

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 111 OF 2014

(FORMERLY KISII HCCRA NO. 79 OF 2012)

BETWEEN

EUNICE ATIENO ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 143 of 2010 at Chief Magistrates Court at Homa Bay, Hon. Ong’ondo, SRM dated 24th February 2011)

JUDGMENT

1. The appellant **EUNICE ATIENO ODHIAMBO** was convicted on 24th February 2011 for the offence of child trafficking contrary to the ***Sexual Offences Act***. She was sentenced to serve 10 years imprisonment. She was granted leave to file her appeal out of time by the High Court at Kisii (Sitati J.) on 6th February 2012 and her petition of appeal deemed as duly filed and served.
2. The matter was transferred to the High Court at Homa Bay on 1st July 2014 and brought to my attention for directions. The court file though did not have the original record of the proceedings and judgment from the subordinate court. I therefore ordered the Deputy Registrar to look for the file on 1st July 2015. The Homa Bay and Kisii High Court registries have both confirmed that they are unable to locate the original file. From the efforts made to locate the file so far, I am satisfied that the court file has not been found and is indeed lost.
3. I called upon the respondent to submit on the position regarding the court. Mr Oluoch, learned counsel for the respondent, submitted that where the court record is missing the court should make an order that meets the interest of justice. He called in aid the two cases from the Court of Appeal, ***John Nyagah Njuki and 4 others v Republic NKU CA Criminal Appeal No. 160 of 2000 (UR)*** and ***John Ooko Otieno v Republic KSM CA Criminal Appeal No. 137 of 2003 [2008]eKLR***. In the latter case the Court of Appeal distilled the principles applicable as follows;

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 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.”

4. Considering the factors thus outlined and the facts of this case, I find as follows. There is no evidence that the appellant was complicit in the disappearance or loss of the court file. She was convicted and sentence in 2011 and 5 years have elapsed since her conviction. She had already served half of her sentence. Given the length of time that has elapsed, it may now be difficult to mount a retrial as there is no indication that the witnesses may be available to testify.
5. I therefore allow the appeal to the extent that the sentence is reduced to time served. The appellant is released unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 15th day of February 2016

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.