



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 68 of 1999
(From the Original Criminal Case 985 of 1998 of Chief
Magistrate's Court at Mombasa).
REPUBLIC.....RESPONDENT
VERSUS
GILBERT OKOTH.....APPELLANT

JUDGEMENT:

The Appellant was, on 26th March, 1998 charged with one ZABLON OWIGO (hereinafter referred to as the "co-accused") with the offenses of house-breaking and stealing contrary to Sections 304 (1) and 279(b) respectively of the Penal Code. These two offenses -were contained, maybe compressed would be a more apt description, in one composite charge as a single count. As this charge (with its particulars) are going to have a pivotal place in this appeal it is necessary to set it out in extenso:

"House-breaking and stealing contrary 304(1) and 279(b) of the Penal Code.

1.(Gilbert Okoth) (2) Zablon Owigo

On the 19th day of March, 1998 at unknown time at Migombani Village in Likoni Location within Mombasa District of the Coast Province, jointly broke and entered the dwelling house of CHRIS OMONDI AWITI with intent to steal and did steal therein Television set make Greatwall, a radio cassette make National a CD Cassette player, two speakers, three travelling bags, an iron box make optima, 12 cooking sufurias, six tea cups, eight pairs of shoes, six plates, six long trousers, eight shirts, one marino blanket, four pairs of neck ties, a TV aerial, several pairs of socks and cash Ksh.5,000/- all valued at Ksh.243,500/- the property of CHRIS OMONDI AWITI".

As can be observed, this charge is fundamentally defective in two respects. If the time of the commission of the offence was unknown, how then could the accused persons be charged with either of the two kindred offences v.z. house-breaking and burglary? To this extent, quite obviously, the accused persons did not know what offence they were expected to meet and how to defend it. The particulars can be said not to have disclosed the offence.

The second and equally if not more important error in this charge is that it is a two-in-one charge. It purports to combine two single and independent offences, under separate provisions of the law, into one charge. Unlike Section 306 of the Criminal

Procedure Code which makes it an offence to "break and enter (certain specified buildings) and commit(s) a felony" or "breaks out of the same having committed any felony"(underlining and brackets are mine) Section 304, which is one of the charging Sections here provides for three alternatives namely:

- (a) breaking and entering with intent to commit a felony;
- (b) having entered, with intent to commit a felony, breaking out or

(c) having committed a felony breaking out

Upon perusal of the charge, it seems crystal clear to me that the prosecution elected to proceed with alternative (a). It chose to couple (a) with another offence i.e. stealing under Section 279(b) of the Penal Code. This involves theft from a dwelling house. In essence the accused persons were asked to plead to one single charge even though two offences were committed. It would be pardonable if the accused persons obtained an impression that actually the prosecution was offering them a special bargain being "buy two for the price of one". Any which way one looks at it, the charge was duplex.

I am satisfied that the charge as laid before the trial court did not satisfy the requirement under Section 135(2) of the Criminal Procedure Code. The prosecution should have preferred two separate counts in the charge in respect of each of the offences it opted for. One of the rudimentary caveats in the framing of an information or charge is to watch out for duplicity. When a charge, or a count thereof, charges the accused with having committed two or more separate offences, then, in my judgement, such error becomes a fundamental irregularity. Would this irregularity, in terms of Section 382 Criminal Procedure Code, occasion a failure or miscarriage of justice? I shall come back to this point a little later.

After the charge was read out and explained to the accused, they pleaded not guilty. Before reading out the charge, it was incumbent upon the Magistrate taking the plea to ensure that the charge as laid was properly framed or presented - See Section 89(5) of Criminal Procedure Code. Later the trial court was under a similar duty - See Section 135(3) of the Criminal Procedure Code. Both the Plea magistrate and the Trial magistrate appear to have overlooked this duty.

Indeed, after the ensuing trial the judgement of the court opened as follows:

"The accused person(sic) Gilbert Okoth and Zablon Owigo whom I will refer to as the 1st and 2nd accused respectively were charged with the offence of house-breaking and stealing contrary to Section (sic) 304(1) and 279(b) of the Penal Code....." and after dealing

with the substantive part of the judgement concluded "I consequently find both accused persons guilty of the offence of house-breaking and stealing contrary to Section (sic) 304(1) and 279(b) of the Penal Code and I convict them under Section 215 of the Criminal Procedure Code. From the above it can be seen that the Learned Magistrate obviously, albeit erroneously, perceived the offenses to be in the singular. That probably, can be understandable, although not excusable, particularly when the mistake is seen to have originated from the inception of the case. What is not understandable though is what transpired at the stage of sentencing for if one were to take to its logical conclusion the concept of "buy two for the price of one" it would follow that the price to be paid (or extracted, depending on how one looks at it) should be that, of one not two.

When sentencing the Learned Magistrate placed the co-accused on probation for two years. The problem appears when examining the sentence of the appellant. In a succinct paragraph he states: "The 1st accused has not given any mitigation. There is nothing to show that he is remorseful for the offence. I will sentence him in the first limb to 12 months plus one stroke of the cane. On the 2nd limb I will sentence him also to serve 12 months imprisonment plus one stroke". (Underlining is mine)

So, suddenly what was all along composite has now become split up.

What hitherto was two-in-one is now two. What previously was rolled-up has now unfurled. And what before was in singular is now in plural.

Quite apart from the inherent illegality of the whole exercise, it becomes, in my humble view, unconscionable for a seller (the court) once the bargain of "buy two for the price of one" is accepted by the consumer (the accused) to then turn around and insist on full price of two. This is patently unjust. Duplicity in itself is bad enough but where it later leads to mutation in form of plurality of limbs" it certainly becomes the "unacceptable face" of criminal law justice.

I have tried to rummage through the criminal law legislation and case law to see if I can locate the origins if not the whereabouts of this expression i.e. "limb of the court" (or is the offence?). I have been unable to find it. For sure, the Criminal Procedure Code does not recognise such a concept. Whether it does exist as a rule of practice, I am not certain. Both the Learned Senior State Counsel, who supported the conviction and sentence, and Counsel for the appellant are men of quite some experience in this field but they too have unfortunately, not been able to assist the court on this point.

It remains now for me to consider whether the errors demonstrated above can be said to have occasioned a miscarriage of justice.

The global and conglomerate impact of these errors leave me in no doubt that they have occasioned a miscarriage of justice. A retrial can serve no useful purpose as there is no proper charge laid down against the accused persons.

I have also gone through the evidence and noted that the Appellant was convicted on the evidence of a single witness aged 14 years. I am not satisfied that her evidence was recorded in compliance with Sec. 19 of the Oaths and Statutory Declarations Act Cap 15 nor did the Learned Magistrate warn himself of the dangers of convicting on the basis of this evidence. Finally the Learned Magistrate overlooked to pronounce the sentences to run concurrently.

It follows therefore that the conviction is to be quashed and the sentence to be set aside. It is so ordered and the Appellant is set free unless otherwise lawfully held.

Dated today 21st day of September 1999.

HON KASSIM SHAH
COMMISSIONER OF ASSIZE