



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Misc. Appli. 55 of 2008 & 54 of 2008 (Consolidated)

JOSEPH MBUGUA WAWERU.....1ST APPELLANT

CHARLES WACHIRA MATHENGE.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.

*229/05, 48/08, 976/05, 441/05, 1002/05, 1008/05, 1053/05, 1121/05, 127/05, 2259/06, 2258/06, 423/07
of the Chief Magistrate's Court at Nairobi).*

R U L I N G

Joseph Mbugua Waweru(1st applicant) and Charles Wachira Mathenge (2nd applicant) have made an application by way of Chamber Summons under Section 135(1) and Section 79(a) of the CPC seeking for the consolidation of Criminal Cases 229/05, 48/08, 976/05, 441/05, 1002/05, 1008/05, 1053/05, 1121/05, 127/05, 2259/06, 2258/06 and 423/07. In their supporting affidavits which are similar, word for word, the applicants state that they were arrested in the year 2005 and subsequently charged with obtaining money by false pretences in all the aforementioned files. They applied before the trial courts to have the cases consolidated – which application was heard by the Chief Magistrate Mr Aggrey O. Muchelule and on 20th July, 2005 he directed that two charge sheets should be prepared to accommodate 18 counts in one and 17 counts in the other in relation to criminal 1121/05, 1122/05 and 127/05. He further directed that criminal case No. 977/05, 978/05, 1008/05, 976/05, 441/05, 1053/05, 1002/05 and 438/05 be consolidated in one charge sheet and tried together. The copy of ruling is annexed and marked JMW2. However this was not done. The applicants contention is that the cases are founded on the same facts, series, same nature and same environment and that in criminal case No. 229/05, 1121/05, 48/06 and 2258/06 they are jointly charged whilst in criminal case No. 976/05, 441/05, 1002/05, 1008/05, 1053/05 and 2259/06, the first applicant appears alone.

The other reason for which the applicants seek consolidation is so that they can be granted one surety in the consolidated files, pointing out that in criminal case No. 423/07, the second applicants were granted bond of Kshs 50,000/- with a surety whereas first applicant was not granted bond. They explain that the consolidation will ease the burden of bonds especially taking into consideration the period of their incarceration which amounts to over one year in remand custody. They also fear that this matter might take a long unpredictable period overlapping the maximum sentence set for the offences allegedly committed. Applicants view the separation of their files as a move by prosecution to oppress them so that

they do not come out of prison custody.

The application is opposed and the learned State Counsel Miss Gateru submitted that the applicants have several counts in several cases so that although Section 135 Criminal Procedure Case recognized consolidation of cases where the same have started, then that becomes discretionary and not mandatory. She pointed out that all the files apart from 1053/05 have commenced hearing and are therefore partly heard – in Criminal Case 299/05, five prosecution witnesses have testified in 48/06, two witnesses have already testified in 976/05 three witnesses have testified in 441/05, four witnesses have testified in 1002/05, one prosecution witness has testified, the same with 1008/05. In 1121/05, five prosecution witnesses have already testified in 259/06, three witnesses have testified in 2258/06, five witnesses have testified in 423/07, four witnesses have testified, and 127/07 five witnesses have already testified. Miss Gateru submits that in the light of this, then consolidation would cause a lot of inconveniences to the parties and witnesses who are all different in all the counts and consolidation would lead to the cases starting afresh as applicants would require to plead afresh to the consolidated charges and this would result in delay.

The learned State Counsel states that consolidation would overload the charge sheet especially considering Court Appeal recommendation that ideally a charge sheet should not have more than 12 counts to avoid overloading the charge sheet and not prejudice the applicants. As regards first applicant, Miss Gateru submits that in the matters where he has not been granted bond, he should make his application for bond in the lower court as these are bailable offences. First applicant's response to this is that in criminal case No. 1121 of 2005, there are more than fifteen witnesses and the trial magistrate Mrs Mutoka has been transferred so the hearing can be De Novo. He further stated that in 1158/05, very few witnesses had testified and so it could also be consolidated in Criminal 1121/05.

Section 135(1) provides that:-

“Any offences, whether felonies misdemeanours, may be charged together in the same charge or information, if the offences charged are founded on the same facts or forum or are part of a series of offences of the same or similar character.”

In all the cases that are set out the applicants have been charged either jointly or separately with the offences of obtaining money by false pretences contrary to section 313 Penal Code. The offences were alleged to have occurred on diverse dates and the complainants are different in each file and count. Criminal case 1121/05 has eleven counts, it is not denied that other five witnesses have testified, the prosecution intends to call fifteen witnesses. I have also confirmed from the record that this matter has been handled by Mr R. Mutoka – Senior Principal Magistrate who has since been transferred from this station and is currently at Kiambu Law Courts. It is against this background that applicants now say the matter could be heard De Novo and rightly so they opt to exercise that right under Section 200(3) Criminal Procedure Code which recognizes that where another magistrate takes over the hearing of a matter which has been partly heard by another, the court has a duty to inform the accused person of the right to have a De Novo hearing or even a recall of witnesses who had already testified before the other magistrate. In the light of this then, all the arguments raised by the learned State Counsel with regard to criminal 1121/05 would not hold except this, if it was to be consolidated with another matter, how many counts would the charge sheet end up with? The Court of Appeal has recommended that a charge sheet should not exceed twelve counts so as not to cause prejudice to the accused person. Indeed that was the finding in ***Ochieng versus Republic 1985 KLR*** that:-

“It is undesirable to charge an accused person with so many counts in one charge sheet as this may occasion prejudiceUsually, no more than twelve counts should be laid in one charge sheet.....”

Would this be in conflict with the finding in ***Ngibuini versus Republic 1987 KLR page 517?*** I think **Ngibuini's** case can easily be distinguished from **Ochieng's** case because the material issue in Ngibuini's case was with regard to the sentencing and indeed that is why the court of Appeal allowed for consolidation on the basis that having separate charges against the accused deprived the accused person

the possibility of serving the sentences concurrently. The other distinguishing feature is that in Ngibuini's case there were a total of eight(8) counts in two separate files – that did not exceed 12 even if consolidated. Criminal case 1121/05 has eleven counts and this is where the applicants were jointly charged. The other file where they are jointly charged is Criminal 299/05, which has 12 counts – so that would already overload the charge sheet. The other file 48/05 where they are jointly charged has four counts, so that consolidation with 1121/05 or 299/05 would again go against the **Ochieng** principle. The same goes for 2258/05 where the applicants are jointly charged – there are twelve (12) counts in that charge sheet. In 127/05, applicants are jointly charged with six counts of obtaining by false pretence. What about the files where the first applicant is charged separately – would consolidation be a viable option? In criminal case 976/05, the 1st applicant is charged with four counts of obtaining money by false pretences – the matter was investigated by DCIO Kilimani. Three witnesses testified before Miss L. Mutende – Principal Magistrate who has now been transferred to Mombasa Law Courts, so that if another magistrate were to take over the hearing and applicant was to opt for De Novo hearing under Section 200(3) Criminal Procedure Code, the witnesses would have to come to court again. In 1053/05 first applicant faces one count of obtaining by false pretences. The complainant is different from 976/05, the dates are different and the matter was investigated by Gigiri Police Station. In 1053/05, hearing has never commenced. In 1008/05, the first applicant is charged alone on one count of stealing by agent – this is a different charge and the matter is in fact investigated by Central Police Station. In my view this particular file is completely unrelated to the others in nature and character and has no place for consolidation. In any event one witness had already testified before Mr Kombo – Resident Magistrate. Certainly 1008/05 has no place for consolidation – it is completely unrelated. In criminal case 1002/05, applicant is charged with obtaining money by false pretences being two counts. The matter was investigated by PCIO Nairobi area – one prosecution witness has testified. The complainant is a different one from any of the others in the earlier files. In 2259/06, applicant is charged with ten counts of obtaining money by false pretences – there are several different complainants, the offences date between 4th November, 2004, through February 2005. The matter was investigated by Kasarani police station. In 423 of 2007, the matter had three counts, two are obtaining by false pretences, it had proceeded for hearing before Mrs Murage and had been investigated by OCS Langata and four witnesses had testified and on 6th March, 2008 the prosecution indicated he only had three more witnesses to call – that is a matter which is near conclusion. In 441/05, four witnesses have testified before Miss Atambo and on 10th March, 2008 the prosecutor informed the court that he only had one more witness left – surely why turn back the hand of time? The upshot of the matter where first applicant is charged alone, is that there are different complainants the dates are different, the investigations were carried out by different police stations so if one were to allow for consolidation, then it would become very cumbersome for the various investigating officers to coordinate and get all the witnesses in a timely manner and in fact that would probably cause even greater delay. The only two matters viable for consolidation would be 1053/05 and 1002/05 which have not made much progress in hearings and investigations were done by Central Police Station and PCIO Nairobi area – indeed Central Police Station is under the jurisdiction of PCIO Nairobi area and so coordination in the matter would be relatively easy and charge sheet will not be overloaded. It is only in these two matters that I would allow for consolidation and I so order.

It is my considered view that were consolidation to be allowed in all the other matters, it would make the trial a very cumbersome process both for the trial court and for the prosecution. The charges did not all spring from the same transaction and there is certainly nothing to suggest that the witnesses to be called will be the same ones and investigations are different and from different police stations. I sincerely sympathise with the applicants as they seem to have their hands full, but where consolidation would have been possible, especially because the charges were of the same nature and the matters investigated by the same police station, the number of counts, if consolidation were to be allowed would have exceeded the Court of appeal recommendation of a total of twelve counts. So for the purposes of hearing of the cases. I decline to order for consolidation. What about for the purposes of bond application? The applicants lament is that due to the multiplicity of the files, it has been extremely difficult for them to get sureties. That is probably true, getting a host of sureties for all the files would be an uphill task.

I would in the circumstances order that purely for purposes of bail application only, all the matters in which the applicants are jointly charged before the Chief Magistrate's Court Nairobi, be placed before the Chief Magistrate on 28th May, 2008 purely for purposes of bail application so as to give a consolidated

bond term in one file which would then apply to all the others.

In the matters before the Chief Magistrate's Court Nairobi where the first applicant is charged separately, let the same all be placed before the Chief Magistrate Nairobi on 28th May, 2008 purely for purposes of consolidated bail application so as to give a consolidated bond term in one file which would then apply across the other files.

Consequently for clarity purposes the orders are as follows:-

- a. Criminal case 1002/05 and 1053/05 be consolidated and heard together. Files be placed before Chief Magistrate's court Nairobi for the purposes of consolidation.***
- b. All files involving first and second applicant jointly be placed before Chief Magistrate's court Nairobi for purposes of hearing a consolidated bail application.***
- c. All files involving first applicant where he is charged in Chief Magistrate's court Nairobi be placed before Chief Magistrate's court Nairobi for purposes of consolidation of bail application only.***
- d. Matters be mentioned on 28th May, 2008 before the Chief Magistrate's court Nairobi.***

Delivered and dated this 26th day of May 2008 at Nairobi.

H.A. OMONDI

JUDGE.