REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 123 OF 2010

NICHOLAS KIPSIGEI NGETICH …..……..... 1ST ACCUSED

JOHNSTONE KIKURUI SIGEI ……..……..... 2ND ACCUSED

STEPHEN KIAMBA MWANZIA ……..……..... 3RD ACCUSED

DAVID NJUNO MBIYU …….……..…..5TH ACCUSED

MUSANA OLE MBUKOI alias SANANGA……...4TH ACCUSED

EDDA WANJIRU MBIYU ……..…..... 6TH ACCUSED

JOHN KIRAGU MACHARIA ……..... 7TH ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

The seven (7) accused persons were charged before the High Court in Nakuru vide **Criminal Case No. 123 of 2010**, of two (2) Counts of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.** The trial was conducted before **Hon. Lady Justice Helen Omondi** who in her judgment delivered on 9th December 2014 acquitted all the six accused persons of the two (2) counts of Murder.

Meanwhile the office of the Director of Public Prosecution proceeded to arraign the same (6) accused person before the Magistrates Courts vide **CMCC No. 287 of 2012** on a charge of **Attempted Murder Contrary to Section 220 of the Penal Code.**

The applicants have now come before the High Court seeking to quash their trial in the lower court.

The genesis of the two trial was an incident which occurred on 3rd December, 2010 at the Soilo Junction along the Nakuru-Kisumu Highway, where gunmen riding a motor vehicle shot at another vehicle causing fatal injuries to two of the passenger in the and serious injuries to a third passenger.

The applicants seek to have the trial before the lower court quashed on the grounds that, since they were acquitted by the High Court of an offence which occurred at the same place and time, and involved the

same witnesses, their continued trial in the lower court amounts to **'double jeopardy'.** They contend that the trial in the lower court amounts to an abuse of the court process.

The application was argued before me on 6th May 2016. **Hon. Paul Muite Senior Counsel** together with **Mr. Gordon Ogolla** Advocate submitted on behalf of the Applicants **MS MARY OUNDO, Senior Assistant Director** of Public Prosecution opposed the application. The parties had earlier filed written submissions.

On behalf of the applicants it was submitted that once the High Court acquitted the accused persons of the charge of murder, the subordinate courts proceed to try the same accuseds persons on charges arising from the same incident as the High Court decision (acquittal) bunds the lower court. The guilt or innocence of the accused persons having already been determined by the High Court after an exhaustive analysis of the evidence cannot be revisited by the lower court purporting to try a different offence. Counsel for the applicant's placed reliance on the concept of **'collateral estoppel'** – which means that once an issue of fact had been decided it cannot be litigated again between the same parties.

Counsel for the applicants also submitted that the trial of the accused persons in the lower court on the basis of the same facts, emanating from the same episode and relying on the evidence of the same witnesses as those presented on the High court (In fact the complainant/victim in the lower court case testified as a witness in the High Court trial) offends the legal principle prohibiting **'double jeopardy'.** It would be wrong to subject the accused persons to the anguish and rigours of a second trial, when the High Court had already acquitted them of charges arising from the same episode.

Counsel took issue with the fact that the lower court trial was initiated almost two (2) years after the murder case was filed. It was submitted that the offence of Attempted Murder being one over which the High Court has jurisdiction, the office of the DPP ought to have filed all the charges together in the High Court as provided by Section 135 of the Criminal Procedure Code. The decision to try the six accused persons two (2) years after the incident infringed their rights to a fair trial guaranteed by Section 50(2)(e) of the Constitution of Kenya 2010.

Ms. Oundo for the DPP opposed the application to quash the trial in the lower court. She submitted that a charge of murder is not the same as a charge of Attempted Murder. They are separate and distinct offences with different ingredients and different standards of proof. That is why she insisted a charge of Attempted Murder could never be an alternative to a murder charge.

Counsel further submitted that the fact that the two charges emanated from the same incident is quite immaterial. Decision to acquit or convict a suspect is based purely on evidence. Therefore the mere fact that the High Court had acquitted the applicants of the charges of murder is not tantamount to an acquittal on all charges emanating from that same incident. The lower court is bound to render it decision on the basis of the evidence on record and will not be bound by the decision of the High Court. She finally urged the court to disallow this application and to allow the lower court trial to proceed to its logical conclusion.

DETERMINATION

There can be no doubt that an accused person ought not to be tried a second time regarding an offence for which he has previously been acquitted or convicted. The legal maxim **"nemo debet bis vexari pro ura et eadem causa"** a latin phrase which literally means **"No-one shall be tried or punished twice in regards to the same event".** This is the legal protection against **"double jeopardy"** which gives right to the defence of **'autrefois convict'** or **'autrefois acquit'**.

Similarly Section 50(2)(a) of the Constitution provide

> ***"50(2) Every accused person has the right to a fair trial which includes the right –***
>
> > ***(a) Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."***

The reasoning behind this principle is quite clear – there must be finality in legal processes. The accused person must be protected from the prejudice he would suffer by going through a second trial after the State has seen his entire defence and to protect citizens from undue oppression by the State.

That being said it is however quite feasible that multiple Criminal Offences may arise out of the same transaction. In such situations generally two tests are applied

(i) "Same evidence" test

(ii) "Same transaction" test

(i) The **"same evidence Test"** bars the mounting of a second prosecution requiring the very same evidence which would have been required to convict at the first prosecution. In any situation where the same evidence would be required to sustain a conviction in any subsequent litigation, then that subsequent litigation is prohibited by the doubt jeopardy rule.

In the case of **CONNELEY Vs DPP 1964 2 All ER 401** the accused was prosecuted on a charge of Murder and a second charge of Robbery with Aggravation was held in abeyance. The accused was convicted on the charge of murder which conviction was later quashed. He was then tried on the count of constitute the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a conviction on the first indictment either as to the offence charge or as to an offence which on the indictment the accused could have been found guilty.

(i) That this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge;

(ii) That on a plea of *autrefois* acquit convict or autrefois convict a man in not restricted to a comparison between the later indictment an some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(iii) 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 is substantially the same as the crime charged in a former indictment and it is immaterial that that facts under examination or the witnesses being called in the later proceedings are the same as those earlier proceedings;

(iv) That apart from circumstances under which there may be a plea of Robbery with Aggravation. The accused objected to this second trial and pleaded **'autrefois acquit'**. The House of Lords in England rejected this plea and held that a plea of **'autrefois acquit'** does not protect a person from further prosecution for a different offence on the same facts simply because he had been prosecuted on those facts and acquitted.

The court in that case set out the principle as follows:

"(iv) that one test whether the rule applied is whether the facts which autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of resjudicata applies"

From the above ruling it becomes very apparent that in order for a plea of **'autrefois acquit'** to apply the offence charges must be the same as the offence for which one had been previously acquitted. The mere fact that the two trials emanates from the same episode, have the same witnesses or similar evidence or that two separate crimes were committed in the same incident is **not** the true test. Therefore the court held that a charge of Murder and Manslaughter cannot arise from the same death. However there can be two distinct charges for Murder and Robbery when the two offences are committed at the same time. These

are two distinct offences and the evidence required to prove one charge does not prove the other. The court in the **Comolly** case held that

> ***"There is no rule or principle to the effect that evidence which has first been used in support of a charge which is not proved may not be used to support a subsequent and different charge. The test is whether the essential ingredients of the offence of robbery or the evidence that is necessary to sustain it would suffice to prove a charge of murder or manslaughter".***

In **Republic Vs Kupferberg [1918], 13 Cr. App. Rep 166**-the conviction of the appellant was at a trial subsequent to the one at which he had been acquitted of conspiracy. The argument of the defence was based on a plea of autrefois acquit. The court held-

> ***"Court further contended that the appellant was entitled successfully to plead autrefois acquit at the second trial, because at the first trial he had been acquitted of certain charges of conspiracy which were frames under the same regulation as that which formed the basis of the charges made against him at the second trial. That also appears to the court to be an erroneous contention. A charge of conspiracy is not the same as one of aiding and abetting. It is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be. For a plea of autrefois to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the same in the sense that each must have the same essential ingredients. The facts which constitute the one must be sufficient to justify a conviction for the other".*** (Own emphasis).

In **Regina Vs Z [2005] 3 ALL ER 95** the court held-

> ***"It is obvious that this principle is infringed if the accused is on trial again for the offence of which he has been acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial".*** (own emphasis).

From the above authorities it is clear that the fact that the evidence in a previous case corresponds overwhelmingly with the evidence in a later case is not in itself sufficient grounds to apply the principle of ***'autrefois acquit'***. Therefore in applying the 'same evidence rule, a court will look **not** at the fails but at the **ingredients** of the offences. The question is whether the ingredients required to prove one offence are the same as those required to prove the second offence.

In the present situation the six (6) accused persons were charged in the High Court with the offence of murder. They were acquitted of that offence. They now face a charge of Attempted Murder. These are two separate and distinct offences. Each provided for under different sections of the Penal Code and each requiring proof of distinct ingredients. Most importantly the victims in each charge is a different person. The fact that they were acquitted of murdering the deceased person does not mean the applicants are equally innocent of attempting to cause the death of the victim (Complainant) in the lower court case. The two charges can never be deemed to be the same.

(ii) The same Transaction Test

Classifies as the same offence all acts which occur out of the same criminal episode. The 'same transaction' test limits piecemeal prosecution by compelling the State to prosecute at one trial all offences which have been committed with a common motivating intent and which has a single ultimate goal. The courts in the United States have set down as a test whether a fundamental unfairness has resulted due to multiple trials.

In the case of **S. BLOCK BURGER Vs UNITED STATES 284 U.S 299 (1932)** it was held

> ***"Where the same act or transaction constitutes a violation of two distinct statutory provisions, the tests to be applied to determine whether they are two offences is whether each provision requires a proof of a fact which the other does not…."***

Likewise in the case of **BOB FRED ASHE Vs HAROUD R. SWENSON WARDEN 399, F – 2D 40 (8th Cr. 1968)** it was held that

"The rule against doubt jeopardy does not forbid the State from prosecuting different offences at consecutive trials even though they came out of the same occurrence. The test is whether such a course has led to fundamental unfairness"

In the Ashe Vs Swenson Case Ashe along with three other men, was accused of robbing six poker players in the basement of one of the victims' homes. Each of the men were charged with seven separate offenses – the armed robbery of each of the six men and the theft of a get-away car. At Ashe's first trial, he was charged with the armed robbery of one of the poker players. The proof established beyond a reasonable doubt that the crime had occurred. However, testimony from the state's witnesses was too indefinite and unconvincing to identify Ashe as one of the robbers. Ashe was found not guilty. Six weeks later, Ashe was tried for the robbery of another of the poker players. Claiming that he was being twice put in jeopardy, Ashe filed a motion to dismiss; but the motion was overruled. At the second trial, the prosecutor did not call the witness who failed to identify Ashe at the first trial. Instead, he called those witnesses whose testimony had been strongest against Ashe and elicited even more positive identification testimony than he had gotten at the first trial. As could be expected, the second jury found Ashe guilty and sentenced him to 35 years in the state penitentiary.

Ashes second conviction was confirmed by the Supreme Court of Missouri. He filed a petition for relief claiming that the second trial had placed him in double jeopardy. In rejecting this plea the court held as follows

> ***"A robbery of one man (Roberts) ordinarily requires proof of facts different from those required to prove a robbery of another man (Knight). This is so even though Roberts and Knight are held up and robbed at about the same time. The items taken from Roberts' person are different than the items taken from Knight's person and the personal indignities inflicted on the respective victims are not the same"***

Based on the above discussion it is evident that the applicants cannot rely on the doubt jeopardy rule. The victims in both crimes were different – one is deceased and one is still alive. The charges they face are separate and distinct. The mere fact that the offences occurred in the same transaction is not a bar to the second charge in the lower court. Whilst it may be true that the State took 2 years to lay charges of Attempted Murder, there is no time limit to a criminal charge. Thus this application fails and is disallowed. I direct that the CMCC 287 of 2012 proceed to its logical conclusion.

Dated in Nakuru this 7th day of November, 2016

Mr. Ogolla for all the accused persons

M. Odero

Judge

7/11/2016