REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 465 OF 1999

SAMUEL MUTINDA KASYOKA...……… APPELLANT

VERSUS

REPUBLIC………………………………RESPONDENT

(From original conviction and sentence in Criminal Case No 1143 of 1999 of

the Chief Magistrate's Court at Nairobi)

JUDGMENT

The appellant was charged in the court below in count 1 of theft contrary to section 275 and in the alternative with handling stolen property contrary to section 322 (2) of the Penal Code and after trial was convicted of the alternative charge. In Count III he was convicted of obtaining by false pretences contrary to section 313 of the Penal Code. He was sentenced to 9 months imprisonment in respect of the conviction on count III and fined shs 20,000/- or in default ordered to serve 4 months imprisonment in respect of the conviction on count I. His appeal to this Court is against conviction and sentence.

Learned state counsel has, quite properly conceded the appeal against conviction on count III because, in my view, there was no evidence to prove any false pretence with regard to that count. In the premises the appeal against conviction and sentence on that count is allowed, the conviction quashed and sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

With regard to the conviction on the handling charge (contrary to section

322(2) of the Penal Code) it is claimed in the amended petition of appeal that the learned trial magistrate erred in law and fact in convicting the appellant on the basis of a fatally defective charge sheet; that the alternative charge to count I as drawn does not disclose an offence created by section 322 (2) of the Penal Code and is bad in law for duplicity; that the learned trial magistrate erred in law and fact in convicting the appellant on the basis of circumstantial evidence when the totality of the testimony did not lead to one inference only, that is the appellant's guilt; that he erred in disregarding other co-existing facts, which if taken into consideration would weaken the inference of guilt such as the fact that the appellant had not withdrawn 60% of the proceeds of the cheque in question, although he had an opportunity to do so; that having made a finding of fact that the appellant was a victim of fraudsters, he could not legally and safely return a verdict of guilt on circumstantial evidence and that the learned trial magistrate erred in law and fact in making a finding without any evidential material whatsoever that the appellant knew the cheque in question was stolen. It is finally alleged that the sentence meted out was harsh and excessive.

The particulars of the alternative charge in count I was that on the 3rd May 1997 at Barclays Bank of Kenya, Queensway Branch Nairobi, jointly with others not before the Court, otherwise than in the course of stealing, dishonestly received or retained a Banque Indosuez Cheque No 008999, valued at Shs 6/30 knowing or having reason to believe it to have been stolen or unlawfully obtained.

In his submissions in support of the appeal, the appellant's learned counsel (Mr Kilukumi) attacked the charge as framed and said that it was bad for duplicity. He said that the duplicity arose from the use of the words 'received or retained' in the same count which he contended had the effect of charging two offences in one count, a situation which he said the law does not permit.

In reply Mr Monda submitted that the fact that a charge sheet was defective was not necessarily fatal to a conviction on such a charge. He said that the real test in a case where it is alleged that a charge was duplex was always whether the accused was able to understand the offence he faced.

In support of that contention Mr Monda cited the decision of the Court of Appeal in Criminal Appeal No 53 of 2002 (*Dickson Muchino Mahero v Republic*) in which the Court considered whether the duplicity created in a charge under section 46 of the Traffic Act by including in the samecount the various ways of managing a motor vehicle which may give rise to the offence of causing death by 'dangerous driving' was fatal. In that case the Court after considering various authorities, ultimately came to the conclusion that the particular appellant in that appeal understood the charge he faced as demonstrated by the fact that he had asked relevant questions to the charge and had not in any way been prejudiced (by the manner had been drawn). In the event the Court found the conviction for

the offence of causing death by dangerous driving proper.

But the same Court (albeit with a different bench) in the case of *David*

Ngugi Mwaniki v Republic (Criminal Appeal No 68 of 2001) had earlier concluded that a charge under the same section ie section 46 of the Traffic

Act, framed in the same manner as is described in the *Mahero* case was in law invariably and incurably duplex and a conviction based thereon could stand.

Both decisions in the *Mwaniki* and *Mahero* cases consider the same point but in my view reach to conclusions, which are in conflict with one another.

The *Mwaniki* case predates the *Mahero* one and was in fact considered in the latter. However, I do not see that it was expressly overruled. Given those circumstances the position in law with regard to the issue of duplicity in offences under section 46 of the Traffic Act is not as clear as Mr Monda thinks. In my view there is a clear need to clarify the position in order to give an indication to the Courts that are bound by Court of Appeal decision as the correct position in law.

In any event, a careful reading of the judgment in the *Mahero* case will show that the decision of the Court revolved around the peculiar provisions of section 46 of the Traffic Act and does not purport to lay down a general law on the issue of duplicity. It certainly does not apply to the special circumstances of this case in which by the very nature of the offences created by the relevant section ie section 322(2) of the Penal Code, different considerations must surely arise.

As far as I can see, the basic difference between the two sections (ie section 46 of the Traffic Act and section 322(2) of the Penal Code is that whereas section 46 of the Traffic Act creates one offence mainly 'causing death by dangerous driving' ie according to the interpretation given by the Court of Appeal in the *Mahero* case, section 322(2) of the Penal Code clearly creates two offences namely (a) that of 'receiving' and (b)''retaining'. It is on account of that distinction I consider what was stated by the Court of Appeal in the *Mahero* case regarding an offence under section 46 of the Traffic Act ought not to be blindly applied to an offence under section 322(2) of the Penal Code.

The rule against duplicity arises from the provisions of section 134 of the Criminal Procedure Code. The section provides:-

"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 such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

As stated in the *Mahero* case the purpose of the rule which is one of fact and degree is to enable the accused to know the case he has to meet. The application of the rule to a charge under section 322(2) was considered by the Court of Appeal in the case of *Hamisi Bakari and the Republic* (Court of Appeal Criminal Appeal No. 217 of 186) in which the Court made reference to *Archbold* 39th Ed P 883 where there is a specimen indictment for an offence under the English Provision similar to our section 322(1). The specimen indictment reads:-

"Statement of Offence

"Handling stolen goods, contrary to section 22 (1) of the Theft Act. 1968.

Particulars of Offence

AB on the ……day of ……19, ……. Dishonestly received certain stolen goods, namely a bag (belonging to C D) knowing or believing the same to be stolen goods.

The above count will suffice where there is clear evidence of possession by the defendant of the goods alleged to have been stolen. Where, however, the prosecution desire to rely also on the other limbs of the offence of handling a second count should be added."

That second limb of the offence according to *Archbold*, should read:-

"Statement of Offence

Handling stolen goods, contrary to section 22(1) of the

Theft Act 1968.

Particulars of offence

A B, on the ……. day of … 19 ……, dishonestly undertook or assisted in the retention, removal, disposal or realization of certain stolen goods namely a bag (belonging to C D) by or for the benefit of another, or dishonestly arranged so to do, knowing or believing the same to be stolen goods"

In the *Hamisi Bakari* case (above) the court stressed the importance of making the distinction between 'receiving' and''retaining' and went on to criticize both the learned trial magistrate and the High Court for failing to deal with the difference. Without going into the fine details of the judgment I would observe that in the end, the court found that both the learned trial magistrate and the High Court dealt with an offence with which the appellant had not been charged, the charge he faced having been one of 'receiving' while both the learned trial magistrate and the

High Court found that the appellant''retained' the items the subject of the charge.

The position in the instant case is slightly different from that obtaining in the *Hamisi* case in that whereas in the former, the charge was in itself not considered duplex, there is an obvious duplicity in the latter in that the two offences created by section 322(2) of the Penal Code are charged in the same count.

In the case of *Cherere s/o Gukuli v Republic* (1955) 22 EACA 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 no merely formal but substantial. Where 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 same Court went on to state:-

“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 is 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.”

In his submissions Mr Monda argued that the appellant, himself an advocate of this Court of some standing, was represented by counsel and in those circumstances it could not be said that he was not aware of the offence he faced. However, as observed by the Court of Appeal in the case of *David Ngugi Mwaniki v Republic* (above) it does not matter that the accused was (an advocate and) was represented by an advocate right from the beginning of the trial and the advocate should have, but did not, raise objection to the charge.

It is also clear that in the instant case, the learned trial magistrate did not attempt to make any finding as to what offence the appellant was charged with or indeed what he was convicting him of. He merely stated that he found the accused guilty and convicted him as charged under section 322(2) of Criminal Procedure Code. Considering the nature of the offence with which the appellant was charged, what the learned trial magistrate stated was not sufficient to identify which offence the appellant had been convicted of. It is my view that the learned trial magistrate could have saved himself a lot of trouble if, had he thought of the matter, he had invoked the provisions of section 188 of the Criminal Procedure Code to convict the appellant of either of the two offences if he thought any of them was committed. But as it is, the appellant was convicted on a duplex charge and as the matter now stands no one can state for sure of which of the two offences he was committed. In my view, such conviction should not be allowed to stand. The appeal is accordingly allowed, the conviction quashed and sentence set aside. The fine paid is to be refunded to the payer.

Dated and delivered at Nairobi this 20th day of June, 2003

T. MBALUTO

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JUDGE