

UGANDA / JUDGMENT

Gukuli v Reginam (Criminal Appeal No. 75 of 1955) [1955] EACA 346 (1 January 1955)

[1955] EACA 346

COURT

East African Court of Appeal

BEFORE

De Lestang J, Nihill P, Worley VP

CASE / FILE NUMBER

Criminal Appeal No. 75 of 1955

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COURT OF APPEAL FOR EASTERN AFRICA-

Before SIR BARCLAY NIHILL (President), SIR NEWNHAM WORLEY (Vice-President) and DE LESTANG, J. (Kenya)

CHERERE s/o GUKULI, Appellant (Original Accused)

\$v\$.

REGINAM. Respondent

Criminal Appeal No. 75 of 1955

(Appeal from the decision of H. M. Supreme Court of Kenya sitting in Emergency Assize, Windham, J.)

Charge—Alternative charges in one count—Duplicity—Effect upon conviction— Penal Code, section 61B (i)—Criminal Procedure Code, sections 135 (2) 137B (i) and 381.

The appellant was charged and convicted under section 61B of the Penal Code on two counts of "administering or being present at and consenting to the administration of an oath relating to the unlawful society commonly known as Mau Mau", the trial Judge finding that the "accused either actually administered the oath or at least was present and played a willing part in its administration".

Section 61B (i) aforesaid reads: "Any person who administers, or is present at and consents to the administration of, any oath, or engagement in the nature of an oath, relating to the unlawful society commonly known as *Mau Mau* is guilty of a felony and shall be sentenced to death".

In support of the conviction the Crown relied upon section .137B (i) of the Criminal Procedure Code, which provides: "Where an enactment constituting an offence states the offence to be an omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;".

Section 135 (2) of the Code provides: "Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count".

By section 381 of the Criminal Procedure Code: "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account (a) of any error, omission or irregularity in the complaint \$\\ldots\$ (b) \$\\ldots\$ (c) \$\\ldots\$ unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice: Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

Held (6-6-55).—(1) Section 61B of the Penal Code charges two alternative offences.

- (2) Where two or more offences are charged in the alternative in one count, the count is bad for duplicity contravening section 135 (2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where charged, and if he is convicted, he does not know exactly of what he has been convicted.

Appeal allowed.

\$\\overline{c}\$

Cases referred to: R. v. Molloy, (1921) 2 K. B. 364; Emperor v. Erman Ali, (1930) L. R. 57 Cal 1228; James Mungai and others v. R., E. A. C. A. Cr. As. 184/190 of 1954; *Iyer v. The King Emperor*, (1901) L. R. 28 I. A. 257; Abdul Rahman v. The King Emperor, (1901) L. R. 28 I. A. 257; Abdul Rahman v. The King E (1926) L. R. 34 I. A. 96; Odda 1 ore and another v. R., (1934) 1 E. A. C. A. 114; Mongella v. R., (1934) 1 E. A. C. A. 152; Ngidipe v. R., (1939) 6 E. A. C. A. 118; R. v. Thompson, (1914) 2 K. B. 99; R. v. Disney, (1933) 24 C

Appellant present, unrepresented.

Brookes for respondent.

JUDGMENT (prepared by Worley (Vice-President)).—This case has had an unfortunate and peculiar history. The appellant was originally arraigned on 26th April, 1954, before a Judge of the Supreme Court of Kenya sitting in Emergency Assize on an information containing two counts of

"administering or being present at and consenting to the administration of an oath relating to the unlawful society commonly known as Mau Mau contrary to section 61B of the Penal Code". The date of the alleged offence was 16th October, 1953. He was found guilty of "being present and consenting" to the administration of the oath, convicted and sentenced to death. On appeal to this Court (E. A. C. A. Criminal Appeal No. 417 of 1954) the convictions were quashed and a retrial ordered for the reason that one of the assessors had been absent for a whole day of the trial before his absence was noticed. The appeal was determined on 18th June, 1954.

For some unexplained reason it was not until 31st January, 1955, that the retrial began on the same information before another Judge of the Supreme Court. The appellant was again convicted on both counts, the Judge this time saying "accused either actually administered the oath or at least was present and played a willing part in its administration ... I therefore find accused guilty on both counts of the offence under section 61_B of the Penal Code." The appellant was again sentenced to death and the learned trial Judge refused to certify the case as one fit for appeal on questions of fact or mixed fact and law.

The appellant again appealed to this Court and his appeal was set down for hearing on points of law taken by the court though not raised in the memorandum of appeal, which is merely the stereotyped form prepared in the prison. The point of law now taken for the first time is whether the charge was bad for duplicity. The appellant was legally represented at both his trials but has not been represented at either appeal before us. We therefore asked counsel for the Crown/respondent to address us on the question of duplicity. He referred us to the precedent for a charge in this form in the appeals of James Mungai and others v. R. (E. A. C. A. Criminal Appeals 184-190 of 1954). The appellants in those cases had been convicted on charges framed in similar terms and their appeals were dismissed by this Court. It is clear from our records that the question of duplicity was not raised in the memoranda of appeal nor taken by the court, but Crown Counsel informed us that this question was made one of the grounds for application for special leave to appeal to the Privy Council, which had been refused. We therefore adjourned the hearing of this appeal to ascertain whether their Lordships had given their reasons for refusing the application. We have since received a transcript of the proceedings before the Judicial Committee from which it is apparent that there was a full argument before their Lordships on the issues of duplicity in the charge, of prejudice to the applicants and also on the point as to whether the objection to the charge, not having been made at any earlier stage of the proceedings, could be entertained by the Judicial Committee. Their Lordships followed their usual custom when refusing leave and did not state their reasons and we think, in the circumstances, that it is impossible from the transcript to infer what view their Lordships took on the submission of duplicity in the charge, or of consequent prejudice to the applicants. It is perhaps significant that their Lordships remarked more than once in the course of the discussion that they were not sitting as a Court of Criminal Appeal.

We think, therefore, we must consider the matter in relation to the charge in the present appeal as res integra. Mr. Brookes, for the Crown, has sought to rely on section 137_B (i) of the Criminal Procedure Code which reads: \$-\$

"Where an enactment constituting an offence states the offence to be an omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence."

Section 61_B of the Penal Code comprises three sub-sections of which sub-section (1) reads: \$-\$

"Any person who administers or is present at and consents to the administration of, any oath or engagement in the nature of an oath, relating to the unlawful society commonly known as Mau Mau is guilty of a felony and shall be sentenced to death.'

Mr. Brookes's submission was that the substantial offence is what he termed "the oath-taking ceremony", that the appellant was shown to be present at such a ceremony either in the capacity of administrator or in the capacity of a person present and consenting and that the case therefore fell within the terms of section 137B(i) of the Code. He conceded that the Crown law officers do not as a rule lay the charge in the instant form but normally formulate separate alternative counts, one charging administering and the other charging being present at and consenting to the administration of an oath. He also drew attention to section 271 (1) of the Criminal Procedure Code which requires that every objection to any information for any formal defect on the face thereof shall be taken immediately after the information has been read over to the accused person and not later. He, however, did not seek to rely upon this and we think rightly so for the defect in the instant case, if it be a defect, is not formal but substantial.

Having given the matter our best consideration, we have come to the conclusion that the charges in question were duplex in that they charged two distinct offences in one count and thereby contravened the provision of section 135(2) of the Code "where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count". The rules describing the formulation of charges and informations in the Criminal Procedure Code are sufficiently akin to the rules under the Indictments Act, 1915, to make relevant English decisions on those rules, and we think we can properly adopt as a test for duplicity passages from the judgment of the Court of Criminal Appeal in *R v. Molloy* (1921) 2 K. B. 364. The judgment of the court was delivered by Avory, J., who after reading the indictment and the relevant statutory provisions, said "The indictment charges the appellant that he either stole the things or, with intent to steal, that he ripped and severed them. Those two offences are not necessarily committed by one and the same act; in other words, the act done may constitute one of the offences but may not constitute the other". Applying that test to the instant case, the conclusion must be that section 61B creates two offences and not one. If the section were worded "any person who is present at a ceremony of oath taking whether as administrator or as a consenting spectator, etc." there would obviously be only one offence capable of being committed in either of these capacities. But the section is not so worded. It is true that a person who administers the oath can be said to be also present and consenting to such administration, but the converse does not necessarily hold true.

It cannot be said that the act is the same in whichever capacity it is done, for the administrator is an active participant, while the person present and consenting is, or may be, a passive onlooker. Indeed, if he in any way actively aids and abets the actual administrator he is, by the provisions of section 22 of the Penal Code, deemed to have taken part in committing the offence of administering and may be charged with actually having done so as a principal.

The next question is, assuming that the charges were bad for duplicity, what effect this has on the trial and conviction. At one time it seems to have been thought by courts in East Africa and in India that almost any departure from the provisions of the Criminal Procedure Code relating to trials vitiated the proceedings. This view resulted from certain observations made in the judgment of the Privy Council in the case of *Subramania Iyer v. The King Emperor* (1901) L. R. 28 I. A. 257. That case, however, was reviewed and to some extent explained by their Lordships in **Abdul Rahman v. The King Emperor** (1926) L. R. 54 I. A. 96. Their Lordships in the latter case concluded their judgment with the following: —

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which, in their Lordships' view may be supported by the curative provisions of sections 535 and 537 (of the Indian Criminal Procedure Code).

The question as to the effect of duplicity in a charge has been considered in a number of decisions of this Court, notably in **Odda Tore** (1934) 1 E. A. C. A. 114, *Mongella* (1934) 1 E. A. C. A. 152 and *Ngidipe* (1939) 6 E. A. C. A. 118. In the first of these cases the appellant was convicted on one count which charged two murders probably committed in the course of one transaction. The count was held bad for duplicity, but the defect was curable because no embarrassment or prejudice had been caused to the appellant. The court followed the English case of *R. v. Thompson* (1914) 2 K. B. 99 in dismissing the appeal on the ground that no substantial miscarriage of justice had occurred, and distinguished the English cases of *R. v. Molloy* (1921) 2 K. B. 364, *R. v. Disney* (1933) 24 C. A. R. 49 and the local case of *R. v. Sowedi* (1933) 15 K. L. R. 105 on the ground that in all those cases it was shown that prejudice had resulted to the defence from the duplicity in the charges. In *Mongella's* case the appellant had been convicted on one count charging six murders the result of one act of arson. The count was held bad for duplicity, but the rule enunciated in *Odda Tore's* case was applied and the appeal dismissed. In *Ngidipe's* case the appellant had been convicted on one count charging three murders all forming part of the same transaction. It was held that the illegality in the form of the charge was cured by section 335 of the then current Tanganyika Criminal Procedure Code so long as the accused persons were not prejudiced or embarrassed in their defence or there had not otherwise been a failure of justice. In its judgment the court considered the two Privy Council cases above referred to together with two Indian full bench decisions given subsequent to *Abdul Rahman's* case, namely *Kapoor Chund v. Suraj Prasad* (1937) I. L. R. 55 All 501 and *Emp. v. Erman Ali* (1930) I. L. R. 57 Cal. 1228. Passages from these two Indian decisions are cited with approval; before summarizing the effect of these,

we should point out that the Indian curative sections (sections 535 and 537) are substantially the same as the corresponding curative

sections in the East African Criminal Procedure Codes. In the case of Kenya, the two sections in question are sections 379 and 381, the material words being "unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice: provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

The effect of the citations in the judgment in Ngidipe's case may be summarized as:-

- (1) Although the Privy Council in Subramania's case drew a distinction between an illegality and an irregularity, the legislature had not subsequently introduced the word "illegality" in the curative section or anywhere else in the Code and, on that state of the law, the court did not think it should introduce a distinction between "illegality" and "irregularity".
- (2) The sole criterion given by the curative section is whether the accused person has been prejudiced or not.
- (3) Both of the Privy Council decisions are really a condemnation of the view that all illegalities are, as such, in the same category for the purposes of appeal. In **Subramania's case** it was idle to suggest that there was no prejudice. In **Abdul Rahman's case** the test applied was whether there was any ground for any probable suggestion of any failure of justice.

Accordingly, following the two previous local decisions, the court held that the illegality in the form of the charge was cured because it was of opinion that the appellants had not been prejudiced or embarrassed in their defence nor had there been otherwise a failure of justice.

The rule adopted in these three decisions of this Court was applied in the cases of *R. v. Mashiki* (1940) 7 E. A. C. A. 50 and *R. v. Gulamhussein* (1946) 13 E. A. C. A. 107. We should, however, observe that its application to Mashiki's case was subsequently disapproved in **Jeremiah v. R.** (1951) 18 E. A. C. A. 218 where the earlier full bench decision in *R. v. Saulos* (1936) 3 E. A. C. A. 34 was followed. The point in issue in these cases was whether the joint trial of two or more separate informations was a curable irregularity or rendered the proceedings a nullity. That is a different point from the one we are now considering.

Gulamhussein's case was one of misjoinder of charges, there being one information containing five counts of which the fifth was held to have been wrongly joined. See also *R. v. Fulabhai Patel* and another (1946) 13 E. A. C. A. 179 at page 181. These decisions are binding on us and the test therefore which we must apply to answer the question, what has been the effect of the defect in the charge on the trial and conviction of the appellant, must be whether there has in fact been a failure of justice.

In Baland Singh v. R. 21 E. A. C. A. 209 this Court said in construing section 381 :=\$

"Section 381 refers to a real failure of justice and not to an apparent failure of justice. If justice has been done in fact there is no real failure of justice, although the correctness of the decision may not be clearly apparent to the parties or the public."

It is to be observed that none of the East African cases cited above were cases in which two or more offences had been charged in one count in the alternative: nor are we aware of any English case in which duplicity or uncertainty

created by charging offences in the alternative has been held to be curable. In: several cases there are dicta which suggest that a general conviction on a count charging two or more offences in the alternative must necessarily work injustice: e.g. in *Odda Tore's* case this Court said: "Clearly an accused person, where he is charged as in *R. v. Molloy* and *R. v. Disney* with distinct offences in one count, even though they are created by the same enactment, would be embarrassed in his defence".

And in *R. v. Surrey Justices: Ex p. Witherick* (1932) 1 K. B. 450 at page 452. *Avory, J.*, said: "It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted, and may be prevented on a future occasion from pleading **autrefois convict**".

In the English cases above referred to, where there has been uncertainty due to the charging of two or more offences in the alternative, the Court of Criminal Appeal does not appear ever to have contemplated the application of the proviso of section 4(1) of the Criminal Appeal Act, 1907. The indictment in all these cases was considered as bad in law and, consequently, the convictions could not stand.

In *Odda Tore's* case this Court said: "Unless this Court is able to say without hesitation that the accused has not been prejudiced by the duplicity there will be no other course open to it than to quash the conviction". We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative: he does not know precisely with what he is charged, nor of what offence he has been convicted. It is, indeed, very difficult to say that a breach of an elementary principle of criminal procedure has not occasioned a failure of justice. We must also point out that the judgment appealed from does not, on the view we have taken of section 61B, conform with section 169(2) of the Criminal Procedure Code in that it does not specify "the offence" of which the appellant has been convicted.

For these reasons therefore we must allow this appeal. The conviction entered against the appellant and the sentence passed on him are set aside. So far as these proceedings are concerned he can no longer be held in custody.

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