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Review Article

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The Effects of Misjoinder of Counts and Offenders in Tanzania

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Abstract

It is clear that the general rule on the preferring of charges against an accused person or the defendant is that every separate offence or claim have to be embodied in a separate charge or plaint and that every accused shall be charged and tried separately for every distinct offence.

However, sometimes by considering a number of circumstances and grounds these offences and offenders or defendants may be tried and charged together.

Justice Katiti in the case of Joseph Masunzu V. Republic,[1] According to him he said as follows:
"….We can't peaceful make our journey through life without the law telling us the right direction to follow, and sometimes even the time to follow and when to start our journey and through which route…."

Hence if those circumstances as provided by the law are followed, a joinder may be formulated but failure to consider those circumstances and grounds in joining these counts and offenders may lead to a misjoinder of counts and offenders hence led to injustice.

This paper intends to explain on the number of circumstance and their effects when a count or the offender is joined without a probable cause.

1. Introduction

It is clear that the general rule on the preferring of charges against an accused person is that every separate offence have to be embodied in a separate charge and that every accused shall be charged and tried separately for every distinct offence.

However, sometimes by considering a number of circumstances and grounds these offences and offenders may be tried and charged together. Justice Katiti in the case of *Joseph Masunzu* V. *Republic*, [1] According to him he said as follows:

"….*We can't peaceful make our journey through life without the law telling us the light direction to follow, and sometimes even the time to follow and when to start our journey and through which route*…."

Hence if those circumstances as provided by the law are followed, a joinder may be formulated but failure to consider those circumstances and grounds in joining these counts and offenders may lead to a misjoinder of counts and offenders hence led to injustice.

2. Joinder

Joinder is a legal term that refers to the process of joining two or more legal issues or parties to a crime together to be heard in one hearing or trial. It is done when the issues or parties involved

overlap sufficiently to make the process more efficient or fairer. It helps courts avoid hearing the same facts multiple times or seeing the same parties return to court separately for each of their legal disputes. Charges may be joined when conduct or acts are concatenated in time, place and circumstances and the evidence of one charge would be relevant and admissible without the evidence of the other charges [2].

The Civil Procedure Code [Cap.33, R.E. 2002] does not compel Plaintiff to join in one action, it is the Plaintiff who decides whether to join another in one action or not. But the CPC does not prohibit parties to be joined as plaintiffs Order 1 Rule 1 of the CPC: deals with joinder of Plaintiffs. The situation is different when Defendants are concerned: Defendants do not choose to be sued, they do not choose to go to court, and they are compelled to submit to the Jurisdiction of the court. It is the plaintiff who chooses his defendants. And the plaintiff cannot be compelled to sue a particular defendant (he is the one who decides who to sue - subject to the legal right vested in him against that person). Under Order 1 Rule 1 as far as the joinder of Plaintiffs is concerned, the rights to relief vests in the plaintiff, and must arise out of the same act or transaction or a series of acts or transactions and if there were several suits common questions of law or facts would arise (if separate suits were brought, you are going to meet the same evidence). But in respect of defendants, in order to join defendants, it must be established that the right to relief against these potential defendants rises from the same act or transaction or a series of acts or transactions and if separate suits were established against them, common questions of law or facts would arise [3].

The Criminal Procedure Act No. 9, 1985 [Cap.20], provides for the joinder or counts in a charge or information that; any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character [4].

3. Misjoinder of Counts

Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character as per section 133(1) of the Criminal Procedure Act, No.9 [Cap.20 R.E. 2002]. Also it is provided under section 21(3) of the Magistrate's Court Act (Third Schedule) which provides as follows:

"..A charge may contain more than one offence if the offences charged are founded on the same facts or form part of a series of offences of the same or similar character but where more than one offence is contained in the same charge it shall be separately stated [5].

4. Misjoinder of Offenders

'Misjoinder' of parties means a joinder of a party who ought not to have been joined either as a plaintiff or as a defendant. In other words, it refers to impleading an unnecessary party. It may also refer to a situation in which a plaintiff is impleaded as a defendant and vice-versa (party wrongfully impleaded) [7].

The Criminal Procedure Act No. 9, 1985 [Cap.20], among other things provides for the joinder of two or more accused in one charge or information that; persons accused of the some offence committed in the course of the same transaction; person accused of an offence and person accused of a betting, or an attempt to commit such an offence; person accused of any different offence committed in the course of the same transaction [7].

Where two or more persons have been joined as defendants or accused person in one suit but the right to relief alleged to exist against each defendant does not arise out of the same act or transaction (or series of acts or transactions) and if separate suits were brought against each defendant, no common question of fact or law would have arisen, there is misjoinder of defendants [8].

Where in a suit, there are two or more defendants and two or more cause of action, the suit will be bad for misjoinder of defendants and causes of action, if different causes of action are joined against different defendants separately [9].

Reasons for a court ruling that there is Misjoinder include:[http://legal-dictionary.thefreedictionary.com/misjoinder. It is a snapshot of the page as it appeared on 29 Aug 2016 06:20:35 GMT.]
a) The parties do not have the same rights to a judgment;
b) They have conflicting interests;
c) The situations in each claim (cause of action) are different or contradictory; or
d) The defendants are not involved (even slightly) in the same transaction.

5. The Effects of Misjoinder of Counts and Offenders in Tanzania[12]

5.1 Strike out of the parties who are wrongly joined

In terms of civil action, where there is a misjoinder, the court can strike out the parties who are wrongly joined (Order 1 Rule 10(1)) of the Civil Procedure Code, 1966 as seen in the case of *Motiba and 6 Others v Permanent Secretary Ministry of Finance and Others*.[13] The appellants who had been employees of the Ministry of Finance, working in different departments to wit, the Income Tax Department, the Customs Department, Sales Tax and Inland Revenue Department, were on 30 June, 1996 retired in the public interest. On 1st July, 1996 the Tanzania Revenue Authority which had taken over the functions, duties and liabilities of the above mentioned departments of the Ministry of Finance became operational.

The appellants disputed the validity of the decision of the Government to retire them in the public interest. They believed that the Tanzania Revenue Authority had taken them over as its employees. Since both the Government and the Tanzania Revenue Authority did not agree with the appellants, the latter brought court action against the Permanent Secretary of the Ministry of Finance, the Attorney General and the Tanzania Revenue Authority seeking among other reliefs a declaration that their retirement in the public

interest was unlawful and that they were still in service, now working for The Tanzania Revenue Authority, the third defendant in the suit. The third defendant, now third respondent, filed in the trial High Court a notice of preliminary objection to the effect that the plaintiff's plaint did not disclose a cause of action against it and the suit was therefore bad for misjoinder of parties.

The High Court, Bubeshi, J., in a ruling dated 28 September 2001, upheld the preliminary objection. It struck out from the plaint the third defendant and ordered that the suit would proceed against the Principal Secretary, Ministry of Finance and the Attorney General only. The appellants did not accept that ruling and filed an appeal to this Court.

At the hearing of the appeal the learned Principal State Attorney, Mr. Kamba, who appeared for the first and second respondents, raised and argued a preliminary objection that the appeal was incompetent because the extracted order in the record was not signed by the judge who gave the ruling against which the appellants are appealing. He cited the decision of this Court in *NBC Holding Corporation v. Mazige Mauya and Another*,[14] as authority. In that decision, this Court held that a decree which was not signed and dated by the judge who gave the decision was invalid for non-compliance with the provisions of Order 39 R. 35 (4) of the Civil Procedure Code, 1966. Mr. Beleko, learned advocate for the third respondent, supported Mr. Kamba in that submission.

Among other thing the Court of Appeal held that; All in all, no injustice has been done to the appellants. When Mr. Kamba raised the objection informally we gave him a hearing, thereby signifying our leave to him to argue the objection. When Mr. Motiba complained against Mr. Kamba raising the preliminary objection he did not indicate that he or his co-appellants needed time to marshal arguments and, at any rate, he made the complaint belatedly when he was responding to the preliminary objection. Hence the struck out from the plaint of the third defendant and ordered that the suit would proceed against the Principal Secretary, Ministry of Finance and the Attorney General only, sustained.

In terms of criminal action, *Ismail Ramadhani Mwembayu v. Republic*,[15] on revision, it was held that;
i. Where the prosecution produces two different documents regarding the age of an accused person and the documents contradict each other, and where the age is a determining factor in sentencing or any other order, the court is duty bound to analyse the said documents and decide which one is authentic.
ii. Where an accused person seems to be a child or young person under section 16 of the Children and Young Persons Ordinance, Cap 13, it is mandatory to determine the age of the accused before sentencing and in order to ascertain the age the court may call in any evidence, including medical evidence.
iii. The trial court should not have imposed sentences of imprisonment on the three accused persons below 16 years of age.
iv. Although there are no magic words in the framing of a charge, the charge here was unclear and confusing, with an incurable misjoinder of accused persons, not of a kind where, under section 134 of the Criminal Procedure Act, 1985, two or more accused persons can be joined in one charge. Conviction was quashed and sentences set aside.

The applicant on the above case was one of the ten accused persons in a badly drafted charge and one in which the accused were misjoined. They were convicted and sentenced to 9 months' imprisonment. The complainant then raised in revision was against the sentence meted out to the applicant, allegedly because he was just 14 years old. On perusal of the record, two more convicts were found to be below the age of 16 years. In sentencing the accused the trial court relied on the charge although there was another document which contradicted the age f the accused persons shown in the charge sheet.

5.2. The suit shall not be defeated on the ground of Misjoinder of parties

In a criminal and civil, the most common cause for misjoinder is that the defendants were involved in different alleged crimes, or the charges are based on different transactions.

Order 1 Rule 9 of the Civil Procedure Code, 1966, [Cap.33, R.E. 2002] provides that a Suit shall not be defeated by reason of MISJOINDER or NON JOINDER. The duty of the court is to decide on the real question in controversy between the parties before it. According to Order 1 Rule 9, a suit will be thrown out just on the grounds of MISJOINDER or NON JOINDER. Where there is a misjoinder, the court can strike out the parties who are wrongly joined (Order 1 Rule 10(1)) or it can order the addition of a party where there has been a Non Joinder.

In other words, misjoinder of parties is not fatal to the suit. It is mere irregularity covered by the Civil Procedure Code [Cap.33, R.E. 2002]. Hence, the various high courts, on the question of misjoinder of parties held that no decree shall be reversed or substantially varied, nor shall a case be remanded in appeal inter alia on account of misjoinder of parties, not affecting the merits of the case or the jurisdiction of the court.

This was also seen in the case of *Tanganyika Land Agency Limited And Others 8 v. Manohar Lal Aggarwal*,[16] whereby the Court of Appeal cited Order 1 Rule 9 of the Civil Procedure Code, 1966 that; "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties before it."

In *Calico Textile Industries Ltd v Zenon Investments Ltd, Registrar of Title & NBC Holding Corporation*,[17] among other thing it was held that, it is submitted that the equitable mortgage given to the National Bank of Commerce by Calico Textile Industries Limited was a banking asset and for that reason, the same was not vested in the NBC Holding Corporation. It is contended that the applicant has failed to traverse the averment that there is a Misjoinder of the third respondent. A specific prayer is therefore being made that the third respondent be struck out of the application and costs thereof

be awarded to it.

Upon the foregoing considerations the application would fail. It is accordingly dismissed with costs. Since the application has been dismissed, the need to consider the applicant's objections does not arise.

5.3. Objections on the ground of nonjoinder or Misjoinder of parties can be waived if not taken at the earliest time

Order 1 rule 13 of the Civil Procedure Code, 1966 [Cap.33, R.E. 2002] provides that, all objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

In the case of *Tanganyika Land Agency Limited And Others 8 v. Manohar Lal Aggarwal*[18]it was held that; Admittedly, the four companies were not impleaded in the court below. As we see it, this is a matter of convenience only. The companies are legal persons which cannot summon meetings. Meetings are summoned by physical human beings who act on behalf of the companies. In terms of Order 1 Rule 13 of the Civil Procedure Code, objections on the ground of non-joinder of the parties must be raised at the earliest opportunity and if the objection is not raised at an early stage, it is deemed to have been waived. There is therefore no merit in this ground of complaint. In the result and for the foregoing reasons, we dismiss the appeal in its entirety with costs.

Also in the case of *Shirima vs Aidan Nguguru*[19] – HC at Dar Massati,J among other thing argued that, "I think Mr. Tadayo, is on firm grounds. On the facts of this case, the Commissioner for Lands could not have been and is not a necessary party. The appellant thought he was, he was at liberty to apply before the trial court to join him as a necessary or third party. This is permissible under Order.1 of the Civil Procedure Code 1966. But Rule. 13 of Order 1 of the Civil Procedure Code 1966, also calls upon the parties to raise objections as to non joinder or misjoinder at the earliest possible opportunity." Therefore, this objection should have been taken at the trial court, and it is therefore too late in the day to raise it at this stage. Besides, Under Rule. 9 of Order 1 of the Civil Procedure Code 1966 no suit could be defeated by reason of misjoinder or non joinder. For these reasons therefore I also think that the fifth ground of appeal also lacks substance.

5.4. The suit shall not be defeated on the ground of misjoinder of counts

This was discussed in the case of *Seidi v Republic*,[20] where it was held that they were indeed defects in the charge, such as the counts being joined into one and the important facts that should be relied upon to determine the liability of the appellant such as the condition of the car, and the speed he was driving at, were omitted from the charge. However, the defects in the charge were not a failure of justice and were held to be curable. The accused was charged on three counts, one of causing death by reckless and/or dangerous driving, one of using a motor vehicle on the road with defective tyres, one of carrying passengers without a licence.

The accused, was hired by his neighbour to drive the latter's land rover to a place called Nzega to buy petrol. He was also instructed to carry 8 passengers who were heading to Nzega for a funeral, an employee of the neighbour and the neighbour's son. The accused while driving with the 10 passengers and a vehicle full of empty bottles picked and charged fare to three-four more passengers. With the vehicle being overcrowded and the speed of the accused being fast, accompanied with the constant bursting of the tyres, the vehicle overturned killing three and injuring twelve people. The accused appealed. It was claimed that the charge against the appellant was defective because the three counts were joined into one count and it was not clear as to what constituted reckless and dangerous driving.

The court cleared up what would constitute as reckless and dangerous driving. It was also stated that the experienced driver's decision to continue the journey knowing that the tyres were worn out and that the vehicle was overloaded constituted as reckless and dangerous behaviour for the appellant as a reasonable man should have foresee that an overloaded vehicle, had a probability of causing an accident and subsequently death.
Appeal was dismissed

5.6. Strike out of the counts which are wrongly joined

Adamu Mwam Balafu v. R[21] on appeal, it was held
(i) the judge erred in invoking s. 346 of the Criminal Procedure Code, whose provisions can only be used by the court sitting "on appeal or revision";
(ii) the appellant could and should have been charged with two offences arising out of the two acts of arson, but the charging of these two offences as one had not occasioned a failure of justice; the irregularity was curable by the court under s. 346 of the Criminal Procedure Code;
(iii) the alleged attempted murder on two occasions of K. and his wife. first by burning K.'s house and then by burning N.'s house when K. and his wife took refuge there after K.'s house had been destroyed, should have been the subject of two separate counts, and each count should have charged the attempted murder of either K. or his wife and not both together.
(iv) the duplicity in the second count and the judge's disregarding of the reference to the burning of N.'s house were irregularities curable under s. 346;
(v) the proper course where there are alternative counts is to convict and sentence on one and to make no finding on the other;
(vi) the charges of arson and attempted murder were not cognate offences such as could properly be charged in the alternative but if the Director of Public Prosecutions chose to make charges in the alternative, the trial must proceed on that basis;
(vii) the conviction on the first alternative count precluded the court from convicting on the second count, because the appellant had in effect only been charged with the commission of one offence.
Appeal allowed in part. Conviction and sentence on the second

count of attempted murder quashed and set aside.

The appellant was charged on alternative counts with arson and attempted murder contrary to s. 319 and s. 211 of the Penal Code. The particulars of the charge of arson stated that the appellant set fire to two houses, one of K. and the other of N. The house of N. was more than hundred yards from K.'s house. The particulars of the charge of attempted murder stated that the appellant attempted to cause the death of K. and his wife by setting on fire two houses, one of K. and the other of N. After the assessors had given their opinions and before judgment was delivered the trial judge noticed that both the counts were bad for duplicity, but considered that it was too late for the irregularities to be corrected by amendment. The judge purported to invoke s. 346 of the Criminal Procedure Code in relation to the first count of arson and held that the first count although bad for duplicity, had occasioned no failure of justice. As regards the duplicity in the second count, in referring to the setting on fire of more than one house, the judge disregarded the reference to the burning of N.'s house. The appellant was convicted of both counts, notwithstanding that the two counts were stated in the information to be in the alternative, and was sentenced to concurrent of terms of three and six years' imprisonment.

5.7. Misjoinder must cause failure of justice

This happens when two or more counts are wrongly joined and such joint may cause failure of justice to the accused person. Misjoinder of causes of action, or counts, consists in joining several demands to enforce substantive rights of recovery that are distinct and contradictory.

In *Joseph Odoro v R*[22] it was held that misjoinder must cause failure of justice in order for it to be Misjoinder.

Also in *Ismail Ramadhani Mwembayu v. Republic*,[23] among other things, it was held that, this would ring a bell of sense to an accused person but not the former. Secondly, there is an incurable misjoinder of the accused. This kind of situation is not the one envisaged and provided for under Section 134 of the Criminal Procedure Act, No.9 of 1985, where two or more accused van be joined in one charge let alone, once again, the wording which leaves a lot to be desired.

5.8. The suit can be defeated on the ground of misjoinder of counts if the defect is not curable

The effects of misjoinder of counts to a case depend on whether the defect is curable or non-curable. If it is curable hence it will not affect the prevail of justice, then the case on a particular count may continue but if it is non-curable then such count used in such case cannot prevail.

This was discussed in the case of *Elias v. R*.[24] The appellant was found with a stolen watch and money bag three days after they were stolen from the complainant. The appellant was convicted of housebreaking and stealing following the doctrine of recent possession and the appellant's failure to give a reasonable account as to how he came in possession thereof. The High Court upheld his conviction and his sentence on these two counts. When the appellant's house was searched some poisonous drugs in the form of procaine penicillin were found besides other suspect articles. The drugs were seized and taken to form the basis for the third charge brought under Cap.409 section 36 (1) to wit practicing medicine without due licence.

Held:

(1) The prosecution committed a serious blunder in bringing the charge on the third count "in the same charge as they brought the offence of breaking and stealing. This was clearly wrong in terms of **section 136 Criminal Procedure Code Cap. 20** which reads: 'Any offences whether felonies or misdemeanours, may be charged together in the same charge of information if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character'. It cannot be said from this definition that the offence of practicing medicine was properly joined with that of housebreaking and stealing since it could not have been founded on the same facts nor was it in any way similar to the offence of housebreaking stealing. In this sense therefore, the appellant's conviction on the offence of unlawfully practicing **medicine was bad for misjoinder** even assuming there was evidence in support of it …. There was insufficient evidence upon which to hold the appellant guilty of practicing medicine unlawfully. It would not therefore be fair to allow his conviction on this count to stand since such defect is not curable under section 346 of the Criminal Procedure Code. Consequently, it is hereby quashed and the sentence thereof set aside. To this extent the appeal is allowed."

(2) "What should have been done was for the prosecution to charge the appellant with the offence of unlawfully possessing poisons under the appropriate ordinance. They had all the evidence to secure his conviction had they done so."

Also in the case of *Kidevu Msese v. R*[25] The accused were convicted of office-breaking, on a charge that they had broken into a service station in Kigoma on the night of 22/23rd October, 1966. At the same trial, two other persons were convicted of breaking into the same service station on the night of the 17/18th October 1966.

Held:

(1) Because the appellants were not concerned in the transaction which was the subject of the charge against the other accused persons, the charge against them should not have been joined in the same information, and the trials should not have proceeded together. (Crim. Proc. Code, s. 137). (2) This defect is not curable under Criminal Procedure Code section 346, "since it is difficult to avoid the conclusion that the appellants were prejudiced by their joint trial." The trial was therefore a nullity. (3) As there was "sufficient indication" that one appellant was in fact guilty as charged, re-trial was ordered for that appellant only.

6. Conclusion

We live in a constitutional democracy, where neither a single dictator nor an overwhelming majority of the people has total power over us as individuals. Our constitutional democracy

balances the need to provide for the public's safety and security against other equally important values, individual liberty privacy, and dignity.[26]

It is one among the constitutional provision that everybody is presumed to be innocent until guilty is proven. Then, in order for a person to be presumed innocent until guilty is proven, he/she must be properly grouped and accused when it comes to the accusation of a certain offence. If the person is grouped among the offenders while he is not suppose to be on that category, then it may affect the concept of innocence even though his guiltiness is not ready proven [1,17].

Dedication

To My Child Ryan Magalla

Acknowledgement

I acknowledge G.O.D. because I would not have everything and every person surrounds me without HIM.

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