nullity.

Counsel asked the Court to decide, on the basis of the record, if a retrial should be ordered: and he urged that the relevant consideration was whether the appellant was likely to suffer prejudice if retrial was ordered.

Learned counsel ***Mr. Mulanya*** urged that the appellant would suffer prejudice if a retrial were ordered, as the evidence on record could not support conviction.

There is no evidence at all that the appellant, a Nigerian, did understand the Kiswahili language, when it was used in Court during the trial; the record shows not, that interpretation took place for the benefit of the appellant. The respondent, thus, quite properly conceded to the appeal, as there was a violation of the appellant's rights under s.77 of the Constitution. On that account I hereby declare the trial to have been a *nullity.*

Mr. Makura has asked the Court to make its own assessment of the evidence, and to determine if this is a fit case for a retrial. Retrial is governed by principles well expressed in case law: ***Ahmed Dharamsi Sumar v. Republic*** [1964] E.A. 481; ***Pascal Clement Braganza v. R*** [1957] E.A. 152; ***Lenkai Sane Ole Kampei & Another V. Republic,*** Nairobi High Court Criminal Appeal Nos. 227 & 230 of 2005 (Consolidated); ***Musila Muli v. Republic,*** Machakos High Court Criminal Appeal No. 65 of 2003.

There doesn't exist, in my view, such cogent evidence as would compel that a retrial be undertaken. And such a condition, besides, would not provide just cause, in relation to the position of the appellant, that he should be subjected to a trial all over again.

Consequently I will make orders as follows:

(a) The trial which took place before the trial Court is declared a nullity, and the relevant proceedings are hereby vacated.

(b) There shall be no retrial of the case.

(c) The appellant shall forthwith be set at liberty, unless otherwise lawfully held.

DATED and **DELIVERED** at Nairobi this 15th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Mulanya

For the Respondent: Mr. Makura