



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 16 OF 2010**

**JAMES ONYANGO NYAKOIRO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from judgment of the Senior Resident Principal Magistrate Hon. S. Soita

delivered on 21<sup>st</sup> January, 2010 in Molo Cr. Case No. 255 of 2006)

**JUDGMENT**

1. The Appellant was charged at the Molo Law Courts with a single count of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty and a fully-fledged trial ensued. At the end of the trial, the Appellant was convicted. He was sentenced to life imprisonment as the law mandatorily required.

2. The Appellant timeously filed his appeal to this Court. His appeal was received in the High Court Criminal Registry on 28/01/2010. The Court file shows that the Deputy Registrar wrote to Molo Law Courts the next day (29/01/2010) to call for the Lower Court file and typed proceedings. There was no response to that letter. There was, similarly, no response to further letters by the Deputy Registrar dated 14/05/2014; 13/07/2016; 27/01/2017; and 08/08/2018; and 19/09/2018.

3. Meanwhile, the Appellant appeared for mentions before the Court on 23/05/2018; 25/06/2018; 24/07/2018; 08/08/2018; 04/09/2018; 18/09/2018; and 25/09/2018. During all these scheduled mentions, the file was not availed. Finally, on 02/10/2018, the Court ordered the Court Administrator Molo Law Courts to appear before the Court to explain the whereabouts of the file.

4. Mr. Kasachon, the Court Administrator of Molo Law Courts appeared before the Court on 08/10/2018 pursuant to the Court orders. He explained that staff at Molo Law Courts had searched for the Lower Court file everywhere but it could not be traced. He requested to be given time to file a Certificate of Loss confirming that the file was missing; and cannot be found with the use of any amount of human efforts. After a few mentions, in a letter dated 21/02/2019, the Court Administrator at Molo Law Courts duly filed a Certificate of Loss of the Lower Court file. It confirmed that the file was nowhere to be located at Molo Law Courts.

5. I requested the parties to address the Court on the appropriate action to take in the circumstances. Mr. Ombati, the Appellant's counsel, filed written submissions. The State did not file any written submissions despite several opportunities to do so. However, on the date scheduled for hearing, Mr. Chigiti orally submitted as Mr. Ombati highlighted his submissions.

6. Mr. Ombati urged the Court to acquit the Appellant in light of the missing Lower Court file. He told the Court to note that there is no evidence that the loss of file was occasioned by the Appellant. He said that the Appellant was in custody since 2009. He urged the Court to acquit unconditionally rather than send the matter for re-trial. He relied on the following authorities:

**a. Nisho Noor Isaack v Republic [2006] eKLR** where in similar circumstances Makhandia J. (as he then was) ordered an acquittal for a file that had gone missing for six years. The Court declined to quash the conviction but, instead, set it aside. The Court, however, refused to order a retrial.

**b. Joseph Kipyegon v Republic [2018] eKLR** where Kimaru J. similarly acquitted the Appellant in an appeal from the Court Martial where it was demonstrated that the Appellant was not involved in the disappearance of the file. The Court declined to order a re-trial because the Appellant had served his full custodial sentence.

**c. John Otieno Ombok v Republic [2017] eKLR** where Makau J. declined to quash the conviction but set it aside and declined to

order a retrial.

7. Mr. Chigiti, the Prosecutor, urged the Court to order a re-trial. He pointed out that an acquittal is not automatic upon the loss of a file. Instead, he urged that the Court seeks to uphold the interests of justice in a case as serious as this one and order a retrial.

8. When an appellate Court is faced with a situation such as this where the Lower Court file is missing and proceedings cannot be re-constructed, the first step is to certify that the file is, indeed, missing and cannot be located. A Certificate of Loss signed by the Court Administrator suffices for this.

9. Once certified lost, in determining the appropriate orders to make, the Court must determine whether there is any evidence or indications that the Appellant was involved in the loss of the file. If there is any evidence of such involvement or collusion, the Court declines to make any orders in favour of the Appellant. The legal principle in application there is *nullus commondum capere protest de injuria sua propria*: no one should be allowed to profit from his own wrong. Thus our Courts have uniformly held that if it is shown that an Appellant colluded in the disappearance of the file, he will not benefit from any favourable orders of the Court. Hence, the Court of Appeal held in ***John Karana Wainaina vs. Republic - Criminal Appeal No. 61 of 1993 (unreported)***:

In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality if he is? In the final analysis the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. 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. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

10. Similarly, Ochieng' and Achode JJs held, in ***Danson Maina Muchoki v Republic [2013] eKLR***, that:

It is a well settled principle that an acquittal does not automatically follow when the Court records are untraceable. The case before us clearly manifests that there was an orchestrated plan to have the files disappear. We say so because all the files connected to the case have mysteriously disappeared, that is, the Lower Court file, and the Police Investigation file. High Court Misc. Criminal App. No. 246 of 2010 now before us had at one time disappeared. This cannot be sheer coincidence.

In determining the most appropriate action to take, Courts must seek to uphold the overall interests of justice. It therefore cannot follow automatically that the missing of Court records should result in an acquittal. If we took this course as boldly suggested by the Learned Counsel for the Applicant, it would be detrimental to justice, and we dare add, create grounds for people to collude to defeat the ends of justice by making files disappear....

11. However, where there is no suggestion or evidence that the Appellant was in any way involved in the loss of the files, the Court must, as an instance of Article 50(1)(q) of the Constitution, make a determination whether to acquit the Appellant or order a retrial. Our case law has consistently established that the appropriate order is not to quash the conviction since no appeal has been heard and the presumption of innocence of the Appellant has been lost by virtue of a lawful conviction. The Court can only set aside the conviction and sentence and then determine if there should be a re-trial or not. The primary consideration in determining what orders to make are the overriding interests of justice.

12. In the present case, the Appellant was convicted of defiling a young child of less than twelve years old. That is a serious felony. Indeed, it is so serious that Parliament, in its wisdom, stipulated a mandatory sentence of life imprisonment. Even with the understanding that the statutory sentence is only a strong guidance not an iron-clad instruction to the Judicial Officer as our emerging jurisprudence now says, the point is that defilement of a child less than twelve years old is a heinous crime which society wishes to signal its opprobrium by incarcerating a person convicted of the offence for possibly life. Part of the reason this decision was reached is the fear that a person who defiles a child of tender years is likely to re-offend if released back to the society.

13. Given this and noting the potential impact of the crime to the individual victim, one convicted of the offence of defiling a child of tender years, should, as a matter of public interest, only be acquitted in the clearest of cases where it is established that a retrial is not possible. The Prosecution and the victim of the crime should be given every opportunity to mount another trial.

14. In the present case Mr. Chigiti was of the view that the Prosecution should be given an opportunity to re-try the case. Apart from the passage of time, there is no other factor that militates against such a re-trial. It seems eminently clear that a re-trial is the order that is more in keeping with the overall interests of justice in this case. If it turns out that the Prosecution does not have the necessary evidence or witnesses in the Court below, then, the Prosecution can seek a withdrawal of the case.

15. Consequently, the orders and directions of the Court are as follows:

**a. The conviction entered in *Molo Chief Magistrate's Criminal Case No. 255 of 2006* is hereby set aside.**

**b. The sentenced imposed on the Appellant is hereby consequently set aside.**

**c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.**

**d. The Appellant shall be presented before the Chief Magistrate's Court, Molo on Monday, 9<sup>th</sup> March, 2020 to take plea.**

16. The Deputy Registrar is directed to send back a copy of this judgment to the Chief Magistrate's Court, Molo for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned S. Soita.

**Dated and delivered at Nakuru this 27<sup>th</sup> day of February, 2020.**

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**JOEL NGUGI**

**JUDGE**