IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox JA, Platt & Gachuhi Ag JJA

CRIMINAL APPEAL NO. 10 OF 1985

Between

PETER OCHIENG ....APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT OF THE COURT

The Appellant was at the material time a clerk in the accounts section at the Provincial Headquarters in Kisumu. The section prepared payment vouchers against invoices submitted by traders in the private sector for services rendered to the police department. The particular services said to have been rendered in the instant case which were the subject of the charges against the Appellant were those of transporting police personnel on duty for the purposes of making inquiries or otherwise.

There were twelve separate transactions which were the subject in all of no less than forty-four counts charging the Appellant with forgery, fraudulent false accounting, uttering and stealing by a person employed in the public service, covering a period of nearly six months. All these transactions were stated in the charges to be in the respect of one, Paul Odiaga, who had a transport business consisting of an omnibus number KDQ 138. He transported government officers against travel warrants from KISUMU to various places such as Siaya and Kakamega. He ceased to do this in March, 1983, when his vehicle became damaged and he could not afford to repair it.

The Appellant's duties were admirably and succinctly set out by the learned judge of the High Court who dismissed the first appeal as follows:

> "Among his duties was the receipt of invoices from transport companies which had ferried police officers on travel warrants issued by the police, and the preparation of payment vouchers to those companies for payment on invoices so presented. His duty on preparation of the voucher was to pass the voucher, the invoice and the accompanying travel warrants, to the authorising officer who would then authorise payment. Payment on the voucher would then be made by cashier to the transporter and the transporter would sign the voucher at the rear on receipt of payment."

It would appear that each invoice is raised in respect of several journeys for which travel warrants had been issued to police officers.

It has to be said that the cashier, Dominic Samuel Okech, who was clearly involved in the frauds, was arrested at the same time as the Appellant but charged subsequently with different offences. He was rightly treated as an accomplice by the trial magistrate. His evidence was nevertheless accepted and the magistrate found corroboration in the fact, of which there was considerable evidence in support, that the Appellant had prepared the invoices which were the subject of the forgery counts. This, indeed, would have amounted to substantive evidence in itself. The magistrate's directions on the law applicable to this aspect of the case was unexceptionable and the High court was in our opinion right to uphold his findings in regard to Samuel Okech.

The frauds came to light as a result of the Appellant attempting to get the provincial police officer, as authorizing officer, to sign the three payment vouchers on June 10, 1983. Since some of the journeys in the travel warrants were for journeys as far away as the Eastern Province the Assistant Commissioner, Mr Kimutai naturally became suspicious and ordered an audit, which was carried out by Francis Ayata, of the Exchequer and Audit department in Kisumu, and investigations by the CID. These revealed all the irregularities which formed the charges against the Appellant. Apart from witnesses who identified the Appellant's writing on the invoice the document examiner from Nairobi, after comparing the invoices with specimens of his handwriting, certified that in his opinion they were made by the Appellant.

All the twelve transactions to which we have referred save the last one, which instead included a count for uttering a forged document (the appeal in respect of which was allowed by the High Court) comprised at least three distinct offences, namely, a charge of forging the invoice from the transporter, in each case Paul Odiaga, forging the payment voucher to match it, and stealing this sum so stated in the forged invoice and payment voucher. There were in addition six charges alleging fraudulent false accounting by the Appellant contrary to section 330 of the Penal Code, but as he was acquitted of these on the submission of no case to answer, or his appeal was allowed in respect of them charges need not engage our attention.

As regards four of the instances of stealing, there was positive evidence from the cashier Dominic Okech, (the accomplice) which was accepted by the trial court and confirmed by the High Court, that he had paid the Appellant the sums in question namely Kshs 2,250, 1,600, 1,802 and 450. These amounts formed the subject of counts 6, 16, 20, and 24. The relevant amount was not, according to the auditor, entered in any of the instances charged in the appropriate votebook for the police division concerned. In the other cases of theft, namely counts 3, 9, 12, 32 and 36 the cashier could not remember whom he had paid and the Appellant was acquitted on those counts. The same applied to count 40 in which the cashier said the Kshs 1,635 concerned was paid to Paul Odiaga. Since that transaction included one proved count of forgery (count 38) this would suggest that Paul Odiaga was at some stage involved in the frauds. In the only other count of stealing, which was count 27, the cashier swore that he gave the Appellant the Kshs 1,492 which was the subject of it. The magistrate, however, found no case to answer on this count, mistakenly believing that it charged the Appellant with forgery, as the statement of the offence said. However, it was perfectly clear from the particulars of that count that the offence laid in it was in fact stealing by a person employed in the public service. Due to these compensating errors the Appellant was acquitted upon a charge of which, if the basis for the conviction on the other counts of theft is accepted, he ought to have been convicted.

A further mistake occurred in count 33, in which the statement of the offence alleged false accounting but the particulars alleged forgery of an invoice. There was a similar mistake in reverse in count 17 in respect of which the first appeal was dismissed, with which we shall shortly deal. As however, the appeal on count 33 was allowed by the High court we do not need to deal with that count further, save to say that this kind of carelessness by all concerned in failing to check the charges properly could result in a serious injustice to either or both the parties. Of the other charges the magistrate found no case to answer in respect of four of the forgery counts, counts 7, 11, 28 and 39, and the High Court allowed the appeals against the Appellant's convictions on one more, count 43, with the result that we are now concerned, on this second appeal, with ten counts of forgeries of invoices (counts 1, 4, 10, 14, 18, 22, 26, 30, 38 and 42) in addition to the four extant charges of stealing to which we referred.

There was another count, count 34, which alleged that the Appellant forged an "agent voucher', or if there

is a duplication of one of the other charges in the transaction. The appeal against the Appellant's conviction on that count was dismissed.

As regards count 17, both the trial court and the first appellate court acted on wrong premise, namely that the prosecution were alleging that the payment voucher 1192 itself was a false document, whereas it is plain that the particulars of that charge were intended to follow, and did follow those in the other fraudulent false accounting charges which contained the word "by falsely pretending that the said payment voucher had been entered in the vote book". It may be that the false entry in this document would constitute it a forgery within the definition sector section 347(c) of the Penal Code, but that was not the basis upon which that particular charge was laid. The High Court treated the charge as one of forgery for it said, in relation to that count:

> "The alleged forgery in count 17 is different to that alleged on the other vouchers. It is an allegation that the entry relating to the vote book on the voucher is the forgery. We are satisfied that this allegation is correct".

That passage does not, however, with respect, deal with the essence of the matter, and indicates that the learned judges did not regard count 17 as essentially one of fraudulent false accounting, and, conversely, they did not regard counts 21, 25, 29, 37 and 41 as false accounting charges, but as forgeries, and as is indicated by the passage;

> "Regarding the charges of fraudulent false accounting, these counts emanate from the certificate at the back of the voucher to the effect that the voucher had been entered in the vote book. That certificate is for the purposes of authenticating the voucher and forms part of the forgery. It is not a separate piece of accounting which goes to create a false account in any other part of the accounting system. It merely affects the authenticity, or apparent authenticity, of payment vouchers which are forged. In our view the counts of fraudulent false accounting cannot stand."

Whether they were correct in taking this view matters not for the purpose of count 17, because we consider that what in essence was laid in count 17 was not forgery but fraudulent false accounting. There were not included for instance, the word "purporting to be", or "purporting to show" which are generally a feature of forgery charges. It follows that if the learned Judges of the High Court had regarded count 17 as one of fraudulent false accounting, they would in all probability have allowed the appeal on that count, just as they did on the other five false accounting charges. For these reasons we think that the appeal as regards that charge must be allowed.

Similarly, as regards count 34, we cannot be certain that the count related to a separate document or that there was a duplication, in view of the wording of the particulars of that charge, which are

> "purporting to be a genuine invoice of Paul Odiaga"

We therefore allow the appeal on count 34.

Reverting to the forgery charges, there was in our opinion acceptable evidence that the invoices were not made out by Paul Odiaga, or by his son, Joseph Ochieng, but by the Appellant. The handwriting expert's evidence confirmed this. As the magistrate rightly said in his judgment, the Appellant never challenged this evidence in his unsworn statement, neither was the witness who recognized the Appellant's handwriting on the invoices, the provincial executive officer, Paul Mutua Musila, seriously challenged in cross-examination on this issue. The magistrate found that the invoices were written by the Appellant. The judges of the High Court agreed with this finding. There were thus concurrent findings of fact by both the lower courts to this effect. Apart from stating that he was not guilty of any of the counts and taking us through the documents and records in immense detail the Appellant did not demonstrate that any point of law arose as to why we should not be bound by these concurrent findings of fact. We consider that these findings were correct and that the Appellant was in law properly found guilty of forging the invoices which were the subject of counts 1, 4, 10, 14, 18, 22, 26, 30, 38 and 42, and we

dismiss his appeal against he convictions thereon.

We turn to the payment vouchers. Again there was evidence from both Provincial Executive Officer and the cashier that these were prepared and signed by the Appellant. Again there was confirmatory expert handwriting opinion, and the magistrate so found, a finding which was once again confirmed by the High Court . The Appellant did in effect deny that he signed these vouchers but the lower courts were, on the evidence , which was extremently strong, entitled to find that he did. There was nothing in the Appellant's address to us which showed that these concurrent findings were wrong in any respect. He showed no matter of law upon which we would be entitled, as the second appellate court, to differ from those findings. We are satisfied that the Appellant was rightly found guilty of forging the payment vouchers in question and we dismiss his appeal in respect of counts 2, 5, 8, 15, 19, 23, 31 and 35;

There was, equally in our judgment, no ground shown by the Appellant in his submissions which would enable us to differ from the concurrent findings of fact by the magistrate and the High Court that the Appellant stole the amounts which formed the subject of counts 6, 16, 20, and 24. Those findings were clearly correct and he Appellant's denials were rightly rejected. We therefore dismiss his appeal in respect of those counts also. In the final result twenty-two out of the convictions upon which the first appeal was dismissed by the High Court are maintained. On two only, those on counts 17 and 34, the appeals are allowed. The sentence of two years imprisonment on count 17 and the conditional discharge on count 34 are hereby set aside. This makes no practical difference to the Appellant however, in view of the fact that all the sentences of imprisonment were expressed to be concurrent.

There is one other matter to which we should refer. It is undesireable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts, upon which it wishes it to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under section 87 (a) of the Criminal Procedure Code (cap 75), which will entitle the prosecution to bring them again if necessary. The Court of Criminal Appeal in England had had occasion to comment as follows on an overloaded indictment:

> "The court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment . If there is a conviction, the other counts can remain on the file and need not necessarily be dealt with unless this court should for any reason quash the conviction and order the others to be tried. But it is undesirable that as many counts as were tried together in this case should be tried together, though the court desires to say that, in its opinion, the Chairman dealt with the case admirably. It was a pity an application was not made to him for separate trial, or perhaps if he had a longer experience as Chairman he might have said at once that he would not try all these counts together. Certainly Judges have tried large number of counts together, and so have Quarter Sessions, but it is not a thing to be encouraged and I hope it will not happen again that as many counts as were tried together in this case will be tried at the same time. It is quite possible to split the indictment up and put some counts in another indictment. It may increase the cost to some small amount, but any small increase of that sort is nothing compared with the danger there may be of not having a fair trial".

(See *R v Hudson and Hagan* [1952] 36 CAR 94 at p 95)

In the more recent case of *R v Novac & Others* [1977] 65 C A R 107 at p 118 the Court of Appeal said:

> "We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing

> of all convictions except on the conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment, containing 38 counts, does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted, as is now plain, in a trial of quite unnecessary length and complexity."

Moreover the possibility of embarrassment and prejudice to the defence cannot be excluded when there are numerous counts because of the danger of an assumption that because the accused faces so many charges, there must be substance in some of them. In the instant case the magistrate was fully alive to the necessity of considering each charge separately as is shown by his finding no case to answer on some of them and acquitting the Appellant on others; so no prejudice was in fact occasioned. We very much hope that in future those responsible for the prosecution of offences will heed these remarks.

The appeals on counts 1, 2, 4, 5, 6, 8, 10, 14, 15, 16, 18, 19, 20, 22, 23, 24, 26, 30, 31, 35, 38, and 42 are dismissed. The appeals on counts 17 and 34 are allowed.

Dated and delivered at Kisumu this 9th day of August , 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

H.G PLATT

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Ag. JUDGE OF APPEAL

J.M GACHUHI

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR