



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMOLO, VISRAM & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 7 OF 2010

BETWEEN

SOLOMON ONYANGO KONDE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J) dated 14th December, 2009

In

H.C. Cr. A. No. 24 of 2009)

JUDGMENT OF THE COURT

The appellant herein was convicted on his own plea of guilty by the Senior Resident Magistrate's Court at Bondo (E. Olwande, Ag. SRM) on 10 counts ranging from stealing, forgery, uttering a false document, obtaining and attempting to obtain by false pretences and handling stolen property, contrary to various sections of the Penal Code, and sentenced to three years imprisonment on each count, all to run concurrently.

Briefly, the facts leading to the convictions are that the complainant, Mark Milingo Onimbo, a student at Makerere University, and a resident of Makasembo Estate in Kisumu, lost his wallet containing Shs.1500 in cash, his ID card, and several ATM cards, including one issued by the Kenya Commercial Bank (KCB), soon after he had dropped his mother to the Kisumu stage, on 2nd January, 2009.

Some five days later, on 6th January, 2009, the appellant went to KCB and attempted to withdraw Shs.15,000/- using the complainant's ATM and ID cards, but did not succeed as his signature did not correspond with the complainant's signature. He returned to the same bank later on the same day, and this time succeeded in withdrawing Shs.23,000/-.

On 8th January, 2009, the appellant again returned to KCB, and this time attempted to withdraw Shs.85,000/- from the complainant's account. Clearly, he raised suspicion, and was promptly arrested, charged and eventually convicted of the offences stated earlier.

After his conviction (on his own plea of guilty) and sentence, the appellant appealed to the superior court (Mwera, J) against both conviction and sentence. The superior court found, correctly in our view, that the plea of guilty had been properly taken and recorded, and went on to order a reduction of sentence, from three years to two years on some counts, but ordered that some of the sentences do run consecutively, and not concurrently, as had been ordered by the trial court, with the result that the appellant was ordered to serve a seven year imprisonment.

The appellant now comes before this Court on a second appeal and he drew the memorandum of appeal in person. He has outlined six grounds of appeal, relating both to conviction and sentence, and raising issues of fact. However, at the hearing of this appeal he clarified that his appeal was against sentence only. He appeared in person, and pleaded simply that the sentence was harsh, and be reduced.

We agree with the learned Assistant Director of Public Prosecutions, Mr. Gumo, that the appeal does not lie to this Court under **section 361** of the Criminal Procedure Code. Clearly, this is a second appeal, against severity of sentence.

Section 361 aforesaid provides in clear terms that a second appeal may only be based on matters of law, and not facts. Severity of sentence is a matter of fact, not law. The sentences imposed by the superior court are lawful sentences, and we are unable to interfere with the same, as the sentences ordered to run consecutively involved offences which were committed on different dates.

We must therefore find and hold that this Court has no jurisdiction to determine the appeal and we order that it be and is hereby dismissed . The sentence imposed by the superior court shall remain.

Dated and delivered at Kisumu this 23rd day of June, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. G NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.