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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 c 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.