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| Case Number: | Criminal Appeal 68 of 1999 |
| Date Delivered: | 21 Sep 1999 |
| Case Class: | Criminal |
| Court: | High Court at Mombasa |
| Case Action: | Judgment |
| Judge: | |
| Citation: | REPUBLIC v GILBERT OKOTH [1999] eKLR |
| Advocates: | - |
| Case Summary: | Criminal Law-house-breaking and stealing-charge sheet not specifying the offence-charge sheet containing a two-in-one charge-duplicity in charge sheet-where the accused persons were asked to plead to one single charge even though two offences were committed-effect of-whether the charge laid before the court satisfied the requirements of the law-304(1) and 279(b) of the Penal Code |
| Court Division: | - |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**Criminal Appeal 68 of 1999**
**(From the Original Criminal Case 985 of 1998 of Chief Magistrate's Court at Mombasa).**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**GILBERT OKOTH.....APPELLANT**

**JUDGEMENT:**

The Appellant was, on 26th March, 1998 charged with oneZABLON OWIGO (hereinafter referred to as the "co-accused") with theoffenses of house-breaking and stealing contrary' to Sections 304 (1) and 279(b) respectively of the Penal Code. These two offenses -were contained, maybe compressed would be a more apt description,in one composite charge as a single count. As this charge (withits particulars) are going to have a pivotal place in this appealit is necessary to set it out in extenso:

"House-breaking and stealing contrary 304(1) and 279(b)of the Penal Code.

1.(Gilbert Okoth) (2) Zablon Owigo

On the 19th day of March, 1998 at unknown time atMigombani Village in Likoni Location within MombasaDistrict of the Coast Province, jointly broke and enteredthe dwelling house of CHRIS OMONDI AWITI with intent tosteal and did steal therein Television set makeGreatwall, a radio cassette make National a CD Cassetteplayer, two speakers, three travelling bags, an iron boxmake optima, 12 cooking sufurias, six tea cups, eightpairs of shoes, six plates, six long trousers, eightshirts, one marino blanket, four pairs of neck ties, a TVaerial, several pairs of socks and cash Ksh.5,000/- allvalued at Ksh.243,500/- the property of CHRIS OMONDI AWITI".

As can be observed, this charge is fundamentally defective intwo respects. If the time of the commission of the offence wasunknown, how then could the accused persons be charged with eitherof the two kindred offenses v.z. house-breaking and burglary" Tothis extent, quite obviously, the accused persons did not know whatoffence they were expected to meet and how to defend it. Theparticulars can be said not to have disclosed the offence.

The second and equally if not more important error in thischarge is that it is a two-in-one charge. It purports to combinetwo single and independent offences, under separate provisions ofthe law, into one charge. Unlike Section 306 of the Criminal

Procedure Code which makes it an offence to "break and enter (certain specified buildings) and commit(s) a felony" or "breaks out of the same having committed any felony"(underlining and brackets are mine) Section 304, which is one ofthe charging Sections here provides for three alternatives namely:

(a) breaking and entering with intent tocommit a felony;

(b) having entered, with intent to commit a felony, breaking out or I

(c) having committed a felony breaking out

Upon perusal of the charge, it seems crystal clear to me thatthe prosecution elected to proceed with alternative (a). It choseto couple (a) with another offence i.e. stealing under Section279(b) of the Penal Code. This involves theft from a dwelling house. In essence the accused persons were asked to plead to onesingle charge even though two offences were committed. It would bepardonable if the accused persons obtained an impression thatactually the prosecution was offering them a special bargain being "buy two for the price of one". Any which way one looks at it, thecharge was duplex.

I am satisfied that the charge as laid before the trial courtdid not satisfy ; the requirement under Section 135(2) of theCriminal Procedure Code. The prosecution should have preferred twoseparate counts in the charge in respect of each of the offenses itopted for. One of the rudimentary caveats in the framing of an information or charge is to watch out for duplicity. When acharge, or a count thereof, charges the accused with havingcommitted two or more separate offences, then, in my judgement,such error becomes a fundamental irregularity. Would thisirregularity, in\ terms of Section 382 Criminal Procedure Code,occasion a failure\or miscarriage of justice" I shall come back tothis point a little later.

After the charge was read out and explained to the accused,they pleaded not guilty. Before reading out the charge, it wasincumbent upon the Magistrate taking the plea to ensure that thecharge as laid was properly framed or presented - See Section 89(5) of Criminal Procedure Code. Later the trial court was under asimilar duty - See Section 135(3) of the Criminal Procedure Code.Both the Plea magistrate and the Trial magistrate appear to haveoverlooked this duty.

Indeed, after the ensuing trial the judgement of the courtopened as follows:

"The accused person(sic) Gilbert Okoth andZablon Owigo whom I will refer to as the 1stand 2nd accused respectively were charged withthe offence of house-breaking and stealingcontrary to Section (sic) 304(1) and 279(b) of the Penal Code……." and after dealing

with the'Subsitantive part of the judgement concluded "I consequently find both accusedpersons guilty of the offence of house-breaking and stealing contrary to Section(sic)304(1) and 279(b) of the Penal Code and Iconvict them under Section 215 of the CriminalProcedure Code.From the above it can be seen that the Learned Magistrateobviously, albeit erroneously, perceived the offenses to be in thesingular. That probably, can be understandable, although notexcusable, particularly when the mistake is seen to have originatedfrom the inception of the case. What is not understandable thoughis what transpired at the stage of sentencing for if one were to take to its logical conclusion the concept of "buy two for theprice of one" it would follow that the price to be paid (orextracted, depending on how one looks at it) should be that, of onenot two.

When sentencing the Learned Magistrate placed the co-accusedon probation for two years. The problem appears when examining thesentence of the appellant. In a succinct paragraph he states:"The 1st accused has not given any mitigation.There is nothing to show that he is remorseful'for the offence. I will sentence him in thefirst limb to 12 months plus one stroke of thecane. On the 2nd limb I will sentence himalso to serve 12 months imprisonment plus one stroke". (Underlining is mine)

So, suddenly what was all along composite has now become splitup.

What hitherto was two-in-one is now two. What previously wasrolled-up has now unfurled. And what before was in singular is nowin plural.

Quite apart from the inherent illegality of the wholeexercise, , it ' becomes, in my humble view, unconscionable for aseller (the court) once the bargain of "buy two for the price ofone" is accepted by

the consumer (the accused) to then turn aroundand to insist on full price of two. This is patently unjust.Duplicity in itself is bad enough but where it later leads tomutation in form of plurality of limbs" it certainly becomes the"unacceptable face" of criminal law justice.

I have tried to rummage through the criminal law legislationand case law to see if I can locate the origins if not thewhereabouts of this expression i.e. "limb of the court' (or is theoffence"). I have been unable to find it. For sure, the CriminalProcedure Code does not recognise such a concept. Whether it doesexist as a rule of practise, I am not certain. Both the LearnedSenior State Counsel, who supported the conviction and sentence,and Counsel for the appellant are men of quite some experience inthis field but they too have unfortunately, not been able to assistthe court on this point.

It remains now for me to consider whether the errorsdemonstrated above can be said to have occasioned a miscarriage of justice.

The global and conglomerate impact of these errors leave me inno doubt that they have occasioned a miscarriage of justice. Aretrial can serve no useful purpose as there is no proper chargelaid down against the accused persons.

I have also gone through the evidence and noted that theAppellant was convicted on the evidence of a single witness aged 14years. I am not satisfied that her evidence was recorded incompliance with Sec.19 of the Oaths and Statutory Declarations ActCap 15 nor did the Learned Magistrate warned himself of the dangersof convicting on the basis of this evidence. Finally the LearnedMagistrate overlooked to pronounce the sentences to runconcurrently

It follows therefore that the conviction is to be quashed andthe sentence to be set aside. It is so ordered and the Appellantis set free unless otherwise lawfully held.

Dated today 21st day of September 1999.

HON KASSIM SHAH
COMMISSIONER OF ASSIZE