



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1 OF 1997

(An Appeal arising out of the conviction and sentence of Hon. G.E. Omondi Tunya (CM) on No.19006 Acting Captain Joseph Kipyegon delivered on 31st October 1996 in Court Martial No.6 of 1996 Sitting at Langata Barracks)

JOSEPH KIPYEGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Joseph Kipyegon, then an officer of the Armed Forces being subject to the then **Armed Forces Act** under **Section 7(1)(a)** of the **Act**, was charged with the offence of **stealing public property** contrary to **Section 38(a)** of the **Armed Forces Act, 1968**. The particulars of the offence were that on 25th December 1995, while at Liboi Military Camp in the then Garissa District, the Appellant stole a sub-machine gun (SMG) Serial No.A97224, three magazines and 102 rounds of 9mm ammunition. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged and sentenced to serve 3 1/2 years imprisonment. He was further ordered to be dismissed from the Armed Forces subject to approval by the convening authority. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the said conviction and sentence.

The appeal lodged by the Appellant has not been heard on its merit on account of the fact that the complete proceedings of the Court Martial has not been availed to the court. Meanwhile, the Appellant served his sentence and was released from prison. Upon his release from prison, the Appellant is still desirous of arguing his appeal before this court. From the court record, it is apparent that the court has corresponded with the Administrator of the Court Martial for the complete proceedings of the Court Martial to be availed to the court for the purpose of the hearing of the appeal. Unfortunately, the complete proceedings of the Court Martial have not been availed to this court. This court was seized with jurisdiction to hear this matter on 21st September 2016. The case has been mentioned more than eight times to give the Administrator of the Court Martial an opportunity to avail the complete records of the Court Martial to this court for the purpose of this appeal. The court even summoned the Administrator of the Court Martial to come to court to explain why the complete proceedings of the Court Martial have not been availed to the court. The Administrator, Colonel Kirui told the court that the Court Martial was not able to trace the summing up that was made by the then Judge-Advocate, Omondi Tunya. They had even contacted Omondi Tunya (Retired Judge) but were not successful in tracing part of the said missing part of the proceedings.

This court has taken into account the period that the appeal has remained pending determination and the fact that, despite its best effort, the missing part of the proceedings, which are crucial, may not be traced and made the decision to write this Ruling with a view to bringing this matter to conclusion. Courts of concurrent jurisdiction have had to grapple with what to do where the proceedings that are the subject of appeal are either missing or have been misplaced. The courts being conscious of the fact that Appellants who have assessed the chances of their appeals not succeeding may **'influence'** the disappearance of the trial court's files, have been reluctant to give orders in favour of Appellants who find themselves in such situations without thorough investigations as to the circumstances leading to the failure of production of proceedings of the trial court before the Appellate court. In **Danson Maina Muchoki v Republic [2013] eKLR**, Ochieng and Achode JJ and held thus as paragraph 8 and 9 of his Ruling:

"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 Application No.246 of 2010 now before us had at one time disappeared. That cannot be sheer coincident.

In determining the most appropriate action to take, the courts must seek to uphold the overall interest 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 detriment to justice, and we dare add, create grounds for people to collude to defeat the ends of justice by making files disappear..."

The Court of Appeal in **Joseph Maina Kariuki v Republic Criminal Appeal No.53 and 105 of 2004** 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 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 the author? “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.”

In **John Otieno Ombok v Republic [2017] eKLR**, the Court of Appeal, after citing the **John Maina Kariuki v Republic (supra)** held that:

“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.”

The court proceeded to set out some of the remedies that it may order including directing that Appellant be retried.

In the present appeal, this court has carefully considered the circumstances under which part of the record of the Court Martial went missing. It was clear from correspondence exchanged between the Deputy Registrar of this court and the Administrator of the Court Martial, and the statement given in court by the Administrator of that court that the Appellant was not involved in any way with the disappearance of that part of the record of the Court Martial. Indeed, the Appellant has already served sentence that was meted out by the Court Martial. The Appellant’s interest in pursuing this appeal is to have his name exonerated from the charges that were brought against him.

This court formed the view that since the Appellant has been denied an opportunity to ventilate his appeal on its merit due to failure by the Court Martial to avail the complete record for the purpose of the hearing of the appeal, the interest of justice in this case demands that the Appellant be acquitted of the charge. This court would have directed that the Appellant be retried were it not for the fact that he has already served the custodial sentence that was imposed upon him by the Court Martial. To subject him to a retrial would expose him to double jeopardy.

In the premises therefore, the Appellant is acquitted of the charge that was brought against him in the Court Martial. The order directing that he be dismissed from the Armed Forces is set aside and substituted by an order of this court directing that the Appellant be retired from the Armed Forces as from the date that he was first charged in accordance with the law. The Appellant shall be entitled to his full benefits for the period that he served in the Armed Forces, including any decorations. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF APRIL 2018

L. KIMARU

JUDGE