

UGANDA / JUDGMENT

Rex v Halake and Another (Cr.A. 43 & 44/1934.) [1937] EACA 114 (1 January 1937)

[1937] EACA 114

COURT

East African Court of Appeal

BEFORE

Gamble. Ag. J. (Kenya), Horne J, Lucie-Smith Ag CJ (Kenya)

CASE / FILE NUMBER

Cr.A. 43 & 44/1934.

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COURT OF APPEAL FOR EASTERN AFRICA. $\sim \sim$

Before LUCIE-SMITH, Ag. C. J., HORNE, J., and GAMBLE, Ag. J. $\mathcal{A} \in \mathbb{R}^n \times n$ (all of Kenya). that the

REX (Respondent) (Original Prosecutor)**ODDA TORE & GUYO HALAKE (Appellants) (Original Accused, Nos. 1 and 2).****Cr. A. 43 & 44/1934\$.**

Criminal Procedure Code of Kenya, section 243 (3) (i)—Indictment Rules 1915, Rule 4—Count bad for duplicity—Inclusion of more than one offence in one count—Whether mere irregularity - Criminal Procedure Code section 367.-Whether substantial miscarriage of justice.

Held (14-5-34).-That, as the information consisted of one count charging the appellants with the murders of two persons, the count
was bad for duplicity; but that, in the circumstances of this case, there had been no failure of justice and that the accused were not embarrassed or prejudiced; and that the convictions should stand and the appeals be dismissed. $\overline{\}$

Both appellants in person.

Bruce (Solicitor-General), for Crown.

Appellant No. 1: "I never killed anyone".

Appellant No. 2: "I was asked if I had killed anyone." $\mathbf{I}$ said 'No!'

Solicitor-General.—Duplicity. *R. v. Benfield*, English Reports, *R. v. Thompson* 9 Criminal Appeal Reports 252; *R. v. Molloy* (1921) 2 K. B. D. 364; *Beresford v. Richardson* (1921) 1 K. B. D. 243; *R. v. Jones* (1921) 1 K. B. D. 632; Irregularity-Criminal Procedure Code section 367, case of *R. v. Sowedi* (Court of Appeal for E. A., Criminal Appeal \$74/1933\$) differs from this present appeal.

JUDGMENT.—This is an appeal from the Supreme Court of Kenya confirming the sentence of death passed on the two appellants for murder by the Provincial Commissioner in the Special District Court at Moyale.

The ground of appeal is that there was sufficient provocation to justify a conviction for manslaughter. That ground of appeal must fail. The appellants admit the killing, but say in excuse, that having heard that two members of their tribe had been killed, and that the two persons killed are their relations in law, they went out and after a journey of two days they found two persons whom they did not know, and of whom they could not say were the actual persons who killed their relations, and thereupon they killed them on account of the blood feud. This defence was adequately dealt with at the court of trial and the assessors and the Provincial Commissioner quite rightly rejected it and the Provincial Commissioner found the appellants guilty of..murder.

There is, however, one matter which was not taken as a ground of appeal by the appellants but which is of considerable importance and must be taken by the court. The information on which the appellants were tried and convicted does not conform with the rules for framing informations which are set out in section 243 of the Criminal Procedure Code. This information consists of one count in the usual scanty statutory form and charges that Odda Tore and Guyo Halake (the appellants) did on the 11th day of July, 1933, murder Nure Abdullah and Ali That count is clearly bad for duplicity. Rule 3 (1) of Isaak. section 243 which is identical with Rule 4 of Indictment Rules. 1915, says: "A description of the offence charged in an information, or where more offences than one are charged, of each offence so charged shall be set out in the information in a separate paragraph termed a count".

The words "each offence" are plain and it is equally plain that the Crown are charging two murders, and for each of those murders there ought to be a separate count.

Rule 3 (II) continues: "A count shall commence with a statement of the offence charged called the statement of offence".

Rule 3 (IV) then states: "After the statement of offence, particulars of such offence shall be set out in ordinary language".

The particulars in the present case disclose two offences, viz. that the two appellants murdered Nure Abdullah and Ali Isaak.

The count therefore is bad for duplicity.

In this present case the prosecution as a result of admissions made by the accused at the preliminary inquiry were aware that Odda Tore and Guyo Halake were concerned in the deaths of Nure Abdullah and Ali Isaak and if the rules in section 243 C. P. C. had been strictly followed there was only one way to draw the information, viz. in two counts, the first charging the accused with the murder of Nure Abdullah, and the second charging them with the murder of Ali Isaak. These two counts may be included in one information and the accused could be tried together on them both if the overt acts relied upon in support of the two offences charged in the counts of the one information are in substance the same for each offence \$(R, v)\$. Lockett (1914) 2 K. B. 720, 732).

But to include more than one offence in a count as is done here is manifestly bad pleading, even if the rules in section 243 did not exist (see *R. v. Thompson* (1914) 2 K. B. 99, where it was held that the inclusion of more than one offence in a count rendered the indictment bad); A fortiori now that rules are clearly laid down in the Code.

The Solicitor-General has addressed to us an interesting argument on this matter. He admits the count is bad for duplicity but says that the defect is an irregularity, and calls in aid of the conviction upon it section 367 of the C. P. C., which says in effect that no sentence shall be reversed on appeal on account of any irregularity in the charge . . . or other proceedings before or during trial, unless such irregularity has in fact occasioned a failure of justice. In the course of his argument he has cited many authorities mostly prior in date to 1915, i.e. the year the Rules set out in section 243 became law in England. Firstly, there is the class of case of which *\$R\$ v. Giddings* (1842) Carrington and Marshman 634, may be said to be typical. There the indictment charged four persons in one count with robbery. for assaulting two persons and stealing from one of them \$2/\$ and from the other 1/- and a hat. This indictment was held good on the ground that it was all one act and one entire transaction. Even under the very strict system of pleading then in existence, which was abolished in 14 & 15 Vict. the defect of duplicity was often held to be curable by pleading over or by a verdict on one of the offences only. Duplicity was no ground for moving in arrest of judgment even in 1864. In *Nash v. Req.* 4 Best and Smith at p. 945. Blackburn J. said in respect of the double count in that case, "that the most that could be done would be by way of application to the judge at the trial to put the prosecutor to his election", and Mellor J. said "that no authority had been cited to show that the objection on the ground of duplicity is available in this court. (Full court of Q. B. on a writ of error) under circumstances like the present and I do not know of any. The only remedy is by demurrer or application to the judge at the trial". And the result was that the judgment on the count was affirmed. Later in 1881 in *Castro v. The Queen* 6 Appeal Cases 229 Lord Blackburn says at pp. 243, 244: "If it were brought to their knowledge (i.e. knowledge of the grand jury) that a man had committed ten murders . . . they would find not one finding as to them all but they would find (a true bill) in separate counts that he had committed each of those charged offences". And in the same page of the learned lord's speech: "the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election and send them to two trials".

Nevertheless until the Court of Criminal Appeal came into existence in England in 1908 the failure to demur or to make an application did not vitiate the trial upon a count bad for duplicity. But the Court of Criminal Appeal in *R. v. Thompson* 1914 2 K. B. 99, Isaacs C. J. delivering the judgment of the Court stated p. 103: "Although very high authorities have in the past expressed the opinion that as a matter of law even two felonies could be charged in the count (see *Castro v. The Queen* per Lord Blackburn) the practice is uniform and well established that several offences should not be charged in the same count and the indictment in this case was irregular for that reason. We are of opinion that there being a defect on the face of the indictment the objection should in strictness be taken before plea and therefore the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in the proceedings at any time".

Consequently an irregularity such as duplicity is now considered a good ground of appeal and appeals have been allowed thereon in *R. v. Molloy* (1921) 2 K. B. 364 and in *R. v. Disney* (1933) Cr. App. Rep. which have been followed by this court in *R. v. Sowedi* 21st July, 1933 (not yet reported).

But in *R. v. Thompson* (supra) the court of Criminal Appeal dismissed the appeal on the ground that no substantial miscarriage of justice had occurred. Isaacs C. J. stated: "If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form we should have felt bound to quash the conviction whatever our views might be as to the merits of the case". In *R. v. Sowedi* (supra) this court felt unable to say on the facts in that case that the accused had not been prejudiced. They came to a conclusion to use the words of section 367 that there had been a failure of justice.

The question therefore for this court is has there been a failure of justice? We think after examining all the facts that the accused were not embarrassed or prejudiced for it is clear in this case that had there been two separate counts the evidence on each of them would be the same. But that is not to say it will be so in all cases. Clearly an accused person, where he is charged, as in *R. v. Molloy* (supra) and *R. v. Disney* (supra), with distinct offences in one count even though they are created by the same enactment, would be embarrassed in his defence. We therefore wish to guard ourselves in this judgment from saying that although duplicity is an irregularity it can in all cases be overcome by a resort to section 367. 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.

In this case, however, the court is satisfied that the accused have not been embarrassed or prejudiced by the duplicity of the information and although it is bad in law we shall allow the conviction to stand. The appeal is therefore dismissed.

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