



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 61 OF 2017**

*(From Acquittal and Discharge in Criminal Case No. 433/2017 of the Chief Magistrate's Court at Mombasa: Hon. F. Kyambia on 29<sup>th</sup> March, 2017)*

**OFFICE OF D.P.P.....APPELLANT**

**VERSUS**

**WENDO IDDI ZUBERI.....RESPONDENT**

**JUDGMENT**

1. The Appellant, the Director of Public Prosecutions of the Republic of Kenya, has lodged the appeal herein dated and filed on 29<sup>th</sup> March, 2017. The Appellant is dissatisfied with the Ruling of the learned Honourable Magistrate F. Kyambia dismissing the charge against the Accused/Respondent on the following grounds:

**(a) That the Learned Hon. Magistrate erred in Law in entertaining a plea of *autre fois acquit* before the charge was read and the accused called upon the answer as per the provisions of Section 207 of the Criminal Procedure Code.**

**(b) That the Learned Honourable Magistrate misdirected himself in law in the interpretation of what amounts to double jeopardy in law thus by dismissing the charge caused a miscarriage of justice.**

**(c) That the Learned Honourable Magistrate erred in law by entertaining arguments by the defence on matters of fact canvassed from the bar without the benefit of any evidence before him on the facts in support of the claim of double jeopardy.**

**(d) That the Learned Honourable Magistrate entertained fanciful theories proffered by the defence counsel regarding the propriety of the decision to charge thus arrived at a wrong finding in law.**

**(e) That the Learned Honourable Magistrate failed to consider the fact that the decision to charge could not be faulted at the stage the objection was raised since no documents or witness statements had been exchanged to enable the court make an informed decision on the issues raised by defence on propriety of the charges.**

**The Background**

2. The Accused/Respondent was initially charged in Criminal Case No. 136 of 2013 with several charges, and underwent a full trial, but was convicted on 1<sup>st</sup> October, 2015 on some of the counts. He later appealed to the High Court being Appeal No. 186 of 2015. On 14<sup>th</sup> March, 2017 or thereabouts, the High Court acquitted the Respondent of all the charges and he was to be set free. That however, was not to be as the State prepared fresh charges against the Respondent. Upon the Respondent being released from prison, he was re-arrested and charged with fresh charges concerning alleged offences which took place on 12<sup>th</sup> January, 2013. The Respondent's case is that the fresh charges are similar to the charges the Respondent was acquitted of by the court and contrary to Section 157 of the Constitution. That notwithstanding, the Respondent was charged and was due to take plea on 16th March, 2017 when his counsel **Mr. Chacha** objected to the taking of the plea pleading **autre fois acquit** before the charge was read and the accused called upon to answer to the same.

3. **Mr. Okello** for the State objected to the interjection by Mr. Chacha, submitting that the plea had not been taken and that it was premature to plead *autre fois acquit*. The trial court, after hearing the parties delivered its Ruling on 29th March, 2017 in which it accepted the Respondent's plea of *autre fois acquit* and rejected the charges against the Respondent.

4. On the same day, the State filed an application before this court for stay of the Ruling of the Honourable Magistrate pending the determination of this appeal. A stay order was granted by this court on 3<sup>rd</sup> April, 2017, and the appeal was heard on 11<sup>th</sup> April, 2017 hence this Judgment.

5. The only issue for determination in this appeal is whether or not the trial court erred in entertaining a plea of *autre fois acquit* before the charge was read and the accused called upon to answer to the charge. In other words, the appeal hinges on the procedure adopted to acquit the Respondent rather than whether the charges amount to double jeopardy of the accused person. Indeed, this is the only issue parties submitted on.

### **Submissions**

6. **Mr. Jami** for the State submitted that the appeal is against the Ruling of Mr. Hon. Francis Kyambia in Criminal Case No. 433 of 2017 delivered on 29<sup>th</sup> March, 2017 whose effect was dismissing the charges laid before the court instituting the criminal case. In addressing grounds 1, 2, 3, 4 and 5 counsel was concerned with procedure that was adopted before the trial court. Counsel submitted that the procedure was improper and goes against the prosecution's right to a fair hearing under Article 50(1) as read together with Criminal Procedure code Section 207 (1) (2) (3) (4) (5). Article 50 enjoins the trial court to resolve any issues before it by application of the law to be decided on a fair manner. Counsel submitted that the application of the law includes following the procedures that are clearly laid down. Mr. Jami submitted that Section 207 (1) is clear that once an accused is arraigned before court the substance of the charge shall be stated to the accused by the court who shall ask him whether he pleads guilty or not guilty or whether he pleads guilty subject to a plea agreement. Mr. Jami submitted that a look at the proceedings show that the trial court did not observe that procedure. It was the counsel of the accused who stood up stating that they opposed the taking of the plea. Section 207(1) was not complied with throughout the proceedings. Section 207(5) comes after compliance with Section 207(1). After the charge sheet was read the accused had an opportunity under Section 207(5) to raise the plea that he had been charged with the same offence and acquitted. The court is then required to try that issue and determine it. Counsel submitted that this procedure was not followed. In this matter, the court went on to determine the issue based on submissions from the bar. So counsel submitted that Article 50(1) of the Constitution was not complied with. The court did not say whether the plea was true or was not true. The court ought to have tried the accused in relation to allegations of double jeopardy. The accused would have been expected to adduce evidence to show that he had been previously charged with similar offences. Mr. Jami submitted that there is no case law on procedure to be adopted but that the procedure is found under Section 207. Counsel asked the court to set procedure to be adopted. This is so because the court can only make a decision based on evidence. Such procedure has been adopted in cases of trial within a trial under Section 25 of Evidence Act dealing with confessions.

Mr. Jami submitted that they were not accusing the trial court of impartiality. They are only saying that the court did not adopt the necessary procedure, and that the failure to follow the procedure is incurable under Section 382 CPC. Further, the failure was not caused by prosecution. Prosecution raised objection at the earliest time possible. This court's power under Section 354(3) (c) CPC are very wide. For this particular instance the charge sheet was not read to the accused so the release of the accused cannot amount to an acquittal. Mr. Jami submitted that an acquittal can only take place where the charge has been read to the accused. In this case, counsel submitted that the court rejected the charge which had not even been read to the accused person.

7. Mr. Chacha for the Respondent submitted that a prayer for a retrial cannot issue. In the first instance there was no trial. The accused person had been charged in a court with five counts. He was acquitted in three charges and convicted on two. The accused appealed to High Court and was acquitted. However, he was re-arrested and charged with current proceedings. Mr. Chacha submitted that the first count was that the accused was unlawfully in possession of two hand grenades. This is the very count with which the accused was charged in the earlier lower court and that is why Mr. Chacha had raised a preliminary objection to the accused taking plea. Mr. Chacha submitted that Section 207(1) only gives three options of plea. There is no provision to opposition to taking plea. However in practice, counsel submitted that parties ordinarily object to the taking of plea, and that further there is need to save court time. Again the Constitution now does away with technicalities. Mr. Chacha submitted that the accused person was acquitted. He is a free person and he should be allowed to enjoy his freedom.

### **Determination**

7. As I have stated earlier herein, the issue for determination is whether or not the trial court complied with procedural requirement of Section 207 of the Criminal Procedure Code. The entire section reads thus:

#### **Section 207**

**“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;**

**(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by hi, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary:**

**Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

**(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**

**(4) If the accused person refused to plead, the court shall order a plea of “not guilty” to be entered for him.**

**(5) If the accused pleads –**

**(a) that he has been previously convicted or acquitted on the same facts of the same offence, or**

**(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”**

8. For the purposes of this Judgment the relevant section is Section 207(5)(a) which states that if the accused person pleads that he has been previously convicted or acquitted on the same facts of the same offence;

**“...the court shall first try whether the pleas is true or not, and if the court finds that the evidence adduced in support of the plea does not sustain it, or if it finds the plea is false, the accused shall be required to plead to the charge.”**

9. Clearly, the issue here is whether the accused had pleaded *autre fois acquit*, and whether the trial court had first conducted a trial of whether the said plea was true or not.

10. It seems to me that the trial required to determine the truthfulness of the said plea is mandatory, and it cannot be waived. It is also clear that the law envisages that the issue would be tried, and that the accused person would be called upon to plead to the charges. When called upon to plea, the accused person who intended to raise the plea of double jeopardy, must first plead that he has been previously convicted or acquitted on the same facts of the same offence.

11. Now, this is an issue which is mandatorily required, for there is no exception provided in the Criminal Procedure Code. That being so, the issue for this court is to establish whether firstly, the accused person was called upon to plead, and secondly, whether the accused person pleaded previous acquittal and finally whether a trial took place to determine the truthfulness of that plea.

12. This procedure, if it took place should be clear from the trial proceedings on record. The trial court's proceedings of 16<sup>th</sup> March, 2017 have been availed to this court. The proceedings open by Mr. Chacha for the accused submitting before the trial court that they opposed the taking of the plea, stating that the suspect is a beneficiary of a full trial being Criminal Case No. 136/2013 where he was convicted in some accounts, but upon appeal he was acquitted in Criminal Appeal No. 186 of 2015.

13. In response Mr. Okello for the State brought to the attention of the court that the plea had not been taken, and that the application by the defence was premature. From the proceedings, the trial court heard the submissions of the parties on the defence objection and finally made the Ruling that:

**“...the suspect is entitled to plea of *autre fois acquit* and I reject the charges herein.”**

14. It is clear that the trial court did not put the accused person to plead to the charges; it is clear that the court did not first try whether the plea was true or not, since infact there was no plea. The procedure adopted by the trial court was against the law. The honourable trial magistrate sought to determine the facts of *autre fois acquit* merely from submissions of the two opposing counsel but disregarded the taking of the plea by the accused person. It is the finding of this court that the procedure provided under Section 207(5)(a) is mandatory and not optional, and that a trial court has no option but to fully allow an accused person to take plea, and if the accused person pleads previous conviction or acquittal, then a trial must take place to determine the truthfulness of the plea. In the finding of this court there was no trial, leave alone a fair trial expected under Article 50(1) of the Constitution as read with Section 207 of the Criminal Procedure Code.

15. Mr. Chacha for the accused had submitted that the accused was being oppressed because he was required to plead to same charges and facts about which he had been acquitted. This court has not determined whether or not the accused person would suffer double jeopardy. That is the issue to be tried under Section 207(5)(a), and which trial did not take place.

### **Final Orders**

16. Pursuant to the foregoing it is the finding of this court that the Honourable trial magistrate erred in law in entertaining a plea of *autre fois acquit* before the charge was read and accused called upon to plead to the same, and that the trial magistrate erred in law in the interpretation of what amounts to double jeopardy in law without the benefit of a trial as envisaged under Section 207(5)(a) of Criminal Procedure

Code; and that the decision reached by the Honourable trial magistrate to reject the charges against the accused person pursuant to alleged plea of *autre fois acquit* was a gross miscarriage of justice.

17. Accordingly, the trial court's Ruling is hereby reversed and set aside, and it is hereby ordered and directed that a plea be taken before another court of competent jurisdiction.

18. That is the Judgment of the court.

**Dated, Signed and Delivered in Mombasa this 17<sup>th</sup> day of May, 2017.**

**E. K. O. OGOLA**

**JUDGE**