



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 103 OF 2014

ERIC SANGURA NASOKO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me for determination is Notice of Motion dated 10th March, 2015. The Applicant herein was charged before Nairobi Anti Corruption Court in Criminal Case No. 31 of 2005 with two counts as follows;

Count I: Soliciting for a benefit contrary to **Section 39(3) (a) as read with Section 48(1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003**. The particulars of the offence were that on the 10th day of August, 2005 at Pangani Police Station in Nairobi, within Nairobi Area Province, being a person employed by a public body to wit, the Kenya Police Department as a Police Constable corruptly solicited for a benefit of Kshs. 500/= from one Stephen Muchiri Kamau as an inducement to process a certain document namely, police abstract a matter in which the said public body was concerned.

Count II: Receiving a benefit contrary to Section 39(3)(a) as read with Section 48 (1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003. The particulars of the offence are that on 10th day of August, 2005, at Pangani Police Station in Nairobi within Nairobi Area, being a person employed by a public body to wit, the Kenya Police Department, corruptly received a benefit of Kshs. 200/= from one Stephen Muchiri Kamau as an inducement to process a certain document namely police abstract, a matter to which the said public body was concerned.

He was found guilty in the second count and was convicted accordingly. One of the annexures to the Supporting Affidavit is the judgment of the trial court. The sentencing part is however missing. Also annexed to the Supporting Affidavit is a letter by the Applicant to the Hon. The Chief Justice of Kenya dated 31st October, 2011 in which he was raising concerns of the disappearance of the trial court file. The second paragraph of the letter shows that he was sentenced to pay a fine of Kshs. 60,000/= and in default serve 8 months imprisonment. In the present application, he prays that the appeal be heard notwithstanding the absence of the copies of the original proceedings. Consequent thereto, he urges that his conviction be quashed and the sentence set aside. The second prayer is that the fine he paid upon conviction be refunded to him. Other annexures to his Supporting Affidavit sworn on 10th March, 2015 are copies of letters he wrote requesting for certified copies of the trial proceedings. According to the Applicant, he raised his concerns with the Chief Justice who directed the Office of the Ombudsperson to

look into the matter. The Hon. D. Mulekyo, Chief Magistrate then heading the Nairobi Anti Corruption Court also wrote to the Chief Registrar of the Judiciary vide a letter dated 23rd May, 2014 indicating that the original file got lost in the Accounts Section. A letter dated 5th January, 2012 signed by N. Motanya, Chief Accountant of the Judiciary addressed to the Chief Magistrate, Milimani Anti Corruption Court indicates that the original trial record was received in the Accounts Department on 19th June, 2009 and the Applicant's claim for refund of cash bail was processed. He attached to that letter deposit ledger extracts as confirmation that the payment was made. Mr. Motanya indicated in the letter that the claim having been processed long after the file had been received by the Chief Magistrate's Court on 24th June, 2009 it could only be concluded that the same had been returned to the Chief Magistrate's Anti Corruption Court. Interestingly, a letter dated 27th December, 2011 by J.O. Ndiege for the Chief Magistrate, addressed to the Principal Accounts Controller, indicates that the file had been forwarded to the cash office on 24th June, 2009.

I took over the conduct of these proceedings on 13th May, 2015. I noted that the application herein could not conclusively be heard and determined before the Chief Registrar of the Judiciary conducted an inquiry/investigations into how the original file disappeared and probably who would be held culpable for the disappearance of the file. The Deputy Registrar of this court wrote a letter to the Chief Registrar of the Judiciary dated 2nd September, 2015 in this regard. The Chief Registrar of the Judiciary in turn delegated the duty of investigations to the Judiciary Ombudsperson Hon. Kennedy Bidali. On 20th November, 2015 Hon. Bidali wrote to the Chief Registrar of the Judiciary in a brief letter with the following words:

“We have conducted an inquiry on the said file and evidence shows that the original record cannot be traced and/or has been lost. Further thereto, we also enclose a self explanatory letter from the Deputy Director Accounts justifying our findings.”

The letter by the Deputy Director Accounts, Mr. Kennedy Moki dated 19th November, 2015 shows that during the year 2009, all the case files for the refund of bails were processed at the Supreme Court and returned to court using a movement register. He further wrote that due to the number of years gone since the file in issue was handled and the turnover of accounts staff, it had been difficult to trace the file. Thereafter, by a letter dated 8th January 2016, the Chief Registrar of the Judiciary wrote to the Assistant Deputy Registrar, Criminal Division Hon. R. Aganyo confirming that the original record in **Criminal Case No. 31 of 2005 (Republic vs Eric Sungura Nasoko)** could not be traced and/or had been lost. She attached the letter of Hon. Kennedy Bidali dated 20th November, 2015 as comprising the report of the investigations requested for by this court.

From the above background, it is safe to conclude that this court will not and cannot in the nearest future be in a position to acquire the original trial court record. To be precise that record has been lost. The appeal preferred by the Applicant herein is a first appeal of which the court must rely on record of proceedings of the trial court. I say so because this is a court of record and in making a determination on an appeal, must give regard to the entire proceedings of the trial court. Without the said record, it follows that no appeal can decisively be heard. The only item which in my view comprise part of the record filed alongside a Memorandum of Appeal dated 28th July, 2014 is an uncertified copy of the charge sheet, uncertified copy of the judgment, copies of five 50 shilling currency notes and several correspondences. Those are not sufficient documents as would enable the court make a determination on the pending appeal. In any case, their origin is unauthenticated. The annexures to this application show that the Applicant has severally made effort to be furnished with the trial record of proceedings. More particularly is the letter dated 5th January, 2012 by N. Motanya, Chief Accountant, which shows that the cash bail refund was processed and the file returned to the Chief Magistrate Anti Corruption Court. Although correspondences emanating from the Chief Magistrate's Court contest the fact that the file was returned to the court, it remains unclear whether or not the original record got lost in the Accounts Department or in the Chief Magistrate's Court. It is clear that none of the results of the investigations ordered by this court and earlier attempted through the various correspondences refer to the file movement register which would confirm the exact point at which the file got lost. I bear in mind that the Applicant who is a former

police officer has a benefit to pursue if this court were to quash the conviction and set aside the sentence without hearing the appeal. Whereas that may seemingly be a prudent thing to do, I am disinclined to go towards that direction. First, as I have noted, because it is not clear the exact point at which the file got lost. Second, because the circumstances under which the original file got lost do not entirely exonerate the Applicant. This is so because after he was sentenced, he paid the fine and has been out of prison since 15th June, 2009. It cannot be exclusively said that he has not been in contact with the file as would be concluded of a person who has been in prison or remand. I think it would set a bad precedent where files get lost and the next step that the court takes as a matter of course is to quash a conviction. Given the seriousness of the offence for which the Applicant was convicted, and in the interest of justice, I hold that the best thing to do is to order a retrial. It is through a retrial that he shall either be held culpable or be vindicated.

In the result, the application partially succeeds. I quash the conviction and set aside the sentence. The Applicant shall be refunded the fine upon production of the original receipt issued in payment of the fine. He shall present himself to Kilimani Police Station for purposes of preparation of fresh charges not later than 23rd March, 2016. In the meantime, I release him on a personal bond of Kshs. 50,000/= pending his appearance in court. It is so ordered.

DATED and DELIVERED in Nairobi this **16th** day of **MARCH, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *The Applicant in person.*
2.*Respondent.*