



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

Criminal Appeal No. 406 Of 2009

Between

1. Jacob Omondi Odongo )
2. George Otieno Akula )
3. Daniel Rabwoye Onialo ).....Appellants
4. Andrew Orwa Odongo )

And

Republic .....Respondents

*(An appeal from the judgment of the High Court of Kenya at Kisumu (Karanja, J.) dated 11<sup>th</sup> November, 2009 in*

**H.C.C.R.A NO. 178 & 199 OF 2006)**

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**JUDGMENT OF THE COURT**

Between the night of 7<sup>th</sup> and 8<sup>th</sup> June, 2006, and the night of 18<sup>th</sup> and 19<sup>th</sup> June, 2006, the appellants in this appeal **George Otieno Akula, Jacob Omondi Odongo, Daniel Rabwoye Onialo** and **Andrew Orwa Odongo**, the first, second, third, and fourth appellants respectively committed a series of burglaries in respect of various dwelling houses in South West Gem and South Gem locations of Siaya District. It is not certain as to when each of them was arrested, but going by the charge sheets in the record, it would appear that they were arrested on or before 26<sup>th</sup> June, 2006 and possibly on 27<sup>th</sup> June, 2006. On 26<sup>th</sup> June, 2006, they were allegedly found handling some of the properties stolen from the various houses the subject of the main charges, and on 27<sup>th</sup> June, 2006, three of them were found in possession of yet other properties. Whenever they were arrested, the police, in their wisdom arraigned them before the trial court on four separate charges in **criminal Case Nos. 905 of 2006, 906 of 2006, 907 of 2006 and 908 of 2006**. We say in their wisdom because in our view, on strict interpretation of **Section 135 (1)** of the Criminal Procedure Code, they could have been charged in one charge sheet and not necessarily in separate charge sheets as happened here. **Section 135 (1)** provides as follows: -

**“Any offences, whether felonies or misdemeanour, 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.”**

All the main offences in each of these charge sheets or in each of the cases were burglary contrary to **Section 304 (2)** and stealing contrary to **Section 279 (b)** of the Penal Code. These were series of offences of the same or similar character committed within the same area and it did not matter that the complainants were different and their dwelling houses were not in the same compound.

However, be that as it may, for some reasons, the police preferred different cases in respect of different complainants. What looks rather interesting is that all the cases were apparently preferred in the same court and their numbers followed each other and further the appellants appeared to have been arraigned in respect of one charge after another, and yet the learned magistrate who took the first plea and was clearly in full knowledge of the disposition of the appellants continued taking one plea after another and as each appellant pleaded guilty to each case, he continued convicting each appellant and sentencing each appellant. We will revisit this aspect hereinafter. It is necessary however to note that all of them were taken to court on 3<sup>rd</sup> July, 2006 for plea in respect of each case.

When the charge in respect of **Criminal Case No. 905 of 2006**, was read out to the appellants, each is recorded of having pleaded guilty to the main charge of burglary contrary to **Section 304 (2)** of the Penal Code and to stealing contrary to **Section 279 (b)** of the Penal Code. That case cited the names of all the appellants but in the particulars of the offence, only three names were actually charged with that offence. The three were **Jacob Omondi Odongo**, **Andrew Orwa Odongo** and **Daniel Rabwoye**. The alternative charge to that charge which was that of handling stolen property contrary to **Section 322 (2)** of the Penal Code was preferred against only two appellants in that charge sheet and those were **Andrew Orwa Odongo** and **Daniel Rabwoye Onialo**. Thus **George Otieno Akula**, though cited as the fourth accused, did not feature in the particulars of both the main charge of burglary and stealing nor in the alternative charge. Notwithstanding that, the proceedings show that he was required to plead and did plead to the main charge even though he was not charged with it. Thereafter, without entering a plea of guilty, the court proceeded to receive facts and **George Otieno Akula** who never featured in the particulars of either charge was again asked if he admitted the facts and he did. They were thereafter convicted on their own plea and each, together with George Otieno Akula were sentenced to serve 4 years imprisonment on each limb of the main offence. It was not stated whether the sentences were to run concurrently or consecutively. We have checked with the original handwritten record of the Resident Magistrate and have ascertained that indeed George Otieno Akula was not cited in the particulars of the main charge of burglary and neither was he cited in the alternative charge in respect of **Criminal Case Number 905 of 2006** at Bondo.

We have no hesitation in concluding that as per the records before us, the sentence meted out against him in respect of Criminal Case Number 905 of 2006 was illegal, for although listed as an accused in that case, the particulars of the main charge and of the alternative charge did not cite him as one of the suspects.

In respect of Criminal Case Number 906 of 2006, again the name of George Otieno Akula is cited as one of the accused in that case but that is all. He was not one of the suspects cited in the particulars of the charge and was not cited in the particulars of the alternative charge, yet the record shows that he pleaded to the main charge and was sentenced in respect of it. This was in our view not proper. Indeed he should not have pleaded guilty to that charge as he was not an accused person in that case. The sentence visited upon him in respect of that case was illegal and cannot stand. In sentencing the appellants in that case, the learned magistrate stated:

**“SENTENCE:**

**To serve 4 years imprisonment on each limb to run concurrently and consecutive to sentence in Bondo Criminal 905/2006.”**

That sentence could have been pronounced only against the second, third and fourth appellants as they

were the accused in those two cases. However, it was pronounced against all the appellants and was made to run concurrently as concerns the two limbs of the charge and consecutive with the sentence in Criminal Case No. 905 of 2005.

Immediately thereafter, charge in Criminal Case No. 907 of 2006 was read to the appellants. This time all the appellants were cited in the charge sheet and were also cited in the particulars of the charge of burglary and stealing. Three of them also faced an alternative charge of handling stolen property contrary to **section 322 (2)** of the Penal Code. They all pleaded guilty to the main charge and were sentenced as follows:

**“SENTENCE:**

**To serve 4 years imprisonment in each limb to run concurrently but consecutive to Cr. 905 and 906 Bondo case file.”**

This was the first time the first appellant was properly and legally sentenced to serve imprisonment period. The first, second, third and fourth appellants were now each to serve a total of twelve (12) years imprisonment.

In Criminal Appeal Number 908 of 2006, although all the four appellants were cited in the charge sheet, only three namely George Otieno Akula, Jacob Omondi Odongo and Daniel Rabwoye Onialo, the first, second and third appellants respectively were cited in the particulars of the charge and were thus in law the ones who could be called upon to plead to that charge. George Otieno Akula also faced an alternative charge of handling stolen property. Andrew Orwa Odongo, the fourth appellant did not feature in the particulars of the two charges. However, a plea was entered for him although he was strictly not an accused in that count. He too, like the others, pleaded guilty and after entering a plea of guilty in that case, the learned magistrate proceeded and sentenced all of them as follows:

**“SENTENCE.**

**To serve 4 years imprisonment on each limb to run concurrently, but consecutively to criminal 905/906 of 2006.”**

Thus in all, the first appellant George Otieno Akula was to serve sentences of four (4) years imprisonment in Criminal Case Number 907 of 2006 and four (4) years in respect of Criminal Case Number 908, but that sentence in Criminal Case Number 908 of 2006 would not run consecutive to Criminal Case Number 907 of 2006. This is what should have happened. Instead he was sentenced to serve four years imprisonment even in respect of charges in Criminal Case Numbers 905 and 906 where he was not cited in the particulars of the charge.

The second appellant **Jacob Omondi Odongo** was sentenced to four years in respect of the Criminal Case Number 905 of 2006, and to four years in Criminal Case Number 906 on the main charge of burglary and stealing and this was to run concurrently in respect of the two limbs of the charge and to run consecutively as between the two cases thus making the imprisonment in respect of these two criminal cases to total eight years. Further, he was sentenced to four years imprisonment on burglary and stealing charges in Criminal Case Number 907 of 2006, and that was to run concurrently in respect of the two limbs of that charge but to run consecutively with the sentence in Criminal Case Number 905 and again in Criminal Case Number 908 of 2006 he was sentenced to serve four (4) years imprisonment in each limb of burglary and stealing charge but to run consecutively with the sentence in Criminal cases Numbers 905 and 906 of 2006. Thus he got the maximum sentence compared to the others.

The third appellant **Daniel Rabwoye Onialo** got the same sentences as the second appellant for he was cited in the particulars of every burglary and stealing charge in respect of all the four cases whereas the fourth appellant **Andrew Orwa odongo** did not feature in the particulars of Criminal Case Number 908 of 2006 and thus should not have been sentenced in respect of that case but he was nonetheless sentenced to four years imprisonment in respect of it. As we have stated, in our view that sentence was illegal.

The appellants were dissatisfied with the sentences and particularly with the subordinate court's order that the sentences of imprisonment on various cases be served consecutively. They moved to the High Court vide Criminal Appeal Numbers 178 and 199 both of 2006 and Appeal Numbers 14, 15 and 16 of 2009. When the appeals eventually came up before Karanja J. the appeals were consolidated and after hearing the appellants and the learned state counsel, the learned Judge, in a judgment dated and delivered on 11<sup>th</sup> March, 2009, dismissed all the appeals stating *inter alia* as follows: -

**“In normal circumstances, concurrent sentences are awarded for offences committed in one criminal transaction (See Ng’ang’a vs. Republic 1981 KLR 530).**

**This court does not think that there are exceptional circumstances to warrant that the sentences in all the cases be made to run concurrently. The offences were committed on different dates, at different places and against different complainants. They were not one big criminal transaction. Consequently, these appeals must fail. They are unmerited and are hereby dismissed.”**

That is the decision that prompted this appeal before us. The appellants are unrepresented. Each is complaining against the order that their sentences are to run consecutively. In effect, the appeals could be considered to be against the severity of sentence which under the provisions of **Section 361 (1)** of the Criminal Procedure Code would not be a matter for us to entertain as this is a second appeal. However, we have taken the view that this appeal is not mainly on the severity of sentence but is on the main, under what circumstances, a court should order consecutive sentences particularly when considering sentences in other cases as opposed to sentences in respect of counts in one charge sheet. Further we are also aware that this Court should be very reluctant to interfere with the discretionary decisions of a trial court particularly when the same has been confirmed by the first appellate court. However, looking at the entire case that was before these two courts and the conduct of the same by the trial court and noting that the first appellate court did not appreciate those flaws which, we think if it had appreciated, it would not have treated the case as lacking exceptional circumstances and lastly having regard to the provisions of **Section 159** of the Constitution of Kenya which enjoins us to apply substantial law where the same application is called for, we think this is a case with such flaws that we cannot ignore.

First as we have stated above, on strict interpretation of the provisions of **Section 135 (1)** of the Criminal Procedure Code, the offences that were committed all being of burglary within a span of about eleven days in respect of which the perpetrators were the same could have been included in one charge sheet.

Secondly, as we have demonstrated above, some appellants were not cited in some cases and were thus not accused in those cases, yet the learned trial magistrate went ahead to seek pleas from them and proceeded to convict them and to sentence them for offences they were not charged with in the first place. In our view, it was the duty of the trial court to ensure that the charges were read and explained only to those who were cited in the particulars of the charge. For example, a number of people may be charged in one charge sheet with various offences, but each charge will only be read to those who are involved as per the particulars of that particular charge and all cannot be expected to answer to those charges that do not concern them. This was a major flaw for it resulted in punishing people not charged with some of the offences. The first appellate court did not direct its mind to it. In our view, the mere fact that one's name is appended to a charge sheet without him being cited in the particulars means nothing and cannot certainly mean that he has committed that offence. In this case, the appellants such as George Otieno Akula whose name appeared at the top of charge sheets in Criminal Cases 905 of 2006 and 906 of 2006 but was not one of those charged with the offence should not have been made to plead to the charge. Likewise Andrew Orwa Odongo should not have been made to plead to charges in Criminal Case Numbers 907 and 908 both of 2006.

Next, in our view, the learned magistrate having taken plea and having convicted and sentenced the appellant in respect of Criminal Case Number 905 of 2006, should not have proceeded to take plea in respect of Criminal Cases 906, 907 and 908 all of 2006 as he had known the accused and knew they were the same people as in previous cases. He should have passed the other pleas to other magistrates. In taking pleas one after the other, the learned magistrate's independence of mind could have been impaired and hence four years for all the cases. We do not make this a cardinal principle for there may be courts

manned by only one magistrate; but we are of a view that such should be avoided as much as possible so as to remove any element of perceived bias.

The other matter which we think placed this matter in the bracket of exception cases is the manner the sentences were pronounced. Sentence in Criminal Case Number 906 of 2006 was ordered to run consecutive to that in Criminal Case Number 905. Then the sentence in Criminal Case Number 907 was read to run consecutive to that in Criminal Case No. 905 and 906 and yet sentence in Criminal Case Number 908 is ordered to run consecutive to that in Criminal Case Number 905 of 2006 and the court remained silent as to whether it would be implemented after sentence in 906 or in 907 which were also to run consecutive to 905 or whether it would start after 907 which was not mentioned in that sentence in Criminal Case Number 908 and no order was made that the sentence in 908 would run consecutively with it or would one take it that sentence in 908 of 2006 would run concurrent with 907 of 2006?

All these are, in our view matters that left the issue of sentences whether running consecutively or not with many loose ends. With respect we do not agree with the learned Judge that this case did not fall within the exceptions in respect of which concurrent sentences would be pronounced.

Mr. Meroka, the learned Prosecuting Counsel conceded the appeal and in his view, relying on the provisions of **Section 12** of the Criminal Procedure Code the sentences should have been made to run concurrently and not consecutively. **Section 12** states:

**“Any court may pass a lawful sentence combining any of the sentences which it is authorised by law to pass.”**

Based on what we have stated above, in our view this was a case where concurrent sentences would have served the purpose. In doing so, we find consolation in the decision of this Court in the case of **Ngibuini vs. Republic (1987) KLR 517** in which the appellant was tried in separate cases where the complainants were neither the same nor did the offences arise out of the same transaction, the Court was of the opinion that because the offences formed a series of offences of the same or similar character, they should have been charged in one charge and thus stated:

**“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. 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.”**

As we have stated, that was a case where the appellant was charged in separate trials in respect of offences committed on different dates against different complainants but the offences were of similar character in that they were both theft by agent. In this case, the offences were also of a similar character as all were burglary and theft from dwelling houses and were committed over a duration of a short period.

We think we have said enough to demonstrate that in our view, this appeal must succeed. We allow it. The High Court order dismissing the appeals and thus confirming the Resident Magistrate’s sentence of four (4) years against each appellant in respect of each limb of the charges in each appeal to run concurrently as to each limb and to run consecutively as to each case is hereby set aside. We substitute the same with an order that the sentences of four years imprisonment as ordered against each appellant in respect of each case shall run concurrently as to each limb of each charge and also concurrently as to each case. That in effect means each appellant is to serve imprisonment for a total of four (4) years. The first appellant George Otieno Akula should not have been convicted and sentenced for the offences in criminal cases Numbers 905 and 906 of 2006. Although he did not appeal against conviction in these cases, his convictions in respect of these cases are quashed and sentences set aside. Also Andrew Orwa Odongo was not in effect charged in Criminal Case Number 908 of 2006. His conviction and sentence in respect of this charge is illegal. The conviction in respect of the charge is quashed and sentence is set aside.

We note that each appellant has been in prison since 5<sup>th</sup> July, 2006, and has thus served a prison term far

in excess of the term they would have served had the sentences been ordered to run concurrently as between the cases as we have ordered. In the circumstances the term served already will suffice and we therefore order each to be released forthwith unless otherwise lawfully held.

*Dated and delivered at Kisumu this 31<sup>st</sup> day of May,2013.*

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**KANTAIriginal.