



**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 41 OF 2017**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 42 OF 2017**

**AND**

**CRIMINAL APPEAL NO. 10 OF 2018**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**REUBEN SIRYA THOYA .....1<sup>ST</sup> APPELLANT**

**ZUBERI CHUL YALYA .....2<sup>ND</sup> APPELLANT**

**DZUNGU VOVA MTUNDO.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. A. Ndung'u, RM dated 1<sup>st</sup> March 2017 at Senior Principal Magistrates Court at Shanzu in Criminal Case No.471 of 2015)***

**JUDGMENT**

1. The appellants, **REUBEN SIRYA THOYA, ZUBERI CHIL YALYA, DZUNGU VOVA MTUNDO** and one co-accused, **STEMBO KATANA KAHINDI** were charged with and convicted of the offence of being in possession of papers of forgery contrary to **section 367** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 28<sup>th</sup> April 2015 in Mtwapa Township within Kilifi County, without lawful authority or excuse knowingly had in their possession 140 papers of Kshs. 1000/- and one paper of USA denominations intended to resemble and pass as special paper such as is provided and used in making currency notes. The appellants were sentenced to 3 years' imprisonment thus precipitating this appeal against conviction and sentence.

2. The 3<sup>rd</sup> appellant and **STEMBO KATANA KAHINDI**, were charged but acquitted of 3 counts of obtaining money by false pretences from one Renson Katite contrary to **section 313** of the **Penal Code**. It was alleged that on 26<sup>th</sup> and 27<sup>th</sup> April 2015 within Mtwapa Township, they, with the intent to defraud the said Renson Katite obtained from him Kshs. 10,000/-, Kshs. 16,000/- and Kshs. 74,000/- by falsely pretending that they could increase the money through prayers, a fact which they knew was false. Both accused were acquitted on the first two counts.

3. This appeal is only in respect of the fourth count relating to the possession of counterfeit notes. From their respective petitions of appeal and submissions, the singular issue for consideration in this matter is whether the prosecution proved that the appellants were in possession of the counterfeit notes. Before I consider this issue, I reiterate that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).

4. The complainant (PW 1) recalled that he had leg problems and a difference with his friend and went to Kahindi, who was alleged to be a witch doctor, to resolve those problems. When he went to see Kahindi, he also met the 3<sup>rd</sup> appellant. Kahindi explained to him that he treats people in the forest within Mtwapa area. He was taken to the forest where he heard some voices demanding money. He made arrangements to deliver money to them. When he returned to the forest with Kahindi and the 3<sup>rd</sup> appellant, he found a box containing local and foreign currency. He went back to the bank to collect more money, returned to the forest and kept it in the box and was told to return on the next day.

He then realized he had been defrauded so he went to report at Mtwapa Police Station.

5. PC Sammy Oyaro (PW 2) recalled that PW 1 reported how he had been defrauded. On 28<sup>th</sup> April 2015, he and the other police officers including PC Dennis Nyakina (PW 3) were directed to the forest by PW 1 where the four accused were arrested and the counterfeit notes and material recovered. An inventory of the notes was taken and sent to the document examiner, Inspector Iranda Masiko (PW 4) who concluded that the notes and paper were counterfeit after subjecting them to several tests.

6. In his defence, the 3<sup>rd</sup> appellant submitted to the court that on the material day he was arrested after returning to view a plot a client wanted. The 1<sup>st</sup> and 2<sup>nd</sup> appellants testified that they were together going to the 2<sup>nd</sup> appellant home. Along the way the 2<sup>nd</sup> appellant sought to relieve himself and went to a nearby bush and that is when they heard a loud bang coming from the forest and they were arrested as they tried to run back.

7. Counsel for the 1<sup>st</sup> appellant submitted that the prosecution did not prove that the notes and paper were counterfeit as a primary fact. On this issue I find that the testimony of PW 4 who examined the exhibits sent to him and concluded that the Kshs. 1000/- and USD dollar notes were fake based on the scientific tests he had subjected them to. I see no reason to differ with his report and I accordingly accept that the notes and dollars were indeed counterfeit.

8. As I stated earlier, the key issue for consideration is whether the appellants were found in possession of the notes. The evidence of PW 3 and PW 4 is that the counterfeit notes were found in actual possession of the 2<sup>nd</sup> appellant when they gave chase to them when one of the officer shot in the air. The clear evidence is that the 2<sup>nd</sup> appellant was in actual possession.

9. The question then is whether the other appellants were in constructive possession of the counterfeit notes within the meaning of **section 4(a)** of the **Penal Code** defines possession as follows:

*(a) "be in possession of " or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."*

*(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his custody or possession, it shall be deemed and taken to be in custody of each of them.*

10. The testimony of PW 1 is that he did not know 1<sup>st</sup> and 2<sup>nd</sup> appellants as he did not meet them when he went to the forest for the first time with the 3<sup>rd</sup> appellant and Kahindi. He only stated that he heard voices in the forest which were demanding that he bring more money and saw them for the first time when they were arrested in the forest. Resolution of this issue largely depends on whether the appellants and their co-accused acted with common intention to or were together in the entire incident to fraudulently take money from PW 1. In this respect the trial magistrate held that:

*I have no doubt that the 1<sup>st</sup> and 2<sup>nd</sup> accused [Kahindi and the 3<sup>rd</sup> appellant] intention was to defraud. The complainant paid the money with a promise to solve his leg and relationship problems and pull money from his girlfriend's account. He did not testify that he was induced to pay the money in order to increase the money as stated by PW 2 and PW 3. It is not clear from the prosecution evidence for what purpose the complainant was persuaded to pay money.*

11. If the evidence shows in fact that the two accused who interacted with the complainant did not intend to multiply or increase his money, it is therefore possible that the 3<sup>rd</sup> appellant acted alone or without the knowledge of the other accused when he was found in possession of the counterfeit notes which in any case were in his pocket. The appeal for the 3<sup>rd</sup> appellant, **DZUNGU VOVA MTUNDO** is dismissed as he had actual possession of the counterfeit currency

12. The benefit of doubt must be given to the 1<sup>st</sup> and 2<sup>nd</sup> appellant that is **REUBEN SIRYA THOYA** and **ZUBERI CHIL YALYA**. Their conviction and sentence is therefore quashed and they are set free unless otherwise lawfully held.

**DATED and DELIVERED at MOMBASA on the 3<sup>rd</sup> day of September 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Achola, Advocate for the 1<sup>st</sup> appellant.

2<sup>nd</sup> and 3<sup>rd</sup> appellants in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.