

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Criminal Appeal 44 of 2002

(From Original BSA SRM 1264/2002)

MUSESI ROBERT.....APPELLANT

VS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant pleaded guilty to a charge containing two counts. The first count relate to a charge of being in possession of forged currency contrary to Section 359 of the penal code. The second count is in respect of a charge of being unlawfully present in Kenya contrary to Section 13 (2) of Immigration Act. He was then convicted and sentenced to serve 6 months and 4 years imprisonment on counts 1 and 2 respectively hence this appeal.

The appellant now appeals against both the conviction and sentence. On conviction he argues that he did not understand the language of the court. The learned Senior state counsel opposed the appeal against conviction stating that the appellant had no right to appeal upon pleading guilty.

The record shows that the trial court used both English and Kiswahili when reading and explaining the charge to the appellant. The record also shows that the appellant did not indicate that he did not understand either language but has opted to raise the matter on appeal. I am not satisfied that the appellant is candid on this point. This ground must fail for it lacks merit.

On sentence, the appellant says that the trial court did not consider his mitigation hence pronouncing a harsh and excessive sentence. The state conceded to this ground arguing that the trial court misdirected itself when it took the view that the appellant was not a first offender upon being convicted on count 1.

The record reveals that the trial Senior Resident Magistrate opined that the appellant was not a first offender in view of the fact that he was serving a sentence in count 1. This is a sentence which arose from the same charge. This was a great misdirection on the trial court. The law is very clear that a court of law should clearly state whether sentences should run concurrently or consecutively in a charge attracting more than one sentence. In this matter the trial court pronounced the sentences as though they emanated from separate cases. The same in essence ran consecutively. The record does not show peculiar circumstances to warrant the sentencing court to award a consecutive sentence. It was appropriate in the circumstances of this case to have the sentences run concurrently.

In this appeal I am satisfied that the trial court misdirected itself when it took into account the sentence in count 1 as though it was a previous sentence. This gives this court the jurisdiction to interfere with the sentence. I also find that the sentence on count 2 was excessive in view of the fact that the appellant was obviously a first offender.

In the final analysis, the appeal on sentence is allowed and the appeal on conviction is dismissed. The sentence on count 2 is set aside and substituted with a sentence of 2 years imprisonment from the time of sentence. The sentence on count 1 shall remain. However the sentences are to run concurrently.

The record shows that the appellant has served the sentences in full in the light of the reduction of the sentence on count 2. The appellant should be set free forthwith and be repatriated back to Uganda

immediately.

DATED AND DELIVERED THIS 4th DAY OF March 2005

J.K. SERGON

JUDGE