

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

**CRIMINAL APPEAL NO.85 OF 2008
(*Originating Korogwe District Court
Criminal Case No.165/2007*)**

HASHIMU JUMA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

Date of last order: 3/08/2009

Date of Judgment: 7/11/2009

JUDGMENT

MUSSA, J.

In the District Court of Korogwe, the appellant was arraigned for being in possession of forged bank notes, contrary to section 348 of the Penal Code, chapter 16 of the laws. The particulars alleged that on the 5th day of November, 2007 at Mombo Jitengeni, Korogwe District, without lawful authority or excuse, the appellant was found in possession of four forged bank notes; each of shs.10,000/= denomination. The appellant denied the accusation and; so the prosecution featured a total of three witnesses in its efforts to prove it. At the close of the contested trial, the appellant was convicted and sentenced to term of five years imprisonment. He presently appeals upon a petition comprised of ten points of grievance and; as

he did not wish to be present, the matter was proceeded in his absence.

The case for the prosecution was, largely, free of any controversy and; indeed, it was undisputed that at Mombo is situate a shop jointly owned by Furahini Hashimu Bendera (PW.1) and her husband, Hashim Mzee Waziri. On the fateful day, around 7.00p.m, both were at the shop; even though, Furahini was the one attending customers, whereas, Hashimu was just sprawled about at the corridor. Moments later, a customer had called up at the shop and; incidentally, he was none other than the appellant. Upon arrival, the appellant enquired about the price of a half a kilogramme of sugar and blended tea, of which, he was told by Furahini. Desirous of taking a purchase, the appellant, then, took out a shs.10,000/= note; giving it to the shop keeper. Furahini was, kind of, reluctant accepting that particular note and; taking a closer look, the same was without the usual hidden symbol of an animal to be found with all genuine bills. That being the reality of the moment, Furahini felt she had to consult her husband, who was within reach, any way. It took just a fleeting glance for Hashimu to determine that the bank note was, after all, counterfeit. He then subjected the appellant to gruesome questioning, if I may say so, of which culminated into the latter being, additionally, subjected to a body search. And, the search was to reap positive results, much as; the appellant was found in possession of three other bank notes of similar quality. The bank notes bearing Nos. AK 5802330; AK 5802332; AK 5802338 and;

AK 58002330 were, collectively, adduced into evidence, marked "P1". As for the appellant, he was apprehended there and then.

There was some further prosecution evidence derived of a woman police constable, called, Mkunde (PW.3); to do with the manner in which investigations were handled. The impugned bills, four in number, were taken to the forensic bureau of the Criminal Investigation for an expertise analysis. The results were positive, in that, a document examiner, namely, Hamad K.H. Hamad was of the opinion that the same were counterfeit. A report to that effect was produced into evidence by the witness Mkunde. That being the whole of the evidence in support of the accusation, the prosecution drape was drawn closed.

In reply to the storm as heaped unto him, the appellant was brief but; to say the least, his defence was one in which he sought to completely disassociate from the occurrence. If I understood him well, he did not quite concede the accusation that the impugned bank notes originated of him. Rather, as he put it, he had sold his goat and two hens from which transaction, he realized a sum of Shs.142,300/=. Such was stuffed in his pocket as he cycled towards township Mombo to attend a sickly friend. Then, suddenly, he was way-laid and beaten up by some young fellows he could not name. The unidentified stole a sum of shs.40,000/= from his pocket and then; apparently out of the blues, took him to the police station to place at his door the accusation that took him to gaol. And so, the

impugned bank notes, according to him, were derived of these unknown persons in the wake of subjecting him to atrocities.

As hinted upon, on the whole of the evidence, the learned trial Magistrate accepted the version as told by the prosecution witnesses, hence the conviction and sentence. In his lengthy petition, the appellant is very critical of the trial court; having to convict, as he formulates, upon a doctrine of presumption of innocence. Indeed, going through the body of the judgment, there is a portion that relates to this:-

"So the accused person defence has utterly (sic) failed to shake the prosecution evidence so as to invite the court to invoke the doctrine of presumption of innocent (sic)."

The language ailment quite apart, I must concede a complete loss as to what exactly the Magistrate meant by the extract. But, as I will venture upon within a short run, presiding officer was clearly heading towards no good. To reflect aback on the appellant's petition, the other points, worth a consideration were, first, that it was not upon an accused to establish his/her innocence; rather, it was the duty of the prosecution to so prove an accusation and; second, that it was not within his contemplation that the bank notes were counterfeit. Miss Naiman, learned state attorney, for the Republic was fully supportive of the conviction and sentence, as I conceived her argument, upon a generalized assumption that the evidence was telling against the appellant.

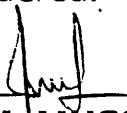
Addressing the points of contention, one has to be clear, first thing, of the requirements of offence laid at the appellant's door and; for that matter I reproduce the provisions of section 348 of the Penal Code in full:-

*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 bank, **knowing it to be forged**, is guilty of an offence, and is liable to imprisonment for seven years.*

And so, I should imagine, upon the expression; "*the proof of which lies on him*", the presiding officer seems to have discerned a dire for the accused to establish his innocence and; hence the invocation of a doctrine, hitherto unheard of in criminal jurisprudence. True; though, the provision imports kind of a burden on the person accused to discharge that possession was upon lawful authority or excuse. That onus, if I should adjudge, is not quite heavy and; for that matter, it is discharged upon reasonable account that lawful authority or excuse was more likely than not. But, perhaps, above all, ahead of the person accused getting into that onus, it is contingent upon the prosecution to embark on a heavier burden; that of establishing that the accused knew that the notes held in possession were forged. That is to say, for the court to get into considering whether or not possession of counterfeit notes was upon a reasonable account; it must be conclusively established, first

hand, that the person accused had knowledge of the falsity. No doubt, the latter burden, as always, remains throughout with the prosecution.

That said, it seems to me there is insufficient material in the situation at hand with which to, at least, impute that the appellant had knowledge that the notes he was having possession were counterfeit. Granted that he might have told a weak defence but; as it is often said, a case for the prosecution stands or falls entirely on its feet. The appellant ought to have been accorded a benefit of doubt and; from where I am standing, the conviction cannot be sustained. The appeal succeeds results of which the conviction and sentence are, respectively, quashed and set aside. The appellant is to be released from custody forthwith unless held there for some other lawful cause. It is so ordered.

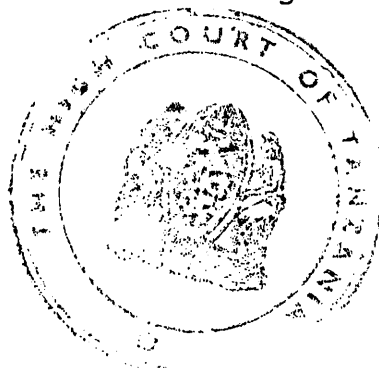

K.M. MUSSA, J
7/11/2009


Before: Mussa, J

Appellant: Absent does not wish to be present

Respondent: Miss Kato

Judgment delivered in the presence of Miss Kato.




K.M. MUSSA, J
7/11/2009