



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 98 OF 2013

SAMWEL KINYAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. Bildad Ochieng' – CM dated 31st October 2012 at the Senior Principal Magistrate's Court at Kilgoris in Criminal Case No. 508 of 2012)

JUDGMENT

1. The only record available to this Court is the committal warrant showing that the appellant, SAMUEL KINYAMA, was convicted on 31st October 2012 for the offence of committing an unnatural offence contrary to **section 162** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and sentenced to serve 10 years imprisonment. He appealed against conviction and sentence.

2. The issue in this matter is that the court file containing the record of the subordinate court has been missing hence the appellant has been unable to prosecute his appeal. As I understand the general principle governing the exercise of the court's jurisdiction in such cases is that the court should make an order that meets the interest of justice. In **John Ooko Otieno v Republic KSM CA Criminal Appeal No. 137 of 2003 [2008]eKLR** the Court of Appeal, on this issue, observed as follows;

In Pius Mukaba Mulewa and Another v 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 ZAVÉR'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.

3. Several efforts have been made to trace the original trial record to enable the appellant mount an appeal and by a letter dated 26th February 2019, the Kilgoris Law Court addressed this Court as follows:-

Reference is made to the above subject matter.

We have tried to trace the original record since last year without success. All records in our Archives were appraised by the Archivists from Supreme Court Nairobi but the file could not be traced.

The only record the Court has is that the accused was sentenced to serve 10 years imprisonment on 31.10.2012.

We write to confirm that the original record cannot be traced.

4. I am satisfied that the Court record is now missing and there is no evidence that the appellant has played any role in its disappearance. Since he cannot exercise his undoubted right of appeal and considering that he has served three-quarters of his sentence. I consider that it is in the interests of justice that I allow the appeal.

5. I therefore quash the conviction and sentence. The appellant is set free unless otherwise lawfully held on a separate warrant.

Dated and delivered at Kisii this 27th day of February 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.