**Republic v Owako and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 27 November 1974

**Case Number:** 79/1974 (10/75)

**Before:** Trevelyan J

**Sourced by:** LawAfrica

*[1] Criminal Practice and Procedure – Autrefois acquit – Murder – Accused discharged by magistrate*

*at preliminary inquiry – May again be charged with murder – Penal Code, s.* 239 (*K.*).

*[2] Criminal Practice and Procedure – Preliminary inquiry – Accused may be committed for trial from*

*more than one preliminary enquiry.*

*[3] Criminal Practice and Procedure – Preliminary inquiry – Nullity – Improper joinder of accused*

*does not nullify inquiry.*

**JUDGMENT**

**Trevelyan J:** A magistrate conducted a preliminary inquiry into a charge against the first and second accused persons of murdering a man called Dennis Ochieng. At the end of the day, considering that the evidence before him was sufficient to put the first accused upon his trial, the magistrate committed him to this court for such trial, and considering that the evidence against the second accused was not sufficient to put him upon his trial, the magistrate discharged him. The Attorney-General filed an information for the murder against the first accused, entered a nolle prosequi in respect of the charge, and this accused was also discharged. The third and fourth accused were arrested, and the first and second were re-arrested. A different magistrate conducted a second preliminary inquiry into the murder, but this time there were four persons charged, namely the four accused persons now before this court. Being satisfied that there was evidence before him sufficient to put all four men on their trial for the murder, the magistrate committed them to this court for such trial, and the Attorney-General filed an information charging each of them with it. The information was read over to the accused persons, and their counsel, Mr. Kapila for the second, and Mr. Otieno for the other three accused, submitted on their behalf that the court ought not to take cognisance of it. Mr. Kapila advanced two arguments. The first was that as the second accused was discharged by the magistrate at the first preliminary inquiry he can never again be charged with the murder, whatever else he may be charged with, and the second was that though different preliminary inquiries may be held for different accused persons in respect of the same offence, an accused person can only once be committed for trial in respect of it. Accordingly, says counsel, the first accused can only properly be before the court on a committal ordered as a result of the holding of the first preliminary inquiry. Two consequences flowed. If the first accused is before us because of the first preliminary inquiry he should have been charged in an information naming only himself, so that the proceedings before us are a nullity because there should have been a separate information for the other accused persons, and two informations cannot be tried together: *R. v. Kristofa Male* (1934), 1 E.A.C.A. 151, whilst, if he is before us because of the second preliminary inquiry, he is wrongly before us because he had already been committed to this court in the other inquiry. Mr. Otieno associated himself with Mr. Kapila’s submissions, but went further. He argued that a preliminary inquiry cannot be split, and, as the second inquiry which was held is a nullity insofar as the first accused, and perhaps the second accused, are concerned, it is also a nullity in respect of the third and fourth accused. In any event, says Mr. Otieno, the very fact of joining the third and fourth accused persons with the first and second, was sufficiently prejudicial to them of itself to render the second preliminary inquiry a nullity. I can find nothing in the Criminal Procedure Code to say, or suggest, that a man may not appear at more than one preliminary inquiry upon the same charge, and I can find nothing in it to say or suggest that he cannot be committed to this court more than once for it. Mr. Kapila read, or referred me to, eighteen sections of the Code, that is to ss. 138, 230, 231, 240, 241, 250, 251, 252, 253, 254, 255, 279, 283, 303, 304, 305, 306 and 308, but they do not support him as I read them. If we leave aside s. 138 which says no more than that persons convicted or acquitted are not to be tried again for the same offence, the sections referred to, if I may take leave to oversimplify, simply lay down when, and by whom, a preliminary inquiry is to be held, what a magistrate holding one is to do, and what is to be done after he has made an order for committal. Mr. Kapila referred me to such expressions as “a committal for trial”, “a subordinate court” and “a preliminary inquiry”, saying “I stress the singular in all cases”. But that is how legislation is usually drafted, the statute using the singular says what is to be done, leaving it to be multiplied, in practice, as many times as is required. I am told that, apart from all else, problems will arise in relation to provisions such as those contained in ss. 303, 304 and 305 of the Code which permit the reading of depositions as evidence and the putting in as evidence of an accused’s statement or evidence at the inquiry, but I see no problems arising. S. 304 cannot be used unless the accused person agrees, and s. 303 in relation to depositions generally, and s. 305 in respect of the accused’s evidence or statement, refer to “the committing magistrate”, which must mean the magistrate who conducted the proceedings which led to the filing of the information which initiated the proceedings in the court of trial. Counsel says that with more than one preliminary inquiry, the opportunity can be taken to use the provisions to put in evidence depositions taken in a variety of preliminary inquiries but this is not so for the reason which I have given. As for an accused person not knowing whether the information which he faces has arisen out of one or other proceedings, I do not see how a doubt can arise. In the present case, as I understood it, until I introduced a reference to the *Kristofa Male* case, the argument was being put to me on the basis that each of the accused was before the court on an information filed as a result of the second preliminary inquiry, and there was no doubt about it. In any event, under s. 244, an accused person is entitled at any time before trial to have a copy of the depositions on payment, or free if the Court thinks fit, and I have never known of a case where an accused in this country was made to stand trial without having a copy of the depositions of the preliminary inquiry wherein he was committed for trial before him. I am quite unable to accept Mr. Otieno’s argument that if a preliminary inquiry is a nullity for one accused it *must* be so for all the accused. In the instant case, even if the second inquiry should have excluded the first accused, there is no reason to hold that it is a nullity in respect of the third and fourth accused persons, nor can it validly be said that because the third and fourth accused were jointly charged with the first and second, the mere joinder was prejudicial to them or resulted in injustice. The purpose of a preliminary inquiry is to see who should, and who should not, be committed for trial, and the case of each accused must be considered separately. Mr. Otieno maintains that where two preliminary inquiries are held, witnesses are able to refresh their memories between the first and second of them, but apart from the fact that the more times a witness relates something the more chance is there of variations appearing, what if one of several accused persons absconds and is not apprehended for some time? Is he never to stand trial because another man has in the meantime been charged with the offence at a preliminary inquiry? As for the third accused having at the first inquiry given evidence against the first accused, himself not then being an accused person, depositions are never automatically in evidence, and even if the third accused’s deposition could, within the rules of admissibility be tendered in evidence (upon which I express no view) a court has an overriding jurisdiction to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. I accept, and I readily accept, that the entering of a nolle prosequi in respect of a charge contained in an information does not discharge the proceedings at the preliminary inquiry, but it is common practice in England to direct that an indictment shall remain upon the record to await further orders, and I do not see why the record of a preliminary inquiry should not remain on the file in the same way. There can be no prejudice to an accused person if this is done. The argument that when a man has been discharged at a preliminary inquiry he cannot ever again be charged with the same offence, is raised on the foundation of the provisions of s. 239 of the Criminal Procedure Code. The section reads: “239. If, at the close of the case for the prosecution, or after hearing any evidence in defence, the court considers that the evidence against the accused person is not sufficient to put him on his trial, the court shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts. Provided that nothing contained in this section shall prevent the court from either forthwith, or after such adjournment of the inquiry as may seem expedient in the interest of justice, proceeding to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or which, in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed.” Mr. Kapila relies especially on the words, “particular charge under inquiry” and “in respect of the same facts” where they appear before, and the words “any other charge” and “the charge so dismissed as aforesaid” where they appear in the proviso, and says that once a magistrate has discharged an accused person upon the charge under inquiry, that charge can never again be brought against him, though some other applicable charge may be brought, say manslaughter or perhaps conspiracy to murder on a charge of murder. With respect it ought not to be so, and, in my view, it is not so. I trust that counsel will acquit me of discourtesy when I say that the fallacy in his argument, as I read the section, is that he seeks to use the proviso to restrict the scope of its substantive part, when, what the proviso does is to widen it. The substantive part of the section, which, it may be noted does not, for all the proviso says, use the word “dismiss”, says that the discharge of “the particular charge under inquiry” shall not be a bar to “any subsequent charge in respect of the same facts”. The reference to the “particular” charge does no more than to pin-point it, and the word “any” is entitled to its full and proper definition. The scope of the proviso is clear from its opening words that “Nothing contained in this section shall prevent the court” from doing what the proviso permits. What the proviso permits is an investigation into “any other charge” within its contemplation. It can also perhaps be argued that the word “particular” was inserted to cover a situation where several charges are put against an accused person at an inquiry. But it may not be so, and I express no concluded view upon it. Mr. Rebello, for the Republic, referred us to a Canadian case, *R. v. Hannay*, 2 W.L.R. 543. We do not have a full report of the case, but, according to its digest in case number 1168 on p. 226 of Volume 14 of the English and Empire Digest, the facts and finding were these. The accused was charged with theft before two justices, and they, after a preliminary inquiry directed by the Criminal Code, discharged him as they were of the opinion that no sufficient case was made out to put him upon his trial. Subsequently another information on the same charge was laid against him and after a second preliminary inquiry he was committed for trial. It was objected that there was no jurisdiction in any magistrate to hear such a charge twice, and much more so in the case of the same magistrates who had dismissed it, but it was held that a preliminary inquiry is not final in its nature and that at common law a dismissal by magistrates is not tantamount to an acquittal upon indictment. We do not know what the Criminal Code lays down, and we are concerned not with the common law, but with our own legislation. But the case, as digested, does appear for what it is worth, to support what I have said. I disallow the objection and rule that the impugned information is properly before the court.

*Order accordingly.*

For the Republic:

*AR Rebelo* (Senior State Counsel)

For the second accused:

*AR Kapila* and *S Dhanji*

For the first, third, and fourth accused:

*JW Onyango-Otieno*