



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.189 OF 2015

(An Appeal arising out of the Ruling of L.M. Mugambi (Mr.) - SPM delivered on 27th July 2015 in Nairobi ACC. Case No.19 of 2014)

JULIUS KILONZO MAWEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Julius Kilonzo Maweu was aggrieved by the decision of the trial court wherein it dismissed an application made by the Appellant in which he sought to have the criminal charges brought against him terminated on the main ground that it was against his constitutionally guaranteed right under **Article 50(2)** of the **Constitution** that protected him from being tried again in respect of an offence for which he was previously tried and acquitted. The background to the Appellant's application before that court is that the Appellant was charged, with another, in **Nairobi CM Criminal Case No.2141 of 2009** with the offence of **stealing by Directors** contrary to **Section 282** of the **Penal Code**. The particulars of the offence in that charge were that on diverse dates between 19th June and 15th October 2009 at View Park Towers in Nairobi, the Appellant being a Director of Malili Ranch Company Limited, stole a sum of Kshs.52 million the property of the said company which came to his possession by virtue of his employment. The Appellant pleaded not guilty to the charge. After the close of the prosecution's case, the Appellant made submission on no case to answer and urged the court to acquit him under **Section 210** of the **Criminal Procedure Code** on the grounds that no *prima facie* case had been established against him. In his considered Ruling delivered on 13th July 2011, the trial court (G.C. Mutembei - CM) gave a short shrift to the prosecution's case. In one paragraph, he dismissed the prosecution's case. This is what the learned trial magistrate said:

“After considering the evidence adduced by the prosecution, I find that precious judicial time had been wasted on the hearing of tramped up charged (sic) against the accused persons done to satisfy the whims of some persons superior to the investigating officer. It beats logic why any responsible officer would want to subject the court to such unnecessary labour. The accused persons have no case to answer and I acquit them under Section 210 of the CPC.”

The prosecution did not appeal against the dismissal of its case.

The Appellant apparently thought that was the end of the matter until he was rudely shocked when on 5th September 2014 he was arraigned before the Anti-Corruption Court together with five other co-accused

and charged with two counts under the **Penal Code**. He was charged with **stealing** contrary to **Section 268** as read with **Section 275**. The particulars of the offence were that on diverse dates between the 17th June 2009 and 11th January 2010 at Machakos and Nairobi Counties, the Appellant jointly with his co-accused, and others not before court, stole the sum of Kshs.179,134,070/- being the sale proceeds of 5,000 acres of land LR. No.9918/3 that was sold to the government of Kenya (Ministry of Information and Communication) the property of individual shareholders of Malili Ranch Limited (hereinafter referred to as the suit parcel of land). In the second count, the Appellant was charged with others, both before and outside court, for **conspiracy to commit a felony** contrary to **Section 393**. The particulars of the offence were that on the dates mentioned above, within the same locality, the Appellant **conspired to commit a felony** by stealing a sum of Kshs.179,134,070/- being the sale proceeds of the suit parcel of land. When the Appellant was arraigned before the Anti-Corruption Court, he pleaded not guilty to the charge. He subsequently thereafter filed the application which was dismissed by the trial court.

In the material part of the Ruling that is sought to be impeached on this appeal, the trial court held thus:

“The position of this court on this matter is that once it has been determined that the offences though founded on the same set of facts are in fact distinct like in the present case where distinction can be seen in the subject matter of the charge, the time the alleged offence occurred as well as the section of the laws charging the offence; It would not in my view be necessary to bar evidence adduced in the course of former trial from being adduced to prove a different offence which was committed in the same occasion or nearly the same time as the other. In any event they could be different offences witnessed by the same people out of the same factual situation as the initial offence charged.”

In his petition of appeal, the Appellant raised several grounds of appeal challenging the said decision. Although the Appellant, in total, raised twelve grounds of appeal, the same can be summarized thus: the Appellant was aggrieved that the trial court had failed to reach a finding and hold that the charge for which he was acquitted in the previous case was substantially the same as the offences which he is charged in the present pending case before the Anti-Corruption Court. The Appellant faulted the trial court for failing to appreciate that the facts leading to the charge that he was acquitted were substantially the same facts that the prosecution will seek to establish in the present case that is facing him. For added measure, the Appellant stated that the witnesses who testified in the case that he was acquitted are the same witnesses who are going to testify in the case before the Anti-Corruption Court. The Appellant was aggrieved that the trial court had failed to make an appropriate finding that the charges brought against him were essentially of the same genre as the one that he was acquitted *i.e.* theft. In the premises therefore, the Appellant urged the court to allow the appeal and set aside the decision of the trial court and substitute it with a decision of this court terminating the charges brought against him at the Anti-Corruption Court.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Adere for the Appellant and by Mr. Ondimu for the State. Mr. Adere reiterated the grounds of appeal lodged by the Appellant. He submitted that the charges brought against the Appellant in the Anti-Corruption Court were substantially the same as the previous charge that was brought against the Appellant that resulted in the Appellant's acquittal. He explained that the charges brought against the Appellant in the Anti-Corruption court were of the same category as the charge that the Appellant was acquitted in the previous case. Learned counsel wondered why the prosecution selectively chose to charge him in the present case while leaving out his co-accused in the previous case. The Appellant argued that the reason why he was charged and his co-accused, who was the Chairman of Malili Ranch Company Limited was made a prosecution witness, was because he refused to co-operate with the prosecution. He was of the view that he was being discriminated upon because of the stand that he had taken.

Mr. Adere argued that the trial court fell in error when it made the finding that the previous charge and facts in support of the charge were not of the same nature as the charges brought against the Appellant in the present charge. He submitted that the fact that the Appellant was being charged again on the basis of the same facts was in breach of his constitutional right to fair trial as provided under **Articles 25** and **50(2)(o)** of the **Constitution**. He emphasized that the Appellant having been acquitted in the previous

case cannot be charged again over the same facts in the present case. He relied on **Section 138** of the **Criminal Procedure Code**. He reiterated that the charge of conspiracy to commit a felony namely theft brought against the Appellant was similar to the previous charge that the Appellant had been acquitted. Learned counsel relied on the cases of **Connolly v Director of Public Prosecutions [1964] 2 All ER 401**, **Regina v Beedie [1998] QB 356** and **R v Riebold & Another [1965] 1 All ER 653**. He submitted that the charge of conspiracy to commit a felony cannot stand in view of the earlier finding made by the previous court that the Appellant had not committed any offence. He was of the view that the Appellant was being treated in an oppressive manner by the prosecution. He urged the court to reach a finding that the Appellant cannot be tried again for an offence for which he had previously been tried and acquitted.

Mr. Ondimu for the State opposed the appeal. He submitted that the former charge that the Appellant was acquitted and the present charges brought against him were completely different. He explained that even though the same witnesses may be called to testify in the present case, that fact alone cannot form a basis upon which the court can reach a finding that the previous charge is similar to the present charge. He reiterated that investigations in the case was continuous and the fact that new charges were brought after the acquittal of the Appellant in the previous charge is not a bar to different charges being brought against the Appellant if new evidence is discovered. Mr. Ondimu was of the firm view that the present charges brought against the Appellant were not of the same nature as the charge that was brought against the Appellant in the case that he was acquitted. He was emphatic that the present charges were not brought against the Appellant in breach of the principle of *Autrefois Acquit*. In the premises therefore, learned counsel submitted that the appeal lacked merit and should be dismissed.

This court has carefully considered the submission made in this appeal. **Article 50(2)(o)** of the **Constitution** provides as follows:

“Every accused person has the right to a fair trial which includes the right not to be tried for an offence of in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”

Article 25(c) of the **Constitution** specifically states that the fundamental right of a person to fair trial shall not be limited under any circumstances.

Section 138 of the **Criminal Procedure Code** amplifies this constitutional edict. It provides that:

“A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.”

Mr. Adere argued that the charges brought against the Appellant in the present case before the Anti-Corruption Court were of the same genre as the charge that the Appellant was acquitted in the previous case. Learned counsel explained that the subsequent charges brought against the Appellant were of the same type as the one that he was acquitted in the previous charge. In the previous case the Appellant was charged with the offence of stealing by a Director. In the subsequent charges, he has been charged with two counts of **stealing** and **conspiracy to commit a felony** namely **theft**. Mr. Adere submitted that the previous and the subsequent charges fell in the same category of charges *i.e.* **theft**. He therefore urged the court to find that the Appellant, having been previously acquitted of the same charge, cannot be tried in respect of the subsequent charges before the Anti-Corruption Court. Mr. Ondimu for the State, not surprising, is of a contrary view. He submitted that the subsequent charges brought against the Appellant are dissimilar to the charge that the Appellant was acquitted. He emphasized that the fact that the Appellant was charged with an offence under the broad category of theft was not a bar to the Appellant being charged with subsequent charges if the facts supporting the charge are different.

It was clear from the submission made that the issue for determination by this court is whether the facts constituting the previous charge upon which the Appellant was acquitted are the same facts as the ones that the Appellant is being tried in the case before the Anti-Corruption Court. Lord Hodson in **Connolly v DPP [1964] 2 All ER 401** at page 428 stated:

“What is meant or involved in the words “the same crime”? It is the answer to this question that so much difficulty has arisen and so much argument has been entertained down to the present day not only in this country but in other countries where the common law prevails.”

The Learned Judge proceeded to explain that the principle of Autrefois Acquit can be interpreted narrowly or broadly depending on the circumstances of the particular case that the court is called upon to determine. Unlike in England where the principle of Autrefois Acquit is based on common law, in Kenya the principle of Autrefois Acquit anchored in the **Constitution**. The interpretation of this court of **Article 50(2)(o)** of the **Constitution** is that for the plea of Autrefois Acquit to be successfully invoked, the following must be established:

- i) That there was a previous case in which the Applicant was charged with a particular offence.
- ii) That the Applicant was acquitted of the particular offence.
- iii) That the decision resulting in the Applicant’s acquittal has not been set aside or varied by an Appellate court.
- iv) That the Applicant is charged with another offence similar to the one or cognate to the one that he was previously acquitted.
- v) That the subsequent charge, though not the same as the previous charge is cognate to the previous charge and is based on similar facts and circumstances of the previous charge.

In the present appeal, it was clear to this court that the Appellant has a case when he states that he is being charged with a similar offence based on the same facts that he was acquitted in the previous charge. In the previous charge, the Appellant was acquitted of the offence of **stealing by a Director** contrary to **Section 282** of the **Penal Code**. The particulars of the offence were that he stole the sum of Kshs.52 million from Malili Ranch Company Limited. In the present charge, he has been charged with others with stealing the sum of Kshs.179,134,070/- from the shareholders of Malili Ranch Company Limited. It is evident that both counts relate to theft. Whereas the subsequent sum that is alleged to have been stolen is higher, the difference can be explained by the fact that the Appellant’s co-accused are accused of stealing the balance of the same. Mr. Ondimu argues that the present charge before the Anti-Corruption Court is different from the previous charge that the Appellant was acquitted. This court cannot discern any difference between the two charges other than the figures that constitute the charge. Theft is theft. The same applies to the second charge of conspiracy to commit a felony namely theft. It does not matter whether it is theft by director or theft by an individual. The complainant is the same. The subsequent charges brought against the Appellant in the Anti-Corruption Court are cognate to the charge that the Appellant was previously charged, tried and acquitted.

In the previous case, the complainant was Malili Ranch Company Limited while in the subsequent case it is the shareholders of Malili Ranch Company Limited. Mr. Ondimu concedes that the witnesses in the previous case are the same witnesses (with additional witnesses) who will testify in the present case. If that is the case, *hasn’t the Appellant made a case that he is being tried in respect of a charge that he has previously been acquitted by a court of competent jurisdiction?* This court agrees with the Appellant that if the prosecution formed the view that he should be charged in the subsequent case, then, his co-accused in the previous case should similarly have been charged because they had both been charged in their respective capacities as Directors of Malili Ranch Company Limited. The Appellant has a case when he complains that he is being discriminated for reasons unknown to him. It did not come out clearly from the prosecution’s submission how they came to the decision to charge the Appellant in the present case while his co-accused in the previous case was made a prosecution witness. This discrimination raises justifiable suspicion that the prosecution is subjecting the Appellant to unfair treatment as compared to his co-accused in the previous case for which both were acquitted.

This court therefore holds that the Appellant has established to the satisfaction of this court that he is being charged with an offence that he was previously acquitted. The facts in support of the subsequent

charge are similar to the previous charge that the Appellant was acquitted. The prosecution did not appeal against the acquittal. That decision stands. The Appellant properly invoked the constitutional principle *Autrefois Acquit*: he cannot be charged again in respect of an offence for which he was tried and acquitted, however the subsequent charge is framed. The facts upon which the Appellant was acquitted are the same facts that the prosecution is relying on to sustain the present two charges facing the Appellant before the Anti-Corruption Court. In charging the Appellant before the Anti-Corruption Court, the prosecution breached the Appellant's constitutional right to fair trial under **Article 50(2)(o)** of the **Constitution** that prohibits the prosecution from bringing charges against a citizen who had previously been charged, tried and acquitted over the same offence.

In the premises therefore, this court holds that the Appellant's appeal has merit. He cannot be charged in respect for an offence for which he was previously acquitted. The prosecution is hereby prohibited from prosecuting the Appellant before the Anti-Corruption Court because he cannot be tried again in respect for an offence for which he was previously tried and acquitted. This is because the **Constitution** says so. The Order by the trial magistrate declining to dismiss the charges brought against the Appellant is hereby set aside and substituted by an Order of this court terminating the charges brought against the Appellant. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF JULY 2016

L. KIMARU

JUDGE