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

Criminal Appeal 101 of 2005

(From Original Conviction and Sentence in Criminal Case No. 3493 of 2004 of the Chief Magistrate's Court at Kibera: Ms Muchira Senior Resident Magistrate)

BERNARD NJAU MUGO…….....……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT

The Appellant, ***BENARD NJAU MUGO*** was charged with one count of being in possession of forged Bank notes contrary to Section 359 of the Penal Code. The particulars were that on the 9th May, 2004 at Deep Sea Slum Village in High Ridge within Nairobi area, without lawful authority or excuse the Appellant had in his possession a bundle of forged Kenya currency papers knowing them to be forged. In a bid to proof their case, the Prosecution called two witnesses. On this evidence, the Appellant was subsequently convicted. Upon conviction, the Appellant was sentenced to 3 years imprisonment.

The Appellant was aggrieved by the conviction and sentence. Through Messrs Kimwere Josephat & Co., advocates he lodged the instant Appeal. In his petition of Appeal, the Appellant faults the Learned Magistrate for convicting him without considering the evidence tendered in a judicious manner, the evidence adduced did not support the judgment, reliance on evidence that was contradictory and uncorroborated, that the conviction was harsh, that the Learned trial Magistrate failed to consider the evidence of the Appellant and his mitigation and finally that the Learned trial Magistrate erred in law and fact in shifting the burden of proof from the Prosecution to the defence.

The brief facts of the case are that on 9th May, 2004 at about 8 p.m., a Police Officer, Ronald Anyoka (PW 1) was at Parklands Police Station on duty when he received a call that some suspects had been arrested and were at the Chief's Camp. He together with PW2, PC David Ngadure proceeded to the Chief's Camp and found the Appellant with another woman who turned out to be the Appellant's girlfriend already arrested. The girlfriend had been arrested for having stolen from her employer Kshs.45, 000/=. PW1 and PW2 demanded to conduct a search in the Appellant's house. In the process of conducting a search, they came across a suit case which they asked the Appellant to open. The Appellant refused and the same was forcefully opened by PW1. Inside the suitcase was found Kshs.1200/=, plain papers bearing the portrait of President Moi in Kshs. 200/= denomination. The Appellant was asked where he had got the papers from and he told the Police Officers that he had been conned by a person whom he had given the money but got the papers instead. The Appellant was then arrested and charged.

Put on his defence, the Appellant elected to give unsworn statement of defence. He stated that on the material day, his friend had visited him with his wife and asked the Appellant to accommodate them as they had moved out of their house. The Appellant then left them, his house and sought accommodation elsewhere. Later on he found his friend's wife arrested. He was summoned by the Chief and accused of harbouring thieves. He was arrested and Police proceeded to his house and among the couple's clothes, Police recovered money. Later he heard that forged Bank notes were found in the house.

When the Appeal came up for hearing before me no submission were made by Miss Omwenga, Counsel for the Appellant in support of the Appeal. Learned Counsel was contend with merely repeating the grounds in the petition of Appeal. She never sought to elaborate and or support by submissions oral or otherwise the grounds of Appeal. Counsel merely said:

"I reply on the grounds of appeal solely. We pray that the appeal be allowed……."

In my view counsel was not of any assistance to this Court. I will say no more.

The Appeal was opposed. Mr. Makura Learned State Counsel submitted that there was sufficient evidence adduced by the Prosecution to support the conviction. That the evidence of PW1 and PW2 clearly demonstrated that the Appellant was arrested whilst in possession of the forged Bank notes. That the evidence of these two witnesses corroborated each other and was sufficient to sustain a conviction. Counsel also referred to the defence advanced by the Appellant and was of the opinion that the same was duly considered by the trial Magistrate and rejected for good reasons. On sentence, Counsel submitted that the Appellant was sentenced to 3 years imprisonment for an offence which carries a maximum sentence of 7 years. The sentence was not therefore manifestly harsh or excessive. Counsel therefore urged me to dismiss the Appeal.

Being a first Appeal, this Court is enjoined to reconsider and reevaluate the evidence adduced before the trial Court so as to arrive at its own decision on whether to uphold the conviction or not. In so doing, this Court has to bear in mind that it neither saw nor heard the witnesses as they testified and, therefore, could not be expected to make any decision on their demeanour. See generally ***OKENO VS REPUBLIC (1972) EA 32.***

The conviction of the Appellant was predicated upon the evidence of PW1 and PW2. These were Police Officers, summoned to the Chief's Camp to re-arrest the Appellant's girlfriend who was being investigated for another crime. It was when they conducted a search in the Appellant's house that they stumbled upon the fake Bank notes. The Appellant does not dispute the fact that the fake Bank notes were found in his house. He seems to pass the blame to a friend and his wife that he had offered to accommodate in his house. However the evidence on record does not absolve the Appellant. PW1 and PW2 all testified as to how they came across the fake Bank notes in a brief case belonging to the Appellant. When asked to open the brief case, the Appellant refused forcing the two Police Officers to forcefully break it open. The Appellant did not give any explanation as to why he resisted opening the brief case when asked. If it was not his, he could have said so. If he did not have the keys, he could easily have said so as well. The action of the Appellant in refusing to voluntarily open the brief case is in my view inconsistent with his innocence. He must have known what was contained therein hence his reluctance to open. Could that brief case have belonged to another person? I do not think so. The only other person(s) who could have staked a claim to the brief case could have been the Appellant's alleged friend and his wife. I find it hard to believe that the Appellant would move out of his house to accommodate a friend and his wife. The Appellant did not bother even to give the names of these people or call them as witnesses to buttress his case. In my view this claim was a mere phantom. There is no doubt at all that the suitcase was found in the Appellant's house. From the evidence no other person other than the Appellant could have had access to the house. That being the case I agree with the holding by the Learned Magistrate that

"…….***I instead find it reasonable and sensible to believe PW 1 and PW2 whose evidence is corroborating each other. It was in accused's house and the case in which the forged bank notes were found was truly accused's….."***

The two witnesses never knew the Appellant before the incident. There was no history of bad blood between the two witnesses or any of them with the Appellant. The two witnesses could not therefore have conspired to fabricate the case against the Appellant or falsely testify against him.

On the basis of the foregoing, I am unable to agree with the Appellant that in convicting the Appellant, the Learned Magistrate failed to consider the evidence tendered in a judicious manner or that the evidence did not support the charge sheet. Indeed, the Learned Magistrate took a lot of time to analyse and evaluate the evidence tendered before reaching the conclusion that the Appellant was guilty as charged. The evidence of PW1 and PW2 in my view and as correctly submitted by the Learned State Counsel was sufficient to sustain a conviction. The evidence was sufficiently corroborated. In reaching her conclusion, I do discern anywhere that the learned magistrate could be said to have shifted the burden of proof from the prosecution to the Appellant. The Appellant's conviction on the basis of the evidence on record was inevitable.

The report of the forensic document examiner is in the following terms

"…….***I have examined the questioned pieces of paper marked A1-A255 bearing images of 200 Kshs. In my opinion these are just ordinary pieces of paper intended to make counterfeit currency notes."***

Under Section 359 of the Penal Code the offence is committed if:-

"……. ***Any person who, without lawful authority or excuse, the proof of which lies on him, imports or purchases or receives from any person, or has in his possession, a forged bank note or currency note, whether filed up or in blank, knowing it to be forged……"***

In the instant case there is no doubt at all that the Appellant had in his possession forged Bank notes. Did he know? From the evidence and the conduct of the Appellant, he does appear to have known that the Bank notes were forgeries. Indeed he did own up to PW 1 and PW 2 as to how he had come by the said Bank notes. He had no right to possess the Bank notes. On the overall, I am persuaded that the evidence tendered was in tandem with the particulars of the charge.

As for sentence, I note that the offence upon conviction carries a maximum jail term of 7 years. Instead the Appellant was sentenced to 3 years imprisonment. The Appellant was allowed to mitigate. However in her sentencing notes, the Learned Magistrate did not at all refer to the mitigation. However considering the sentence imposed which in my view was lenient; I do not think that failure by the Magistrate to record that he had taken into account the Appellant's mitigation occasioned him any prejudice or injustice. The sentence imposed was neither harsh nor excessive and I will not interfere with it. It will stand.

In the end then, I do not find any merit in this Appeal and same is hereby dismissed.

Dated in Nairobi this 31st day of July, 2006

……..

MAKHANDIA

JUDGE