REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 70 OF 2016

DENNIS ONYANCHA ONGUSO.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. J. Were – SRM Keroka dated and delivered on the 22nd day of July 2009 in the original Keroka Senior Resident Magistrate's Court Criminal Case No. 432 of 2008}

RULING

The appellant was tried and convicted on a charge of robbery with violence and sentenced to death on 22nd July 2009. He lodged his appeal at the High Court at Kisii on 3rd February 2010 being Kisii HCCRA 70 of 2010 which was by an order of Okwany J dated 1st September 2016 subsequently transferred to this court. At the time the applicant had filed an application for bond pending appeal vide a miscellaneous application No. 72 of 2016 which seemed to have delayed the proceedings in the appeal. On 30th June 2016 before the appeal was transferred to this court he withdrew that application but the order was never brought to the attention of this court. He therefore made another application before this court to withdraw that application on 16th July 2018. Thereafter on 10th May 2018 this court admitted the appeal and so begun the long search for the lower court file which to-date has not been traced the only record received by this court being certified copies of the proceedings and judgement. After many correspondences with the lower court this court finally summoned the Executive Officer Teresia Nyomenda who together with Antony Ochieng Oniala swore an affidavit dated 2nd March 2020 to the effect that they were completely unable to trace the original lower court file. This then raises the question of what should be done about this appeal.

When this court invited the submissions of the appellant and Senior Prosecution Counsel Mr. Majale, the appellant stated that this court should release him as he has been in jail for a long period.

Mr. Majale on the other hand submitted that since the prosecution could not lay its hands on the proceedings it could not assess the gravity of the offence. Counsel stated that the prosecution would not concede to the appellant being released despite having served nine years. He instead urged this court to vary the period of life imprisonment to a reasonable period.

In reply the appellant denied he had committed the offence and urged this court to release him.

It is trite that the loss of a court file is not a ground for acquittal. Faced with a similar situation in the case of **Mwangi v Republic [2005] KLR 495** although somewhat more grave, as in our case we at least have a certified copy of proceedings and judgement, the Court of Appeal stated**:** -

> **"Loss of files does not mean that an acquittal would automatically follow. Each case must be considered on its on peculiar circumstances."**

Similarly, in **John Ooko Otieno v Republic [2008] eKLR** the court citing with approval the case of Mwangi v Republic (supra) and also the case of **Pius Mukaba Mulewa & another v Republic** Court of Appeal Criminal Appeal No. 103 of 2001 stated: -

> **"We have anxiously considered the appeal. Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court file, judgement, police file and Attorney General's file is a rare occurrence. It has however, occurred and this Court is not a stranger to such a situation. This Court has on more than one occasion in the past encountered such a situation. In the case of *Pius Mukaba Mulewa and Another vs. Republic,* Court of Appeal Criminal Appeal No. 103 of 2001, this Court, faced with that situation had the following to say: -**

> **"What we can take from ZAVER'S case is that the courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has occurred. Who stands to gain from the loss" Is it merely coincident that both the magistrate's file and that of the police are lost" Does the available evidence point to anyone as being responsible for the loss" And if so, can such a party be allowed to benefit from a situation of his own making" In final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course. After all a person who has been tried or has pleaded guilty before a court with competent jurisdiction and has been convicted by such court has lost the benefit of the presumption of innocence given to him by Section 77 (2) (a) of the Constitution and on appeal the burden is on him to show that the court which convicted him did so in error. The loss of the file may deprive him of the 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."**
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> **That was a decision on a second appeal. In this appeal, as we have stated above, the matter is before us on first appeal as the appellant was charged with murder and was tried in the superior court. However, the principle as pronounced above is the same and that is that the interest of justice as a whole must be considered before either a retrial is ordered or the appeal is fully allowed, but acquittal is not automatic merely because the file and records are missing."**

Again in **Joseph Maina Kariuki v Republic Criminal Appeal No. 53** and **105 of 2004 (unreported)** cited with approval by Makau J in **John Otieno Ombok v Republic [2017] eKLR** the Court of Appeal stated: -

> **"faced with that kind of situation, this court remarked as follows in the case of John Karanja Wainaina v Republic, Criminal Appeal No. 61 of 1993 (unreported): -**
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> **"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 of 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 the 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."**

Accordingly, as observed by Makau J: -

> **"This principle is now well settled in various decisions of the Court of Appeal that in cases where the records have disappeared or cannot be traced such as in this case, whatever order it is, to be made, the interest of justice as a whole must be considered but acquittal is not automatic mainly because all records for the cases are missing or has disappeared.**
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> **……"**

The appellant is therefore not entitled to an acquittal merely on the ground that the original record of the lower court could not with due diligence be found. This court must consider his case on its own circumstances. In this case the court was furnished with typed proceedings which in my view disclose that the appellant committed the offence of robbery with violence with which he was charged and was therefore properly convicted. In all fairness however he was prevented from prosecuting this appeal by reason of the missing lower court file. Neither the prosecution nor himself applied for a retrial which I do not consider would have been possible given that it has been very long since the trial and as the prosecution could not trace its own file it may not be possible to find the witnesses. It is therefore my finding that the order that best commends itself to this court is to sustain the conviction but set aside the sentence of death meted by the trial court and substitute it with one for the period of ten and half (10 ½) years already served as in any event it was a mandatory sentence which has since been rendered unconstitutional **(see Francis Karioko Muruatetu & another v Republic [2017] eKLR**). The term of imprisonment must have served its intended purpose which is to deter and reform the appellant. Accordingly, the appellant is to be released forthwith unless he is otherwise lawfully held.

Signed, dated and delivered in open court this 12th day of March 2020.

E. N. MAINA

JUDGE