



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO. 29 OF 2001

FRANCIS MWANZA MULWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The petitioner Francis Mwanza Mulwa was charged with the offence of stealing by agent C/s 283(b) of the Penal Code.

The particulars of the charge were that on the 6th April, 1999 at view Park Towers Nairobi area being an agent to, Embakasi multipurpose limited he stole kshs.one million which had been entrusted to him by the said Embakasi Multipurpose Limited for and on account of Shangilia Baba na Mama company.

When the said charge was read over and explained to the petitioner, his reply thereto was;

“It is not true. I was charged and acquitted on the same charge.”

Subsequent to the said plea, The learned counsel for the petitioner and the prosecutor addressed the lower court on the previous and present charges. To justify the plea of antefois acquit, the learned counsel took the lower court through the proceedings of criminal case no. 1919 of 1999. The prosecutor opposed the application to have the petitioner acquitted on that basis.

In her ruling dated 6th April, 2001, 2001, the learned trial magistrate said:

“It appears that there was a claim by Shangilia against The accused person.

Pw1 who was the complainant in the earlier charge was not a director or representative of Shangilia Mama na Baba and had complained in his own capacity. The complainant here is therefore totally different from the complainant in that case. There is no evidence that the one million shillings in that case is the same one in this case.

I agree with the prosecution that the charge here is different from the other charge on which the accused was acquitted. I consequently dismiss the preliminary objection and order that there is nothing barring the accused from answering the present charge now before court.”

The charge in criminal case no. 1919 of 1999 upon which the petitioner was acquitted related to stealing by Agent c/s 283 of the Penal code. The particulars thereof were that on the 8th day of April, 1999 at Mwatu wa Ngoma Road within Machakos being a commission agent to Mr Mutuku Kaluma he stole one million shillings the property of Mutuku Kaluma which was entrusted on behalf and account of the said

Mutuku Kaluma.

After the close of the prosecution case, the petitioner submitted that he had no case to answer and was acquitted under Section 210 of the Criminal Procedure Code. I note in passing that, the present charge which is being challenged was field in court on 15th February, 2001.

Section 77(5) of the Constitution of Kenya provides;

“(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or any other criminal offence for which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

The Constitution is the supreme law of the land but it is instructive to note that, the spirit thereof has been embodied in the criminal procedure order Cap.75 Laws of Kenya. Section 138 of the said code provides.

“138. A person who had 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.”

It is further provided in Section 218 thereof that:

“218. The production of a copy of the order of acquittal, certified by the clerk or other officer of the court, shall without other proof be a bar to a subsequent information or complaint for the same mater against the same accused person.”

This court has been referred to blackstones, criminal practice 1995 where at pg. 1217 it is stated.

“The basic purpose of the two pleas of antrefois acquit and antiefois convict is to protect the subject against repeated prosecutions for the same offence.”

It is further stated at page 1219 that “the defence is not confined to a simple comparison of the wording of the two indictments but may adduce such evidence of identity of persons, dates, facts etc as is necessary to show that the accused is indeed now charged with an offence substantially the same as that charged in the earlier indictment.” See also *Connelly v Director of Public Prosecutions* (1964) 2 ALL E.R. 401 I agree with the statement by lord Hodson in the *Connelly Case* that the plea may be raised at any time either as a plea in bar to the second indictment or any stage in the proceedings.

In the instant case, the petitioner’s counsel raised the plea immediately the charge was put to the petitioner. He tendered the previous proceedings where in the facts were substantially the same. Only the complainants have been changed alongside the dates of he alleged offence. But mere variance between the record of a former acquittal and the later indictment will not defeat the plea if both indictments are for the very same felony.

I subscribe to the seventh principle as laid out by Lord Morris in the Connelly case at page 412 “that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or substantially the same as the crime charged in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings.

Applying the above facts and observations to the present case I am of the view that the plea entered by the petitioner should have been upheld by the learned trial magistrate as in my view, after the acquittal in the earlier case, any other charge related to the same facts, was an abuse of the court process, and I may add is tainted with oppression.

This matter coming before me by way of revision I will be acting within the law if I make final orders herein. The proceedings before the learned trial magistrate are hereby terminated by upholding the plea of antrefois acquit. As the learned counsel for the Republic also concedes this shall be the order of the court.

Dated and delivered at Nairobi this 2nd day of May, 2002.

A. MBOGHOLI MSAGHA

JUDGE

Mr Kilukumi for the Petitioner

Mr Monda for the state

ORDER

Supply typed copy(certified) of ruling to counsel on payment of requisite fees.

MBOGHOLI MSAGHA

JUDGE

2/5/2002