REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO. 250 OF 2004
(In the matter of an intended appeal)
Between

VICTOR MUISYO ……APPLICANT

and

REPUBLIC ……RESPONDENT

(Intended Appeal from conviction(s) and sentence(s) of the
Chief Magistrate's Court at Nairobi in Criminal Case
No. 3088 of 2003 & 150 of 2004)

RULING

The applicant VICTOR MUISYO seeks in pertinent orders as follows:-

> ***"THAT Criminal Case Numbers 3088 of 2003 and 150 of 2004 against the applicant be consolidated into one case."***

It is supported by an affidavit sworn by **IAN GAKOI MAINA**, Advocate for the applicant. The application was opposed.

The applicant argued that the two cases against him should be consolidated in the interest of justice. That the witnesses in both cases are the same and that the complainant is StanBic Bank. That it would be expeditious if both cases were heard simultaneously.

Miss OKUMU for the Respondent objected to the application on grounds the complainants were different and further that consolidating both cases would render the total number of counts in the charge to be 18. She cited **OCHIENG –V- REPUBLIC 1985 KLR 253** in support of her submission.

I will begin with the case cited by **Miss Okumu, OCHIENG –V- REPUBLIC (Supra)** that case is distinguishable from this one. In the cited case, the applicant had been charged with 44 counts. The court held at page 258:-

> **"It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed. Usually, though not invariably, no m ore than twelve counts should be laid in one charge sheet … Moreover the possibility of embarrassment and prejudice to the defence cannot be excluded when there are numerous counts because of the danger of an assumption that because the accused faces so many charges, there must be substances in some of them."**

From the language used by the Court of Appeal in its holding, the court was merely giving a direction

of practice and not stating '***law***' as it were. It was a recommendation that in any trial, no more than 12 counts should be tried in one charge. From this case it is clear that there are certain factors to be taken into consideration and certain principles to be applied. First, it is clear that the discretion to determine the number and nature of counts to be tried in one charge is the province of the prosecution. This of course is subject to any direction or order the trial court may give in that regard. Secondly, the prosecution may choose to try some of the counts and withdraw others under Section 87(9) of the Criminal Procedure Code, which, if so withdrawn, would entitle the prosecution to bring them again if necessary. Thirdly, numerous counts may cause embarrassment and prejudice to the defence because of the danger of an assumption that because the accused faces numerous counts there must be substance in some of them.

The case of **OCHIENG –V- REPUBLIC** must be considered along the principles applicable in the exercise of courts discretion in determining the issue of joinder of counts in a charge as innumerate in the case of **NGIBUINI –VREPUBLIC 1987 KLR 517**. In that case, **NYARANGI, GACHUHI JJA and MASIME Ag. JA** held:-

> ***"1. Where the offences are founded on the same facts or form or are part of a series of offences of the same or similar character, they ought to be charged together.***
>
> ***2. The court has the discretion to direct that offences in the same charge or information be tried separately where it i s of the opinion that the accused may be embarrassed in his defence or that for any other reason it is undesirable .***
>
> ***3. Where there is a single complex of offences connected in kind and time it is undesirable although not unlawful for the accused to be arraigned on separate trials…"***

In this case, the charges against the applicant in both cases are of similar character. It does appear in my view, that the transactions involved in each charge is different from each other. However the complainant is basically the StanBic Bank who was the applicant's employer.

Considering **NGIBUINI's case** it would appear that the applicant's application to have both cases consolidated is merited. It is undesirable to have many counts in one charge. However it is also undesirable to try separately offences which are the same or of similar character or which are related in kind. Considering these factors including the fact that the total number of counts that may result once the two cases are consolidated will not be excessively many I would find that it will be favourable in the circumstances of these cases to have both cases tried together.

I will allow the application and order that the two cases quoted herein filed against the applicant be consolidated and tried together.

Orders accordingly.

Dated at Nairobi this 8th day of July 2004.

LESIIT J.,

JUDGE

Read, signed and delivered

In the presence of

LESIIT J.,

JUDGE