



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 21 OF 2016

BETWEEN

REPUBLIC.....APPELLANT

AND

DANSON MGUNYA.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Odero, J.) dated 8th May 2015 and read by Muya, J. on 26th June 2015

in

H.C.R.C. No. 26 of 2008)

JUDGMENT OF THE COURT

This is an appeal by the State against the acquittal of the respondent, **Danson Mgunya**, by the High Court at Mombasa, **(Odero, J.)**, for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. In addition to the contention that his acquittal was proper due to the failure by the prosecution to prove its case beyond reasonable doubt, the respondent also challenges the right of the State to prefer an appeal in this Court against an acquittal by the High Court in the exercise of its original jurisdiction, contending that such right of appeal does not exist and if it does, it is in violation of the Constitution.

Before we consider the jurisdictional point taken by the respondent and the merits of the appeal, if need be, we shall first set out briefly the background to the appeal. At all material times, the respondent was a police officer, having served with the Administration Police for 35 years. He was the Corporal in charge of **Kizingitini Administration Police Camp, Faza Division** in **Lamu County**. On 21st May 2006 the respondent received a warrant of arrest from the Principal Magistrate's Court, Malindi for the arrest of **Mselem Mohamed Ali (the deceased)**. The warrant was issued on 10th February 2006 in **Criminal Case No. 267 of 2006** where the deceased was charged with assault and had absconded while on bail.

In the company of three other administration police officers, namely **Maurice Oludhe Oduor (PW 10)**, **John Juma** and **Mutwiri Linus**, the respondent went to the home of the local Chief, **Kassim Sheebwana**

Mohamed to seek assistance in identifying the deceased, so that he could be apprehended in execution of the warrant. It was at about midnight and the night was very dark, compelling them to use torches all the time. All the police officers were armed with G3 guns, save the respondent who was armed with a *Ceska* Pistol. The Chief led the police to the home of the deceased where they searched three houses in the compound but did not find him. The fourth and last house belonged to the deceased's mother, **Khadija Ali Malau (PW1)**. The Chief knocked on the door and after a while, PW1 opened. The respondent introduced himself and the purpose of their visit, upon which PW1 stated that she had not seen the deceased for about two years. Nevertheless, the police insisted on searching the house.

By the door, they noticed a ladder leading to the roof. PW10 climbed the ladder to the roof where he found the deceased hiding. Upon asking him to get down, the deceased made to escape and fell from the *makuti* roof, landing outside the house. As he was alighting from the roof, PW10 heard a gunshot outside the house and upon getting out, he found the deceased bleeding from a head injury and surrounded by the other policemen. He did not see who had fired the shot. The police then carried the deceased to Kizingitini Dispensary, but he was pronounced dead on arrival. His body was subsequently transferred to Lamu District Hospital where **Lali Ahmed Lari (PW 3)**, identified it before postmortem and burial.

After a long period of almost two and half years, the respondent was arrested on 9th October 2008 and charged the next day, jointly with the Chief, with the murder of the deceased. The Chief unfortunately died on 26th August 2011 while the trial was still ongoing and so the trial continued and concluded only against the respondent. The prosecution called 11 witnesses while the respondent gave an unsworn statement in his defence and called no witness. **Ibrahim, J.** (as he then was), heard the evidence of 10 of those witnesses while Odero, J. heard only the last witness.

The prosecution evidence was largely as narrated above, save the evidence of PW1 who testified that there were only two police officers with the chief and that the deceased, upon being discovered hiding in the roof, climbed down and was shot while in the house by a police officer who she could not identify. All the other prosecution witnesses who were in the vicinity of the *locus in quo*, namely **Umi Hamadi Mumini (Pw2)**, **Kassim Ali Shedi (PW4)**, and **Hassan Mohamed (PW7)**, came to the scene after the shooting and their evidence was that the deceased was shot outside, not inside the house. **Yusuf Mohamed (PW5)** who claimed to have witnessed the deceased being shot by a police officer was unable to tell which officer shot him and could not identify the respondent. According to this witness, he heard "gunshots" fired during the incident.

Hakim Maisha Athman (PW8), a doctor at Tudor District Hospital produced the autopsy report prepared by **Dr. Gilbert Marabi**. According to the report, the deceased died from brain injury secondary to a bullet, which had entered on the temporal area and exited on the occipital area. The other relevant evidence was that of **Emmanuel Lagat, (PW9)** the ballistics expert and firearms examiner. He confirmed that he had examined in May 2006, a **Ceska Pistol Serial No. F9016**, one magazine and 13 rounds of **9x19 mm ammunition** and confirmed that they were all in good working order and constituted firearm and ammunition within the meaning of the **Firearms Act**. However, the witness testified that he was unable to determine whether the firearm was recently fired.

When he was put on his defence, the respondent's defence was again largely along the lines we have set out above. He admitted firing his weapon in the air to warn the deceased, but denied that it was him who shot the deceased. His version of the events was that as the deceased made to flee from the police, he jumped from the roof of his mother's house, hoping to cross to the roof of an adjacent house. In the process he miscalculated his jump and landed heavily on a heap of stones and sustained fatal injuries.

On the basis of that evidence, Odero, J. was not satisfied that the prosecution had proved the charge of murder against the respondent beyond reasonable doubt. Accordingly, the learned judge acquitted him, prompting the State to lodge this appeal.

Mr. Yamina, learned prosecution counsel, in supporting the appeal for the appellant, started by addressing the jurisdictional point raised by the respondent on whether the State had a right of appeal to this Court against acquittal by the High Court in the exercise of its original jurisdiction. He submitted that

section 348A of the Criminal Procedure Code as amended by the **Security Laws (Amendment) Act No. 19 of 2014** conferred jurisdiction on this Court to entertain an appeal from an acquittal by the High Court in the exercise of its original jurisdiction. That Act, he submitted, came into force on 22nd December 2014, while the judgment in this appeal was delivered on 8th June 2015. In his view therefore, the State had legal basis for preferring the appeal.

Learned counsel further argued that the principle of double jeopardy had no application in an appeal, which is not a new trial. It was submitted that this Court is an appellate court rather than a trial court and that there was no basis for treating an appeal as a new trial.

On the merits of the appeal, counsel attacked the acquittal of the respondent on three broad grounds, contending that the trial court erred by failing to find that the prosecution had proved its case beyond reasonable doubt; by advancing and relying on theories rather than relying on the evidence that was adduced; and by failing to invoke **section 179(1)** of the Criminal Procedure Code empowering the court to convict an accused person for a minor cognate offence in lieu of the main offence charged.

Regarding the first ground of appeal, counsel submitted that the trial court erred by placing on the prosecution a standard of proof that is unknown in law; that of proof beyond doubt. It was submitted that this was extra burden and that the acquittal of the respondent was against the weight of evidence, which showed that the respondent had fired a shot. The trial court was also faulted for holding, in the circumstances, that evidence should have been led to show that the deceased was shot by a bullet fired from the respondent's gun, instead of drawing the necessary inference from the evidence on record.

On the second ground of appeal, it was contended that the High Court erred by holding that the records of the firearm and ammunition should have been produced in evidence instead of relying on the evidence that was adduced which showed that the respondent had fired a shot from his gun in a bid to prevent the deceased from fleeing. Even without producing such records, it was urged, the trial court could have convicted the respondent. Relying on **Section 24(3)** of the Criminal Procedure Code, **section 111** of the **Evidence Act**, and **sections 10** and **19** of the Penal Code, counsel submitted that the burden was on the respondent rather than upon the prosecution to prove that he had used reasonable force in a bid to effect the arrest of the deceased. Relying further on **Okethi Okale v. Republic [1965] EA 555**, it was submitted that the trial court was duty bound to act on the evidence on record rather than advancing theories that had no foundation or basis in that evidence.

Lastly, it was submitted for the State that the High Court erred by failing to invoke section 179 of the Criminal Procedure Code and find the respondent guilty of manslaughter. While conceding that malice aforethought may not have been proved against the respondent, it was submitted that there was sufficient evidence on record to convict him of manslaughter.

Dr. Khaminwa, learned senior counsel for the respondent, opposed the appeal contending, first, that there was no right of appeal to this Court. Relying on **Article 50** of the Constitution, which guarantees the right to fair trial, counsel submitted that the right of appeal in criminal cases is guaranteed by **Article 50 (2) (q)** of the Constitution to an accused person and that the Constitution does not recognise a corresponding right of appeal by the State. If it was the intention of the Constitution to confer such a right of appeal upon the State, counsel urged, nothing would have been easier than to state so expressly. Further, it was contended, **Article 157** of the Constitution on the powers and functions of the Director of Public Prosecutions does not confer any powers on him to appeal against an acquittal.

Dr. Khaminwa next invoked **Article 2 (5)** of the Constitution which provides that the general rules of international law shall form part of the law of Kenya and submitted that the general rules of international law do not recognize the right of the State to appeal against an acquittal of an accused person. Pressing the point further, learned senior counsel argued that to allow the State to appeal against an acquittal is tantamount to subjecting the appellant to double jeopardy, which is prohibited by **Article 50 (o)** of the Constitution. In his view, an appeal is a separate trial from the trial in the High Court for purposes of Article 50 (o). By way of authority, counsel relied on **Blackstone's Criminal Practice, 2000 (Blackstone Press Ltd)** to support the proposition that the right of appeal vests only in the convicted person and **Susan**

Marks & Andrew Clapham, International Human Rights Lexicon (Oxford University Press) in support of the view that the right not to be tried or punished more than once for the same offence is a fundamental right under international human rights law.

Turning to the merits of the appeal, counsel supported the judgment of the High Court contending that the prosecution did not adduce any evidence to show that a bullet fired from the respondent's pistol killed the deceased. It was submitted that PW9's evidence, apart from failing to confirm whether the respondent's pistol had been fired recently, did not link the respondent's pistol to the fatal wounds inflicted on the deceased. In light of the paucity of the prosecution evidence, counsel argued, even a charge of manslaughter could not be sustained in this case. Counsel therefore urged us to find, as the trial court did, that the prosecution did not prove its case beyond reasonable doubt and to dismiss the appeal.

The first issue to dispose of in this appeal is the jurisdictional point raised by the respondent on whether the State has a right of appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction. We shall consider the merits of the appeal only if we are satisfied that the State has such a right.

Before the enactment of the Security Laws (Amendments) Act, No 19 of 2014, the State had a right of appeal to the High Court against acquittal by a subordinate court. That right of appeal was created by **section 348A** of the Criminal Procedure Code, which provided as follows:

“348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.”

As is evidently clear, that right of appeal against acquittal was limited to matters of law only. (See ***Paul Mwangi Maina v. Republic, Cr. App. No. 93 of 200 (Nakuru)***). It is also important to point out that the right of the State, recognised by section 348A to appeal to the High Court from an acquittal by the Subordinate Court was introduced in 1967 by **section 3** of the ***Criminal Procedure Code (Amendment) Act No 13 of 1967*** which came into force on 16th June 1967. In addition, **section 10(1)** of the ***Magistrates Court Act, cap 10*** (repealed by the ***Magistrates Courts Act. No 26 of 2015***) conferred a right of appeal against acquittal upon the Attorney General when it was enacted in 1967. By that provision, the Attorney General could appeal from an acquittal by a Magistrate Court of the Third Class to the Resident Magistrates Court.

An additional relevant provision is **section 354 (3) (c)** of the Criminal Procedure Code, which provides for the powers of the High Court in an appeal from acquittal by a subordinate court. The provision reads:

“354(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit.”

As regards appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction, the law did not recognise such a right. By dint of **section 379 (5)** of the ***Criminal Procedure Code***, all that the Director of Public Prosecutions was permitted to do was, within one month from the date of the acquittal or such other period as extended by this Court, to sign and file a certificate with the Registrar of the High Court certifying that the decision of the High Court involved a point of law of exceptional public importance and that it was desirable in the public interest that the point be determined

by the Court of Appeal. On its part the Court of Appeal was empowered to review the case and to deliver a declaratory judgment. Section 379(6) of the Code provided expressly that such a declaratory judgment could not operate as a reversal of the acquittal, but it was thereafter to bind all courts subordinate to the Court of Appeal.

A fundamental change was introduced by the Security Laws (Amendment) Act, 2014 as regards the right of appeal to this Court from an acquittal by the High Court in the exercise of its original jurisdiction. **Section 19** of the Act repealed section 348A of the Criminal Procedure Code and replaced it with a new section providing as follows:

“348A (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.”

The effect of the new amendment is to enable the Director of Public Prosecutions to appeal to the High Court against an acquittal in a trial by a subordinate court and to this Court against an acquittal in a trial by the High Court, on both matters of fact and law. For the record it is important to point out that the Security Laws (Amendment) Act, 2014 did not repeal or affect section 379 (5) and (6) of the Criminal Procedure Code, which continues side by side with the new section 348A of the Code.

The Security Laws (Amendment) Act, 2014 was the subject of a major constitutional challenge in the High Court in ***The Coalition for Reforms and Democracy & 2 Others v the Republic & Others, High Court Petition No. 628 of 2014***. A number of the provisions of the Act were declared to be unconstitutional. Section 19 of the Statute Law (Amendment) Act, 2014, which conferred on the State the right of appeal to this Court against acquittal by the High Court in the exercise of its original jurisdiction, was not among the provisions whose constitutionality was challenged. Nevertheless that in itself would not preclude us from addressing the jurisdictional point raised by the respondent.

Article 50 (2) (q) of the Constitution, one of the provisions relied upon by the respondent to argue that the State has no right of appeal against acquittal in the circumstances of this appeal, states as follows:

“50 (2) Every accused person has the right to a fair trial, which

includes the right—

...

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

Under that provision, one of the attributes of a fair trial under the Constitution is the right of an accused person who has been convicted of a criminal offence to appeal or apply for review of the conviction to a higher court ***as prescribed by law***. The right of appeal in the context of the above provision enables an aggrieved convict to request a higher court to have a second look at his trial and satisfy itself that the conviction is indeed well founded. By Article 50 (2) (q), the Constitution allows the law to prescribe how the right of appeal or review will be exercised. It is on that basis that the law provides, for example, the circumstances under which an aggrieved person may lodge and appeal or apply for review; to which court an appeal or application for review lies; whether the appeal is on both facts and law or on law alone; the period within which an appeal or application for review is to be made; among others.

The right to appeal or to apply for review in Article 50(2)(q) is available only to an accused person who

has been convicted. In the circumstances of this case, the respondent cannot sustain the argument that his right to appeal or to apply for review has been violated because he has not been convicted. He can only make an argument founded on possible violation of Article 50(2) (o) on double jeopardy. The fact that the Constitution confers on a convicted person the right to appeal or to apply for review and is otherwise silent on whether or not the State can appeal against an acquittal of such a person, does not, in our view, *ipso facto* mean that the Constitution has denied the State the right of appeal against acquittal. There is therefore nothing express or by implication in Article 50(2) (q), which can be construed as prohibiting the State from appealing against an acquittal. Consequently, so long as there is a law, which confers on the State the right of appeal against acquittal, the State can properly appeal against acquittal without infringing the corresponding right of the convicted person to appeal if he is convicted.

The real issue, in our view, is whether the right of appeal by the State against acquittal of an accused person constitutes a violation of the principle against double jeopardy (*autrefois acquit or convict*) in Article 50(2)(o) of the Constitution. That Article provides thus:

“50 (2) Every accused person has the right to a fair trial, which includes the right—

...

(o) 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.” (Emphasis added).

William Blackstone explained the essence of the plea of double jeopardy or *autrefois acquit* (and *autrefois convict* too), in his ***Commentaries on the Laws of England* (Vol. 1V 18th Ed. 1829, Chapter XXVI)** as follows:

“First the plea of *autrefois acquit* or a former acquittal, is grounded on the universal maxim of the Common Law of England that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.”

A comparison of Article 50 (2) (o) of the Constitution with **section 77(5)** of the former Constitution, which also prohibited double jeopardy, shows a major difference in the way the two provisions are drafted, with the former Constitution expressly recognizing the right of appeal against conviction as an exception to the rule against double jeopardy whilst the Constitution of Kenya 2010 is silent on the matter. Section 77 (5) provided as follows:

“77(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 for any other criminal offence of 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.” (Emphasis added).

Does the fact that Article 50(2) (o) has no express exception similar to that in section 77 (5) of the former Constitution mean that the Constitution has prohibited appeals by the State against acquittal? In our view, the answer is in the negative because of the different drafting styles adopted in the former and the current Constitutions. The drafting style of the former Constitution tended to emphasize all and sundry exceptions to any right that it conferred. The current Constitution on the other hand eschews such an approach and leaves the extent and limit of any guaranteed right to interpretation subject to the principles spelt out in Article 24 of the Constitution. The difference in the drafting styles of the two Constitutions was noted by the Supreme Court in ***In The Matter of the Principle of Gender Representation in the National Assembly and the Senate*, (Advisory Opinion No. 2 of 2012, Para 54)** where the Court stated:

“Certain provisions of the Constitution of Kenya have to be perceived in the context of such

variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions.”

Consequently, the absence of a particular phrase or exception in the Constitution of Kenya, 2010 that was in the former Constitution is not the decisive factor in determining whether Article 50 (2) (q) prohibits a right of appeal by the state against an acquittal. Indeed in *Mtana Lewa v. Kahindi Ngala Mwangandi, CA No. 56 of 2014*, this Court rejected the appellant’s contention that the doctrine of adverse possession was unconstitutional and unknown in Kenya because the Constitution of Kenya 2010 does not expressly recognize it in the manner that section 75(6) (vi) of the former Constitution did.

Beyond the lack of express exception, can Article 50(2) (q) be otherwise interpreted to bar an appeal by the State against acquittal? Does an appeal against acquittal of the accused person constitute trying him again for the offence in respect of which he was acquitted? Is an appeal a new trial of the accused person for the same offence?

Many plausible arguments can be advanced for and against the proposition that an appeal against conviction is barred by the double jeopardy principle, which in reality are the very grounds upon which the double jeopardy principle itself is supported or criticized. In support of the proposition that the State cannot appeal against acquittal is the literal argument that in an appeal by the State, an accused person who has been acquitted is put into risk or jeopardy of conviction by the appellate court (see for example *Thompson v. Master-Touch TV Series Pty Ltd [1978] 38 FLR 397*, Australia Federal Court). Secondly is the argument that because of the State’s wherewithal and the prosecutorial resources at its disposal compared to those of the individual accused person, it ought to have only one opportunity to bring a person to trial. Granting the State the right to appeal against an acquittal is therefore perceived to be oppressive and a violation of the accused person’s expectation of finality and closure of his prosecution.

In *Green v. United States, 355 US 184, 187-188 (1957)*, Justice Black made the point as follows:

“The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.”

On the other side of the prism is the view that the society has legitimate interest in ensuring that perpetrators of crime are duly punished and that they should not go Scot-free even where the trial court has made obvious errors and mistakes by acquitting an accused person. The trial system, it is be contended, is not some Russian roulette and the State ought to have a free hand to appeal against acquittals where they are based on errors and mistakes, otherwise tainted acquittals will de-legitimize the criminal trial process and irreparably undermine the administration of justice. Secondly, ignoring the argument founded on equality of arms, it is contended that if the accused person is entitled to appeal in a bid to correct errors and mistakes by the trial court, why should the State not enjoy the same right? Lastly is the view that in jurisdictions with a hierarchy of courts, an accused person is not finally acquitted or convicted until the relevant final court with jurisdiction has pronounced itself on the matter. In this view, an appeal by the State against an acquittal does not run a foul of the rule against double jeopardy because the appeal is a continuation of the trial rather than an entirely different trial.

A look at the practice in some of the Commonwealth jurisdictions indicates that some form of appeal

against acquittal is allowed without the same constituting a violation of the principle of double jeopardy. Thus for example, in the England, the **Magistrate's Court Act 1981** provides the "**case stated**" appeal procedure by which the prosecution may appeal the decision of a lower court on a point of law. In such an appeal the High Court may affirm the acquittal or remit the case to the trial court with a direction to convict. The appellate court may itself set aside the acquittal, convict and impose the sentence it considers appropriate. As regards appeals from acquittals by the superior courts, the **Criminal Justice Act, 1972** prescribes a procedure similar to that in section 379(5) of our Criminal Procedure Code by which the Attorney General may refer to the Court of Appeal a point of law where an accused person has been acquitted by the High Court as a trial court. Strictly speaking though, no issue of double jeopardy is involved in this procedure because the decision of the appellate court does not affect the acquittal. It is necessary also to point out that under the **Criminal Justice Amendment Act, 1988** of England, the Attorney General can appeal to the Court of Appeal against a sentence by the Crown Court if it is too lenient and the court may alter the sentence and impose one that it considers appropriate. Lastly, as held in **Regina. v. Dorking Justices, ex parte Harrington, (1984) AC 743**, an acquittal by an inferior tribunal acting without or in excess of jurisdiction is liable to be quashed by judicial review notwithstanding the principle of double jeopardy, the reasoning being that there has been no lawful acquittal of the accused person (see also **Regina v. Dorchester Justices, ex parte Director of Public Prosecutions**, RTR (1990) 369).

In South Africa, **Article 35(3) (m)** of the Constitution sets out the principle against double jeopardy in terms similar to Article 50 (2) (o) of the Constitution. That notwithstanding, **section 310** of the **Criminal Procedure Act, No 51 of 1977** allows the prosecutor to appeal against a decision of the lower court **in favour** of an accused person on any question of law. In a successful appeal against acquittal, the appellate court may sentence the accused person or remit the case to the lower court for appropriate action in line with the decision of the appellate court. Again at the prosecutor's instance, a question of law may be reserved from a decision of a superior court where among others the accused person has been acquitted. Once again the appellate court may reverse the lower court, impose the appropriate sentence or order a retrial. A recent illustration of the exercise of the prosecution's right of appeal against a judgment in favour of the accused person is the case of **State v. Oscar Leonard Carl Pistorious (Case No. CC 113-2013)**, where the High Court acquitted the accused of murder, but convicted him of culpable homicide. On an appeal by the prosecutor, the Supreme Court of Appeal altered the verdict, convicted the accused of murder and remitted the case back to the trial court for appropriate sentence. (See **Director of Public Prosecutions, Gauteng v. Oscar Leonard Carl Pistorious (Case No. 96 of 2015)**).

Turning to Canada, an appeal by the State against acquittal is entertained and is not treated as a violation of the rule against double jeopardy. **section 11(h)** of the **Canadian Charter of Rights and Freedoms** provides for the principle against double jeopardy as follows:

"A person charged with an offence has the right if finally acquitted of the offence, not to be tried for it again and if finally found guilty and punished for the offence, not to be tried or punished for it again."

In **Regina v. Morgentaler (1988) 1 SCR 30**, it was contended that **section 605 (1) (a)** of the Canadian **Criminal Code** which confers on the Crown the right of appeal against acquittal on questions of law was in violation of among others, section 11(h) of the Charter. Rejecting the argument, the Supreme Court of Canada stated:

"There is a simple answer to this argument. The words of s. 11(h) "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise, there would be no point or meaning in the word "finally". There is no merit in this ground."

And in **Corp Professionnelle Des Medecins v. Thibault (1988) 1 SCR 1033**, the same court added:

"Naturally the accused cannot avoid an appeal based on an error by the trial judge, since there was no real acquittal if the decision rendered was the result of an error."

In India, the Supreme Court has taken the view that an appeal is not a new trial. **Article 20 (2)** of the **Constitution of India** provides as follows:

“20(2) No person shall be prosecuted and punished for the same offence more than once.”

In ***Kalawati v. The State of Himachal Pradesh, 1953 AIR 131***, it was contended that an appeal by the State against the acquittal of the appellant on a charge of abetting murder was a violation of Article 20(2) of the Constitution. Rejecting the argument, the Supreme Court of India expressed itself thus:

“It was also urged that as sub-clause (2) of article 20 of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once, the Government cannot have any right of appeal against an acquittal. If there is no punishment for the offence as a result of the prosecution, the sub-section has no application; and secondly, an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution. (Emphasis added).

It is also worthy pointing out that in India, after an amendment to the Criminal Procedure Act in 2009, even a victim is allowed to appeal against acquittal or conviction of an accused person for a lesser offence. (See ***Jagmohan Bhola v. Dilbagh Rai Bhola & Others, HC of Delhi, Cr. App No. 793 of 2010***).

The point that a case on appeal in a higher court is not a separate and different case from that before the trial court is also well made by **Peter D. Marshall** in his article, **“A Comparative Analysis of the Right of Appeal” *Duke Journal of Comparative and International Law, (2010) Vol. 22:1*** where he states:

“A casual observer could be forgiven for thinking that criminal proceedings invariably end with the entry of verdict and imposition of punishment. But where a defendant is convicted, the trial is often not the final stage in the criminal process. A convicted person generally has the right to appeal against, or seek review of conviction and sentence. And there is no reason to think that a person who has elected to defend charges will not exercise this right. Criminal appeals are thus a crucially important feature of the modern criminal process. Convictions cannot be treated as final until appeal rights have been either exhausted or waived”

In our view, an appeal to a higher court against acquittal of an accused person does not constitute a new or different and distinct trial of the accused person for the offence in respect of which he was acquitted and therefore does not violate Article 50 (2) (o) of the Constitution. A conviction or acquittal does not mark the end of one trial and an appeal against conviction or acquittal the beginning of another trial. An appeal is a continuation of the same trial in a higher court; a different stage of the same trial for the purposes of correction of errors, if any, and ensuring that there is no miscarriage of justice.

The inexorable connection between a trial and an appeal in this jurisdiction is emphasized by the fact that the primary material, which is considered by the appellate court, is only the record of the proceedings kept by the trial court and the impugned judgment of the trial court. The higher court is confined to re-examining the law and the evidence adduced before the trial court to determine whether the conviction or acquittal was lawful. For all intents and purposes therefore, rather than constituting a new trial, the appeal is a continuation of the case that was before the trial court for purposes of confirming whether the conclusion of the trial court was correct or erroneous. It is in that context that the statement that is often made to the effect that an appeal to the Court of Appeal from a trial by the High Court is by way of a retrial must be understood. (See for example ***Sir Clement De Lestang, VP in Selle & Another v Associated Motor Boat Co Ltd & Another [1968] EA 123***). It does not imply a new and separate trial conducted by the appellate court.

That an appeal to this Court from a trial by the High Court is not a new and separate trial is further emphasized by the principles that guide the Court when hearing the appeal, which demonstrate that far from conducting a new trial, the court is only involved in re-examination and reappraisal of the evidence adduced before the trial court. Those principles have been stated and restated in a myriad of cases, among them ***Kiilu & Another v. Republic [2005] KLR 174*** where it was stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drew its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own conclusion only then can it decide whether the magistrate findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses.” (Emphasis added).

Before we leave this issue, there are two important points that we feel constrained to make regarding the right of the State to appeal to this Court against acquittal by the High Court in the exercise of its original jurisdiction. It seems to us totally undesirable that fundamental changes in the law, such as the ones involved in this appeal, should be effected through miscellaneous statute law amendments, which is what, for all intents and purposes, the Security Law (Amendment) Act, 2014, is. As we understand it, the device of miscellaneous statute law amendments is intended to effect minor rather than fundamental and far-reaching amendments to legislation. Ordinarily it will seek to correct any errors, anomalies or inconsistencies in legislation. It is completely ill suited to settle controversial or highly contested issues of the day, which may require deep reflection and careful consideration.

As a direct consequence of the questionable choice of the devise of miscellaneous statute law amendments to effect changes to the Criminal Procedure Code regarding the right of appeal to this Court from acquittals by the High Court in the exercise of its original jurisdiction, we now have two sets of completely incongruous provisions on the issue. On the one hand there is Section 348A as amended by the 2014 Act, which allows such appeals on matters of fact and law, and on the other there is section 379(5) and (6) of the Criminal Procedure Code, which, having not been repealed continues to provide for the procedure of declaratory judgment which does not reverse an acquittal. In these circumstances, courts are forced to resort to the device of implied repeal, which in an issue like the one before us, ought not be the case. (See **Ellen Street Estates Ltd v. Minister for Health (1934) 1 ALL ER 385**).

The second point is that although we have concluded that legislation conferring a right of appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction is neither in violation of the principle against double jeopardy nor otherwise unconstitutional, nevertheless it is to be expected that the Director of Public Prosecutions will not use the amendment to prefer all and sundry appeals against acquittals by the High Court. In our view, this is a right that must be exercised in exceptional circumstances, the kind that loudly cry out for appellate justice. As the survey above has demonstrated, in many Commonwealth jurisdictions, even where a right of appeal against acquittal by the superior courts is allowed, it is very circumscribed, for example by the requirement that it is only by leave; or it is limited to issues of law only; or a successful appeal does not affect the acquittal and has only prospective effect; among others. The Director of Public Prosecutions must therefore consider putting in place clear policy on the exercise of this right of appeal to distinguish it from the automatic appeal to the High Court in acquittals by the subordinate courts.

Turning now to the merits of the appeal, we must reiterate that the burden was on the prosecution to adduce evidence, which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture. We agree with the trial judge when she stated:

“The law places an obligation upon the prosecution to prove each and every element of an offence beyond reasonable doubt. The mere fact that (the) accused admits to having fired a shot on the night in question does not absolve the prosecution from this legal burden of proof. In the present case, in order to prove the actus reus of the offence (i.e. the act of shooting the deceased) as against the accused the prosecution must prove firstly that the accused was armed on the material night. Secondly proof must be tendered of the type of firearm and ammunition the accused had and lastly proof must be tendered that it was a shot fired from the accused’s firearm which killed the deceased.”

In this case, at the *locus in quo* there were four policemen, including the appellant. Three were armed with G3 guns while the appellant was armed with a *Ceska* pistol. While the respondent admitted firing in the air, he denied having shot the deceased. From the evidence of PW5, he heard “gunshots” at the material time, suggesting that more than one shot was fired. In view of that evidence and in the absence of ballistic or other evidence connecting the gun wounds from which the deceased died to the respondent’s pistol, we do not see the basis of the submission that the court erred by failing to draw the inference that the deceased was shot by the respondent.

The fact of the matter is that the prosecution did a woefully shoddy job in this case. There was no witness who saw the respondent shoot the deceased. There was no evidence to link the deceased’s injuries to the appellant’s pistol. The ballistic expert, PW9, a totally worthless witness, merely examined the respondent’s pistol to determine whether it was recently fired and was even unable to make that determination. That undertaking, with respect, may not have been very helpful because the respondent did not dispute that he had fired his pistol, though he insisted that he had fired in the air. The guns of the other three policemen needed to be tested to rule out the very reasonable possibility that the fatal shot was fired from any of those three guns. This was not done begging the question; on what basis was the court being invited to find that the fatal shot was fired by the respondent, while the possibility that it was fired by any of the other three policemen still loomed large? The investigation and shoddy prosecution becomes more alarming, if we take into account the fact that it took almost two and half years to prefer charges against the respondent.

This case is nowhere similar to ***Dickson Mwangi Munene & Another v. Republic, Cr. App. No. 314 of 2011*** and ***Republic v. Edward Kirui, Cr. App. No. 198 of 2010*** where the Court reversed decisions of the High Court after finding that from the circumstances of those cases, there was no doubt as to who had fired the fatal shot. In the former appeal, in a charge of murder where the deceased was shot twice, one of the issues was whether the 1st appellant’s gun was the murder weapon. The Court found that it was the only gun at the scene and that the 1st appellant had admitted that it had been fired twice at the scene. The Court concluded:

“As we have stated, out of the 13 rounds of ammunition supplied to him, the 1st appellant surrendered 11. Having not claimed to have used two in any other incident, we find that the gun used to shoot the deceased was the one the 1st appellant had.”

In the latter appeal, the appellant was identified at the scene; was positively identified as the shooter; and the ballistic expert linked the bullet that was removed from the head of the deceased to the appellant’s gun.

We have ultimately come to the conclusion that this appeal is bereft of merit and the same is dismissed in its entirety. It is so ordered.

Dated and delivered at Malindi this 30th day of September, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR