



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

crim app 882 of 82

JAMES MWANGI MAINAAPPELLATE

Versus

REPUBLIC.....RESPONDENT

CORAM: AGANYANYA, J

Appellate absent, unrepresented.

B M Mbai (State Counsel) for Respondent

JUDGMENT

The charge against the appellant herein was of having forged currency notes contrary to Section 359 of the Penal Code. What appears to have happened here was that the appellant hired a taxi from town on November 20, 1978 which dropped him near Hodi Hodi Bar in Maringo Area. As he was well-known in that bar he went in to get change so as to be able to pay for the taxi. He therefore handed to Patrick Mwangi Muiruri (PW 2) a note of Kshs 100 and was given Kshs 20 to pay for the taxi. He went out and left a balance of Kshs 80 to collect later.

In the meantime Muiruri checked the note which the appellant had handed to him and suspected that it was not genuine. He informed the appellant of this when the latter came back to collect the balance of the change. A policeman by the name of Koske (PW 3) who happened to be in the bar was given the note to check which he confirmed to be fake. The appellant said the note was a genuine one.

The two sides did into agree and so the appellant was arrested and taken to Jogoo Police Station.

While there, the appellant said he had 9 more notes of similar nature which he believed were genuine. These notes were checked and found to be fake. He was then charged with the offence subject to this appeal. In his unsworn testimony, the appellant explained how he had been given the money by one Njoroge Kamau who had withdrawn it from the bank. He agreed with the prosecution evidence as to how he had gone to the bar and handed over one of the notes to get Kshs 20 to pay for the taxi and how he was later informed that the note was not genuine. He said he had been given the money by one Njoroge to whom he had sold 2 watches and that he had no knowledge that the notes were forged.

The trial Magistrate wrote a judgment in which he set out the evidence adduced at the trial and at the end of the day he convicted the appellant. He was of the opinion that the appellant was aware that the first note was fake. So far so good.

Section 359 of the penal code under which the appellant was charged states:

“359 Any person, who without lawful authority or excuse the proof of vehicle lies on him, imports or purchases, or receives from any person, or has in his possession, a forged bank note currency note whether filled up or in blank, knowing it to be forged is guilty of a felony and is liable to imprisonment for seven years.”

The most important ingredient of this offence as far as I can see is that the culprit should know that the bank note or currency note is forged. And it is the duty of the prosecution, not the culprit to prove knowledge. The burden of proof shifts to the culprit only where he alleges he was in lawful possession or had an excuse to possess the bank note or currency note.

In the case subject to this appeal there was no dispute that appellant handed over Kshs 100 note which was later found to be forged. A document examiner Ronald William Thompson (PW 1) confirmed this. Appellant did not plead he had lawful authority or excuse to possess that note. But was it proved that appellant knew that the notes he had were forged? This was not done according to evidence. The appellant known to the proprietor of Hodi Hodi Bar and other employees.

It is most probable he would risk changing a fake note in that particular bar. Moreover, having handed over the note which was found fake he would not continue arguing that the note was genuine and even go ahead to produce 9 more notes of a similar nature at Jogoo Police Station if he knew they were fake. The appellant could not do anything more to establish his innocence and it was expected too much from him when the trial magistrate said that appellant had to establish that he was a watch dealer and/or that he had to prove that he had no knowledge that the notes were forged. He said appellant had produced the other 9 - Kshs 100 notes at Jogoo Police Station and not at the bar as Police Constable Koske wished the court to believe.

In any event, appellant's denial was consistent through out the case and it was not too easy for the prosecution to prove the guilt of the appellant beyond a reasonable doubt. I therefore concur with the state counsel and allow this appeal, quash conviction and set the sentence aside. The appellant will be released from prison unless he is otherwise lawfully held.

Dated at Nairobi this 25th day of March, 1983.

DKS Aganyanya

Judge