THE EAST AFRICA LAW REPORTS

[2001] VOLUME 1

Butterworths

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count is not merely a formal but substantial defect and that in such a situation an accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if he is convicted, of what he has been convicted. We note from the very elaborate and well considered judgment of Mosdell J in *Shah*'s case that he did not at any stage of that judgment refer to this point. He correctly found that the charge was bad for duplicity but then proceeded to hold that no actual embarrassment or prejudice had been occasioned to Shah. We would ourselves prefer the decision in *Cherere* which, in effect, assumes prejudice, for if that was not so, the court would not have stated as it did that "We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative".

We are ourselves satisfied that when framing a charge under section 46 of the Traffic Act, the prosecution is bound to choose how it proposes to proceed. The prosecution ought to be forced to choose whether they are alleging that:

(i) the driving was reckless; or

(ii) was at a speed; or

(iii) was in such a manner; or

(iv) the vehicle was left on the road in such a position or manner or in such a condition as to be dangerous to the public.

We suppose that if the driving partook of each and every one of these elements, then the prosecution can bring them in by the use of the conjunctive "and", which in the view of Mosdell J appeared to make the matter, that is, the use of "and" or "or" farcical, for he remarked as follows in the *Shah* case at page 202:

> "The real offences were causing the deaths of two people by driving in a manner dangerous to the public by reason of one or the other of two things, viz the speed or manner of driving. How can it be stated, therefore, with any sense of reality, that he did not know what case he had to answer? It seems to me that an accused is in no worse position where the particulars of the offence are framed disjunctively than when they are framed conjunctively. Is prejudice really occasioned by the use of the word 'or' but not by the use of the word 'and'? Whether 'or' or 'and' appears in the charge an accused knows that he must be prepared to meet both limbs of the charge. Moreover, in the instant appeal, the Appellant knew of what, in each count, he was convicted because the magistrate enlightened him".

We go back to *Odda Tore*'s case and there, as we have seen, the Appellants were tried and convicted on one count of an information which alleged that they had murdered two named persons, let us say X and Y. But suppose, for a moment, that the charge had alleged in that one count that the Appellants had murdered "X" or "Y"? The offence would remain the same, one of murder. But surely an accused person is entitled to know right from the beginning of his trial the specific person he is being alleged to have murdered? If the conjunctive "and" is used then he knows it is being alleged he murdered both. But it is no good telling an accused person to prepare his case on the basis that it is being alleged he murdered one or the other of X or Y. That is why we have remarked that Mosdell J does not seem to have drawn any distinction between charging in the alternative two offences in one count and the situation in which the conjunctive "and" is used so that though the charge is duplex, an accused person is not necessarily embarrassed or prejudiced. In the latter case, the duplicity is not necessarily fatal; in the former, it must be necessarily fatal for the reasons given in *Cherere*'s case, and it does not appear to matter that the accused

was represented by an advocate right from the beginning of the trial and the advocate should have, but did not, raise objection to the charge. In where two offences are charged in the alternative in one count, the duplic occasioned is invariably fatal, and section 382 of the Criminal Procedure cannot cure such irregularity. The only risk the prosecution runs in using conjunctive "and" is that they may well be required to prove both charged, that is, that the Appellant drove at a speed and in a manner dang to the public, before a conviction can be had, for it may well be argued t only one limb is proved, then the charge as laid has not been proved.

It is for these reasons that we allowed the Appellant's appeal on the term have already stated.

For the Appellant:

JM Njenga instructed by *JM Njenga and Co*

For the Respondent:

JM Bw'onwong'a instructed by *the Attorney-General*

Njagi v Kihara

HIGH COURT OF KENYA AT NAIROBI

MULWA J

Date of Ruling: 30 JULY 2001 Case Number: 93

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[1] Advocate – Unqualified person – Definition thereof – Failure to hold a cun practising certificate – Application for stay filed by an unqualified person – Applicatio lift orders for stay – Whether application signed by unqualified person incompeten. Section 9 – Advocates Act.

Editor's Summary

On 30 August 2000, the Respondent herein filed an application seeking a st of execution of judgment pending appeal. The application was heard the sa day and granted as prayed. It later emerged, as a result of correspondence wi the Law Society of Kenya, that the Respondent's advocate who had signed t application had not, at the time, had in force a practising certificate. Th Applicant now sought orders to lift the stay granted to the Respondent 30 August 2000 on the ground that an unqualified person had signed the appl cation for stay.

Held – Documents duly drawn, signed and filed in court by an unqualifie person, that a court had acted upon, should not be expunged from the reco and done away with; *Samaki Industries (Nairobi) Ltd v Samaki Industries (1* [1995] LLR 2505 (CAK), *Marbon Cafe and others v BM and Downtown Ltd* civ appeal number Nai 192 of 1997 and *Obura v Koome* [2000] LLR 3251 (CAK not followed; *Muniu v Giovanni, Kinyanjui v Gichungu* considered. The applica tion would be declined.

Cases referred to in ruling

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

East Africa

Hug v Islamic University in Uganda [1995] LLR 44 (SCU)
Khanji v Kanji [1992] LLR 597 (HCK)
Kinyanjui v Gichungu [1997] LLR 518 (CAK)
Marbon Cafe v BM and Downtown Ltd CA number Nairobi 192 of 1997 – F
Muniu v Giovani [1997] LLR 613 (CAK) – C
Obura v Koome [2000] 1 EA (CAK) – F
Richards v Bostock [1914] 31 TLR 70
Samaki Industries (Nairobi) Ltd v Samaki Industries (K) [1995] LLR 2505 (CAK) – F

United Kingdom

Spirling v Brereton [1866] LR 2 Eng 64

Ruling

MULWA J: In this notice of motion application dated and filed on 21 March 2001, the Applicant is seeking orders that the stay orders granted on 30 August 2000 be lifted as the application for the stay had been signed by an unqualified person, the advocate who signed it at the material time not having in force a practicing certificate.

It is based on the grounds that having been signed by an unqualified person, the application was itself incompetent and accordingly any orders obtained in consequence thereof are themselves invalid. It is further supported by an affidavit of Sarah Njoki Kihara, also sworn on the same date.

The Respondent in this application was aggrieved by the decision of the Kiambu Principal Magistrates Court and filed a chamber summons application on 30 August 2000 for stay of execution of the judgment pending the hearing and determination of an intended appeal, which was subsequently filed on 12 September 2000.

It has subsequently emerged, through some correspondence from the Law Society of Kenya, that the advocate who signed the application did not have in force at the time a practicing certificate, as he last held it as at 30 November 2000 for the year 2000. The chamber summons application giving rise to this application was signed on 29 August 2000 by Mr GO Okatch, the said advocate. Through the aforesaid correspondence, it is clear that at the time of signing the application, he did not have in force at the time a practicing certificate.

This is a particularly difficult case as it has wide repercussions on the nature of pleadings filed by an unqualified person being on record. The main issue for determination is whether documents filed and signed by an advocate without a practicing certificate are incompetent and should be struck off.

The Advocates Act (Chapter 16) of the Laws of Kenya governs and reg the practice by advocates. In particular section 9 (as amended) of the provides that:

"Subject to this Act, no person shall be qualified to act as an advocate unless:

1 He has been admitted as an advocate; and

2 His name is for the time being on the Roll; and

3 He has in force a practicing certificate; ...".

I have referred to several decisions namely *Samaki Industries (Nairobi) L Samaki Industries (K)* [1995] LLR 2505 (CAK); *Marbon Cafe and others v BM Downtown Ltd* civil appeal number Nai 192 of 1997 and more recently the of *Obura v Koome* [2000] LLR 3251 (CAK) all of which dealt with the que of an advocate practicing without a certificate. The consensus in these cases that the proceedings where the advocate acted without a certificate were and void.

However, I have considerable discomfort with the prospect that an advo (whose name is in the Roll as per section 2) without a practicing certificate, therefore not qualified under section 9 to act as an advocate, who draws, s and files documents in court, should bear his or her misfortunes onto the cl where the defect in qualification is subsequently discovered.

The consequences of an unqualified person acting as an advocate are cle spelt out in the Act. Section 31 forbids the unqualified person, that is, a per not qualified to act as an advocate which includes an advocate not meeting requirements of section 9, from causing to issue any summons or process, o institute, carry on or defend any suit or other proceedings in the name of other person in any court of civil or criminal jurisdiction.

Criminal penalties are levied for so doing to the person in such cont vention.

Similarly sections 33 and 34 further forbid the unqualified person from gaging in certain activities, in breach whereof, criminal penalties are levi Section 40 expressly forbids the recovery of costs in respect of anything dc by an unqualified person in contravention of these provisions.

However, the section, though very loud on forbidding an unqualified pers from doing or engaging in the practice of acting as an advocate, is very silent the consequences of the actions so done in contravention of the section.

Accordingly, the unqualified person will face criminal penalties, fine, impr onment and or debarment but nothing is said about the very same acts so do as being void *ab initio*.

Thus the question which stands to be answered is whether such actions su as plaint drafted and signed, applications and or orders obtained, by an unqual fied person, are void *ab initio* or they constitute valid and binding court proc dures to which the person of the unqualified person shall face the full wrath the foregoing sections.

To my mind, I do not think that documents duly drawn, signed and filed court, and which the court has acted upon, by an unqualified person and mo specifically an advocate because his name is in the Roll of Advocates und section 2, should be expunged from the records and done away with. It woul be most hurting to realize that a defect in qualification of an advocate b sufficient ground to quash the proceedings to the detriment of the persons wh

were so innocently caught unawares of the defect in qualification of the advocate, a person so held out by the society, the courts, the professional bodies and all concerned with the administration of justice as being an advocate of the High Court of Kenya and as such entitled to act as such.

Further, the statutory safeguards on costs incurred by such a person that cannot be so recovered, and the relevant disciplinary procedures to which such a person is amenable in breach of such legislation, are more than indicative that the documents so drawn, signed and filed by such a person, particularly if he is an advocate of the High Court of Kenya, whose name is duly entered in the Roll of Advocates, should not be declared null and void *ab initio*, with the attendant risks both to the courts and to clients with respect to time and money, who are so innocent of the defects in full qualifications.

I would concur with Lord Pagewood in *Spirling v Brereton* [1866] LR 2 Eng 64, that it would be most mischievous if a person without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their advocate.

The remedy available to such an instance is to hold the advocate as having professionally misconducted himself and have the relevant disciplinary measures undertaken against him by the professional bodies, and again be amenable to the statutory penalties.

In the instant case, Mr *Okatch* did not even appear in court. The only problem against him is that at the time of appending his signature to the chamber summons, his qualification were not on all fours with the statute even though on all three. All he did was to append this signature and nothing else.

Though as Wambuzi JSC in the Uganda case of *Hug v Islamic University in Uganda* [1995] LLR 44 (SCU) stated that the court will be guilty of condoning an illegality if the court acted on such document, for my part, I would find also that it would be guilty of condoning injustice, if merely because of an advocate's defect in qualification at the time of putting pen to paper and appending the signature, on subsequent discovery that there was such a defect of qualification at the time, the Plaintiffs' or indeed either party's claim or counterclaim application would wither away and be condemned to extinction.

In any event, there are a considerable number of authorities that the innocent client should not be punished for the mistakes of his advocate. Recently in *Muniu v Giovani* [1997] LLR 613 (CAK), the court held that administrative mistakes on the part of busy practising advocates should not be visited on an innocent client, but the explanations for the mistakes should be good enough.

In that case, the defendant's advocate had failed to attend the hearing of the suit, because by mistake, the hearing date had not been noted in the respective diary, and consequently she was not aware that the suit was to be heard on the particular date, and thereafter judgment was entered against the Defendant. The Defendant then applied for the setting aside of the judgment, which was dismissed. On appeal to the Court of Appeal, the appeal was allowed and the *ex parte* judgment was conditionally set aside.

Further Lakha JA in *Kinyanjui v Gichungu* [1997] LLR 518 (CAK) in reference to rule 4 of the Appellate Jurisdiction Rules held thus: "I find no hesitation whatsoever in finding as I do, that the failure to comply with rule 85(1)(*f*) was clearly a mistake".

This was in a case in which an appeal had been struck out as incompete because the record of appeal did not include an application to the Land Contr Board for consent to subdivide in breach of rule 85(1)(*f*) of the relevant rules.

In the instant case, within three months, the advocate had rectified his defe of qualification; he had obtained a valid practicing certificate. Accordingly, would be illogical to say that within a span of a day, which can very we happen, an advocate with a defect in qualification who causes or issues an process or draws, signs and files documents in court can very well spring from layman to a learned officer of the court.

The only reasonable conclusion to be drawn from interpreting the provisior of the Advocates Act is that the innocent party, who knocked at the door c such advocate, without knowledge that deep down in our statute books the sai advocate is not entitled to act as an advocate, and accordingly anything done b him, without this notice to the client, are supposedly null and void *ab initi* should be made to bear the responsibilities attendant and arising thereto.

The innocent client will have to face the glaring behemoth of limitation i some instances and where it is not overcome, it will be only the defect of th advocates' qualification in drawing, signing and or filing the proper cour documents, that there would be no available remedy to which the client ca grapple with, however just the claim was.

Surely taking into account the serious consequences which may flow fron declaring such proceedings null and void on the litigant, then Parliament woul have specifically enacted that this would be the position instead of leaving it t be implied. I find it difficult to accept that Parliament intended that suc proceedings be null and void.

I have found some support on this from England, to which the qualification of solicitors are verbatim, the same as ours of advocates. Section 1 of the Solicitors Act 1974 lays down the qualifications in England for a person to ac as a solicitor that:

> "(*a*) He has been admitted as a solicitor.
>
> (*b*) His name is on the Roll of Solicitors as the time in question.
>
> (*c*) He has in force a certificate issued by the Law Society authorizing him to practise as a Solicitor".

Thus, save that our Advocates Act (Chapter 16) Laws of Kenya in section 9 includes a requirement for an annual licence, the requirements are virtually verbatim. Even the disqualification provisions in section 31 are found in section 20 of the Solicitors Act, 1974, see Supreme Court Practice 1999, volume 2 paragraph 15A–14 at 1253. But their interpretation of the requirements of qualifications and particularly lack of a practising certificate by an advocate whose name is in the Roll is somewhat different.

In *Spirling v Brereton* [1866] LR 2 England 64 Lord Pageword stated:

> "The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a solicitor who acts for a client without being duly qualified the proceedings themselves are not void. It would be most mischievous if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties, the acts of such a person acting as a solicitor are valid and binding upon the client on whose behalf they are done".

The learned Vice Chancellor concluded: "I should be infringing both Plaintiffs and Defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit".

In *Richards v Bostock* [1914] 31 TLR 70, this decision was upheld and the court refused to dismiss an action on the same grounds but ordered the case to be "stood over so that the Plaintiff might be able to consult another solicitor".

This position seems to be the law in England at the moment. See *Halsbury's Laws of England* (4 ed) Volume 44 paragraph 353 at 26, where it is stated that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigants' solicitor being unqualified, for example by his not having a proper practising certificate in force, and in paragraph 57 at 38 that the steps taken by the uncertificated solicitor on his client's behalf are not invalid.

Similar sentiments can be found in Uganda, where in *Hug v Islamic University in Uganda* [1995] LLR 44 (SCU) where Tsekooko JSC opined:

> "I think that the Court would be guilty of condonation of illegality if it allowed an advocate who does not possess a valid practising certificate to recover his costs through the court. I think therefore, that documents drawn by an advocate without a practising certificate should not be regarded as illegal and invalid simply because the advocate had no valid practising certificate when he drew or signed such document".

Justice Waki in *Khanji v Kanji* [1992] LLR 597 (HCK) for leave to issue an application for the issue of orders of *mandamus* and *certiorari*, in the matter of plot Number 302 SV Mainland North stated: "On that score, I would accept the criticism that it would be a harsh decision to hold that the documents were a nullity *ab initio*, when they should only be irregular. Equity may then deal with them as the justice of each particular case deserves".

As a parting shot too, just as Justice Waki stated, I would hope that the Court of Appeal would provide an authoritative decision on this matter should there be an appeal, which I strongly recommend. Thus, I would decline to grant the orders sought herein.

For the Applicant:
Information not available

For the Respondent:
Information not available

NK Brothers Building and Contractors Ltd v Kamau

COURT OF APPEAL OF KENYA AT NAIROBI

KWACH, BOSIRE AND KEIWUA JJA

Date of Judgment: 9 FEBRUARY 2001 Case Number: 156/98

Sourced by: LAWAFRICA SUMMARISED BY W AMOKO

[1] Evidence – Admissibility – Hearsay evidence – Investigator's report – No direct objection taken to its admission – Whether Judge acted properly in admitting the report – Whether Judge erred in placing any weight on the report.

Editor's Summary

The Plaintiff (now Respondent) sued the Defendants (now Appellants damages arising from the death of her husband in a traffic accident. She al that the accident, which occurred when the car being driven by her hus collided with a truck owned by the First Defendant and driven by the Se Defendant, was caused entirely by the negligence of the Second Defen The Defendants denied liability.

At the trial, the Plaintiff's case relied solely on the Plaintiff's own evid and that of the accident investigator employed by the insurance company. accident investigator produced a report containing the results of his inves tions, which was admitted in court without objection. The trial Judge four the Plaintiff's favour. The Defendants appealed mainly on the ground that Judge erred in admitting the report, which was based on hearsay. The De dants' counsel also contended that though there had been no express objec to the production of the report, there was an implied objection based on questions asked in cross-examination.

Held – The Judge had acted properly in admitting the report as it was mad the investigator and he was entitled to produce it.

An objection cannot be raised by implication and the record did not sl any objection having been made to the investigator's evidence.

The evidence contained in the report was dubious and of no probative v as, *inter alia*, the witness did not himself inspect the police file. The Judge t erred in placing any weight on it.

Appeal allowed.

No cases referred to in judgment

Judgment

KWACH, BOSIRE AND KEIWUA JJA: The late Kamau Githira (the deceas was employed as a driver by Ogilvy and Mather (Eastern Africa) Ltd. On June 1990 at or about 11:00am he was driving a Subaru 4WD KTU 2 belonging to his employer along Limuru Road in the direction of Limu when it collided with an Isuzu lorry KXR 909 driven by Mburu Gitau, t Second Appellant (hereinafter called "the Second Defendant") but owned NK Brothers Building and Contractors Ltd, the First Appellant (hereinaf called "the First Defendant") and the deceased was fatally injured.

Jane Wairimu Kamau, the deceased's widow and the administratrix of estate, the Respondent herein (hereinafter called "the Plaintiff"), filed a suit the superior court for damages against the two Defendants on behalf of h children, the deceased's estate and on her own behalf under the Law Refo Act (Chapter 26) and the Fatal Accidents Act (Chapter 32). It was alleged in t plaint that the accident was caused by negligence on the part of the Seco Defendant for whose actions the First Defendant was vicariously liable. Th particulars of negligence alleged among other things that the Second Defenda drove at a speed which was excessive in the circumstances and that he failed keep to his correct side of the road. The Defendants filed a joint defence a denied the allegation of negligence made against the Second Defend