REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 191 OF 2012

(An appeal against both conviction and sentence of the Senior Resident

Magistrate's court at Hamisi in Criminal Case No. 288 of 2010

[J. K. NG'ARNGA'R, SPM] dated 6th August, 2012)

KINGSLEY DENNIS MOGENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with three counts. The first count was being in possession of forged currency contrary to **Section 359** of the Penal Code. He was charged with three others. The particulars of charge were that on 15th May 2010 at Tambua market, Kimaragwa sub-location, Tambua Location, Vihiga District of Western Province jointly without lawful authority or excuse had in his possession three one thousand forged currency notes knowing them to be forged. In count II, he was charged also with three others with having in his possession paper for forgery contrary to **Section 367 (a)** of the Penal Code. Particulars of charge were that on the same day and place, jointly without lawful authority or excuse had in possession 86 printing papers for Kshs.1,000/= and 7 printing papers for Kshs.200/= intended to resemble and pass as a special paper such as is provided and used for making currency notes. Count III was for having in his possession implements for forgery contrary to **Section 367 (b)** of the Penal Code. The particulars were that on the same day and place jointly with three others knowingly without lawful authority or excuse had in his possession one bottle containing chemical and a syringe for producing such a paper, word, figure, letters, marks, lines or devices peculiar to and use in or any such paper.

He denied all the charges. After a full trial he was found guilty on all the three counts and sentenced to serve two years imprisonment on each count to run concurrently. He has now appealed to this court. Before the appeal was heard, he made an application through his counsel for release on bond pending appeal. That application was allowed.

At the hearing of the appeal, Mr. Vadanga who appeared for him, submitted that the Constitutional rights of the appellant were violated. That the appellant was not presented to court for charge within the time allowed by the Constitution. That he was not given adequate time to prepare for his defence contrary to **Article 50 (2)** of the Constitution. Counsel cited two case authorities, which he relied upon.

The learned Prosecuting Counsel Mr. Oroni, opposed the appeal. Counsel stated that the offence

occurred on a Friday. Therefore the appellant was taken to court on Monday 17th May, which was the next working day in compliance with the law. Counsel argued that the evidence tendered proved the commission of the offences.

I have re-evaluated the evidence as I am required to do in a first appeal. That is the duty of any first appellate court. See the case of **Okeno -vs- Republic [1972] EA 32**.

The explanation given by the Prosecuting Counsel on the complaint of alleged contravention of the Constitutional rights of the appellant is in my view, satisfactory. I find no such violation.

Having re-evaluated the evidence on record, I find that there was no evidence to connect the appellant with any of the alleged offences. All the arresting witnesses, that is PW1 and PW2, stated that they did not find the appellant in possession of anything. They admitted that the appellant told them that he was a mere passenger in the motor vehicle. The other three accused also confirmed that the appellant was a mere passenger who had asked for a lift to Kisumu.

In my view, there was no suggestion or evidence that the appellant was involved in the commission of the alleged offences. The magistrate was therefore wrong in convicting him.

In addition to the above, the learned magistrate made the mistake in not considering the evidence of the prosecution against the defence with regard of each of the accused persons as required by the Criminal Procedure code. In my view, had the learned magistrate done so in the judgment, he would have found that there was no single piece of evidence connecting the appellant to the offences. In his short judgment, the learned magistrate merely stated as follows in regard to his consideration of the evidence.

> ***"I have considered both the prosecution case and the defence herein. I find that the evidence on record against the four accused persons is straight forward and watertight. They were found in a car and when the car was searched, the items the subject matter of the three counts (sic). The evidence by the prosecution was strong, corroborated and consistence. The same was not shaken during cross-examination. It was not watered down by the defence advanced by the accused persons."***

It is clear from the above observations of the learned magistrate that no attempt was made to analyse the evidence of each witness as it relates to each offence and each of the accused persons. There was also no consideration of the defence of each accused. The magistrate also shifted the burden of proof to the defence by requiring that the defence waters down the evidence of the prosecution. An accused person is merely required to raise doubt and not to water down the evidence of the prosecution. See **Woolmington –vs- DPP [1932] AC 462**.

Having re-evaluated the evidence of record, I am of the view that the conviction of the appellant was a mistake. I allow the appeal, quash the conviction and set aside the sentence. I understand that the appellant is already out on bond. In case he is not out on bond, I order that he be released forthwith unless otherwise lawfully held. In case he provided bond or bail, same is discharged.

Dated and delivered this 6th day of March, 2014

George Dulu

J U D G E