REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 209 of 1997

BENSON KIARIE NGUGI…….....……..…….APPELLANT

VS

REPUBLIC…….……RESPONDENT

JUDGMENT

The appellants herein were charged before the Senior Principal Magistrate Court, Bungoma with a charge of "*Being in possession of papers for forgery contrary to section 367 (a) of the Penal code*."

Particulars of the charge were that

"*On the 27th November, 1997 at Bungoma Township in Bungoma District within Western Province, knowingly had in his possession of papers upon words, figures, letters, marks, lines had been printed to resemble Ksh.1,000/= and Ksh.500/= notes" sic.*

Upon the particulars being read over and explained to the appellants, they each replied:

"***I admit I had fake notes."***

A plea of guilty was entered against them. The facts were read out to them and they each replied "***facts are true".***

A conviction followed and they were each sentenced to serve 2 years imprisonment. Being dissatisfied with the said conviction and sentence, they filed this appeal through J. S. Khakula & Co. Advocates. The appeal is premised on the following grounds:-

1. The learned Senior Principal Magistrate erred in law in accepting the accused's words as a plea of guilty.

2. The facts given by the prosecution did not disclose an offence under section 367 (a) of the Penal Code.

3. The learned Senior Principal Magistrate erred in law in convicting the appellant on his own plea of guilty when the plea was equivocal.

The 4th ground was abandoned. The learned counsel for the appellants expounded these grounds in court and urged the court to allow the appeal. Mr. Ndege, counsel for the state intimated that he was opposing the appeal in a preliminary point in view of section 348 of the Criminal procedure Code. In my

considered view, however, I believe this is a point in law. Section 348 of the Civil Procedure Code only applies where the plea is unequivocal. Where the appellant nonetheless challenges the manner in which the plea was taken and more so puts forward the claim that the plea was equivocal, then this becomes a point of law and the appellant must be heard on his appeal against a conviction that follows such a plea. I believe it is on that basis that the judge who admitted this appeal admitted the same as against both the conviction and the sentence.

I have perused the record of the trial court along with section 367 (a) of the Penal Code under which the appellants were charged. I agree with learned counsel for the appellants that under section 367 (a) knowledge is an essential ingredient. Possession of a fake note per se is not an offence. One has to possess the same with the knowledge that it was fake. This is not a strict liability offence. The only issue that arises in this appeal therefore is whether the answers given by the appellants on plea show that they knew that the said notes were fake. Their answer as set out earlier was "***I admit I had fake notes".*** That in itself does not amount to an offence. The answer does not show that other than processing the said notes, the appellants had the knowledge that they were fake. The particulars as read to and admitted by the appellants do not include the statement that the appellants knew that the said notes were fake. Neither the answer to the charge, nor the one to the fact after they were read over to the appellants gives the slightest indication that the appellants were aware that the offence was not the possession of the notes – but the possession accompanied with the knowledge that they were fake.

Guilty knowledge cannot be deduced from their conduct before arrest. After evaluating the material before me, my finding is that all the essential elements of the charge were not clearly explained to the appellants as stipulated in the well celebrated case of ***ADAN -V- REPUBLIC (1973) E.A 445, KARIUKI -V- REPUBLIC (1984) KLR 809*** and other subsequent cases. For the aforegoing reasons, my finding is that the pleas entered by the appellants were not equivocal. The conviction against them cannot therefore stand. Accordingly, I allow this appeal, quash the conviction against both appellants and set aside the sentence imposed by the trial court.

W. KARANJA

JUDGE

15/5/2007

Delivered today in open court in the presence of:

Mr. Makali for Khakula for the appellant.

Mr. Onderi for the state