REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 135 of 2009

(From original conviction and sentence in Criminal Case No. 1027 of 2009 of the Principal Magistrate's Court at Molo - S. M. S. Soita (P. M.)

JOSEPHAT SHIKUKU…………………………………………………………………..APPELLANT

VERSUS

REPUBLIC………………………………………………………………………………RESPONDENT

Criminal Practice and Procedure *- charge - duplicity of charge - where charge sheet charges accused person of burglary and stealing contrary to Section 304(2) and 279(b) of the Penal Code - whether charge as drafted is bad for duplicity - Section 134 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya)*

JUDGMENT

The Appellant was jointly charged with four others for the offence **Burglary and Stealing** contrary to **Section 304(2) and 279(b)** of the **Penal Code.**

The particulars were that on the night of 22nd April 2009 at Kasarani Elburgon in Molo District within the Rift Valley Province, jointly broke and entered the dwelling house of John Nderitu with intent to steal therein and did steal therein a TV make GLD, a DVD Panasonic, a Battery, Radio Cassette, Nets, two mattresses, four blankets, safari boot and fertilizer all valued at Kshs 26,500/= the property of the said John Nderitu. There was also an alternative charge against the Appellant's co-accused - or handling stolen property contrary to Section 322(2) of the Penal Code.

Of the five accused only the Appellant pleaded guilty and was convicted *"on each of the limbs and the accused to serve 7 years on each of the limbs."* The Appellant has appealed to this court on only one ground-sentence. In terms of **Section 348** of the **Criminal Procedure Code**, upon a conviction and sentence on a plea of guilty one can only appeal on the ground of either *extent* or *legality* of the sentence. The Appellant wants his sentence reduced. He is remorseful. In his submission to this court the Appellant stated the complainant had informed him that he would forgive him. He had however by this time pleaded guilty and had been convicted and sentenced as stated above. The complainant is apparently a large-hearted man. He forgave the appellants four co-accused who were subsequently acquitted under section 204 of the Penal Code. Perhaps the Appellant may have got the same favour if he had not pleaded guilty. That is however water under the bridge.

Although the Appellant did not raise it, and learned State Counsel did not notice it either, the appellant's appeal should succeed on one ground only, and that ground is one of duplicity.

The rule against duplicity arises from the provisions of **Section 134** of the **Criminal Procedure Code**. It provides-

> ***S. 134. "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged."***

The purpose of the rule which is one of fact and degree to is to enable the accused person to know the case he has to meet. The application of the rule to a charge under **Section 322(2)** *(handling stolen goods)* was considered in the case of **Kasyoka** ***vs.*** **Republic [2003] K.L.R. 406** where the Court came to the conclusion that the Appellant was convicted on a duplex charge and no one can state for sure which of the two offences he was convicted.

In the old case of **CHERERE s/o GUKULI** ***vs.*** **REPUBLIC (1955) E.A. 478**, the Court of Appeal for Eastern Africa held -

> ***"Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code. The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted."***

The court went to say -

> ***"We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what he has been charged, nor of what offence he has been convicted. It is indeed, very difficult to say that a breach of an elementary principle of criminal procedure has not occasioned a failure of justice."***

Whereas **Section 135(1)** of the **Criminal Procedure Code** permits the joinder of counts in one charge or information, subsection *(2)* thereof requires that where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

In that case, two offences - burglary and stealing are charged in the alternative in one count. The particulars of each such charge are not set out in a separate paragraph as enjoined by **Section 135(2)** of the **Criminal Procedure Code.** That is a statutory requirement, and failure to do so is in my opinion fatal. It causes prejudice to an accused person.

Let us take the Appellant's case. The punishment for burglary under **Section 304** of the Penal Code is imprisonment for a period not exceeding seven years. On the other hand the punishment for stealing contrary to **Section 279(b)** the offender is liable to imprisonment for a term of fourteen years. The Appellant was convicted to seven years on each limb? On what basis? None at all. Firstly maximum sentence for the offence of burglary is 7 years. Why is he given the maximum? Is it to appear fair - when he is given 7 years, half of the term for stealing? The practice of charging two or more offence to the alternative in one charge is not only prejudicial to an accused person but is also bad for duplicity as it contravenes S. 135(2) of the Criminal Procedure Code and in this case the charge also caused prejudiced to the Appellant.

For those reasons the appeal is allowed, the conviction quashed and sentence set aside. The Appellant be set free unless otherwise lawfully held.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 23rd day of July 2010

M. J. ANYARA EMUKULE
JUDGE