IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Potter, Hancox JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 1 OF 1983

BETWEEN

JASON AKUMU YONGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the Penal Code (cap 63) and sentenced to six months' imprisonment. There are seven grounds of appeal but we shall deal with only two, ie Grounds 5 and 6 which in effect raise the same point of law, namely that the trial magistrate erred in amending the original charge. The particulars of the original charge were as follows:

"Jason Akumu Yongo: On August 1, 1982 at Garissa Township in Garissa District within the North Eastern Province, created a disturbance in a manner likely to cause a breach of the peace by saying that 'Moi's Government is finished and he will not come back to power'". [underlining is ours].

There was only prosecution key witness Robert Wanyonyo (PW 1) who said that he heard the appellant say on August 1, 1982, that 'no, we need a change in the Government'. In cross-examination Robert said "the accused said that we need a change." When Simon Shabande (PW 2) testified he said that Robert told him that the appellant had told him that we needed a change in the Government. The prosecution did not call further evidence and the court proceeded to amend the charge. The record reads:

"Court

Under section 214 Criminal Procedure Code the court amends the charge to read the accused said 'we need a change in the government' instead of the words 'Moi's Government is finished and he will not come back to power'."

The appellant had the amended charge read to him and he maintained his plea of not guilty. The prosecution then said that was the close of its case and after the magistrate had pronounced that the accused had a case to answer the appellant gave sworn evidence in which he denied meeting Robert on the material day. The cross-examination of the appellant does not show that he was even asked whether he uttered the alleged words or any. Section 214(1) of the Criminal Procedure Code provides as follows:

"214(1) Where at any stage of a trial before the close of the case for the prosecution, it appears to the

court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."

We have not found any useful local reported case on the point, but we have looked at the practice in England. The English Indictments Act 1915 section 5(1) reads as follows:

"(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the merits of the case, unless having regard to the circumstances of the case, the required amendments cannot be made without injustice."

An indictment in England is similar to an information in Kenya, but the same principle, we think, applies to the amending of a charge. The English section is wider, in that the Kenyan law restricts the amendments to those made before the close of the case for the prosecution, whereas the English legislation is not so restricted: indeed in the magistrates' court, while it is true that the section (section 123(1) of the Magistrates Courts Act 1980) is wider than ours it seems that an amendment can take place at any time until the case is concluded; see *Allan v Wiseman* [1975] Crim LR 37. The English section expressly states that the amendment must not cause prejudice to the accused which the Kenyan law does not do, but in practice the principle has been applied in Kenya. Both Acts use the phrase 'it appears to the court that the indictment/charge is defective.' In this country no definition or explanation, to our knowledge, has been given of a 'defective charge.' In England examples of a defective indictment have been discussed. In the case of *R v Pople* [1951] 1 KB 53, Pople and others were indicted on counts of obtaining certain sums of money by false pretences from a building society. At the close of the case for the prosecution objection was taken that there was no evidence to support those charges. The matter having been argued the prosecution applied for leave to amend those counts by altering in each count the sum of money to 'a valuable security, to wit a cheque for' the same amount. The application was granted. On appeal it was argued that the court had no jurisdiction to allow the amendment. The submission was overruled and the court said at 54:

"The argument for the appellants appeared to involve the proposition that an indictment in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person … It is to be observed that the indictment was defective was in the mere description of the thing obtained. In substance the charge was the same …"

In *R v Norton* [1979] Crim LR 282 (CA), Norton was caught in the storeroom at a swimming bath. A door into the premises had been broken, the office ransacked and two bunches of keys taken from it. The keys were found in a room adjoining the storeroom. Norton said he had entered the premises for a swim. He was indicted under section 9(1)(b) of the Theft Act 1968 in that having entered as a trespasser he stole six keys. At the end of the prosecution case the defence submitted that on any view Norton had clearly not stolen or attempted to steal the keys. The judge allowed the indictment to be amended to allege entering the building as a trespasser with intent to steal property, saying that there was no prejudice to Norton other than losing the chance of an acquittal on a technicality. It was held that the amendment was properly made and that it merely corrected a misdescription of the original offence.

As stated in paragraph 218 of 11 *Halsbury's Laws of England* (4th edn) para 218, the power to amend is not limited to those cases in which the indictment is bad on its face and provided the amendment causes no injustice to the accused, alteration in matters of particulars may be made. In England it has been said:

"An indictment is defective not only when it is bad on the face of it, but also (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein, (ii) when for such reasons it does not accord with the evidence given at the trial. See Archbold, *Criminal Pleading Evidence and Practice* (40th edn) para 53."

In our opinion, a charge is defective under section 214(1) of the Criminal Procedure Code where:

a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b) it does not, for such reasons, accord with the evidence given at the trial; or

c) it gives a misdescription of the alleged offence in its particulars.

In the present case the main charge remained the same, and the amendment was only in respect of the misdescription of the offence in the particulars, and had the phrase ‘or words to that effect’ been used no amendment would have been required. In so far as the charge did not accord with the evidence given at the trial because of the misdescription in the particulars, the original charge was defective within the meaning of section 214 of the Criminal Procedure Code and the amendment made by the trial magistrate was proper. The substituted words were perhaps of less serious importance than those originally particularised, but, nonetheless, in the context of events at the material time, would undoubtedly have been likely to cause a breach of the peace. The question is therefore whether the amending section of the Code can be applied where the evidence is at variance with the charge, and in our view it can. We therefore do not think that the wording of the section, bearing in mind its marginal note, precludes an amendment of the charge in a case of this nature, but its provisions should be strictly observed.

Unfortunately, though the magistrate recorded that he had complied with section 214, and that the amended charge was read to the appellant, he did not record that the requirement under the second proviso, namely the appellant’s right to recall the witnesses, was also complied with. This he should have done, particularly as regards Robert, who gave the only material evidence. In view of the fact that Robert’s story as to the gravamen of the charge, namely the words used, had obviously changed, we think the appellant should have been given the opportunity further to question him with a view to showing that he was unworthy of credit. We cannot say that this failure to observe the requirements of the section occasioned no prejudice to the appellant in the circumstances of the case. Such further questioning might well have caused the magistrate to form a different view of Robert’s evidence. For that reason we allow the appeal, set aside the order of the High Court summarily dismissing the appeal, quash the conviction and set aside the sentence by the trial magistrate.

Dated and Delivered at Nairobi this 6th day of May 1983.

K.D.POTTER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

I Certify that this is a true

copy of the original.

DEPUTY REGISTRAR