IN THE COURT OF APPEAL

AT KISUMU

(CORAM: LAW, POTTER JJA & HANCOX Ag JA)

CRIMINAL APPEAL NO 122 OF 1982

LAMEK OMBOGA.......……..………… APPELLANT

VERSUS

REPUBLIC…………..……………… RESPONDENT

JUDGMENT

On December 6, we allowed this appeal, quashed the convictions and set aside the sentences. We now give our reasons.

The appellant, a court clerk, was charged in the district magistrate's court at Homa Bay with two counts. The first charged him with fraudulent false accounting, contrary to section 331 of the Penal Code, the particulars being stated as follows:

"Lamek Omboga s/o Owanda, between May 29, 1980, at Rongo district court in South Nyanza district of Nyanza Province, being charged with the receipt of money which form part of the public revenue, knowingly furnished a false statement of cash Kshs 749 received by him."

The second count charged the appellant with stealing by a person employed in the public service, contrary to section 280 of the Penal Code, the particulars being stated as follows:

"Lamek Omboga s/o Owando, between May 29, 1979 and May 20, 1980 at Rongo district magistrate's court in the South Nyanza District of Nyanza Province, being a person employed in the public service in the judicial department as a clerical officer, stole a total of Kshs 749 the property of the Republic of Kenya which came into his possession by virtue of his employment."

The appellant, who was represented, pleaded not guilty. Evidence was given by five complainants that on various dates they paid money for court fees at Rongo court and were either given receipts for lesser amounts or no receipt at all. No objection was taken to the form of the charges at the trial. The appellant denied the offences. He was convicted on both counts and sentenced to two concurrent terms of one year's imprisonment. He appealed to the High Court (Patel J). State counsel did not support the convictions. The appeal was however dismissed. The learned judge correctly noted that the first count was defective, in that the appellant was alleged to have made a number of false entries, and should have been charged separately for each false entry, but he held that no prejudice or failure of justice resulted. He did not comment on the second count, which in our view was equally defective, as it charged stealing on a general deficiency when an account is shown to be short, and the circumstances indicate that the account

holder is responsible, but it was not appropriate in this case where the deficiency was made up of separate thefts, committed on different occasions, each capable of proof. In this connection, see *R v Tomlin* (1954) 38 Cr App R 82, and *Archbold*, 40th Edn Para 48(b) at page 49.

When the appeal opened before us, Mr Okoth for the appellant began by submitting that as state counsel did not support the conviction in the first appeal in the High court, the state was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of state counsel as to the merits of an appeal.

Mr Okoth then went on to deal with misdirections in the magistrate's judgment, which he submitted made the convictions bad in law.

At page 7 of his judgment, the magistrate said:

"There is more evidence that on May 9, 1980, the accused person received an amount of Kshs 28 from Mary Otieno PW 4 as court fees. The accused gave to Mary Otieno a receipt No 769181."

What Mary Otieno in fact said was:

"Later again in April, 1978, I paid some more money Kshs 28 for summons fees. I paid it to another clerk who is not before the court today."

Far from implicating the appellant, as the magistrate seems to have thought, Mary Otieno's evidence specifically exonerated him from any connection with the matter of the Kshs 28.

At this stage in the proceedings, Mr Mugu for the Republic informed us that he was unable to support the convictions and that he conceded the appeal. In our view, Mr Mugu was right. We are of the opinion that the first count, which charged in omnibus form a general allegation of fraudulent false accounting extending over the period of a year, was incurably bad. To prove the charge the prosecution adduced evidence of a series of separate acts, each one of which could, and should, have formed the subject of a separate charge. As the charge was framed, the appellant could not possibly have known what offence was being charged against him.

The second count was, in our view, equally defective. Even though it is legally permissible to charge a general deficiency under section 280 of the Penal Code, this was a series of offences, committed on different dates, each one of which should have been the subject of a separate charge. In addition to these technical defects, there is also the misdirection as to Mary Otieno's evidence, the effect of which was misunderstood by the trial magistrate, and which must inevitably have affected the magistrate's approach to the whole question of the appellant's guilt or innocence, to his undoubted prejudice. For these reasons we allowed this appeal.

Dated and Delivered at Kisumu this 8th December, 1982

E.J.E.LAW

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JUDGE OF APPEAL

K. D. POTTER

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JUDGE OF APPEAL

A.R.W. HANCOX

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Ag JUDGE OF APPEAL