



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 174 OF 2015

ALISTIDE BRILLANT NKOUMONDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1068 of 2015 by Hon. Mr. Daniel Ogembo the Chief Magistrate Nairobi Law Courts dated 5th October, 2015)

JUDGMENT

Alistide Brilliant Nkoumondo, the Appellant herein appeared before the Chief Magistrate's Court at Nairobi vide Criminal Case No.1064 of 2015 on 5th October, 2015 to answer to the following charges;

Count I: Stealing by servant contrary to Section 281 of the Penal Code

The particulars of the offence are that on the 6th day of April, 2011 in Nairobi within Nairobi County, jointly with others not before court being an employee of East African Breweries Limited as the Director of Procurement stole 691,200 US Dollars (Equivalent to Kshs. 58,752,000) which came into his possession by virtue of his employment.

Count II: Stealing by Servant Contrary to Section 281 of the Penal Code

The particulars of the offence are that on the 6th day of July, 2011 in Nairobi within Nairobi County, jointly with others not before court being an employee of East African Breweries Limited as Director of Procurement stole 350,000 US Dollars (equivalent of Kshs. 29,750,000/=) which came into his possession by virtue of his employment.

Count III: Stealing by Servant Contrary to Section 281 of the Penal Code

The particulars of the offence are that on the 18th day of July, 2011 in Nairobi within Nairobi County, jointly with others not before court being an employee of East African Breweries Limited as the Director of Procurement stole 388,300 US Dollars (equivalent to Kshs. 33,005,500/=) which came into his possession by virtue of his employment.

Count IV: Stealing by servant contrary to Section 281 of the Penal Code

The particulars of the offence are that on the 18th day of October, 2011 within Nairobi County, being an

employee of East African Breweries Limited as the Director of Procurement stole 1,432,200 US Dollars (Equivalent to Kshs. 121,720,000/=) which came into his possession by virtue of his employment.

As at this point, the defence had been supplied with a charge sheet dated 18th June, 2015 outlining the above charges. On the same date, the prosecution applied to amend the charge sheet and substitute it with another dated 5th October, 2015. The prosecutor submitted to the court that the amendment was intended to achieve two purposes; first, that in count number I, it would amend the particulars relating to the date of the offence. In the first charge sheet, the date of the offence was indicated as 6th April, 2011 whereas in the proposed amendment the date would be reflected as 8th April, 2011. The second purpose was to introduce an alternative charge to counts numbers I, II, III and IV respectively.

The proposed amendments were opposed by learned counsel for the Appellant Mr. Mwaniki Gachoka & Nyaanga. Mr. Nyaanga submitted that the amendment amounted to duplicity of charges. His contention was that under the main charges, the Appellant is reflected as having stolen from East African Breweries Limited while he was its director of Procurement. The alternative charges spelt out the particulars that the Appellant, with intent to defraud obtained the monies in question from Frigorex East Africa Limited. In that case, each of the counts together with its alternative charge named two different complainants, in which case, the amendments would bring confusion to the Appellant with regard to whether he stole the monies from East African Breweries or with intent to defraud, obtained the monies from Frigorex East Africa Limited. That would pose a hurdle to the Appellant who would not be in a position to prepare for his defence. Mr. Nyaanga further submitted that as at the 5th October, 2015, the defence had not been furnished with any documents or prosecution witness statements. They were unaware of any case related to Frigorex East Africa Limited as a complainant in the case. As such, it was obvious that the Appellant would be embarrassed during the trial. For those reasons, he urged that the intended amended charge sheet be stuck out.

In response, the prosecutor defended the proposed amendments. His argument was that the charges of obtaining by false pretences were similar to those of stealing. Further, that for the offence of stealing to stand, it was possible for an accused person to have committed an act of stealing of a thing and being in possession of it and at the same time steal the thing from the legal owner. The case for the prosecution therefore was that it was possible that the appellant would have stolen the same item from two persons. He further submitted that the prosecution was also ready and willing to furnish the defence with exhibits from Frigorex East Africa Limited.

In his ruling, the learned magistrate observed that under Section 214 of the Criminal Procedure Code, the prosecution could amend the charges at any time during the proceedings before the close of its case. The only proviso was that an accused person must be subjected to plead afresh to the amended charges. As at the time the proposed amendments were sought to be effected, the trial had not started. It was therefore in the interest of justice that the amendment be allowed. On whether the amendments amounted to duplicity of charges, the court ruled that this would only be determined once the evidence was adduced. Accordingly, the application for the prosecution to amend the charges was allowed. The court then read out the respective charges to the appellant in the English language. But before he could respond, Mr. Nyaanga objected to the accused pleading to them and sought leave of the court to appeal against the ruling. The prosecution did not object and the court ruled that the appellant was at liberty to file an appeal. The trial was fixed for mention on 8th December, 2015 to confirm the position of the appeal before the High Court.

The appellant was aggrieved by the ruling and order of Hon. Daniel Ogembo, Chief Magistrate on the following grounds:

1. That the learned trial magistrate erred in law and fact in failing to appreciate that the amended charges were clearly duplex to the initial charges, making the entire charge sheet incurably bad for duplicity.
2. That the learned trial magistrate erred in law and fact in failing to appreciate that the amended charges would prejudice and/or embarrass the appellant in his defence by a trial of all the alleged

- offences in one charge sheet.
3. That the learned trial magistrate erred in law and fact by failing to ensure that the rules of drafting charges are adhered to strictly.
 4. That the learned trial magistrate erred in law and fact by failing to appreciate the amendment would result in unfair trial as the accused will not be enabled to focus sufficiently on his defence.
 5. That the learned trial magistrate erred in law and fact by failing to appreciate that the amended charge sheet purported to contain two complainants both claiming the same property.
 6. That the learned trial magistrate erred in law and fact in failing to appreciate that the amended charges were contradictory with each other.
 7. That the judgment is null and void for failure to be dated or signed.

The appeal was canvassed before me on 24th November, 2015. Learned counsel Mr. Nyaanga represented the appellant whilst learned counsel Ms. Atina was in attendance for the Respondent. Mr. Nyaanga did not make any submissions on noting that the Respondent did not oppose the appeal. In her written submissions filed on 20th November, 2015, Ms. Aluda conceded that the amended charge sheet presented duplicity of charges. She contended that the main count and the alternative charge in respect of all the offences as amended, represented the same transaction and cause of action. Whereas the main charges are of stealing and the alternative of obtaining by false pretences, it was not possible that one could steal from one master and at the same time obtain the same money from a different master. According to Ms. Aluda, the appellant ought to stand the trial with the knowledge of who the owner of the money was or who he is purported to have stolen or obtained from. In that case, the charge of obtaining money by false presences could not stand as an alternative to the charge of stealing by servant.

It is important that I duplicate the charges as framed in the intended amended charge sheet dated 5th October, 2015. The appellant is alleged to have committed the following offences:

Count I: Stealing by servant contrary to Section 281 of the Penal Code

The particulars are that about the 8th day of April, 2011 in Nairobi within Nairobi County, jointly with others not before court being an employee of East African Breweries Limited as the Director of Procurement stole 691,200 US Dollars (Equivalent to Kshs. 58,262,423.04) which came into his possession by virtue of his employment

Alternative charge to Count I: Obtaining money by false pretences contrary to Section 313 of the Penal Code. *The particulars of the offence are that on or about the 8th day of April, 2011 within Nairobi County, being an employee of East Africa Breweries Limited as the Director of Procurement with intent to defraud, obtain from Frigorex East Africa Limited the sum of United States Dollars 691,200 (equivalent to Kshs. 58, 262,432.04) by falsely pretending that the was authorized by East African Breweries Limited to receive the money being the residue value for 14,400 second hand fridges, something he knew to be false.*

Count II: Stealing by Servant Contrary to Section 281 of the Penal Code

The particulars of the offence are that on or about the 1st day of July, 2011 in Nairobi within Nairobi County, jointly with others not before court being an employee of East Africa Breweries Limited as the Director of Procurement stole 350,000 US Dollars (Equivalent to Kshs. 31,275,895) which came into his possession by virtue of his employment.

Alternative charge to Count II: Obtaining Money by False pretences contrary to Section 313 of the Penal Code. *The particulars are that on or about the 1st day July, 2011 within Nairobi County, being an employee of East Africa Breweries Limited as the Director of Procurement with intent to defraud, obtained from Frigorex East Africa Limited the sum of United States Dollars 350,000 (equivalent to Kshs. 31,275,895) by falsely pretending to be authorized by East African Breweries Limited to receive the money being the residual value of 5,000 second hand fridges, something he knew to be false.*

Count III: Stealing by servant contrary to Section 281 of the Penal Code

The particulars of the offence are that on or about the 16th day July, 2012 within Nairobi County, being an employee of East Africa Breweries Limited as the Director of stole 388,000 US Dollars (equivalent to Kshs. 32,664,650.26) which came to his possession by virtue of his employment.

Alternative charge to Count III: Obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence are that on or about the 16th day of July, 2012 within Nairobi County, being an employee of East African Breweries Limited as the Director of Procurement with intent to defraud obtained from Frigorex East Africa Limited the sum of United States Dollars 388,300 (equivalent of Kshs. 32,664,650.26) by false pretending that he was authorized by East African Breweries Limited, to receive the money being the residual value of 3,530 second hand fridges, something he knew to be false.

Count IV: Stealing by servant contrary to Section 281 of the Penal Code

The particulars of offence are that on or about 14th day of October, 2011 in Nairobi County, jointly with other not before court being an employee of East African Breweries Limited as the Director of Procurement stole 1,432,200 US Dollars (Equivalent to Kshs. 145,262,317.20) which came into his possession by virtue of his employment

Alternative charge to Count IV: Obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence are that on or about the 14th day of October, 2011 within Nairobi County, being an employee of East African Breweries Limited as the Director of Procurement with intent to defraud, obtained from Frigorex East Africa Limited the sum of United States Dollars 1,432,200 (equivalent to Ksh. 145,262,317.20) by falsely pretending that East African Breweries Limited had resolved and authorized him to resell 2,500 second hand fridges, something he knew to be false.

In condensing the 7 grounds of appeal, I conclude that there are only two issues for determination. These are: whether the amended charge sheet was duplex and whether the same was null and void for failure of being dated and signed.

Section 135 (2) of the Criminal Procedure Code spells out how joinder of counts in a charge or information should be framed. The same provides as follows:

“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.”

As such, an instance of duplicity would arise where more than one offence is charged in the same count. For example, in the case of **Saina vs Republic, [1974] EA, 83** where the accused was charged in a single count with house breaking, theft and handling stolen property, on appeal, the High Court was of the view that the charge was an incurable illegality.

In the Black’s Law Dictionary, 9th Edition at page 578, *duplicity* is defined as, ***“The charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue.”***

Under the explanation paragraph, *duplicity in the Criminal procedure takes the form of joining two or more offences in the same count of an indictment.*

From the above definitions, it is clear that duplicity concerns the count as opposed to the charge. A charge would be bad for duplicity when it contains more than one offence in a single count. This is

clearly explained in Archbold Criminal Pleading, Evidence and Practice, 2010 at page 9,

“The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences...”

The question of whether a count breaches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence... thus, if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity.”

It is important that I demonstrate by case law what constitutes a duplex charge. In the case of **Ephraim Botto Wahome vs Municipal Council of Nakuru Constitution Petition No. 1 of 2006** the particulars of the offence referred therein were that: ***“On diverse dates, between 28th February 2002 and 25th July 2003, being proprietor of Soto Solar Limited on plot No. Block 1/752 along Kanu Street within Nakuru Municipality caused noise pollution from Kanu Street workshop thereby causing annoyance, interference with concentration, communication, relocation and sleep to the neighbours.”*** In that case it is obvious that the particulars of the offence represented two different offences, that is; noise pollution and causing annoyance, interference with concentration, communication, relocation and sleep to the neighbours.

In **Reuben vs Nyakango Mose & another V Republic, Criminal Appeal No. 606 of 2010**, the Court of Appeal referred to the persuasive authority of the High Court of Kenya in the case of **Laban Koti V R [1962] EA 439** where the appellant was charged with and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceedings, either before or after they had given evidence, contrary to **Section 121(1)(f) of the Penal Code**. On appeal, it was suggested that the charge might have been bad for duplicity, firstly because it alleged that the appeal “wrongfully attempted to interfere with or influence” witnesses and secondly because it alleged that such attempt occurred “either before or after” the witness had given evidence. It was held that in deciding whether there is duplicity in a charge the test is whether a failure of justice has occurred or the accused has been prejudiced. It was further held in that case that

“the appellant had been left in no doubt, from the time the first prosecution witness gave evidence ... and his defence could not be said to have been prejudiced in any way. Accordingly, there was no miscarriage or failure of justice on the ground that the charge was duplex in alleging that the attempt was made either before or after the witnesses had given evidence”

The Court of Appeal also referred to the case of **Mahero v R [2000] 2 KLR 496** which considered the **English case of Ministry of Agriculture Fisheries and Food v Nunn Comm & Coal (1987) Limited [1990] LR 268** where it was emphasized that the question of duplicity is one of the fact and degree and that the purpose of the rule is to enable the accused to know the case he had to meet.

Further, in the case of **Omboga vs Republic [1983] KLR 340**, it was held that;

“injustice will be occasioned were evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence exactly he is charged with.”

It is the view of this court that the rationale for the principle of duplicity is that when a charge is duplex, and an accused person goes through a trial, the fairness of the process is fundamentally compromised. The obvious reason to this is that it would not be clear to him/her what the exact charges do confront him or her. In the end, he/she may not be in a position to prepare himself/herself for a proper defence. This may not only be prejudicial but ultimately amounts to a failure of justice.

Duplicity can also be represented where the particulars of an alternative charge are a replica of those in the main count. As clearly depicted in the draft amended charge sheet herein, the complainants in each of the main counts and the alternative charges are distinct, that is to say that they are different entities. In

contrast, the transactions and the subject matter in each of the particulars of the offence are the same, thus representing the same cause of action for each of the transactions. It is impracticable then that the appellant could have stolen the amount of money reflected in the main count from East African Breweries Limited and at the same time with intent to defraud obtained the same amount of money from Frigorex East Africa Limited. And as cleared submitted by learned counsel for the Respondent, it was not possible that the Appellant stole money from one master and at the same time obtained the same money from another master. This scenario presents confusion not only to the Appellant but also to the court as to who the complainant is. And precisely put, who the owner of the monies in question is. This definitely would pose a hurdle to the Appellant during the trial as he would not know which offence between the two he is required to defend; either of stealing the money from East African Breweries Limited or of obtaining by false pretences from Frigorex East Africa Limited. The draftsmanship of the charge sheet definitely amounts to duplicity of charges as more than one offence is reflected in each count. It follows then that the offence of obtaining money by false pretences cannot be an alternative to the offence of stealing by servant when the complainants in each of the offences are different. The charges as drafted have joined two offences under the same charge notwithstanding that one is an alternative to the other. In view of this, the trial would not only embarrass the appellant but would occasion him total injustice and prejudice. At the best, the prosecution ought to drop the alternative charges or draft them as a separate charges or rephrase the particulars of each of the main counts so as to reflect how the transactions in each of the of the offences were executed.

On whether the draft amended charge sheet was signed, it is clear that the same bears two stamps, from Muthaiga Police Station and office of the Director of Public Prosecutions. Those stamps have signatures on them. Although it is not clear whether the magistrate signed it, it is obvious that owing to the objection to take plea by the appellant, the learned magistrate may not have had an opportunity to sign it. That ground of appeal cannot stand in the circumstances.

In the result, I find this appeal as meritorious. The same is allowed. I set aside the ruling of the Honourable trial magistrate. The draft amended charge sheet dated 5th October, 2015 is struck out. The same shall not be admitted for purposes of the intended plea.

DATED and DELIVERED this 1ST day of DECEMBER, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Nyaango for the Appellant*
2. *M/s Wario for the Respondent.*