

UGANDA / JUDGMENT

Rex v Kipsang (Con. C. 575/1933.) [1933] EACJ 8 (1 January 1933)

[1933] EACJ 8

COURT

East African Court of Justice

BEFORE

Barth CJ, Horne J

CASE / FILE NUMBER

Con. C. 575/1933.

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CRIMINAL CONFIRMATION.

Before SIR JACOB BARTH, C. J., and HORNE, J.

REX

v.

CHELIMU S/O KIPSANG.

Con. C. 575/1933.

Criminal Procedure Code, section 132—Joinder of charges.

Held (18-10-33).—(1) That the words "of the same kind" in section 132(a) of the Criminal Procedure Code must be interpreted to mean offences punishable under the same section of the relevant law.

(2) That an accused person cannot be allowed to waive the benefit of a legal provision relating to the trial.

Lewey, Crown Counsel, for Crown.

Accused absent, unrepresented.

The facts of the case are sufficiently set forth in the order.

Lewey referred to the Indictments Act, 1915, section 4, and referred to various English decisions in which the intention of that section of the Indictments Act had been interpreted, viz., *Rex v. Heywood*, 9 Cox 479; *Rex v. Mitchell*, 6 State Trials N. S. 599; *Rex v. Lockett* (1914), 2 K. B. 720; and submitted that in this case the joinder of charges had not caused any embarrassment to the accused. He stated, however, that the wording of the Criminal Procedure Code was more restricted than the English provisions in the Indictments Act.

SIR JACOB BARTH, C. J.—The convict has been tried and convicted in the same trial of an offence under section 282 (1) of the Penal Code and an offence under sections 283 and 362 of the Penal Code. The provisions $\S$ r_e\$ joinder of charges are to be found in section 132 of the Criminal Procedure Code, which provide for a separate trial on every charge or information except in the cases set out in the section. Exception $\S$ (a)\$ enacts that where a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged with and tried at the same time for any number of them not exceeding three.

We are not concerned here with the interpretation of the expression "committed within one year of each other" as the offences charged in this case were committed on the same date.

The short point is whether the expression "of the same kind" may include offences of what may be called the same genus, or whether it is confined to offences punishable under the same section of the law applicable. In the interests of the accused

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person it is obviously necessary to construe the provision as strictly as possible in view of the fact that under the existing procedure the proceedings before a magistrate in a summary trial begin with the charge to which the accused pleads.

In my judgment, the "same kind" must be construed as meaning offences punishable under the same section of the relevant law.

Mr. Lewey has conceded that if the joinder cannot be sustained then the convictions must be quashed.

I accordingly am of opinion that the convictions and sentences should be quashed and a new trial had.

HORNE, J.-In this case the accused was charged with burglary under section 282 of the Penal Code and an attempted burglary under section 283. He was tried under the procedure laid down in Part VI, "Procedure in Trials before Subordinate Courts."

The Criminal Procedure Code (section 132) requires that every distinct offence shall be the subject of a separate charge, and every charge should be tried separately. A court should not treat a case before it as an exception to the general rule unless it is satisfied that the case should be brought within one of the four exceptions $\S$ (a)\$, $\S$ (b)\$, $\S$ (c)\$, $\S$ (d)\$. But no magistrate can satisfy himself as to the necessity of resorting to the exceptions when he commences a trial under Part VI. The object of joinder is to avoid the necessity of hearing the same witnesses giving

the same evidence two or three times over in separate trials. Even where joinder is permissible under any of the exceptions, there still remains the question of whether or not the accused will be prejudiced or embarrassed in his defence to be considered. If the accused is tried on information in the Supreme Court, provision is made for objection to joinder, and the court may disjoin at any stage of the trial-section 259 (4). There is no such provision in Part VI, the reason being that Part VI is derived from the English Summary Jurisdiction Act, 1848, under which no joinder was allowed. I do not think it ought to be allowed in this case, nor in any case where a magistrate proceeds under Part VI. Joinder is made in an information after preliminary inquiry in which the accused has had the opportunity of hearing the evidence that will be brought against him at his trial. A plea will then be taken to each count separately, and objections may be made and separate trials ordered if necessary. If joinder is to be permitted in the subordinate courts, then in justice to the accused the magistrate should commence the proceedings as a preliminary inquiry. Where several charges are made and are allayed by the

prosecutor or complainant to be within one of the exceptions, the magistrate is confronted with the question as to whether the charges are suitable to be disposed of upon summary trial. Separately, they may appear suitable on the face of each, but the proposal to try them together raises the question whether the joinder will be within any of the exceptions, and raises the question whether summary trial is suitable. No opinion can be formed by the magistrate on either point until he hears some evidence. Under Part VI he can hear no evidence until after the accused has pleaded, that is after the joinder has been made, which is what was apparently done in this case.

The position under the repealed code was different. Anything punishable by more than six months was a warrant case, and although joinder was permissible in a summons case, yet in a warrant case, where occasion for joinder would more often occur, the magistrate heard the complainant and took evidence in support of the prosecution before framing the charge. The accused was even allowed to cross-examine at that stage. If the magistrate was satisfied that there was ground for presuming the accused had committed an offence triable by him, and capable of being adequately punished by him, he then framed the charge in writing and called upon the accused to plead. At that stage, under that procedure, he could adequately deal with the question of joinder. Under the present Code, the magistrate is not compelled to deal with the matter in that way. It is, however, possible for him, by applying sections 214 and 223 of the Criminal Procedure Code in the manner I have suggested, to obtain equally as just a result.

This matter of joinder of charge was much better expressed in the repealed Cap. 7 which this Code replaced. In that enactment there could be no doubt whether an offence was of the same kind as another. Section 193 (2) of Cap. 7 (repealed) said "offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any Ordinance or other law."

Now an offence is defined in the present Penal Code as an act, attempt or omission punishable by law. Consequently, for an offence to be of the same kind as another offence, it must be one in which the acts or omissions constituting it are the same as the acts or omissions constituting that

other. Applying this proposition to the present case, the acts constituting the offence in section 282 are breaking, entering and stealing from the building; those in section 283 are breaking and entering only. The two offences are of the same kind in part only, but the section says "of the same kind". In practice therefore it will be found

that the test of identity of the acts and omissions in each case will result in not being able to join offences under exception (a) unless they are punishable under the same section of the Penal Code or the same section of any other law.

In this case therefore there has been misjoinder. The defendant has pleaded guilty, and it would appear that no injustice would be done if the conviction stood. But an accused person cannot be allowed to waive the benefit of a legal provision relating to the trial, and as there has been a misjoinder the conviction must be set aside.

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