



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 195 OF 2011

ABDI RAMADHAN TULETO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Abdi Ramadhan Tuleto, was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** by the Kibera Chief Magistrate's Court (Hon. F. Nyakundi PM) in **Criminal Case No.4031 of 2019**. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the same. The appeal has not, however, been heard. This is on account of the fact that the trial court's file containing the proceedings and judgment cannot either be traced or is lost. All effort by the Deputy Registrar to procure the particular file from the Chief Magistrate's Court Kibera has been in vain. On perusal of this appeal's file, there are six letters written to the Chief Magistrate, Kibera requesting for the trial court's file to be availed to this court for the purpose of hearing of the appeal. These letters are in addition to numerous calls that were made to that court requesting for the same file.

On 31st January 2018, the Executive Officer of Kibera Chief Magistrate's Court, finally responded to the letters addressed to the court in regard to the missing file. The content of the letter was to the effect that despite effort to trace the file, the same had not been found within the court's premises. The material part of the letter states as follows:

“after conducting comprehensive search on our registry of the subject criminal case file, we are unable to find it anywhere within our court premises. The previous records on chain custody of the subject file haven't yielded much help as they were as then, poorly kept and we apologize for the same.”

It was therefore apparent from the said correspondence that the trial court's file containing the proceedings and judgment cannot be availed to this court for the purpose of the hearing of the appeal.

That being the case, what is the way forward in regard to the disposal of this appeal? The Applicant urges the court to discharge him on account of the fact that he has been in remand custody since 2009 when he was arrested and arraigned before the trial court. The Applicant was in remand custody until his conviction by the trial court in 2011. Since then, he has been in prison serving a life sentence which was as a result the commutation of the death sentence imposed on him by Presidential decree. On the other hand, the prosecution informed the court that its effort to trace the police file was still ongoing due to the length of time that has passed since the trial was concluded at the magistrate's court. The prosecution left the issue of what next to be done to the court.

This court has carefully considered the facts of this case. It is common ground that the trial court's file containing the proceedings and judgment cannot be traced or is lost. All the effort by the registry staff at Kibera Law Courts to trace the file has been in vain. The issue for determination by this court is what should be done to this appeal. The Appellant has indicated to court that he wishes to be discharged since he has been in lawful custody, both as a remandee and a convict for the better part of a decade. There are two competing issues that came to the fore for determination by this court; the first issue is the Appellant's constitutionally guaranteed right to have his appeal heard and determined expeditiously, while the second issue is the protection of the integrity of the criminal trial process.

As the court held in **Prince Kwadwo Baffor vs Republic Nairobi HC Cr. Appeal No.305 of 2008 (unreported)** where the court was considering a case with similar circumstances to the present one:

“Disappearance of the trial court's file undermines the entire criminal justice system. If the court were to issue an order that the loss of a trial court's file can automatically result in the discharge of the Appellant, such an order would send a

wrong message to consumers of justice. It would imply that the court would be giving a stamp of approval to subversion of the criminal justice system.”

The Court of Appeal in **John Karanja Wainaina Vs Republic [2004] eKLR**, when faced with circumstances similar to the present one where the trial court’s file could not be traced held thus:

“In such a situation as this, the court must try to hold the scales of justice and in doing so, must consider all circumstances under which the loss has occurred. Who occasioned the loss of all the file? Is the appellant responsible? Should he benefit from his own mischief and illegality? In the final analysis, the paramount consideration must be whether the order proposed to be made is the one that 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 presumption of innocence given to him by Section 77(2) (9) 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 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.”

This court agrees with the above holding. The Appellant’s right to fair trial must of necessity give way to the broader interest of justice that requires this court to uphold the integrity of the criminal justice process. In the present Appeal, it was clear to this court that in as much as the court empathizes with the Appellant’s situation (he has after all been in lawful custody for a period of approximately eleven (11) years), the ends of justice will be served by the Appellant being retried. The Appellant will not suffer much prejudice since he is currently serving a life sentence. If he succeeds in challenging the charges in the retrial, then the effort will be worth his while, if not, he will be in no worse position than he currently is.

This court is aware of the principles it must consider in determining whether or not to order a retrial. The principles were enunciated by 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.”

In the present appeal, even though the prosecution has indicated that it has so far not been able to trace the police file (the search for the file is still ongoing) this court is of the considered view that, taking into consideration the serious nature of the charges that the Appellant faced, he should be retried. This court therefore orders the Appellant to be retried.

In the premises therefore, this court quashes the Appellant’s conviction in **Kibera CMC CRC NO.4031 OF 2009 Republic Vs Abdi Ramadhan Tuleto**. It sets aside the sentence of death which was later commuted to life imprisonment that was imposed upon him. The Appellant shall be presented before the Kibera Chief Magistrate’s Court on 5th January 2021 either physically or virtually as the COVID-19 protocols in place may dictate. The Appellant shall be at liberty to apply for bail pending trial before the court that shall take his plea. Meanwhile, the Appellant shall remain in custody until that date.

It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF DECEMBER 2020

HON L. KIMARU

JUDGE