REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 218 of 2004

ALLY ISMAIL SAID ……....……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Kimaru, Ag. J.) dated 18th March, 2004

in

H.C.CR.APPL. NO. 580 OF 2002)

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JUDGMENT OF THE COURT

This appeal emanates from the Ruling of the superior court, **Kimaru Ag. J.** (as he then was) made on 18th March, 2004 in which the learned Judge dismissed an application expressed to have been brought under ***Section 8*** of the ***Law Reform Act***, ***Cap 26*** Laws of Kenya seeking an order of prohibition to stop the prosecution of the appellant before the Chief Magistrate's Court Nairobi or by any other magistrate in Kenya.

It is pertinent to relate the background to the appeal:

Ally Ismail Said alias ***Ally Ismail Mwangi*** alias ***Ally Mwangi Wanjiku*** (hereinafter "*Ally*") was at the time material to these proceedings, a businessman at Jitihadi Shopping Complex in Nairobi. In May 2000 he was arrested by the police and was subsequently charged in **Criminal Case No. 1211/2000** (hereinafter "the first trial") before Nairobi Chief Magistrate's Court on 23.06.00 along with two other persons on several counts under the Penal Code and the Immigration Act. The seventh count which is relevant to this appeal was on "*unlawful present (sic) in Kenya Contrary to* ***section 13 (2)*** *of the* ***Immigration Act Cap 172***, *Laws of Kenya"*, and the particulars were: -

"ALLY SAID ISMAEL SAID ALIAS ALLY MWANGI WANJIKU

On the 10th day of May, 2000 at City Centre, in Nairobi within Nairobi Area, being a Tanzanian citizen was unlawfully present in Kenya without entry permits or passport."

Ally pleaded not guilty to all the counts, was admitted to bail and the trial commenced before Wanjala SRM on 19.02.00. The hearing was not completed until 22.05.02 when the prosecution case was closed after the 14th witness testified. A ruling on whether there was a case to answer was delivered by the magistrate on 23.10.02 dismissing the charges and acquitting ***Ally*** under ***section 210*** of the ***Criminal Procedure Code***. Before the completion of the hearing or the ruling in that case however, ***Ally*** was again arrested by the police in March 2002 and on 16.04.02 he was taken before the Nairobi Chief Magistrate in **Criminal Case No. 994/02** (hereinafter "the second trial") to answer five counts under the Immigration Act, one of which was count (2) which stated:

"COUNT 2

Being unlawfully present in Kenya contrary to section 13(2)(c) of the Immigration Act Cap 172 Laws of Kenya.

PARTICULARS: ALLY ISMAIL SAID

On the 11th day of April 2002 at Taveta road within Nairobi area was found being unlawfully present in Kenya in contravention of the Immigration Act in that he was not a citizen of Kenya and he had no valid permit or pass authorizing him to remain in Kenya."

The plea was due for taking on 16.04.02 but ***Ally*** indicated that he would raise objections to the charges protesting that he was being concurrently exposed to trial on the same charge twice over. The prosecution however contended that the charges were different in both trials. In a ruling delivered on 25.04.02, the trial magistrate, M.M. Mugo stated: -

"**I have looked at the charges herein and I feel the case should proceed the way it is. After the matter is finalised if the accused feels that he is being tried twice on same facts then he will produce the proceedings of the completed case to the trial court which will be presiding over the unconcluded case and if that court finds the matter is based on same facts then he will be acquitted otherwise its (sic) evidence only which may disclose whether the two are similar. We will now take the plea."**

The plea was subsequently taken, ***Ally*** pleaded "not guilty" to all counts and was admitted to bail pending trial which was set for 27.06.02. As at that stage, PW14 was due to testify in the first trial. ***Ally*** did not wait until the date set for the second trial.

On 13.06.02 he went before the superior court and sought leave to obtain an order of prohibition against the hearing of the case, and leave was duly granted. It operated as a stay of the proceedings in **Cr. C. 994/02**. The substantive notice of motion was subsequently filed on 02.07.02 and the matter was heard and determined as stated earlier by Kimaru Ag. J. (as he then was).

The grounds advanced for seeking the prerogative order of prohibition at that stage was that the arrest and arraignment of ***Ally*** in the second trial was a gross abuse of court process and also malicious, unconscionable, contrary to the tenets of natural justice, and against public policy. He had not been acquitted in the first trial at the time and so the plea of *autrefois acquit* did not lie when the application was made.

The notice of motion did not come up for hearing until after the conclusion of the first trial and the acquittal of ***Ally*** on 23.10.02. ***Ally*** then swore a supplementary affidavit on 30.05.03 to introduce the ruling and to plead "*autrefois acquit"* as well as the provisions of ***Section 77(5***) of the ***Constitution of Kenya*** and ***Section 138*** of the ***Criminal Procedure Code*** both of which legislate against double jeopardy. The Attorney General however was unmoved. He filed a replying affidavit from the Immigration Officer who was prosecuting the case, one **Cyrus Omooria** who stated: -

"**4. THAT I have perused the Immigration file and understood the offences the applicant is facing.**

5. THAT it is not true to (sic) the applicant's proceedings in Criminal Case No. 994 of 2002 amounts to a double trial over the same alleged offence.

6. THAT I have facts from the applicant confirming that he is a Tanzanian.

7. THAT I have facts from other sources confirming that the applicant is a Tanzanian and not a Kenyan.

8. THAT this (sic) facts will be brought in evidence during the trial.

9. THAT it is true that the applicant was acquitted in criminal Case No. 1211/2000.

10.THAT in respect to Criminal Case No. 1211/2000 the applicant was charged by the police on the 16th May, 2000.

11. THAT in respect to Criminal Case No.994/2002 the applicant was charged on the 11th April, 2002.

12.THAT the Immigration Department did not have ill-faith (sic) when charging him with the offences in Criminal Case No. 994/02.

13.THAT the applicant was charged with the offences as it is from evidence that he is not a Kenyan.

14. THAT the charges brought against the applicant in Criminal Case No. 994/02 are properly brought against him and do not amount to double jeopardy."

Upon hearing submissions on both sides, Kimaru Ag. J. (as he then was) refused to grant the order of prohibition stating after summarizing the facts and the law applicable:

"**The issue before me for determination is whether or not the decision by the court in the first case barred the court from hearing the subsequent case brought before it by the state. As I had stated earlier in this ruling, the first offence was allegedly committed on the 10th of May 2000 whilst the second but similar offence was alleged to have been committed on the 11th of April, 2002. Criminal cases brought to court under the provisions of the Immigration Act are criminal cases of special nature. A charge brought under the Immigration Act is not of a similar nature of a charge brought under, say, the Penal Code. In a charge instituted under the provisions of the Immigration Act, there is a presumption, which is stated, that if a person is charged with the offence of not being a citizen of Kenya, prima facie, it is upon the said individual so charged to prove that he is indeed a Kenya. Section 15 of the Immigration Act provide that**

"*Whenever in any legal proceedings under or for any of the purposes of this Act anyone or more of the following questions is in issue, namely:*

(a) whether or not a person is a citizen of Kenya.

(b) …….

The burden of proof shall lie on the person contending that that person is a citizen of Kenya, or one of the persons mentioned in section 4(3) or a person to whom such an issue or grant was made or a person who was entitled to such an issue of grant, as the case may be."

In normal criminal cases, the burden of proof is always on the prosecution to prove the case against an accused person beyond any reasonable doubt. In cases under the Immigration Act, especially those touching on proof of citizenship, once charged in court, the burden of proof is upon the

individual so charged to prove that he is a citizen of Kenya or alternatively that he is lawfully in Kenya. In the instance case, the applicant was charged in the previous cases for being unlawfully in Kenya. The learned Senior Resident Magistrate in applying the standard of proof of an ordinary criminal case under the Penal Code found the prosecution not to have proved its case that the applicant was a Tanzanian and thus acquitted him under the provisions of section 210 of the Criminal Procedure Code. With respect to the learned Senior Resident Magistrate, I am of the considered view that the said learned Senior Resident Magistrate misdirected himself. In the portion of the ruling of the said trial court quoted in this ruling, the court proceeded on the wrong premise that it was upon the prosecution to prove that the applicant was a Tanzanian. It is my considered opinion that once evidence has been adduced in court by the prosecution in an Immigration case questioning the alleged citizenship of an accused person, prima facie, the court ought to put the accused person to his defence so that he can give evidence to prove that he is indeed a Citizen of Kenya as provided for under section 15 of the Immigration Act. In acquitting the applicant under section 210 of the Criminal Procedure Code, the said court fell in error. At the hearing of this application, I ask (sic) the applicant if he had annexed any exhibits in support of this application to prove that indeed he is a citizen of Kenya. He had not. On the face of it therefore, the prosecution's contention that the applicant was not a citizen of Kenya has merit and ought to be investigated. I do that unless the applicant discharged the presumption that he is not a Kenyan citizen and was not found to be lawfully present in Kenya either on the 10th of May 2000 or subsequently on the 11th of April, 2002, he cannot seek to invoke the provisions of Section 77 (5) of the Constitution of Kenya or section 138 of the Criminal procedure Code. I further find that in bringing the subsequent case, the State were not in error. It could be that the applicant was legally in Kenya in the year 2000 and but was not legally in Kenya in the year 2002. To invoke the *autre fois acquit* the applicant has to prove that the previous case was conclusively determined on the facts, which the State sought again to retry. In the instant case, the issue that the previous court ought to have addressed is the citizenship of the applicants. It did not. The subsequent case concerns the issue of the citizenship of the applicant. The first court having failed to address the issue and conclusively make a finding on the citizenship of the applicant, the subsequent court is not barred from hearing the case by virtue of the Principle of *autre fois acquit*."

It is against those findings that some 12 grounds of appeal were laid out to challenge. Learned counsel for the appellant Mr. Ngunjiri however consolidated them and argued them globally under two heads. He argued, firstly, that the superior court made a monumental error when it considered the acquittal of the appellant in the first trial and declared that the magistrate erred in acquitting him. In the first place there was no appeal filed by the State against the acquittal and the issue did not therefore arise for consideration. In the second place, the application before the superior court was not based on the acquittal of the appellant in the first case because the application was filed long before the acquittal. The grounds on which the application was made were harassment of the appellant and abuse of process by having two concurrent trials over the same alleged offence.

The second argument by Mr. Ngunjiri was on the construction of ***Section 15*** of the ***Immigration Act*** which the learned Judge used in criticizing the acquittal of the appellant. The section, in Mr. Ngunjiri's view, shifts the burden of proof on an accused person whilst there is a clear constitutional provision in ***Section 77(2)(a)*** that every person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. To that extent, he submitted, the section is unconstitutional despite the provision under the same section in ***subsection 12 (a)*** stating that:

'Nothing contained in or done under the authority of law shall be held to be inconsistent with or in contravention of –

(a) Sub-section (2)(a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts."

Mr. Ngunjiri went into some length in his submissions and even cited a Namibian case in aid, **Freiremar SA v Prosecutor – General of Namibia & Anor.** [1994] 2 LRC 251, but, in our view, that decision would not have assisted him as it related to the construction of a proviso in legislation considered in that

case **(Section 17 (1) of the Sea Fisheries Act 1973)** a portion of which was clearly against the constitutional presumption of innocence. There was no mention in that case that a constitutional provision as exists in ***Section 77(12) (a***) of the Kenya Constitution also exists in the Namibian constitution, but the Namibian High Court affirmed, after citing Canadian and American authorities with approval that: -

"**The fact that a reverse onus is placed on an accused does not mean that such reverse onus is unconstitutional in all circumstances."**

We find it unnecessary to delve deeper into the two issues raised because we are satisfied that the learned Judge was in error in expressing his views on the validity or otherwise of the first trial of the appellant. The issue is not whether or not he was right in the views he expressed. It was neither necessary nor relevant to do so in the matter before him for the simple reason that the application before him had nothing to do with the doctrine of *autrefois acquit*. As correctly pointed out by Mr. Ngunjiri, the notice of motion before the Judge was filed long before the first trial of the appellant was completed and the leave to seek a prohibition order was granted on the basis of the facts stated by the appellant at the time. There was no application to amend the application subsequently and the affidavits placed on record on both sides long after the filing of the application were of no consequence. It did not matter therefore what became of the first trial. In our view the expressions made on the decision of the trial magistrate or the applicability of ***Section 15*** of the ***Immigration Act*** are *obiter dicta*, and therefore unnecessary for the decision of this appeal. We will ignore them. Learned senior state counsel, Mr. Kaigai also fell into the same error when he conceded the appeal on the basis that there was an acquittal of the appellant and no appeal against the acquittal by the State. His concession of the appeal is however not binding on us. We now proceed to consider what was relevant and what we must decide. It is this:

Was it lawful for the police to arrest and arraign the appellant in court for an alleged offence of unlawful presence in Kenya when the appellant was facing trial of the same offence before another court of competent jurisdiction? We restrict ourselves to that issue because it was the only count duplicated in both trials. As stated earlier, in the first trial the appellant with others not before the court faced seven counts all of which, except count seven (7) were under different provisions of the Penal Code. In the second trial, the appellant alone faced five counts all of which except count 3 arose from various provisions of ***Section 13(2)*** of the ***Immigration Act*** and the regulations thereunder. Count 3 was under the ***Aliens Restriction Act Cap 173*** Laws of Kenya. It was count two (2) in the second trial which was identical to count seven (7) in the first trial except for the dates and place of arrest. ***Section 13*** of the Act creates an array of sixteen different offences and in our view there can be no impropriety in the Police or Immigration officers charging any person for those offences as and when they are allegedly committed. They may do so even when the commission of such offence or offences is a serial one by the same person. It cannot be argued, for example, that a person charged and convicted for the offence of unlawful presence in Kenya cannot be arrested and charged again for the same offence under a plea of *autrefois convict.* Conversely, a person charged and acquitted for the same offence does not automatically acquire Kenyan citizenship through a plea of *autrefois acquit* unless the lawful procedure is followed to confer such status on the person.

We do not think we are called upon to decide on the appellant's citizenship in this matter but to decide on the propriety of his second trial for the charge of being unlawfully present in Kenya when substantially the same count was pending in the first trial. On this we think the appellant is on firmer ground. For it is clearly recorded in the proceedings in the first trial that the appellant pleaded "*not guilty"* to all the counts including the count relating to unlawful presence in Kenya and he was released on Kshs.100,000/= bond with one surety pending his trial. He complied with those terms and his trial was not completed until the 23.10.02 when the ruling was delivered. It would be farcical therefore to arrest the appellant and detain him on the ground that he was unlawfully in the country when he held a lawful document commanding him to attend court at the pain of his bond being cancelled and facing incarceration if he did not. We agree with Mr. Ngunjiri on that score that the arrest of the appellant and the duplication of the count for which he was awaiting trial before a court of concurrent jurisdiction was an abuse of court process. It would follow that that count would attract the sanction sought by the appellant, that is, an order of prohibition. Not so however, the remaining counts in the charge sheet. Mr. Ngunjiri submits that they

are of no consequence since count (2) "*carried with it the other counts.*" As we stated earlier ***Section 13*** of the ***Immigration Act*** creates several offences. Each of them is independent of the other and may be charged and proved on its own set of circumstances and evidence. We do not agree that they all carry each other or are capable of being carried whatever the import of that expression. In the result, we do not propose to interfere with the trial in respect of those counts.

The outcome of the appeal is therefore that it partly succeeds. We set aside the order of the superior court dismissing the appellant's application for an order of prohibition and substitute therefor an order granting an order of prohibition limited to count (2) in the charge sheet filed in **CM. Cr. Case No. 994/2002**. For the avoidance of any doubt, the order of prohibition does not extend to any charges that may validly be made against the appellant under ***Section 13(2) (C)*** of the Immigration Act at any future date outside **CM. Cr. Case No. 994/2002**. The trial in relation to the remaining counts may proceed before any court of competent jurisdiction.

That shall be our judgment.

Dated and delivered at Nairobi this 17th day of March, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR