

**IN THE HIGH COURT OF TANZANIA  
AT MTWARA**

**CONS. CRIMINAL APPEAL NO.47 & 48 OF 2007  
ORIGINAL MTWARA DISTRICT COURT  
CRIMINAL CASE NO. 179 OF 2005  
BEFORE: M.C. MTEITE, ESQ: RM**

1. ALLY SAIDI ALLY } ..... APPELLANTS  
2. ATHUMANI SELEMANI }

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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**DATE OF LAST ORDER – 25/10/2007**

**DATE OF JUDGMENT - 04/12/2007**

**JUDGMENT**

**MJEMMAS, J.**

The appellant Athumani s/o Selemani and four (4) others were arraigned before the District Court of Mtwara and charged as follows:

First count: The appellant – Athumani Selemani (as 1<sup>st</sup> Accused) was charged for the offence of purchasing forged bank notes contrary to section 348 of the Penal Code.

Second Count: (For the Second, third, fourth and fifth accused)  
Being in unlawful possession of forged bank notes contrary to section 348 of the Penal Code.

At the end of the trial the appellant who was the first accused person and the second accused person namely Ally s/o Said Ally were found guilty and convicted accordingly. Both were sentenced to imprisonment term of five years each. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused person's were acquitted. The appellant and his co-accused were dissatisfied with the decision of the District Court and hence the present appeal. Before the hearing of the appeal this court received information from Prison (Gereza Kiwanda cha Chumvi – Mtwara) that Ally Said Ally who was the first appellant had escaped from lawful custody in prison. His appeal was therefore dismissed for want of prosecution and the court proceeded to hear the appeal of the second appellant Athuman s/o Selemani.

The background of this matter is that on 10<sup>th</sup> September, 2005 at around 11.00 hrs the appellant issued twenty five (25) bank notes of TSh.10,000/= denomination to one Fitina Hassan with the intention of purchasing thirty five boxes of cigarettes. During her evidence Fitina said it was TSh.450,000/=. All in all, before issuing the cigarettes she counted the money and in the process she suspected the bank notes to be counterfeit or forged ones. She therefore, informed the appellant that the notes issued were not legal tender and thereafter the appellant ran away (according to Fitina) but he was arrested after raising alarm of "thief". The appellant was sent to Police Station where upon interrogation mentioned Ally s/o Said Ally (The first appellant who escaped from prison) as the one who gave him the said money to

purchase cigarettes. The Police followed the said Ally Said Ally who according to the information received from the appellant was staying in a Guest House called Panama. The Police searched his room and found eleven (11) bank notes of ten thousand shillings each, some of which had the same or similar numbers. The said "bank notes" were sent to the Bank of Tanzania for verification whereby it was established that the same were not legal tender and were not issued by the Bank of Tanzania.

The appellant appeared in person, unrepresented at the hearing of the appeal while the respondent – Republic was represented by Mr. Hyera, learned State Attorney. The appellant did not have much to say or add to his petition of appeal to this court. Of course after the learned State Attorney had made his submission the appellant responded by repeating some of the arguments raised in his petition of appeal. He has raised about four grounds of appeal which for purposes of clarity may be reduced into one and that is, there is no evidence that he had knowledge that the said "bank notes" were forged.

Mr. Hyera, learned State Attorney for the respondent Republic resisted the appeal.

According to Mr. Hyera, there is no dispute that the appellant was found in possession of forged bank notes of TSh.10,000/= amounting to Tsh.250,000/=. He went on to submit that there is no dispute that the said bank notes were forged and

that the appellant intended to use the same to purchase cigarettes in Mikindani area. The crucial issue, said Mr. Hyera, is whether the appellant was aware that the said bank notes were forged. Mr. Hyera-was of the opinion that the appellant was aware that the said bank notes were forged because of the following reasons. First, when the appellant was told by PW.2 that the said bank notes were forged he grabbed the money and ran away. That conduct shows that he had knowledge that the notes were forged. Second, the appellant was given the forged notes at Panama Guest House, Chikongola area within the Township of Mtwara but he did not use those bank notes around Mtwara Town instead he went to Mikindani area to buy cigarettes. Third, the appellant led the Police to the place where the first appellant was and when he (first appellant) was searched he was found with more forged bank notes so the appellant knew what was going on. Those were the reasons given by the learned State Attorney to show that the appellant was aware that the bank notes given to him were forged.

Let me say by way of passing that the reasons given by the learned State Attorney were the same reasons which were used by the learned Resident Magistrate to convict the appellant.

Section 348 of the Penal Code provides:

“Any person who, without lawful authority or excuse, the proof of which lies on him, purchases or receives from any person, or has in his possession, a forged bank note or currency note, whether filled up or in blank, knowing it to be forged, is guilty of an

offence, and is liable to imprisonment for seven years."

I agree with the learned State Attorney and even with the appellant that there is no dispute that the appellant was found in possession of forged bank notes which he intended or rather issued to purchase cigarettes at Mikindani area. The major issue for determination as correctly put by the learned State Attorney is whether the appellant had knowledge that the said bank notes were forged.

The trial Magistrate and the learned State Attorney subscribed to the view that the appellant was aware that the said bank notes were forged. On the other hand the appellant has insisted, during his trial and even in his petition of appeal that he was not aware that the said bank notes were forged. I have already mentioned the reasons given by the learned State Attorney and even the trial Magistrate in holding that the appellant was aware that the bank notes were forged. It was submitted that the appellant knew that the said bank notes were forged and that was the reason why he went to Mikindani area which is a little bit far from Mtwara Town where there are many big shops. The appellant explained in his defence during his trial that he went to Mikindani because he didn't know well Mtwara Town and that he was afraid that thugs would grab the money. In his petition of appeal, the appellant argues that he went to Mikindani not only to buy the cigarettes but also to take some private food items to his

home. According to the appellant he was a regular customer of PW.2's shop so he wouldn't use forged bank notes to her or to a shop in which he was living nearby.

It is a settled principle of criminal law that the prosecution is required to prove a case against an accused person beyond reasonable doubt. In the present case, and to be specific, on this ground which has been raised by the appellant, I think he has raised a reasonable doubt against the argument raised by the respondent Republic. If the appellant knew that the bank notes which were given to him were forged he wouldn't have gone to Mikindani area where he resides, is well known and above all to a shop which is near to his home. I think there is merit in that argument. The record shows that he stated that his residence was Mikindani area and that was not challenged by the prosecution. In addition to what I have said, the trial Magistrate allowed himself to be influenced by irrelevant considerations or issues which were not in evidence when he said that the appellant was aware that the bank notes were forged and that's why he went to interior places or shops where people are not aware of forged notes. The appellant told the court that he went to Mikindani area instead of Mtwara Town because he was afraid of thugs due to the big amount of money he had. The trial Magistrate ought to have directed his mind to that argument instead of bringing in irrelevant considerations or issues which were not in record or in evidence.

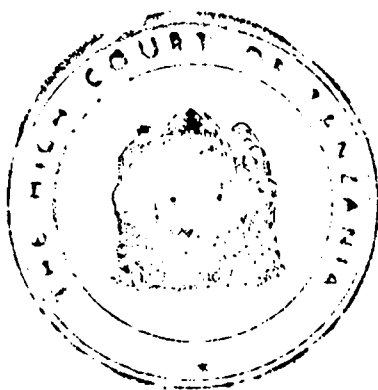
There is an argument that the appellant knew that the said bank notes were forged because when PW.2 informed him about the notes being forged he decided to run away. The appellant denies to have run away. However, there is evidence of PW.2 and PW.3 that the appellant ran away and he was arrested by PW.3. Let us assume or take that the appellant ran away. Is that sufficient reason to prove that he had knowledge that the money or bank notes which he offered to PW.2 were forged? I don't think so. It may not necessarily be for that reason. That could be one of the reasons but there are many others or explanations. Example, being told that the money or bank notes which he issued were forged, something which was different from what he knew or believed might have frightened him by realizing that he had been "used" and could be in trouble. That is one possibility and if he decided to run away it was not because he knew that the money or bank notes were forged but the realization that he had been "used" and he was in trouble. I said that could be one possibility or explanation, therefore, the argument that he had knowledge that the bank notes were forged because he ran away cannot be taken to be sufficient evidence to establish beyond reasonable doubt the appellant's guilt in that respect.

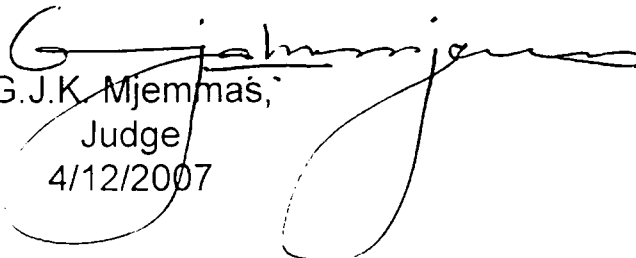
There is an argument that because he led the Police to where the first appellant was and he (first appellant) was found in possession of more forged bank notes than the appellant (who was the second appellant) knew what was going on. With due respect to the learned State Attorney I am unable to agree with

that reasoning. I think what the appellant did was the right thing under the circumstances. If the appellant believed that he was innocent and had been used without his knowledge by the second appellant to transact an illegal business the right thing to do was to show the law enforcers the culprit. Luck being on his side the culprit was found in possession of more forged bank notes. If the appellant had done the opposite I would buy the argument that he knew what was going on and that's why he attempted to cheat or mislead the authorities. I had the opportunity of reading his cautioned statement and found out that he was consistent in what he said to the Police and what he said in his defence.

From the foregoing I am of the settled mind that the case against the appellant was not proved beyond reasonable doubt as required by the law. I therefore quash his conviction and set aside the sentence of five years imprisonment imposed on him. I further order that the appellant be released forthwith unless he is held for other lawful cause.

Order accordingly.



  
G.J.K. Mjemmas,  
Judge  
4/12/2007



Date: 4/12/2007

Coram: Hon. G.J.K. Mjemmas, J.

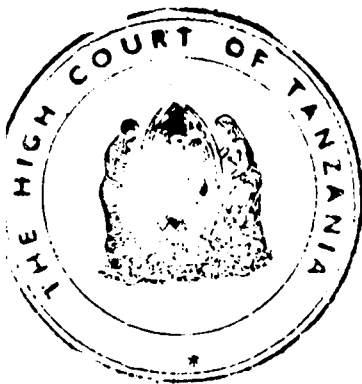
For the Republic: Mr. Hyera, State Attorney

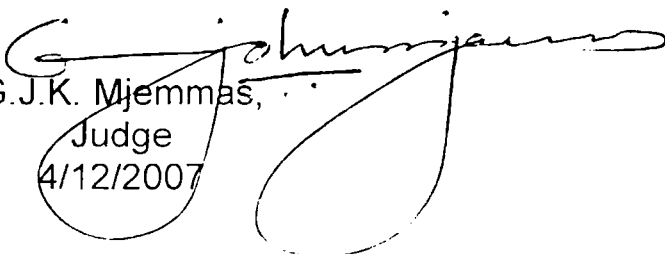
Appellant: Present

B/C: Nanyanga, RMA

Mr. Hyera: This appeal is coming for judgment and we are prepared.

Order: Judgment delivered in Chambers this 4<sup>th</sup> day of December, 2007 in the presence of Mr. Hyera, learned State Attorney and the appellant.



  
G.J.K. Mjemmas,  
Judge  
4/12/2007