



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 66 & 66 A OF 2016

(CORAM: F.M. GIKONYO J.)

(Formerly Nakuru High Court criminal appeal no. 199 of 2013 & Nakuru High Court Criminal Appeal No. 198 of 2013)

DAVID KIPKORIR SEREM1ST APPLICANT

DISMUS KIPLANGAT KITHU.....2ND APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Missing trial court file

1. Before me is an application dated 23rd November 2010 in which the applicants seek orders that;

i. The pending appeal be terminated and they be set at liberty.

ii. This honourable court do set aside the conviction and sentence of the trial court in NAROK CMCR NO. 171 OF 2013 and discharge them forthwith.

iii. Any other reliefs this court may deem fit and just to grant in the circumstances.

Issues

2. Given the nature of the application before me, the court should determine two alternate issues:

a. Whether the applicants are entitled to discharge in the circumstances of this case; and

b. If not, how will the appeals be heard and determined?

Brief background facts

3. A brief background of facts is relevant here. The Applicants herein were charged in **NAROK SRMCR NO. 171 OF 2013**. They were both charged with one joint charge and each of them an extra separate count. In the first count they were jointly charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. In count two the 1st Applicant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. In count three the 2nd Applicant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The Applicants pleaded not guilty to all charges. On 30th August 2013 both applicants were convicted and sentenced to death. The 1st and 2nd applicants filed their petition of appeal at Nakuru High Court vide Criminal Appeal No. 199 of 2013 and 198 of 2013 respectively.

4. The applicants appeal cases were first registered at Nakuru High Court. It was later transferred to Naivasha then Narok High Courts in that sequence after High Court stations were established.

5. On 4th December, 2018 when this appeal came before Justice Bwonwonga, they were informed that the original court file could not be traced. The applicants were amenable to proceeding with the appeal on a skeleton file. There have been several adjournments and correspondences with various efforts to trace the original court file proving futile.

ANALYSIS

6. The sole ground for seeking discharge herein is that the trial court's file containing the original proceedings and judgment cannot be traced or is lost.

7. Needless to state that, the cardinal preoccupation of the court is to safeguard fair trial. And, court record is at the heart of fair trial. Of the centrality of court record to fair trial as well as challenges in maintaining credible and reliable court record, **Catherine S Namakula**, in the abstract to the article; *The court record and the right to a fair trial: Botswana and Uganda*, wrote: -

The court record is everything to the judicial process. Budgetary constraints and administrative challenges facing judicial services in the African countries studied here leave courts with inefficient modes of generating and maintaining full and reliable court records, hence defeating the ends of justice. Evidence is lost in the process of recording and during the preservation of court records through fires and malpractices. The court record is the basis for a fair trial. Any determination of a court is founded on the material in the record and such decision is placed and preserved on the face of the record. Fair trial guarantees of appeal and review are initiated by the court record. An appeal is a trial of the record. The competence of a court that cannot accurately record its proceedings and preserve the records to guarantee a fair trial is questionable. There is a need to facilitate a reliable mode of producing and maintaining the court record, towards a culture of fulfilling the right to a fair trial in Africa. This analysis focuses mainly on the experiences of the courts of Botswana and Uganda.

8. Be that as it may, the court is aware that effort by the registry staff at Nakuru and Naivasha Law Courts to trace the file has been in vain. That being the case, how will this court ensure fair trial is attained in this case?

Clamour for discharge

9. The Appellants has asked the court to terminate the appeal and discharge them of the charges herein. They say that they have been in lawful custody, both as remandees and convicts for about 8 years. The prosecution was of a different view; that the material contained in the skeleton file is sufficient for the appeal to be heard and determined.

10. The circumstances of this case presents quite a squirm. On the one hand, the Appellants' constitutionally guaranteed right to have their appeal heard and determined expeditiously is ringing. On the other hand, the need to protect the integrity of the criminal trial process which includes provision and maintenance of credible and reliable court record is bleating.

11. Articles 50 (1) (2) (g) of the Constitution of Kenya, 2010 provides for the protection of the Law and that parties should be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

12. The Appellants' lodged an appeal in 2013. It is their right to have expeditious disposal of the appeal. I should therefore fashion remedy that guarantees their right and also engenders integrity in the process of criminal justice to all including the victims of their crimes.

13. The law is that acquittal or discharge of the convict is not automatic where a court file is lost or cannot be found. As was held in the case of **Pius Mukabe Mulewa & Another vs Republic Criminal Appeal No. 103 of 2001 and followed in John Karanja Wainaina vs Republic - Criminal Appeal No. 61 of 1993 (unreported) and Joseph Maina Kariuki vs Republic Criminal App. No. 53 and 105 of 2004:**

“An acquittal should not follow as a matter of course where a file has disappeared. After all a person like the appellant has lost the benefit of the presumption of innocence given to him by section 72 (2) (a) of the Constitution, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error.” (Emphasis added)

14. Accordingly, I reject the request for acquittal or discharge simply because the original file cannot be found or is lost. What about retrial?

Retrial

15. Retrial is an option in such cases. In **High Court Misc. Criminal Application No. 246 of 2010- Danson Maina Muchoki vs Republic**. Ochieng and Achode JJ in dispensing the argument that an acquittal should follow where court records are alleged to be missing, stated that, the appropriate orders to make where court records are alleged to be missing, depending on the circumstances of the case, is a retrial.

16. Nonetheless, retrial is ordered where a trial is possible; the evidence and witnesses should be available. It may also be ordered in the interest of justice. See the Court of Appeal in **Ikimat vs Republic [2005] IKLR 1982** where it stated that:

“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

17. In this case, the exhibits are not available. The incident took place over 8 years ago and possibility of procuring all the witnesses may be

impossible or only with great difficulties and expense. This option is therefore not feasible in this case.

18. What therefore is the best option?

Reconstruction of skeleton file

19. In the present appeal, even though the prosecution has not indicated whether they are able to trace the police file, they are not averse to reconstruction of a skeleton file on the basis of typed proceedings in the court file. The appellants also agreed to proceed with their appeals on the basis of those proceedings. The court considers determination of these appeals on merits to be the only way of protecting and guaranteeing the rights of the appellant and the victims. It will also vindicate the law and society given the serious nature of the offence in question.

20. The reconstruction of a skeleton file is therefore the most feasible option in this case. I so order.

21. But how will this be done in a manner that ensures the record is reconstituted in a credible and reliable manner?

22. The typed proceedings are available. Typed proceedings is sufficient record for purposes of these appeals. In *Pius Mukabe Mulewa (supra)* where the original record of the trial magistrate was missing at the time his first appeal was heard, the court relied on reconstructed material and said:

“There is more than sufficient material before the court upon which their appeals can be determined one way or the other and that being our view of the matter, we over-rule their preliminary arguments for acquittal at this stage and order that their appeals be heard and determined on merit.”

23. Accordingly, the typed proceedings shall be provided to the appellants and the DPP. The DPP will also provide any material in their possession which is relevant to this exercise. Then there shall be a session to consider the proceedings and whether they are credible or not. Eventually, the record agreed by parties and authenticated by court shall become the record of appeal.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF APRIL, 2021.

F. M. GIKONYO

JUDGE

In the presence of Court Assistant Mr. Kasaso and Miss. Torosi for the state/respondent and Mr. Kubwa for the Applicants.

F. M. GIKONYO

JUDGE