



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**HCCR – APP 13 OF 2006**

JOSEPH MACKENZIE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant, *Joseph Mackenzie*, was charged with the offence of being in possession of fake bank notes contrary to section 359 of the Penal Code.

The particulars of the offence are that on the 14<sup>th</sup> day of February, 2006 at Malakisi Township, Malakisi Location, Bungoma District within Western Province without lawful authority or excuse had in his possession Ksh.15,000/= forged currency notes (7,000) seven thousand bearing the same serial No. BH No.7400780 another 7000 bearing serial No.AN6284902 and one thousand (1000) bearing serial No.AP1061097 knowing them to be forged.

By record of proceedings he pleaded guilty and was sentenced to serve three (3) years imprisonment.

The record of proceedings is as follows:

“16.02.04

*Before: K. Ngomo SPM*

*Pros: CI Onyango*

*CC: Wanjala*

*Charge read over and explained to accused who replied as follows:*

*Accused: It is true*

*Pros: On the 14.02.06 at about 1000 hours, the accused went to Rentovi Hotel in Malakisi. He ordered for breakfast. He was with another person. They were served. The accused produced a 1000/= note serial no.AP1061097 and he gave it to the waiter. The waiter checked the note and found it to be fake.*

*The waiter informed the police who were in town and they apprehended the accused. He was taken to*

*the police station where upon being searched another 13,000/= worth of notes were found on him. He was charged with the offence. The fake notes are in court. I produce them as exhibits.*

*K. NGOMO*

*SPM*

*ACCUSED: The facts are correct.*

*K. NGOMO*

*SPM*

*COURT: Guilty of plea and convicted.*

*K. NGOMO*

*SPM*

*PROS: He may be treated as a first offender.*

*K. NGOMO*

*SPM*

*ACCUSED IN MITIGATION: I pray for leniency. I am a first offender.*

*K. NGOMO*

*SPM*

*SENTENCE Accused is to serve 3 years imprisonment. Right of appeal within 14 days.*

*K. NGOMO*

*SPM*

The appellant now appeals to this court against both conviction and sentence. It was urged on his behalf that the plea was unequivocal in that each and every ingredient of the charge was not explained to the appellant in a language, he understands. The language in which the charge was explained to the appellant is not indicated.

The charge was read but it does not disclose an offence under section 359 of the Penal Code. That one of the acts that must be shown in the charge is that the act was without lawful authority or excuse. That ingredient is missing in the charge and in the particulars. On the premises, it cannot be said that the plea was unequivocal. On sentence, it was urged on behalf of the appellant that it was harsh and excessive in that the appellant was a first offender.

The state, through Mr. Onderi, conceded on the issue of conviction. He urged me to find that the plea was not unequivocal in that the language in which the proceedings were conducted is not indicated. However, the state supported the sentence. It was urged that being in possession of forged currency to the time of Sh.15,000/= is a grave matter as it sabotages the economy. The sentence was thus deserved.

It is axiomatic that a proper interpretation as provided for in section 198 of the Criminal Procedure code shall be provided at the trial, as the language in which proceedings took place is not indicated, the appellant could not be said to have followed the proceedings during the trial. I take the view that the

constitutional right of the accused necessitates a retrial. See ADIKINYI & 2 OTHERS VS REPUBLIC (Criminal Appeal No.42 of 1984 (C.A)).

Accordingly, it is ordered that the case shall be remitted under section 361 (2) of the Criminal Procedure code for a retrial. The accused person shall be remanded in custody pending his appearance before a court of competent jurisdiction at Bungoma other than that held by K. NGOMO, the Senior Principal Magistrate. A copy of this ruling to be served upon the Senior Principal Magistrate for compliance.

DATED and DELIVERED at Bungoma this 22<sup>nd</sup> day of May 2006.

N.R.O. OMBIJA

JUDGE

MR OCHARO for the Appellant

MR ONDERI for the Republic