**Saina v Republic**

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

**Date of judgment:** 7 June 1973

**Case Number:** 1120/1972 (31/74)

**Before:** Sir James Wicks CJ and Trevelyan J

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*[1] Criminal Practice and Procedure – Charge – Duplicity – Several offences in same count – Incurable illegality – Criminal Procedure Code, s.* 135 (*K.*)*.*

**JUDGMENT**

The considered judgment of the court was read by **Trevelyan J:** This was a most unsatisfactory case. The appellant and others were charged in a single count with shop breaking and theft, said to be contra ss. 306 (*a*) and 275 of the Penal Code, and, in the alternative, with handling stolen property contra s. 322 (2) of that Code. The trial magistrate appears, as we think, not to have considered the charge sheet before he charged the appellant and his co-accused, and, as a result, there was a good deal of confusion, and a number of errors was made. Had the charge sheet been given proper consideration, it would have been seen that the first count charged not the permitted one offence, but three, i.e. shop breaking, contra s. 306 (*a*), theft, under s. 275 of the Code and handling, against s. 322 (2). There are three and not two offences because the offence under s. 306 (*a*) includes the commission of the felony, in this case theft, in the building concerned. To have convicted the appellant of both offences, as was done, meant that he was twice convicted for theft: *R. v. Charles Awala* (1949), 23 K.L.R. 61; *Ayodi Chumba v. R.* (1950), 24 K.L.R. 93. But the more serious aspect of the way in which the charge sheet was prepared and passed by the trial magistrate, is that alternative charges are contained in a single count. The Court of Appeal, on the facts before it in *Cherere Gukuli v. R.* (1955), 22 E.A.C.A. 478, held that this mode of charging was not merely a curable irregularity but an incurable illegality. S. 135 (2) of the Criminal Procedure Code provides that where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of that charge or information called a count. In the English case of *R. v. Boyle*, [1954] 2 All E.R. 721, which was mainly concerned with the procedure to be adopted where several offences appear in the same charge or indictment, the court, dealing with the charging of alternative counts said: “For instance, where there are counts of stealing and receiving it is proper that the two counts should be put separately. . . .” So is it the proper procedure in this country. It is, of course, in order to charge theft and handling in one charge or information: *Pita v. Republic*, E.A.C.A. Cr. A. 66 of 1972 (unreported) but it must be done in separate counts. The trial magistrate, we are impelled to add, also appears to have paid little or no attention to the requirements of s. 169 of the Criminal Procedure Code in regard to the contents of his judgment. Had it been otherwise, he could not have made the further mistakes which the record reveals and which we now describe. He found that the appellant “broke in the shop of P.W.1 and stole from the shop these properties”, i.e. that the appellant committed the offence of shopbreaking, convicted him of all three charges contained in the count, and sentenced him for handling. There can be no doubt about this because the magistrate convicted the appellant “for the charges under count 1” and sentenced him to seven years’ imprisonment with hard labour, which exceeds by two years the amount that he has power to award for shopbreaking. He made his award as he did because “the offence has got a minimum sentence”. Insofar as the facts are concerned, even had there been a full evaluation of the evidence, which there was not, a conviction could not, on what was before the trial court, properly have been entered. It is more than likely that if the property found in the appellant’s house was that stolen from the complainant, the thieves were more likely to have been the men who were in the house with him when the police called, who ran away and were later acquitted, than the appellant. He would the more likely have been the receiver. But the others were acquitted by the magistrate because, though they were in the house with the property, guilty knowledge could not be imputed to them. In those circumstances, was there not, then, at least a doubt about the appellant’s guilt? One needs to ask oneself whether, having just stolen property from a shop, he would display it to guests with whom he was playing cards. But assuming that there was not, a conviction was yet not possible, for the appellant was not charged with the receiving type of handling, but the retaining kind, i.e. that he handled the goods “for the benefit of unknown person”, and an inference could not properly have been drawn that anyone else was concerned. We draw attention to the judgment of the Court of Appeal in *Ratilal v. Republic*, [1971] E.A. 575. The appeal is allowed. The conviction which State Counsel did not support, is quashed. We set the sentence aside and acquit the appellant. *Order accordingly.*

The appellant appeared in person.

For the respondent:

*KA Amoo-Adare* (State Counsel)