IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 51 OF 1979

B E T W E E N

KASMIRI JOSEPH ARIDAI . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha) (Mnzavas, J.) dated the 5th day of March, 1979,

IN

CRIMINAL APPEAL NO. 171 OF 1977

JUDGMENT OF THE COURT

KISANGA, J.A.:

This is a second appeal against conviction for conveying property suspected to have been stolen or unlawfully acquired, and a fine of shs. 3,000/- or six months' imprisonment in default.

Both courts below found that a police officer in the exercise of his powers under section 24 of the Criminal Procedure Code stopped a motor vehicle in which the appellant was travelling and which was carrying nine bales of khanga, five boxes of pangas and two boxes of hoes. Of these goods the appellant claimed ownership of only two bales of khanga but did not produce any receipts in support of his claim. He called defence witnesses who claimed ownership of the rest of the goods and who stated that they had entrusted the goods to the appellant for the purpose of taking them to a market. These witnesses also were found to have failed to account for the goods claimed by them.

Mr. F. B. Mahatane who appeared for the appellant argued the appeal on three grounds. His first ground was that the charge was bad for duplicity. The charge as laid in the particulars alleged -

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"Particulars of Offence:

Kasmiri Joseph, David s/o Saba, Wilson s/o Kimeme, Mbiga s/o Mwanyaga and Thomas Mongi jointly charged on the 15th day of June, 1976, at about 00.30 hours at Larang'wa within Hai District, Kilimanjaro Region, having been stopped by Inspector Paul Mokiwa under powers conferred upon him by s. 24 of the C.P.C. were found in possession of nine bundles of Mwatex Khanga material, five boxes of bush knives and two boxes of [illegible] marked Crocodile valued at approximately shs. 200,000/- in a Landrover Reg.No. ARB 115 the property which is suspected to have been stolen or otherwise unlawfully acquired.".

Mr. Mahatane contended that the use of the word or in the last sentence meant that the prosecution was charging two separate offences in a single count and this was bad for duplicity in as much as it embarrased the appellant in his defence. He took the view the prosecution must make up its mind which of the two offences it wants to proceed with, that is, whether property suspected to have been stolen or property suspected to have been unlawfully acquired. He stressed that it was not open to the prosecution to charge both offences in one count as it purported to do. In support of this contention he referred us to the case of Maithaka s/o Gichinga v. R. 1963 E.A. 627, a decision by the Supreme Court of Kenya. In that case the court cited with approval the decision in the English case of R. v. Wilmot (1933) All E.R. 628 where the charge was laid in the following terms:-

"Particulars of Offence:

Charles Wilmot, on the 25th day of October, 1932, on a certain road called Legsby Avenue, in the borough of Grimsby in the county of Lincoln, drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road.".

The English court held that the charge was bad for duplicity. It charged offences in the alternative which caused embarrassment to the appellant in that he could not know with precision which charge he was to answer. The appeal was allowed and conviction was set aside.

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But perhaps the learned counsel overlooked the case of Shah v. R. (1969) E.A. 197 in which the same Supreme Court of Kenya declined to follow its earlier decision in Maithaka s/o Gichinga's case and R. v. Wilmot cited therein. In Shah's case the appellant was charged on two counts with causing death by dangerous driving and the particulars on each count alleged that the appellant caused death by driving at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case. His conviction on both counts was upheld on the ground that he knew clearly what case he had to answer and so he was not embarrassed in his defence, with the result that there was no prejudice or failure of justice caused to him.

We think that in Tanzania mainland this question may be resolved by reference to section 138 of the Criminal Procedure Code which makes provision for the mode in which offences may be charged. Section 138(b)(i) provides that:-

> "138. The following provisions shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code:-
>
> (a) ...
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> (b) Where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of 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 312(1)(a) under which the appellant was charged provides that:-

> "312. - (1) Any person who -
>
> (a) has been detained as a result of the exercise of the powers conferred by section 24 of the Criminal Procedure Code and is found in possession of, or conveying in any manner, anything which may be reasonably suspected of having been stolen or otherwise unlawfully acquired;
> may be charged with being in possession of, or conveying, or having control over, as the case may be, the property which is suspected of having been stolen or otherwise unlawfully acquired ..."

The section says that the property which is the subject matter of the charge may be either reasonably suspected of having been stolen or unlawfully acquired, and the reading of section 138(b)(1) of the Criminal Procedure Code quoted above appears to make it plain that in charging this offence the particulars may describe the property in question in the alternative. In other words the offences may be charged in the alternative, but whether either or both offences have, in fact, been committed is a matter to be established by evidence.

Again, the Second Schedule to the Criminal Procedure Code contains specimen charges, and section 138(a)(iv) of that Code provides that those specimen charges, or forms conforming thereto as nearly as possible, shall be used in laying informations in the respective cases. In some instances these specimen charges have charged the offences in the alternative. To take only one example of the offence of false accounting, the particulars of the offence state that:

> "A.B. on the ... day of ... in the region of ... being a clerk or servant to C.D., with intent to defraud, omitted or was a privy to omitting from a cash book belonging to the said C.D., his employer, a material particular, that is to say, the receipt on the said day of one thousand shillings from H.S.".

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The offences are charged in the alternative following the manner in which they are set out under section 317 of the Penal Code which creates them. Thus there can be no doubt that the mode adopted by the prosecution here of charging the offence in the alternative is fully sanctioned by the provisions of the Criminal Procedure Code, and therefore the contention of the appellant's counsel that the charge was bad for duplicity must fail.

Mr. Mahatane's next ground was that the conviction was against the weight of evidence in as much as the appellant gave a reasonable explanation of his possession of the goods in question. The learned counsel, however, abandoned this ground when it was pointed out to him that the appellant claimed ownership of two bales of clothes but did not give any explanation of how he came by them.

His last ground was that on the evidence the appellant's conviction should be upheld only in respect of the two bales referred to in the last preceding paragraph and not in respect of all the property as set out in the particulars of the offence. We think that there is merit in this submission. The appellant called defence witnesses who claimed ownership of the property in question except for the two bales just mentioned. The witnesses said, and they were not contradicted, that they had hired the appellant to convey the goods to the market place where they were going to sell them. This ought to have been sufficient to discharge the burden cast on the appellant. Because there is nothing on the evidence to show or suggest that when he thus accepted the goods on hire from the witnesses he knew or had reason to believe that the goods were stolen or had been unlawfully obtained. The conviction is varied accordingly and is upheld only in relation to two bales of clothes. Notwithstanding such variation of the conviction, there can be no ground for interfering with the sentence which the learned judge of the High Court found to be so lenient.

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The various goods which formed the subject matter of the charge were ordered to be treated as unclaimed property and to be dealt with under section 44 of the Police Force Ordinance Cap. 322. We think that once conviction was upheld, that order was a proper one in the circumstances of this case and we see no reason to interfere.

We accordingly dismiss the appeal.

DATED at ARUSHA this day of 1980.

F. L. NYALALI

CHIEF JUSTICE

Y. M. M. MWAKASENDO

JUSTICE OF APPEAL

R. H. KISANGA

JUSTICE OF APPEAL

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

(L. A. A. KYANDO)

DEPUTY REGISTRAR