

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 388 OF 2007

BONIFACE OBATI OBAMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Bonface Obati Obamba, was charged with the offence of **robbery with violence** contrary to **Section 296(2) of the Penal Code in Kibera Senior Principal Magistrate's Court CRC. No. 5757 of 2005**. He pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to death as then provided by the law. Aggrieved by his conviction and sentence, the Appellant filed the present appeal on 21st June 2007. Unfortunately, the trial court's original file together with the proceedings and judgment has been misplaced or is lost. This court, through various correspondence and interventions has failed to secure the said file to be availed to this court for the purpose of the hearing of this appeal. It was in that regard that this court directed the Director of Public Prosecutions to consult with the Police with a view to having the Appellant retried. The response received is that the Police file also cannot be traced. The Appellant was not opposed to this development in light of the fact that he has been in a legal limbo for the past thirteen (13) years since the case was determined by the trial magistrate's court.

This court, having considered the issues pertaining to the appeal, more so the rights of the Appellant and the broader interest of justice i.e. a convicted person should not be acquitted merely because the trial court's file is lost or cannot be found, is of the considered view that the only course of available to this court is to order the Appellant to be retried. This court is fortified in its decision by several decided cases, both in the High court and the Court of Appeal, where the conundrum faced by this court was addressed. In **Justus Cheruiyot Chumba vs. Republic [2016] eKLR** Mumbi Ngugi Judge held that:

“As was held in the case of Pius Mukabe Muliwa & 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 Criminal Appeal. 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.”

The Court of Appeal in **Francis Ndungu Wanjau vs. Republic Criminal Appeal No. 187 of 2002** (unreported) held as follows;

“On all available authorities the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of Joseph Maina Kariuki vs. Republic Criminal Appeal No. 53 and 105 of 2004 (unreported) where it had been established that the record of the trial magistrate and that of the High Court on first appeal have simply vanished into the thin air and cannot be traced. The Police file has also vanished in the same way. Nor can any record be traced in the office of the Attorney General. The Appellant's own copies of the record of proceedings in both the lower courts which had been supplied to him had also disappeared.”

In the present appeal, it is not evident how the trial courts' file was lost or went missing. From this court's own research and experience, there was a spate of loss or disappearance of files from a particular court in Nairobi when the Court of Appeal in an unfortunate decision (which was later reversed) ruled that where a court record of proceedings could not be found or went missing, the Appellant was entitled to an acquittal. This happened at more or less the same time it is alleged the original court file in respect of the Appellant's appeal went missing. The circumstance of the loss of the original file therefore raised an eye brow. At stake is the principle that the administration of justice cannot be frustrated or sabotaged by deliberate or dereliction of duty on the part of those who have access to court records and who caused the said court record to go missing or disappear so as to force the court to reach a certain predetermined decision in favour of the Appellant without the due process of the law being followed. In other words, a criminal appeal cannot be determined other than on its merits. Therefore, when such disappearance or loss occurs, whether or not it is established that the Appellant (who is a principal beneficiary) was involved, the only available remedy, with a view to upholding the integrity of the trial process, is to order that the Appellant be retried.

This court acknowledges that the Appellant has been in lawful custody for a period of more than fifteen (15) years. He is however serving a sentence of life imprisonment. This was after the sentence of death that was meted on him was commuted by Presidential decree. The Appellant will therefore not suffer any prejudice if he is retried since he is currently serving the maximum custodial sentence permitted by the law. The ball is now on the prosecution's court.

In the premises therefore, the conviction of the Appellant by the trial court is hereby quashed. The death sentence meted on him on 14th June

2007 is hereby set aside. The Appellant shall be retried before the Kibera Chief Magistrate's Court. He shall remain in custody pending appearance before the said court on 7th October 2020 to take plea in the retrial. The Appellant shall appear in person or virtually as the circumstances may dictate. The issue regarding whether the Appellant shall be release on bail pending trial shall be determined by the trial magistrate's court. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2020

HON. L. KIMARU

JUDGE