



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Platt, Gachuhi & Apaloo JJA)

CRIMINAL APPEAL NO 141 OF 1986

BETWEEN

JOHN MBURU KINYANJUI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Nakuru, Tunoi J)

February 26, 1988, **Platt, Gachuhi & Apaloo JJA** delivered the following Judgment.

This appeal was well-taken on the point whether, in the case of nine counts alleging a specific offence (eight counts of theft and one count of attempted theft), it was proper to add a count of conspiracy as an alternative. So, for example on the first count, it was alleged that three persons, of whom the present appellant is one, jointly stole Kshs 97,655 the property of the Pyrethrum Board of Kenya. The alternative count stated that the three men conspired to defraud the Pyrethrum Board of Kshs 97,655. Similarly seven succeeding charges of the theft of a specific sum of money, were followed by an alternative count charging a conspiracy to defraud the Board of that sum of money. The last and ninth count alleged an attempted theft of Kshs 270,754.50 and the alternative count alleged a conspiracy to defraud the Pyrethrum Board of that Particular sum of money.

When the trial started before the Principal Magistrate on June 3, 1987, the prosecutor applied to put in a substituted charge which introduced the alternative charges of conspiracy. Mr Ochieng' was off the mark at once protesting at the inclusion of these alternative charges; on the grounds that the distinction must be declared as to whether there was a theft, and if not, then let the accused be charged with conspiracy. Mr Sheth followed.

He added that it was obvious that it would be difficult and embarrassing in reparing the defence. The charge was bad and should be rejected under section 89(5) of the Criminal Procedure Code. Mr Kimatta agreed that the charges must be clarified so that the accused would know what charges they were facing.

Neither the Principal Magistrate nor the Judge in the High Court had any sympathy for these arguments. Their stand was, that the substituted charge sheet, was not invalid per se, and would not cause prejudice. It appears that the original charge had distinct counts of conspiracy to steal covering the same period.

Apparently, the substituted charge had cured one alleged defect of the original charge, where the specific thefts were followed by substantive counts of conspiracy.

It was thought to make all the difference if the conspiracy counts were alternatives to the specific charges of theft. The learned judge quoted a High Court decision *Mulama v Rep*, [1976] KLR 24 where Trevelyan and Chanan Singh JJ held that the courts do not and have never looked kindly at conspiracy charges brought instead of specific offences, when specific charges are available. In that case there was only a conspiracy charge which failed because one of two conspirators was acquitted. It is a decision which hardly applied to the facts of this case, although it was correctly decided on its own facts. Whilst the High Court offered its protection in general to accused persons charged with conspiracy, it dismissed the appeal, because no prejudice would be caused in this particular case.

Mr Sheth, on behalf of his appellant, and we suppose the other accused persons, has undertaken to challenge these views. His grounds of appeal are that the substantive and alternative counts were not very clear and distinct in themselves, and were not capable of permitting the appellant to prepare his case.

Secondly, it was wrong to form the view that there was nothing wrong in law in laying a conspiracy charge as an alternative to that of stealing. Thirdly, the learned judge ought to have held that the charge sheet was bad in law in that it was ambiguous and prejudicial to the proper defence of the appellant. The appellant had the right to know the offences with which he was charged. Lastly, the learned judge had failed to appreciate the fundamental principles of the criminal law and practice concerning the joinder of charges.

At the hearing of the appeal a more careful case was presented. It was acknowledged first of all, that the decision of this court's predecessor in *Musinga v R* (1951) 18 EACA 211 was one which sets the complications of this problem in realistic perspective. At P 216 the East African Court of Appeal remarked:-

“Counsel for the appellants have referred us to expressions of opinion by this Court and by Courts in England, deprecating the joinder of a charge of conspiracy with charges of specific offences based on the same evidence. It is admitted that there is no illegality in such a joinder, but we agree that it ought not to be done in cases where it is likely to prejudice the conduct of the defence. No objection was raised to the joinder of this charge at the trial and we do not think that it was improper in the circumstances of this case.

Indeed, it would seem to have been the only course open to the Crown to bring home the guilt of some persons concerned in this series of illegal transactions.”

We can therefore agree with the Courts below that it is not illegal per se to join an alternative charge of conspiracy; indeed it is not necessarily illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences, as *Musinga's* case above shows, and more especially *R v Cooper & Compton* [1947] 2 All ER 701. The problem is deeper than simply changing substantive counts of conspiracy to alternative counts. Dealing with counts of conspiracy raises problems which require discretion and complete understanding of the case in hand. It seems to us that the principles summarised in *Archbold Criminal Pleading Evidence and Practice*, 40th Ed para 4073 as to the desirability of including a count of conspiracy in an indictment or charge, offers a useful approach. But the question cannot be determined by the application of any rigid rules.

Each case must be considered according to its facts. The following points should be considered :-

- 1.As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable. It is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence

- 2.To this general rule there are exceptions, as for instance:-

a)Where it is in the interest of justice to present an overall picture, which a series of relatively small substantive offences cannot do; sometimes a charge of conspiracy may be the simpler way of presenting the case;

b)Where there is clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy is justified;

c)Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence, it may be right and proper to include a charge of conspiracy.

3.But a count for conspiracy should not be included if the result will be unfair to the defence, and this has always to be weighed with other considerations.

4.It may be necessary to try a count for conspiracy separately from substantive counts which are only examples of carrying out the conspiracy.

5.Where the evidence discloses more than one conspiracy, it is undesirable to charge all the conspiracies in one count, but it may not be bad in law as *Musinga's* case shows.

6.Other factors concern the number and type of conspirators, for instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, may need to be safeguarded as *Mulama v Rep* [1976] KLR, 24 indicates.

The question which one must then ask is why or in what circumstances it is undesirable to join a count of conspiracy with counts for substantive offences? The main ground is unfairness to the accused, which is a general consideration. That may arise because the accused may not know with what he is charged precisely, or may be embarrassing to be obliged to defend in the alternative.

In this case, were the thefts or attempted theft completed, or was it merely a conspiracy without carrying out any overt acts? Secondly, it is desirable that the court admits only evidence which is admissible in law, and what is admissible in a substantive offence and in a conspiracy may cause confusion. In *Musinga's* case the court explained at p 216 :-

“A person who joins a conspiracy is responsible in law for all the acts of his fellow-conspirators, done in furtherance of the conspiracy, whether done before, during or after his participation. In our view therefore, as continuing unlawful possession of the wolfram, even if it originated with the second appellant, attached itself in law to the other conspirators.”

In *R v Luberg* (19 Cr App Rep 136) Sankey, J highlighted the point in this way:-

But we do desire to say one word about the whole indictment. It will be observed that it starts with the general count for conspiracy. I am far from saying that that is wrong ... but it does, in our judgment place the defendants in a case like this in some difficulty. The reason is that it renders admissible evidence of what one prisoner says in the absence of the others, because if they are all conspirators what one of them says in furtherance of the conspiracy could be admissible evidence, even though it was said in the absence of the other conspirators.

It is necessary to be quite sure that no evidence is given which is inadmissible and great care is required in approaching the evidence to keep all the issues perfectly clear at the trial, and in judging the case afterwards.

The third matter used to concern sentence; see *Verrier v DPP* [1966] 3 All ER 568 to which we were referred. But that is catered for in Kenya by the skillful drafting of section 393 of the Penal Code.

Having set out the guidelines, we must then ask in what manner these conflicting interests are to be

resolved? In England a practice direction was set out in [1977] 2 All E.R 540. It was:

“1. In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

2. A joinder is justified if the judge considers that the interests of justice demand it.”

We may add that election or severance follows from the Court’s inherent powers to see that its process is not abused, in the sense that the accused is guarded against oppression or prejudice. It is for this purpose that the rule is that the objection must be taken at the earliest opportunity; and here we congratulate counsel for trying to safeguard their clients at the right time, a chance missed in *Musinga’s case*, whether or not their clients are ultimately proved right.

Now these guidelines of 1977 are not unknown in East Africa. Mrs Awori brought the decision of the Court of Appeal In *Uganda v Milenja* [1970] EA 269 to the attention of the learned judge. The magistrate in that case had called upon the prosecution to justify or elect. That is the order that should have been made in this case.

Accordingly, we allow the appeal, set aside the rulings in both Courts below, and remit the record to the Principal Magistrate to take up the objection and cause the prosecution to justify his charge sheet or elect which offences he will rely upon.

It was suggested that that should take place in this Court. Provincial State Counsel was not prepared with the facts; so we were unable to carry out the exercise. The Principal Magistrate will, we are sure perform this task without difficulty.

Dated and delivered at Nakuru this 26 th day of February , 1988

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL