

**IN THE HIGH COURT OF ZAMBIA**  
**ECONOMIC AND FINANCIAL CRIMES REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**HPEF/03/2022**

**BETWEEN:**

**THE PEOPLE**  
**AND**  
**WILSON LUNGU**  
**DANIEL MAKWAWA**  
**EMMANUEL MUBANGA**  
**BOYD MWANASHIMBALA**  
**LIVINGI ABEL**



***BEFORE THE HONOURABLE JUSTICES E. L. MUSONA, P. K. YANGAILO AND K. MULIFE, ON 7<sup>TH</sup> DAY OF OCTOBER, 2022 AND 31<sup>ST</sup> DAY OF OCTOBER, 2022.***

*For the People:*

*Mr. N. Kanyimbo – Legal Counsel, Anti-Corruption Commission.*

*For the 1<sup>st</sup> Accused Person:*

*Mr. G. K. Mwamba and Mr. M. J. Chitupila – Gill and Seph Advocates.*

*For the 2<sup>nd</sup> & 3<sup>rd</sup> Accused Persons:*

*Mr. J. K. Matende and Mr. J. T. Nyasula – Legal Aid Board.*

For the 4<sup>th</sup> & 5<sup>th</sup> Accused Persons: Mr. J. Zulu – Japhet Zulu  
Advocates.

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## **RULING**

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**YANGAILO P. K., J. DELIVERED THE RULING OF THE COURT.**

**CASES REFERRED TO:**

1. *Director of Public Prosecutions v S. I. Limbada and Company (1964) Limited (1980) Z.R. 52;*
2. *The People v Mwiya Lubasi (1981) Z.R. 310;*
3. *Wang Shunxue v The Attorney General – 2021/CCZ/003;*
4. *Miyanda v The High Court (1984) Z.R.;*
5. *Director of Public Prosecutions v Joseph Murimi (2020) eKLR;*
6. *Antonio Ventriglia and Another v Finsbury Investment Limited – Appeal No. 2 of 2019;*
7. *Edward Jack Shamwana v The People (1985) Z.R. 41;*
8. *Vangelatos and Vangelatos v Metro Investments Limited and Others – Appeal No. 45 of 2014;*
9. *R v John Wambua Munyao and 3 others (2018) eKLR; and*
10. *Director of Public Prosecutions v Perry Mansukh Kansagara and 8 others (2020) eKLR.*

**LEGISLATION REFERRED TO:**

1. *The Anti-Corruption Act No. 3 of 2012 of the Laws of Zambia;*
2. *The Criminal Procedure Code, Chapter 88, Volume 7 of the Laws of Zambia;*
3. *The Constitution of Zambia, Act No. 2 of 2016;*
4. *The Public Procurement Act No. 12 of 2008;*
5. *The Medicines and Allied Substances Act No. 3 of 2013; and*
6. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia.*

### **1 INTRODUCTION**

1.1 This is the Ruling on a matter that was referred to this Court for determination by the Principal Resident Magistrate, Honourable J. Bwalya. By the Ruling delivered

under Cause No. SSPD/015/2022 on 27<sup>th</sup> April, 2022, the issue referred for determination by this Court is whether a plea in bar can be raised and sustained where the accused person never appeared before an earlier Court to take plea but was acquitted on withdrawal of complaint and before the complainant was authorised by the Director of Public Prosecutions to privately prosecute the matter.

## **2 BACKGROUND**

- 2.1 The background to this matter is that under cause number SSPD/015/2022, the accused persons stand charged with 2 counts of wilful failure to follow applicable law or procedure guidelines contrary to **Section 34 (2) (b) of *The Anti-corruption Act***<sup>1</sup>.
- 2.2 The particulars on the first count are that the Accused persons, on dates unknown but between the 1<sup>st</sup> day of July, 2019 and 31<sup>st</sup> day of December, 2019, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being members of the Evaluation Committee jointly and whilst acting with other persons unknown, wilfully failed to comply with the applicable law and procedure relating to procurement evaluation of Tender Number MOH/SP/032/19 for supply and delivery of 22,500 Health Centre Kits, a matter or transaction which concerns the Ministry of Health, a public body.

- 2.3 The Particulars of offence on the second count are that the 4<sup>th</sup> accused person (A4), on unknown date but between the 1<sup>st</sup> day of July, 2019 and the 31<sup>st</sup> day of December, 2019, at Lusaka in the Lusaka District of the Republic of Zambia, being a member of the Evaluation Committee jointly and whilst acting with other persons unknown, wilfully failed to comply with the applicable law and procedure relating to procurement evaluation of Tender Number MOH/SP/032/19 for supply and delivery of 22,500 Health Centre Kits, when he participated in both the Evaluation Committee and Ministerial Procurement Committee, a matter or transaction which concerns the Ministry of Health, a public body.
- 2.4 At the trial of the matter, upon the production of the consent to prosecute by the Prosecution, Counsel for Wilson Lungu (A1) raised a plea of *autre fois acquit* and submitted that A1 had previously appeared before a Court of coordinate jurisdiction facing the exact same charge as before and was acquitted under Cause No. 2SPD/027/2021. Counsel further submitted that a Notification of Acquittal was issued by that Court. On this basis, Counsel for A1 submitted that A1 cannot be prosecuted over the same offence that he had previously been acquitted of.
- 2.5 In response to the said submissions, Counsel for the State contested the legality of the said acquittal based on a

number of legal issues noted from the record under Cause No. 2SPD/027/2021. Amongst the issues was the contention that the defence of *autre fois acquit* can only be raised in instances where a person has been tried by a court of competent jurisdiction and thereunder acquitted. Counsel stated that in this instance, there was no trial in that case as A1 did not take plea. Counsel further contended that a search of the record under Cause No. 2SPD/027/2021 revealed that on the same day of filing the complaint, the complainant filed a Notice to Discontinue and that despite the matter being withdrawn, Honourable Magistrate Chiwaula, to whom the record was allocated, rendered a Ruling and acquitted A1, including other accused persons therein, pursuant to **Section 201** of **The Criminal Procedure Code**<sup>2</sup>.

- 2.6 Counsel submitted that there was no record of a formal charge, no record of the complainant or A1 appearing before Court, no record of a plea having been taken and no record of proceedings. Therefore, it was argued that the issue of double jeopardy does not arise as the defence of *autre fois acquit* requires the accused to have been tried and acquitted for the same offence on the same facts before a competent court. On the basis that the acquittal was erroneously entered, the State challenged the legality of the said acquittal.

2.7 In its Ruling dated 27<sup>th</sup> April, 2022, the lower Court referred the preliminary issue to this Court for the determination on the basis that it was of coordinate jurisdiction with the Court that entered the subject acquittal. Therefore, pursuant to the said Ruling, this Court has been called upon to determine whether a plea in bar can be raised and sustained in a case where an accused person did not appear before Court to take plea, but was acquitted on withdrawal of the complaint by the complainant soon after filing the complaint, and before the said complainant was authorised by the Director of Public Prosecutions to privately prosecute the matter.

### **3 SUBMISSIONS**

3.1 The State filed its submissions on 23<sup>rd</sup> September, 2022, where it stated *inter alia* that the Notification of Acquittal was issued irregularly contrary to the provisions of **The Criminal Procedure Code**<sup>2</sup>. Counsel for the State submitted his arguments on three limbs, as follows: -

1. Whether this Court has jurisdiction to determine the plea in bar;
2. Whether A1 can claim *autre fois acquit* when he was never tried by any court of competent jurisdiction; and
3. Whether the acquittal of the A1 was legal.

3.2 In submitting on the first limb on whether this Court has jurisdiction to determine this matter, Counsel submitted that the lower Court under Cause No. SSPD/015/2022 could not proceed to render a ruling on the legality of the alleged acquittal in cause number 2SPD/027/2021 as it would be reviewing the decision of a Magistrate of equal power and jurisdiction. Counsel further stated that this Court has the power to review any criminal record of the Subordinate Court as enshrined in **Section 337 of The Criminal Procedure code<sup>2</sup>**, which is couched in the following manner: -

*“The High Court may call for and examine the record of any criminal proceedings before the subordinate court, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed; and as to the regularity of any proceedings of any such subordinate court.”*

3.3 Counsel cited the provisions of **Section 338 (1) (b) of The Criminal Procedure Code<sup>2</sup>** and contended that it empowers the High Court to exercise power of revision. The relevant part of **Section 338 (1) (b) of The Criminal Procedure Code<sup>2</sup>** reads as follows: -

*“(1) in the case of any proceedings in a subordinate court, the record of which has been called for, or which otherwise comes to its knowledge, the High Court may-*

**(b) in the case of any other order, other than an order of acquittal, alter, or reverse such order.”**

- 3.4 Counsel submitted that this Court should consider the legality of the alleged acquittal and whether the Magistrate was competent to acquit the alleged accused person in the manner he did without following the provisions of the law. To fortify his submission, Counsel invited the Court to the cases of the **Director of Public Prosecutions v S. I. Limbada and Company (1964) Limited**<sup>1</sup> and **The People v Mwiya Lubasi**<sup>2</sup>. It was Counsel’s further contention that there was no commencement of trial, as no plea was taken and no appearance of the accused person was made before any Court.
- 3.5 On the second limb on whether A1 can claim *autre fois acquit* when he was never tried by any Court of competent jurisdiction, Counsel referred the Court to **Section 138 of The Criminal Procedure Code**<sup>2</sup> which provides for protection from being prosecuted twice for the same offence on the same facts where one has been acquitted or convicted.
- 3.6 Counsel submitted that from the proceedings of Cause No. 2SPD/027/2021, a charge sheet was filed on 19<sup>th</sup> January, 2021, but was not signed and that on the same day a notice of withdrawal was filed, which does not indicate the law pursuant to which it was made. **Section**

**90** of *The Criminal Procedure Code*<sup>2</sup> was cited as follows:-

- “(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.*
- (2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a magistrate having jurisdiction.*
- (3) A complaint may be made orally or in writing, but if made orally shall be reduced to writing and in either case shall be signed by the complainant.*
- (4) The magistrate, upon receiving any such complaint, shall-*
- (a) himself draw up and sign; or*
  - (b) direct that a public prosecutor or legal practitioner representing the complainant shall draw up and sign; or*
  - (c) permit the complainant to draw up and sign;*
- a formal charge containing a statement of the offence with which the accused is charged, and until such charge has been drawn up and signed no summons or warrant shall issue and no further step shall be taken in the proceedings.”*

- 3.7 On the strength of the foregoing, Counsel submitted that the magistrate upon receiving the complaint ought to have directed on the drawing of a charge and the charge should have been signed. In the absence of the foregoing, it was submitted that the Magistrate should not have taken any further steps. Counsel submitted that in Cause No. 2SPD/027/2021 there was an unsigned charge sheet filed on 19<sup>th</sup> January, 2021 and the Learned Magistrate took a further step pursuant to **Section 201** of **The Criminal Procedure Code**<sup>2</sup> and rendered a Ruling in a Cause where the complaint was withdrawn.
- 3.8 It was further contended that there was no evidence led before the lower Court showing that A1 was tried before any competent Court and thereafter, acquitted on the same facts and for the same offence. Based on the foregoing contention, Counsel cited the provisions of **Section 277 (2)** of **The Criminal Procedure Code**<sup>2</sup> and submitted that when the plea of *autre fois acquit* is denied, the Court is mandated to try whether the plea is true or not, which entails leading of evidence by the person who alleges that it is.
- 3.9 On the third limb of whether the acquittal of A1 was legal, Counsel cited the provision of **Section 201** of **The Criminal Procedure Code**<sup>2</sup> on withdrawal as follows: -

***“If a complainant, at any time before a final order is passed in any case under this part satisfies the court***

*that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw the same, and shall, thereupon, acquit the accused.”*

3.10 Based on the foregoing, it was submitted that the lower Court in Cause No. 2SPD/027/2021 did not have to rely on the provisions of **Section 201** of **The Criminal Procedure Code<sup>2</sup>** as the proceedings were a nullity and *void ab initio* on the basis that the charge sheet was unsigned and therefore, defective and that the complaint supporting the affidavit and the charge filed on 19<sup>th</sup> January, 2021, were never taken before a Magistrate in accordance with **Section 90** of **The Criminal Procedure Code<sup>2</sup>**.

3.11 It was further contended that under Cause No. 2SPD/027/2021, A1 never made an appearance nor did he take plea of any of the charges against him and that therefore, the learned Magistrate misapplied **Section 201** of **The Criminal Procedure Code<sup>2</sup>**, as the said section provides for a withdrawal during trial.

3.12 Counsel stated that A1 did not prove in the lower Court under Cause No. SSPD/015/2022 to the satisfaction of the Court or the State that he was tried on the same facts for the same offence as prescribed under **Section 138** of **The Criminal Procedure Code<sup>2</sup>**. Counsel further noted

that the offences appearing on the Notification of Acquittal are different from those under SSPD/015/2022.

3.13 In the alternative, it was submitted that in the event that it was determined that A1 had been acquitted, the proceedings should be deemed to have been void as no authority to conduct private prosecution was granted by the Director of Public Prosecutions contrary to the provisions of **The Criminal Procedure Code**<sup>2</sup> and **The Constitution**<sup>3</sup>. In support of the foregoing submission, Counsel invited the Court to the holding in the case of **Wang Shunxue v The Attorney General**<sup>3</sup>, where the Court pronounced itself on the provisions of **Sections 89** and **90** of **The Criminal Procedure Code**<sup>2</sup>.

3.14 By A1's submissions filed on 29<sup>th</sup> September, 2022, Counsel submitted, *inter alia*, that the State's invitation to this Court to review the record under Cause No. 2SPD/027/2021 and set aside the resultant acquittal raises a serious jurisdictional issue of whether in terms of **Sections 337** and **338 (1)** of **The Criminal Procedure Code**<sup>2</sup>, this Court has the jurisdiction to review or revise an acquittal order. It was submitted that when construed literally, the import of the said sections is that this Court is vested with jurisdiction to review or revise decisions of the Subordinate Court for purposes of satisfying itself of the correctness, legality or propriety of the orders passed by the Subordinate Court. It was further submitted that

as per **Section 338 (1) b** of **The Criminal Procedure Code**<sup>2</sup>, the said revisionary power is not unlimited and does not extend to an order of acquittal passed by a Subordinate Court.

3.15 Counsel proceeded to cite the definition of jurisdiction as defined by the Supreme Court in the case of **Miyanda v The High Court**<sup>1</sup> and submitted that its import was that jurisdictional limitations are stated in appropriate legislation. Counsel contended that in the case at hand, the jurisdictional limit contained in **Section 338 (1) (b)** of **The Criminal Procedure Code**<sup>2</sup> relates to an area over which revisionary jurisdiction of the High Court does not extend, namely an order of acquittal. Therefore, it was contended that this Court is wanting of jurisdiction. In fortifying his contention, Counsel cited the case of **The People v Mwiya Lubasi**<sup>2</sup> as follows: -

*“From Section 338 of Cap 160 (former criminal procedure code with same provision as Cap 88), it is clear that the High Court can make a number of orders or revision in the case of any proceedings before the subordinate court where there has been a conviction, but not where there has been an acquittal.”*

3.16 Counsel took the opportunity to point out that the State conveniently omitted the *ratio decidendi* of the above authority which it cited in its submissions just because it was against its case.

3.17 Counsel further emphasised his contention that as the proceedings in respect of which this Court has been invited to review terminated into an acquittal, **Section 338 (1)** of **The Criminal Procedure Code**<sup>2</sup> expressly denies this Court revisionary jurisdiction to alter or reverse an order of acquittal. Counsel invited the Court to the holding in the Kenyan High Court case of **Director of Public Prosecutions v Joseph Murimi**<sup>5</sup>, which jurisdiction has provisions in its Criminal Procedure Code which are similar to our **Section 338 (1)** of **The Criminal Procedure Code**<sup>2</sup> as follows: -

*“An order of acquittal, as is the case of this application is exempted from orders that the High Court may interfere with by revision. It may exercise its revisionary jurisdiction in case of a conviction... not where the court ordered an acquittal.. It is therefore clear that the High Court has no revisionary jurisdiction in case of an acquittal.”*

3.18 Counsel urged this Court to decline an illegal invitation to review, let alone alter or vary the acquittal order.

3.19 In the alternative, it was submitted that in the event that this Court entertains the illegal invitation to review the acquittal order, this Court would be acting in want of jurisdiction, the consequence of which will amount to nothing. Counsel placed reliance on the Supreme Court case of **Antonio Ventriglia and Another v Finsbury Investment Limited**<sup>6</sup>, where it was held as follows: -

*“Therefore, not only do we agree with the Kenyan Court of Appeal’s observation in the case of Owners of the Motor Vessel “Lillians” that, “Jurisdiction is everything (and that) without it, a court has no power to make one more step”, we also share the Court’s further observation in the same case that: “where the Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing”.*”

3.20 In response to the State’s contention that the proceedings that gave rise to the impugned acquittal were *void ab initio* as no authority was granted by the Director of Public Prosecutions to conduct private prosecution premised on the Constitutional Court case of **Wang Shunxue v the Attorney General and Another**<sup>3</sup>, Counsel submitted that this argument as well as other arguments impugning the legality, regularity and propriety of the acquittal are improperly before this Court as it lacks the requisite jurisdiction to review the acquittal.

3.21 In responding to the State’s contention that a private citizen requires prior authorisation of the Director of Public Prosecutions before instituting criminal proceedings, Counsel cited the holding in the case of **Wang Shunxue v the Attorney General and Another**<sup>3</sup> in support of the submission that a private citizen does not require prior authorisation of the Director of Public Prosecutions in order to institute criminal proceedings or prosecution as this is constitutionally and legally

guaranteed by the provisions of **Article 180 (8)** of **The Constitution**<sup>3</sup> and **Section 90** of **The Criminal Procedure Code**<sup>2</sup>.

3.22 It was further submitted by Counsel that the Constitutional Court in the said case draws a very clear distinction between institution of criminal proceedings by a private citizen and conduct of a private criminal prosecution by a private citizen. The distinction being that although a private citizen does not require prior authorisation of the Director of Public Prosecutions in order to institute criminal proceedings, authorisation of the Director of Public Prosecutions is required when the private citizen or his advocate desires to conduct a private criminal prosecution. Counsel contended that in this case the private citizen did not conduct a private prosecution and that what happened in the matter under Cause No. 2SPD/027/2021 is that a private citizen instituted a criminal complaint, which he later withdrew but did not undertake private prosecution. Counsel contended that therefore, the issue of authorisation by the Director of Public Prosecutions did not arise in this instance as no private prosecution took place.

3.23 Counsel submitted that the since the acquittal remains undisturbed by this Court and is not amenable to disturbance by the Court, A1 is barred from any subsequent proceedings in respect of the same matter.

**Section 216** of **The Criminal Procedure Code**<sup>2</sup> was cited in support of the foregoing submission as follows: -

*“The production of a copy of an order of acquittal, certified by the clerk or other officer of the court, shall, unless the acquittal has been set aside by a competent court, without other proof, be a bar to any subsequent information or complaint for the same matter against the same accused person.”*

#### **4 THE HEARING**

4.1 At the hearing of the matter on 7<sup>th</sup> October, 2022, Counsel for the State gave a background to this matter and reiterated his written submissions, particularly that the proceedings under which the alleged acquittal was issued do not exist as the complaint was withdrawn the same day it was filed and that even if they existed they would have been rendered void for the following reasons: -

1. No authority was obtained from the Director of Public Prosecutions;
2. No plea was ever taken by the accused persons; and
3. No formal charge sheet was drawn after the complaint was withdrawn on the same day.

4.2 Based on the foregoing, it was submitted that a plea in bar cannot be sustained herein as A1 was not tried by any Court of competent jurisdiction for him to plead *autre fois acquit*.

4.3 Counsel further stated that in the case of **Edward Jack Shamwana v The People**<sup>7</sup>, the Supreme Court held as follows: -

*“The defence of autre fois acquit does not arise in circumstances such as these. Autre fois acquit like autre fois convict is merely a plea in bar to a second indictment for the same offence or any other which the accused might have been convicted under the first.”*

4.4 On the strength of the foregoing authority, it was submitted that the record under Cause No. 2SPD/027/2021 clearly demonstrates that after the complaint was filed and withdrawn on 19<sup>th</sup> January, 2021, there was no formal indictment on which A1 can say to have taken plea and be tried and acquitted thereafter. Counsel contended that therefore, there was no first indictment on which the charges under Cause No. SSPD/015/2022 can be said to amount to a second indictment.

4.5 Counsel concluded by stating that a plea in bar should not and cannot be sustained where an accused person never took plea before a competent court.

4.6 In response, Counsel for A1 stated that he would rely on the written submissions filed herein. In reiterating the written submissions, Counsel emphasised that pursuant **Section 338 (1) (b)** of **The Criminal Procedure Code**<sup>2</sup>, the invitation to review the order of acquittal is illegal.

- 4.7 It was further submitted that there was nothing irregular about the Ruling of the Magistrate wherein he ordered an acquittal pursuant to **Section 201** of **The Criminal Procedure Code**<sup>2</sup>, following the withdrawal of complaint by the complainant.
- 4.8 On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons, their Counsel submitted that as the matter primarily relates to A1, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons was merely present as a friend of the Court.
- 4.9 Counsel submitted that as an issue of jurisdiction has been raised, it takes precedence in relation to the issues raised before the Court below. He further submitted that there are only three (3) avenues on which matters can come before the Court and these are appeal, revision or case stated. It was contended that as this was not a case or appeal or case stated, which can only be invoked on conclusion or judgment, this Court would have to determine the question of jurisdiction in relation to review of an order of acquittal.
- 4.10 Counsel for the 4<sup>th</sup> and 5<sup>th</sup> Accused persons made no submissions on the basis that the issues raised do not affect the 4<sup>th</sup> and 5<sup>th</sup> Accused persons.
- 4.11 In reply to the foregoing, Counsel for the State referred to the Ruling under Cause No. SSPD/015/2022, in which the Honourable Magistrate J. Bwalya referred the matter to

this Court and submitted that what this Court was called upon to determine was clear.

4.12 With respect to **Section 201** of **The Criminal Procedure Code**<sup>2</sup>, Counsel submitted that before the complainant withdrew the matter, the complainant was required to make an application and provide sufficient grounds for withdrawing the matter. Where the Court is satisfied, the Court may acquit. Counsel contended that in the matter wherein the alleged acquittal was issued, the complainant merely filed a Notice of Discontinuing the complaint but did not provide any sufficient reason.

4.13 Counsel reiterated that as there was no trial, it cannot be alleged that A1 had been tried and acquitted. Counsel submitted that this is a matter in which a plea in bar cannot be sustained as A1 and fellow Accused persons never appeared before a Court of competent jurisdiction.

## **5 CONSIDERATION AND DECISION OF THE COURT**

5.1 We have considered the matter before us and the submissions by Counsel for the State and of the accused persons. We have also considered the list of authorities cited herein for which we are grateful. On our analysis of the issues raised herein, we find that the main issue for determination is whether a plea in bar can be raised and sustained where the accused person never appeared before the earlier Court to take plea but was acquitted on

withdrawal of complaint and before the said complainant was authorised by the Director of Public Prosecutions to privately prosecute the matter. In short, this Court has been moved to determine the legality of the proceedings leading to the order of acquittal of A1 and whether the said acquittal can be relied upon by A1 in his defence of *autre fois acquit*.

5.2 We note from the onset that the jurisdiction of this Court to determine the issues raised herein has been challenged by Counsel for A1 on the basis that this Court has no jurisdiction to review an order of acquittal pursuant to the provisions of **Section 338 (1) (b)** of ***The Criminal Procedure Code***<sup>2</sup>.

5.3 In the case of ***Vangelatos and Vangelatos v Metro Investments Limited and Others***<sup>8</sup> the Supreme Court held as follows: -

***“Where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing.”***

5.4 We shall therefore consider the jurisdictional issue first as it raises a pivotal question that goes to the foundation of these proceedings.

5.5 The matter before us has been referred to this Court pursuant to a Ruling of the learned Magistrate wherein

this Court has been called upon to exercise its supervisory jurisdiction over the proceedings of the Subordinate Court.

5.6 By the submissions of Counsel for the State, Counsel contends that this Court should invoke its revisionary jurisdiction and review the proceedings leading to the order or acquittal pursuant to **Sections 337** and **338 (1) (b)** of **The Criminal procedure Code**<sup>2</sup> which provide as follows: -

**“337. The High Court may call for and examine the record of any criminal proceedings before any subordinate court, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed; and as to the regularity of any proceedings of any such subordinate court.**

**338 (1) In the case of any proceedings in a subordinate court, the record of which has been called for, or which otherwise comes to its knowledge, the High Court may-**

**(b) in the case of any other order, other than an order of acquittal, alter or reverse such order.” (Our emphasis)**

5.7 From the foregoing provisions it is clear that this Court is clothed with the jurisdiction to review any order or proceedings before a Subordinate Court and consequently, alter or reverse such order except when there has been an acquittal.

5.8 We note, however, from the Ruling under Cause No. SSPD/015/2022, that in this matter, this Court has been called upon to invoke its supervisory jurisdiction to assess the proceedings that led to the order of acquittal in order to establish whether the learned Magistrate competently entered the order of acquittal under Cause No. 2SPD/027/2021. Therefore, this Court shall be considering the legality of the proceedings that resulted in the order of acquittal taking into account the circumstances in which it was entered.

5.9 **Article 134 of The Constitution**<sup>3</sup> prescribes as follows regarding the supervisory jurisdiction of the High Court: -

***“The High Court has, subject to Article 128—***

***(a) unlimited and original jurisdiction in civil and criminal matters;***

***(b) appellate and supervisory jurisdiction, as prescribed; and***

***(c) jurisdiction to review decisions, as prescribed.”***

*(Our emphasis)*

5.10 Further, we are persuaded by the holding in the Kenyan case of ***R v John Wambua Munyao and 3 others***<sup>9</sup>, cited in the case of ***The Director of Public Prosecutions v Perry Mansukh Kansagara and 8 others***<sup>10</sup>, as follows: -

***“It is therefore clear that the powers of revision under Section 362 of the Criminal Procedure Code (provision is***

*identical to Section 338 of the Zambian Criminal Procedure Code) are only to be invoked to enable this Court satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. Therefore, if out of anger the Court makes a decision which is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same." (Our emphasis)*

5.11 Based on the foregoing authorities and considering the seriousness of the alleged irregularities in the proceedings that resulted in the order of acquittal under Cause No. 2SPD/027/2021, this Court has no option but to intervene as this is a case that properly fits into a revision. Therefore, in the exercise of its supervisory jurisdiction over the proceedings in the Subordinate Court, this Court has the jurisdiction to review the proceedings under Cause No. 2SPD/027/2021 to determine the legality, therefore correctness of the proceedings that led to the said acquittal in the interest of justice. In determining the validity of the proceedings that led to the order of acquittal, this Court will resolve the issue of whether or not A1 herein can raise the plea of *autre fois acquit* in the proceedings under Cause No. SSPD/015/2022.

5.12 Having determined that this Court has jurisdiction to supervise and review the proceedings under Cause No.

2SPD/027/2021, we now turn to consider whether there were valid proceedings in which the Magistrate therein entered the order of acquittal with respect to A1 and his fellow accused persons therein.

5.13 Before we proceed to consider the legality of the proceedings leading to the order of acquittal under Cause No. SSPD/015/2022, we shall first consider the contention by the prosecution that the complainant under Cause No. 2SPD/027/2021 was required to seek authorisation from the Director of Public Prosecutions before instituting criminal proceedings against A1 and his co-accused persons as it was a private prosecution. A1's Counsel disputed the said contention and argued that the action by the complainant under Cause No. 2SPD/027/2021 was not a private prosecution but that a private citizen instituted a criminal complaint against A1, which did not require authorisation from the Director of Public Prosecutions. To support this contention, A1's Counsel cited the case of **Wang Shunxue v The Attorney General**<sup>3</sup> as follows: -

*“We need to mention here that Section 90 of the Criminal Procedure Code specifically provides for an individual to institute criminal proceedings and not the conduct of a private criminal prosecution. If a complainant or his advocate subsequently desire to conduct a private criminal prosecution, they ought to obtain necessary authority of the Director of Public*

*Prosecutions in line with the dictates of Article 180 (8) of the Constitution... In view of what we have stated above, we hold that whilst the right of a private citizen to institute private criminal proceedings is constitutionally guaranteed, no such action can be undertaken without authorisation of the D.P.P.”*

5.14 **Article 180 (8)** of **The Constitution**<sup>3</sup> referred to in the above holding provides as follows, regarding private criminal prosecution: -

*“The functions of the Director of Public Prosecutions may be exercised in person or by a public officer or legal practitioner, authorised by the Director of Public Prosecutions, acting under the general or special instructions of the Director of Public Prosecutions.” (our emphasis)*

5.15 Further, **Section 90 (1)** and **(2)** of **The Criminal Procedure Code**<sup>2</sup> provides as follows regarding the institution of criminal proceedings: -

*“(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.*

*(2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a magistrate having jurisdiction.”*

5.16 On our analysis of the foregoing authorities and as rightly stated by Counsel for A1, we find that there is a distinction between the conduct of private criminal prosecutions by citizens and the institution of criminal proceedings by citizens. Further, we find that it is the conduct of private criminal prosecution that requires prior authorisation from the Director of Public Prosecutions and not the institution of criminal proceedings by private citizens. Therefore, from our analysis of the facts on record, the complainant under Cause No. 2SPD/027/2021 instituted criminal proceedings against A1 herein pursuant to **Section 90 of The Criminal Procedure Code<sup>2</sup>**, therefore the said action did not require prior authorisation from the Director of Public Prosecution.

5.17 We now turn to consider whether there were valid proceedings in which the learned Honourable Magistrate could competently enter the order of acquittal with respect to A1 herein under Cause No. 2SPD/027/2021. According to the undisputed evidence on record, Joseph Chirwa, who was the complainant under Cause No. 2SPD/027/2021, filed a complaint and an unsigned Charge Sheet in the Subordinate Court Criminal Registry against A1 and other accused persons on 19<sup>th</sup> January, 2021.

5.18 The unsigned charge sheet contained the following offences: -

1. *Wilful failure to comply with the law and applicable procedures or guidelines relating to procurement contrary to **Section 13 (1)** as read with **Section 76 (1) and (2)** and **Section 1 (a)** of **The Public Procurement Act**<sup>4</sup>.*
2. *Importing, storing, selling, distributing and dealing with sub-standard, adulterated and misbranded medicines and allied substances contrary to **Section 59 (1) and (2)** of **The Medicines and Allied Substances Act**<sup>5</sup> as read with **Section 187** of **The Penal Code**<sup>6</sup>; and*
3. *Unlawful doing or omitting to do acts which are within his duties to do, by which acts or omission harm was caused to numerous people contrary to **Section 23** of **The Criminal Procedure Code**<sup>2</sup>.*

5.19 On the same date of filing the complaint and unsigned charge sheet, the complainant filed a Notice of Withdrawal of Complaint. On 26<sup>th</sup> January, 2021, the learned Magistrate, Honourable Chinunda Chiwaula, purportedly relying on the provisions of **Section 201** of **The Criminal Procedure Code**<sup>2</sup> proceeded to render a Ruling in the matter and acquitted A1 and his co-accused persons. No proceedings took place, A1 and his co-accused persons therein did not take plea nor make an appearance and no evidence was led before the Subordinate Court.

5.20 From the forgoing facts on record, it is clear that the proceedings conducted under Cause No. 2SPD/027/2021 were marred with a number of irregularities. From the onset, the first irregularity to note is the fact that an unsigned charge sheet was filed with the complaint into the Subordinate Court Criminal Registry. **Section 90 (4)** of **The Criminal Procedure Code**<sup>2</sup> provides as follows regarding the steps to be taken once a complaint is filed: -

***“The magistrate, upon receiving any such complaint, shall-***

***(a) himself draw up and sign; or***

***(b) direct that a public prosecutor or legal practitioner representing the complainant shall draw up and sign; or***

***(c) permit the complainant to draw up and sign;***

***a formal charge containing a statement of the offence with which the accused is charged, and until such charge has been drawn up and signed no summons or warrant shall issue and no further step shall be taken in the proceedings.” (Our emphasis)***

5.21 From the foregoing, it is clear that once a complaint has been filed, the Magistrate can take various steps which include permitting the complainant to draw up and sign a formal charge containing the statement of offence.

5.22 In the proceedings under review, there is no record of the Magistrate permitting the complainant to draw a charge

containing the statement of offence against the accused and though a charge was filed, the said charge was not signed and therefore, it cannot be treated as a competent formal charge, under the law, against A1. Consequently, A1 in the matter in review was not formally charged as prescribed under the laws and as such, no legal, regular, correct and competent criminal proceedings were ever instituted against him as provided for in the law quoted above.

5.23 **Section 90 (4) (c)** of **The Criminal Procedure Code**<sup>2</sup> cited in the authority above goes further to proscribe the taking of further steps in an action if a formal charge has not been drawn and signed in the prescribed manner. It follows therefore, that the nature of the complainant filing a Notice to Discontinue an action on the same day that it was filed did not warrant an acquittal. Simply put, the withdrawal in the absence of the charge and trial did not confer jurisdiction on the Court below to acquit A1 and his fellow accused persons.

5.24 This brings us to the consideration of whether the filing of a Notice to Discontinue by the complainant, in the circumstances, effectively withdrew the complaint and purported charge against A1 herein. **Section 201** of **The Criminal Procedure Code**<sup>2</sup> provides as follows regarding the withdrawal of a complaint: -

*“If a complainant, at any time before a final order is passed in any case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw the same, and shall, thereupon, acquit the accused.”*

5.25 We must state here that the foregoing provision falls under Part 6 of **The Criminal Procedure Code**<sup>2</sup>, that provides for the procedure during trials before the Subordinate Court. Therefore, the said provision refers to the withdrawal of a complaint by a complainant during the course of a trial. However, in the proceedings under review, there was no plea taken and no trial conducted in which a withdrawal could be made pursuant to **Section 201** of **The Criminal Procedure Code**<sup>2</sup>. It is, therefore, distinguishable from the facts of the present case under consideration.

5.26 Further, even in the event that a trial had been conducted, it is clear from the said provision that before a complaint is withdrawn by a complainant, the complainant must satisfy the Court that there are sufficient grounds for permitting him to withdraw the complaint. In the case under review, the complainant did not file an application to withdraw the complaint in which he may have set out grounds for the withdrawal on which the lower Court may have considered permitting the complaint to be withdrawn. The complainant simply filed a Notice to Discontinue on

the same day that he had filed the complaint which action did not and would not have effectively withdrawn the complaint in the event that A1 had been formally charged.

5.27 Following the purported withdrawal of the complaint, the record was allocated to the learned Honourable Magistrate in the lower Court and he proceeded to render a Ruling in which A1 and his co-accused persons therein were acquitted pursuant to the provisions of **Section 201** of **The Criminal Procedure Code**<sup>2</sup> cited above. By the said Ruling, the learned Magistrate was effectively permitting the withdrawal of a complaint in a matter where a plea had not been taken nor had trial commenced and where no grounds had been raised by the complainant on which the withdrawal could be based. Additionally, by rendering the said Ruling, the learned Magistrate was effectively taking a further step in an action where a formal charge had not been drawn and signed, in direct breach of the provisions of **Section 90 (4) (c)** of **The Criminal Procedure Code**<sup>2</sup>. Further, by the said Ruling, the learned Magistrate effectively acquitted A1 herein in a matter, where no criminal proceedings had been competently instituted as no formal charge had been drawn and signed.

5.28 As a consequence of the said irregularities and incorrectness in the proceedings under Cause No. 2SPD/027/2021, the Ruling of the learned Honourable Magistrate and its consequent order of acquittal are null

and void as an order of acquittal presupposes that all the formal processes of commencing a criminal action and other consequential actions therein are done in accordance with the provisions of the law. This was not the case in the matter under review as the various irregularities therein rendered all the proceedings in the said matter a nullity.

5.29 Having determined that proceedings under Cause No. 2SPD/027/2021 were a nullity due to the irregularities and incorrectness highlighted herein, it follows that the Order of Acquittal rendered in the learned Magistrate's Ruling is null and void.

5.30 We now turn to consider the effect of the said nullification of the proceedings in which an Order of Acquittal was issued and on which A1 bases his plea of *autre fois acquit*. **Section 277 of The Criminal Procedure Code<sup>2</sup>** provides as follows regarding the circumstances under which an accused person can raise a plea of *autre fois acquit*: -

***“(1) Any accused person against whom an information is filed may plead-***

***(a) that he has been previously convicted or acquitted, as the case may be, of the same offence; ...” (Our emphasis)***

5.31 Additionally, **Section 138 of The Criminal Procedure Code<sup>2</sup>** provides as follows regarding the prohibition of

acquitted persons from being tried again for the same offence based on the same facts: -

**“A person who has been once tried by a court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence.”** (Our emphasis)

5.32 From the foregoing, it is clear that a person that has been formally charged, tried and acquitted of an offence cannot be tried again for the same offence based on the same facts. In the matter under review, as A1 was not formally charged therein nor was he tried and convicted of the offences under Cause No. 2SPD/027/2021 that he has been charged for under Cause No. SSPD/015/2022, A1 herein cannot raise the plea of *autre fois acquit*. Accordingly, the plea of *autre fois acquit* raised by A1 under Cause No. SSPD/015/2022 lacks merit and is accordingly dismissed. It follows therefore, that the action under Cause No. SSPD/015/2022 should proceed against A1 so that he can be prosecuted for all the charges raised therein.

## **6 CONCLUSION**

6.1 In the exercise of its supervisory jurisdiction over the proceedings in the Subordinate Court, this Court has the

jurisdiction to review the proceedings under Cause No. 2SPD/027/2021.

- 6.2 Further, the complainant under Cause No. 2SPD/027/2021 instituted criminal proceedings against A1 and his co-accused persons therein and therefore he did not require prior authorisation from the Director of Public Prosecution to commence the action as it was not a private prosecution.
- 6.3 Additionally, A1 in the matter in review was not formally charged and as such, no criminal proceedings were instituted against him. Furthermore, the filing of a Notice to Discontinue the action on the same day that it was filed did not warrant an acquittal nor did it confer jurisdiction on the Court below to acquit A1 and his fellow accused persons in the absence of the charge and trial.
- 6.4 Moreover, by the learned Honourable Magistrate's Ruling under Cause No. 2SPD/027/2021, A1 was acquitted in a matter, where no criminal proceedings had been instituted as no formal charge had been drawn and signed, no plea had been taken and no trial had commenced against him. As a consequence of the said irregularities in the proceedings under Cause No. 2SPD/027/2021, the Ruling of the learned Honourable Magistrate and its consequent Order of Acquittal are null and void. It follows therefore that the plea of *autre fois acquit* raised by A1 under Cause

No. SSPD/015/2022 lacks merit and is accordingly dismissed.

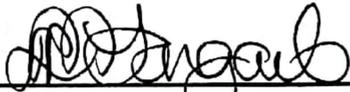
6.5 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 31<sup>ST</sup>  
DAY OF OCTOBER, 2022.**



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**E. L. MUSONA  
HIGH COURT JUDGE**



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**P. K. YANGAILO  
HIGH COURT JUDGE**



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**K. MULIFE  
HIGH COURT JUDGE**