REPUBLIC OF KENYA

High Court at Kakamega

Miscellaneous Criminal Application 32 of 2010

BENJAMIN ONG'ANYA.....1ST APPLICANT

PATRICK OKUSIMBA.....2ND APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The two appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. They were convicted and sentenced to death. The appellants filed two appeals that were sent to the Nairobi Central Registry and allocated as follows: **Criminal Appeal No.269 of 1998 (Patrick Kusimba v Republic)** and **Criminal Appeal No. 271 of 1998 (Benjamin Ong'anya v Republic).** The two appeals were transferred to Kakamega and became **Criminal Appeal No.67 of 2002 for Patrick Kusimba and Criminal Appeal No.120 of 2002 for Benjamin Ong'anya**.

On 16th September 2008 the two appellants filed a notice of motion contending that their fundamental rights have been violated and are continuing to be violated as they had remained in prison for more than 10 years without their appeals being heard. They also sought to be supplied with the record of the lower court, Kakamega **Criminal Case number 331 of 1997** before the Chief Magistrate's Court. On 22.9.2010, the appellants filed a similar application seeking similar orders. The second application was heard by Justice Lenaola who referred the matter to a two judge bench to deal with the situation.

From the record the appellants filed a third set of appeals in 2008, these being Kakamega **Criminal Appeal number 121 of 2008 (PATRICK KUSIMBA V REPUBLIC)** and **Criminal Appeal number 122 of 2008 (BENJAMIN ONG'ANYA V REPUBLIC).** The grounds of appeal in the 2008 appeals are similar and are that:

1. That I pleaded not guilty to the above appended charge.

2. That, the learned trial magistrate misdirected himself in law and fact by failing to appreciate that the prosecution case was not only sufficient but was fabricative, speculative, conjecture, discredited, unconstitutional and lacked probative values.

3. That the trial court erred in law and fact by failing to appreciate that before and at the trial there was a material irregularity for the failure of the prosecution to disclose to the defence relevant evidence for a fair trial as guaranteed under section 77 of the constitution of Kenya.

4. That, the learned trial magistrate erred in law and fact by failing to warn himself adequately as to

the risk of a mistaken identification by the prosecution.

5. That, the decision of the learned magistrate was made without jurisdiction.

6. That, the decision of the learned trial magistrate violates the appellant's constitutional right to protection of the law under section 77 of the constitution of Kenya.

7. That, the learned trial magistrate misdirected himself in arriving at the decision based on belief and anticipations.

8. That, the trial court erred in law and fact by rejecting my alibi defence which sufficiently created a reasonable considerable amount of doubt as to the strength of the prosecution.

The main issue is why has the court not been able to determine the appellants' appeals for all this long? It follows from the court record that the original file from the subordinate court, that is Criminal Case file number 331 of 1997 could not be traced. After long search through the registries it was discovered that the subordinate court file was part of the old records that were destroyed. On 14th of June 2004, a three months notice was given to destroy the old records being held by the Kakamega Chief Magistrate's Court as follows:-

1. Criminal cases - 1990 – 1999

2. Traffic cases - 1990 – 1999

3. Juvenile criminal cases - 1980 – 1998

4. Civil case - 1971 – 1988

The notice was accompanied with a schedule of the specific files to be destroyed. The appellants' file is capture in the schedule of files for the year **1997** and it was in the bundle listed as **1 – 509**. Since then, the records of the subordinate court have not been traced. It is quite unfortunate as by the time the notice was given in **2004**, the appellants had already lodged their appeals in **1998** that were transferred from Nairobi to Kakamega and allocated fresh numbers in **2002**. It is not clear as to why the registries could not pick out the appeals and retrieve the file. What should the court do when faced with such a situation and taking into account the fact that no records will be availed to both the court and the appellants. The State Counsel has indicated that the police file cannot be traced and they too are waiting to be served with the record of the trial court. In the case of **HAIDERALI LAKHOO ZAVERI V REX [1952] 19 E.A.C.A. 244** the appellate court stated the following:-

"What we can take from ZAVER'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 a coincidence 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 the 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 it must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

In the case of **PIUS MUKABE MULEWA & KAZUNGU KENGA V REPUBLIC, Mombasa C.A. 103 of 2001**, the court held that in such situations courts must try to hold the scales of justice and in doing

so must consider all the circumstances under which the loss of the court record has occurred. Who stands to gain from the loss?

In the current case, the court record did not disappear from the court registry. It was officially destroyed amongst other old records. We had the advantage of seeing the two appellants on several occasions and they do appear to us not capable of influencing the destruction of the court record. All along the appellants have been calling for their appeals to be heard and to be supplied with the record of the trial court.

Is a re-trial an alternative? The record of the trial court is not available. Similarly the police file cannot be reconstituted as it is not available. In the case of **JOSEPH MAINA KARIUKI V REPUBLIC; Criminal Appeals Nos. 53 & 105 of 2004 eKLR 2012,** the Court of Appeal acquitted the appellant as the record of the High Court could not be traced. The court held that the appellant could not be retried as the record was not available and could not be kept in prison indefinitely when it was possible for his appeal to have been concluded according to the law.

Similarly, in the case of **JOHN KARANJA WAINAINA V REPUBLIC [2004] eKLR,** the Court of Appeal held as follows:-

"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? 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 77(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 be considered."

The Court of Appeal in the above case acquitted the appellant who had been in custody for about **15 years**. In the current case, the appellants were convicted on **3.2.1998**. They have been in custody for over **15 years**. Their appeals cannot be heard as the record of the trial court was officially destroyed. We do hold that the fifteen year period the appellants have suffered in prison is enough punishment even if their appeals were to be dismissed. Further, it cannot be concluded that their appeals could not have succeeded as the record of the trial court is not available.

In the end, we find that, the scales of justice favours the appellants. The conviction and sentence is hereby set aside. The two appellants are hereby set at liberty and shall be free unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 19th day of March 2013

SAID J. CHITEMBWE **B. THURANIRA JADEN**

J U D G E **J U D G E**