REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 472 of 2005

(From original conviction(s) and Sentence(s) in Criminal Case No. 946 of 2005 of the

Principal Magistrate's Court at Garissa (J. G. Kingo'ri – Ag. PM)

NOOR AHMED MUSAMIL……..APPELLANT

VERSUS

REPUBLIC…… ……...RESPONDENT

J U D G M E N T

NOOR AHMED MUSAMIL was convicted on his plea of guilty for the offence of **BEING IN POSSESSION OF FORGED BANK NOTES OR CURRENCY** contrary to Section 359 of the Penal Code. In the particulars of the charge, it was alleged: -

"NOOR: on 12th September 2005 at Kadhi Court in Garissa District within the North Eastern Province, without lawful authority or excuse had in possession ten forged currency notes knowing them to be forged."

The Appellant admitted that he presented ten fake notes of Kshs.1000/- each denomination to a court official at Garissa Kadhi's Court as payment of a maintenance order made earlier by that Court against him. After the charge and facts were explained to the Appellant in Kiswahili language, he admitted both. He was then sentenced to 3 years imprisonment.

Being dissatisfied with the Court's findings in both conviction and sentence, the Appellant lodged this appeal.

Four grounds of appeal are relied upon in the Appellant's petition of appeal in which the Appellant contends that the charge and facts of the case did not support the conviction and that a plea of guilty ought not to have been entered on such facts and that the plea was equivocal and the sentence harsh, oppressive and excessive.

MR. AMUGA argued the appeal on behalf of the Appellant. Learned counsel submitted that the

currency was not before the plea court as the record nowhere indicated so. That the clerk to whom the Appellant allegedly gave the fake notes was not identified by name in the facts of the case. That the KCB staff member who is said to have examined the notes to confirm that they were fake, was also not named and neither were the features that were the basis of finding them fake disclosed. Learned counsel finally submitted that the use of the words forged and fake interchangeably in the proceedings created a confusion.

MISS OKUMU, learned counsel for the State challenged the competence of the Appellant's appeal challenging the conviction entered against him. Learned counsel submitted that having pleaded guilty to the charge the Appellant should not be heard to challenge the conviction. Learned counsel further submitted that the plea of guilty was unequivocal. That the Appellant admitted having the fake money. That the currency was examined and confirmed to be fake. That it was not necessary that the reason why the court official suspected the notes to be fake should have been disclosed since a bank official confirmed it. That for the same reasons, and the fact the Appellant admitted having the forged notes, it was not necessary to go into the reasons why the currency was so declared. The learned counsel submitted that the charge before the Court was clear and that the Appellant knew what he faced and should not be heard to say he was confused.

On the issue of conviction and whether the Appellant could challenge the same having pleaded guilty to the charge. **Section 348 of the Criminal Procedure Code** provides: -

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence."

In the persuasive High Court case of MERALI vs. REPUBLIC 1972 EA 47, HARRIS, J, at page 48 observed as follows: -

"Although by Section 348(1) of the Criminal Procedure Code no appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on such a plea by a subordinate court, except as to the extent or legality of the sentence, this limitation applies only where the plea itself is freely given and is in unequivocal."

The principle in **Merali's case,** supra, is good law and I am persuaded by it. The Appellant has to fall within the suggested exception for the appeal against the conviction to be entertained as against the conviction. It would appear from the record of the proceedings that prior to making his plea the substance of the charge and every element of it had been stated by the trial magistrate to the Appellant. It is also clear that the facts of the case had been outlined by the prosecution before the Appellant pleaded guilty. After the facts were read out by the prosecution, the Appellant was recorded to have stated as follows: -

"Accused

It is true I had fake currency."

The learned trial magistrate then entered a plea of guilty on the Appellant's own plea and admission of the facts. The charge read out to the Appellant and the facts outlined by the prosecution were in tandem and cannot be said not to support each other. The facts disclosed the charge preferred against the Appellant. The Appellant admitted the facts specifically stating that it was true he had fake currency. He cannot be heard to claim that he was confused with the words fake and forged. The Appellant

through counsel has argued that the features that led to the currency being declared fake were not disclosed in the facts of the case and neither was the name of person who examined them. **MISS OKUMU** did not think that it was necessary for those matters to be disclosed at that stage. I agree with the learned counsel for the State, it was not necessary for the prosecution to State all the details of their case and the grounds that led the prosecution to declare the currency in question fake. The duty of the prosecution at the plea stage was to provide sufficient facts and circumstances of the case to enable the Appellant to know what charge he was facing and what it is that constituted the prosecution case against him in an outline. The details of who in particular examined the currency and what features they saw to arrive at the opinion that the currency was fake was a matter of details which could be supplied in evidence if the case was to be heard. The Appellant was at liberty to deny the charge when it was read to him and to deny the facts led by the prosecution but he not only pleaded guilty to the charge but admitted specifically that the currency was fake. I also find no merit in Appellant's counsel's submission that the currency was not before the Court. The Court ordered its disposal because it was before him even though not specifically so mentioned. Even if it was not before the Court, I find that the Appellant was not prejudiced in any way and that ground has no merit.

I find that the Appellant freely gave his plea of guilty and that the plea was unequivocal. The Appellant cannot now challenge the conviction entered against him and his appeal to that extent is incompetent.

On the sentence, learned counsel for the Appellant submitted that the sentence is harsh because the Appellant was a first offender.

MISS OKUMU on her part submitted that the sentence was legal and that the learned trial magistrate had taken into consideration that the offence was notorious and due to the circumstances of the offence, three years was not excessive.

The learned trial magistrate observed the circumstances of the offence. The fact that the Appellant had daringly made payment in compliance with a court order using fake money. The learned trial magistrate, however, made an observation that the offence was notorious. The record does not show the basis of that remark and therefore ought not to have been considered.

In addition, the learned trial magistrate stated that the offence of forgery under Section 349 of the Penal Code carried a maximum sentence of 7 years. He then gave a sentence of 3 years having taken into account the fact that the Appellant pleaded guilty to the charge and was a first offender.

It was a serious matter that the Appellant presented the forged currencies to the Court, the seat of justice, knowing them to be forged. The learned trial magistrate was quite justified to impose an imprisonment term in the circumstances of the case. Even though the sentence may have been harsh, it is nonetheless neither excessive nor oppressive bearing in mind that the Appellant is not remorseful for this offence. I decline to interfere with it. The Appeal against sentence is therefore dismissed.

Dated at Nairobi this 20th day of December 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

LESIIT, J.

JUDGE