

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 118A OF 2012

JOSEPH MUTHIE MURIUKI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The appellant was sentenced to 8 years imprisonment on count 1 which charged him with obtaining money by false pretences contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya and 10 years imprisonment for the offence of making a document without authority contrary to section 357 of the Penal Code. The appeal was lodged in the registry of this court on 31st July 2012 and has not been heard and determined to date. The reason being that the original court file and the record of appeal are missing or misplaced.

2. It emerged that when the appellant applied for bail pending appeal on 25th August 2015, Ms Matere for the respondent brought to the attention of the court that she did not have the record of appeal. As a result, the appeal was set for mention on 17th September 2015 with the court directing the Deputy Registrar to prepare the record of appeal. On 18th April 2016 the appeal came up for mention and the Executive Officer in charge of the Criminal Registry (Mr Kandia) informed the court that the original court file had been misplaced for many years.

3. Thereafter, the court ordered that a search for the misplaced/missing file be looked for. In the end, the court ordered Mr Kandia to file an affidavit indicating the steps he had taken to look for the missing/misplaced file, which he did in his 9 paragraphs affidavit dated 17th October, 2016. In his affidavit, he has deponed that the lower court file in criminal case number 1205 of 2007, the appellant was charged with obtaining by false pretences and that the court file has been missing or misplaced from its bundle to date. He has further deponed that he visited the bundle where this particular file was supposed to be and found it missing.

4. He has also further deponed that he later organized a team comprising of staff from the registry, which searched for that same court file without success. Additionally, he has deponed that the exercise of looking for the same file was repeated severally without success. Furthermore, he has deponed that he informed the archivist in charge of records to assist in tracing the file. After several searches, the archivist reported that he was unable to trace the same. He concluded that the file is still misplaced/or missing.

5. The police through No. 231171 SSP Joshua Cheptoo, who is attached to the Criminal Investigation Department in Embu West also prepared an affidavit in respect of the original police file. He prepared an 8 paragraphs affidavit in response to an order of this court to ascertain whether they have in their possession the said police file. He deponed that the appellant was charged with obtaining by false pretences with Silvester Njeru Muruatetu being the complainant. He further deponed that the appellant was sentenced to 5 years imprisonment on 28th March 2010 by the court of the Resident Magistrate at Embu. He further deponed that their police charge register was closed on 14th September 2012 by the Provincial Criminal Investigating Officer (P.C.I.O).

6. He has also further deponed that once the police file is closed, it is kept in the police archives awaiting disposal. He has finally deponed that they have exhaustively and unsuccessfully searched for the police

file without success and he has deponed that the court may make any order that it deem fit in the matter.

7. I have considered the affidavit evidence of the Senior Executive Assistant in charge of Chief Magistrate's Criminal Registry at Embu. I have also considered the affidavit evidence of No. 231171 SSP of Police Joshua Cheptoo. I find from their evidence that the possibility of tracing both the original court file and the original police file is very slim. I also find that the appellant has been in prison since 2010. I further find that he was sentenced to a consecutive term of 18 years imprisonment. It seems from his petition of appeal forwarded to the Deputy Registry of this court dated 1st February 2011 that the appellant was sentenced on several counts arising out of the same transaction. In his petition of appeal and submissions to this court, he has urged the court to order for a concurrent sentence.

8. I find from the foregoing that the appellant has served 7 years imprisonment following his conviction and sentence on the consecutive sentences imposed upon him. I find that the original police file and the original court file have not been traced to date. The possibility of finding those two files appears to be slim. In principle, the loss or misplacement of a court file and the police file are not in themselves a ground for not ordering a re-trial. In the circumstances of this case, I find that the sentence already served is sufficient and is not therefore necessary to order a re-trial.

9. The upshot of the foregoing is that the appellant is hereby ordered released from imprisonment unless he is otherwise held on other lawful warrants.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **DECEMBER 2016**

In the presence of the appellant and in the absence of the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

19.12.16