IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GACHUHI JJ.A. AND MASIME Ag. J.A.)

CRIMINAL APPEAL NO. 48 OF 1986

BETWEEN

CHRISTOPHER KIRAGU NGIBUINI…….……APPLICANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a judgment, of the High Court of Kenya at Nairobi (Schofied, J.) (Amin, dated 25th February 1986)

in

Criminal case No. 287 of 1985

JUDGMENT OF THE COURT

This appeal concerns the sentences passed by the Resident Magistrate's court at Nyeri on the appellant upon his conviction of various charges of theft by agent contrary to section 283(b) of the Penal Code in two separate trials namely Criminal Case Nos 212/84 and 213/84.

The appellant was an advocate of the High Court in private practice in Nyeri; he acted for *inter alia*, various land buying companies who deposited with him various sums of money to be used by him in payment for farms which he was instructed to buy for the companies.

The two charges in criminal case no 213/84 related to thefts allegedly committed (1) between May 20, 1980 and July 13, 1983 at Karatina (2) on diverse dates between October 23, 1980 and July 13, 1983 at Karatina. The appellant was arrested on July 4, 1984 and taken to court on July 11, 1984. He denied the charges and his trial opened on November 20, 1984, and was concluded on February 7, 1985 when he was convicted as charged on both counts and sentenced to serve six years and five years respectively on counts 1 and 2 the jail terms being ordered to run concurrently; he was also ordered to effect restitution to the complainants of the sum stolen plus interest upon completion of his jail terms. The convictions and sentences of the appellant on these counts were the subject of High Court Criminal Appeal No 288 of 1985 which was heard and disposed of by Schofied and Amin JJ who for reasons given in their judgment reduced the sentences to four years on count one and three years' imprisonment on count two the sentences being ordered to run concurrently leaving the order of restitution intact.

On the same day that the appellant was arrested and charged on the counts in Criminal Case No 213/84 he was also charged in Criminal Case No 212/84 with another six counts of theft by agent contrary to section 283(b) of the Penal Code. Again these counts related to monies deposited with the appellant as an advocate by land buying companies for the purpose of purchasing farms for the companies. Six counts of thefts were charged covering the period between February 13, 1980 and July 13, 1983 at Karatina and the complainants were six different land buying companies; a total of Kshs 3,557,750.35 was involved. When he was first charged in court the appellant pleaded not guilty to the charges; however at the mention of the case on February 15, 1985 the appellant elected to change his plea and admitted each of the six counts of theft and was duly convicted on his plea. The court prosecutor then said:

> **"The accused has one previous conviction of similar**
>
> **offences for which he is currently serving sentence vide**
>
> **senior resident magistrate criminal case 213/84 decided**
>
> **on February 7, 1985. He is serving six years**
>
> **imprisonment on 1st count and 5 years imprisonment**
>
> **on second count. The sentences are running**
>
> **concurrently. Decision was by Resident Magistrate Nyeri.**
>
> **Under section 179 Criminal Procedure Code the**
>
> **accused was ordered to restitute stolen money. I am praying to court**
>
> **to make a similar order in the current case."**

The learned Senior Resident Magistrate before sentencing the appellant noted *inter alia*, that "the complainants were neither the same nor did the offences arise out of the same transaction." He then sentenced the appellant to 4, 5, 4, 2 and 2 years' imprisonment respectively on counts 1, 2, 3, 4, 5 and 6 and ordered that such terms do run concurrently; he also made an order of restitution of the stolen money pursuant to section 178 of the Criminal Procedure Code.

The appellant appealed against both the convictions and sentences in this case too and the High Court in Criminal Appeal 287/85 (Schofied and Amin JJ) on February 25, 1986 after hearing the appeal decided that a total sentence of eight years' imprisonment was appropriate for both the convictions in the two separate trials and reduced the sentence in count two only to four years leaving the two sets of sentences to be consecutive. Further on the basis of the proved illness of the appellant the High Court ordered that the appellant do have the facility to be prescribed drugs by his private doctor under the supervision of the prison medical authorities and that such doctor do report to the court should the appellant's health deteriorate. It is from those orders of the High Court that the present appeal is preferred.

The grounds of appeal are contained in the supplementary memorandum of appeal and they are:

1.The learned judges of the High Court erred in law in failing to hold that in failing to order or direct that any sentences of imprisonment imposed on the appellant by the learned Senior Resident Magistrate in Criminal Case No 212/84 were to run concurrently with similar sentences imposed upon the appellant following a conviction in a concurrent criminal trial

conducted in the same court and of which conviction the learned Senior Resident Magistrate was aware and cognizant of the learned Senior Resident Magistrate had fallen into error which resulted in the sentences so awarded by him being unfair, illegal, unjustified, oppressive and further erred in affirming such order;

2.The learned judges of the High Court erred in failing to hold that in the light of all the circumstances surrounding and the publicity attending to conduct of the criminal trial against the appellant being R M Criminal Case No 213/84 in the same court which took place a few days prior to the present trial, the appellant could not and did not have fair trial within the meaning of section 77 of the Constitution of Kenya;

3.The learned judges erred in failing to appreciate fully or at all, and to hold that the learned trial magistrate had fallen into error and committed a fundamental misdirection in holding that the offences for which the appellant had been convicted of sentenced in Criminal Case No 213/84 were not offences arising from similar facts or forming part of the same transaction with those for which he had convicted the appellant and was in the process of sentencing him and thereby declined to direct that the sentences imposed by him be served concurrently with those of the previous case and rendered the exercise of his discretion as a sentence wrong in law with the result that the appellant was seriously prejudiced by such exercise.

Before we deal with the grounds of appeal it is pertinent to revert to the facts. All the offences charged in the two separate trials were alleged to have occurred between February 13, 1980 and July 13, 1983. This fact was known to the prosecution at the time that the appellant was arrested on July 4, 1984. In his unsworn statement the appellant told the court in Criminal Case No 213/84 (P 9 of the typed judgment) that he acted for some eight land buying companies from whom he received a lot of money for the purchase of land. It was these eight counts he was charged with in the two separate trials. Despite this the trial court in criminal case 212/84 decided that the sentences he meted out to the appellant should be consecutive to rather than run concurrently with those meted out in Criminal Case No 213/84.

What is the law in this matter? Section 135 of the Criminal Procedure Code provides

“135 (1) Any offences, whether felonies or misdemeanours may be charged together in the same charge or information if the offences charged are founded on the same facts or form or are part of a series of offences of the same or similar character.

(2)……..

(3)Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information or that for any other reason it is desirable that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of the charge or information.”

On the facts set out above it is clear that the charges laid against the appellant on July 11, 1984 in the two separate cases could have been charged together. It is the appellant’s case in this appeal that failure to do so has embarrassed him and occasioned to him a miscarriage of justice as it had the effect of depriving him of the possibility of the trial court exercising in his favour the sentencing discretion provided for in section 14 of the Criminal Procedure Code. That section provides:

“14 (1) Subject to the provisions of subsection (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(3) For the purpose of appeal, the aggregate of consecutive sentences imposed under this section in the case of convictions for several offences at one trial shall be deemed to be a single sentence.”

In this connection our attention was drawn to the decision of the High Court of Tanzania in *Mwakapesile v Republic* [1965] EA 407 with which we respectively agree in which it was held that 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 occasions before different magistrates. The reasons why it is undesirable is as was explained in the case of *Republic v Ames & Carey* [1938] 1 All ER 515 that it prevents the sentencing courts from looking at the appellant vis a vis the series of offences as a whole if they had been charged together. The maximum penalty for the offences charged in the two separate cases is seven years jail with or without an order for restitution. The trial magistrate in Criminal Case No 213/84 gave sentences of six and five years jail respectively for count 1 and 2. He clearly considered the offences very serious; if he had known that the appellant was also guilty of the thefts charged in criminal case No 212/84 he would most probably not have imposed a severer sentence. We are in the circumstances in agreement with learned counsel for the appellant that the sentences in the two separate trials ought to have been made to run concurrently and the High Court erred in failing to direct they do so run. The High Court order that the sentences in the separate trials do run consecutively is therefore set aside and we substitute an order that the sentences in Criminal Case 213/84 and 212/84 shall run concurrently. Order accordingly.

Learned counsel for the appellant in addition addressed us on the possible exercise of mercy to the appellant in view of all the circumstances of this case. However in view of section 361(1) of the Criminal Procedure Code that is not a matter the court can deal with. We order that the appellant be transmitted to the Kenyatta National Hospital to facilitate the control of his diabetes. We direct that during the remainder of his sentence the prison authorities shall comply with the High Court order for the prescription and administration of drugs.

Dated and delivered at Nairobi this 5th day of October, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O. MASIME

.....

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR