



Case Number:	Criminal Appeal 68 of 1995
Date Delivered:	22 Nov 1995
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Akilano Molade Akiwumi, Abdulrasul Ahmed Lakha, Richard Otieno Kwach
Citation:	Mutinda Mutisya Kyale v Republic [1995] eKLR
Advocates:	-
Case Summary:	<p>Kyale v The Republic</p> <p>Court of Appeal, at Kisumu</p> <p>November 22, 1995</p> <p>Kwach, Akiwumi & Lakha, JJ A</p> <p>Criminal Appeal No 68 of 1995</p> <p><i>Criminal practice and procedure- charge-amendment of- procedure to be followed by court on amendment of charge- Section 214[1] –Criminal Procedure Code.</i></p> <p><i>Criminal practice and procedure-charge-amendment of-appellant indicating to court that trial may proceed after amendment of the charge without recalling witnesses-whether appellant can subsequently challenge the trial as contrary to Criminal Procedure Code.</i></p> <p>Head notes</p> <p>The appellant who was an Inspector of Police and was convicted on the alternative charge of stealing</p>

by a person employed in the public service contrary to Section 280 of the Penal Code and ordered to serve two years suspended sentence. His appeal to the superior was dismissed as lacking in merit. On second appeal, his counsel on two principal grounds: first, he submitted that Section 214 (1) (ii) of the Criminal Procedure Code, Cap. 75 had not been complied with and, secondly, that the charge was defective and contravened Section 280 of the Penal Code, Cap. 63 in failing to state whose property it was that the appellant stole.

HELD

1. Under section 214 (1) of the Criminal Procedure Code, 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 the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case provided that where a charge is so altered, the Court shall call upon the accused person to plead to the altered charge.
2. Where a charge is altered under section 214[1] the accused may demand that the witness or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.
3. in the instant case after the court had allowed an amendment of the charge the appellant's then advocate is recorded to have indicated that the trial may proceed without recalling the witnesses and the appellant was called upon to plead to the altered charge. The court does not therefore, agree that there was non compliance with Section 214 (1) (i) (ii) of the Criminal Procedure Code.

	<i>Appeal dismissed</i>
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H. C. CR. APPEAL NO. 156 OF 1995
Case Outcome:	Appeal dismissed
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT KISUMU

(CORAM:KWACH, AKIWUMI & LAKHA, JJ A)

CRIMINAL APPEAL NO 68 OF 1995

BETWEEN

MUTINDA MUTISYA KYALEAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a decision of the High Court of Kenya at Kakamega (Mr. Justice B. K. Tanui) dated 18th July, 1995)

in

H.C.CR. APPEAL NO. 156 OF 1995)

JUDGMENT OF THE COURT

The appellant was an Inspector of Police and was convicted by the Principal Magistrate's Court at Kakamega on June 8, 1995 on the alternative charge of stealing by a person employed in the public service contrary to Section 280 of the Penal Code, Cap 63. He was to serve two years suspended sentence. His appeal to the superior court against conviction only was heard on July 4, 1995 and by its judgment delivered on July 18, 1995 the learned judge dismissed the appeal. He now appeals to this Court and his appeal was heard on November 20, 1995. Such is the speed with which our courts have dealt with this case.

This being a second appeal it lies only on points of law and Mr. Menezes for the appellant argued the appeal on two principal grounds: first, he submitted that Section 214 (1) (ii) of the Criminal Procedure Code, Cap. 75 had not been complied with and, secondly, that the charge was defective and contravened Section 280 of the Penal Code, Cap. 63 in failing to state whose property it was that the appellant stole.

We now turn to consider these grounds. As to the first, 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 the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that –

- i. Where a charge is so altered, the Court shall be thereupon call upon the accused person to plead to the altered charge
- ii. Where a charge is altered under this subsection the accused may demand that the witness or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

In the instant case after the court had allowed an amendment of the charge the appellant’s then advocate is recorded to have indicated that the trial may proceed without recalling the witnesses and the appellant was called upon to plead to the altered charge. We do not, therefore, agree that there was non compliance with Section 214 (1) (i) (ii) of the Criminal Procedure Code as was urged by Mr. Menzes. In any event, the appellant was not convicted on the altered charge. This ground of appeal fails.

Secondly, Section 280 of the Penal Code, Cap. 63 provides that –

280. If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.”

It will at once be noted that there are two limbs to this section. The appellant here was charged with the second or later limb of the section, namely, that the thing stolen came into the possession of the offender by virtue of his employment. We do not see that the charge is in any way defective of that it contravenes Section 280 of the Penal Code.

Accordingly and, for reasons we above stated, the appeal against conviction is dismissed. We cannot, however, refrain from making two observations. First, we are simply outraged by the lenient sentence imposed by the Principal Magistrate at Kakamega. The offence with which the appellant was convicted and the large sum of money involved make the offence a serious and grave one and to impose a two year suspended sentence is, in our judgment, a farce and raises considerable suspicion.

It I unfortunate that no notice of such an intention on the part of the State had been given to the appellant. If the State, however, were serious in its intentions we have no doubt that it could have ensured that appropriate steps were taken to serve such a notice upon the appellant. In the result, the appellant received no sentence proportionate to the gravity of the offence with which he was convicted.

Dated and delivered at Kisumu this 22nd day of November, 1995.

R. O. KWACH

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR



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