



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 246 OF 2010

DANSON MAINA MUCHOKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2165 of 2003 in the Chief Magistrates Court at Thika.)

RULING

1. In 2003, the Applicant was convicted and sentenced to death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the **Chief Magistrates Court at Thika**, in **Criminal Case No. 2165/2003**. The Applicant was aggrieved by the conviction and sentence of the trial Court and he appealed in what the Applicant states was **HCC Cr. No. 1015/2003** in the year 2003.
2. The Applicant has now come to Court by a Notice of Motion dated 8th March 2013 brought under **Articles 50** and **159** of the **Constitution**. He is seeking for orders that the Registrar be compelled to provide records of appeal for the Appellant, or in the alternative that the Appellant's conviction and sentence be quashed and set aside. The Application is supported by the Affidavit of Betty Rashid, Advocate for the Applicant sworn on 8th March 2013. The Applicant states that since he lodged the appeal, there has never been any progress of the matter for the reason that the appeal records were never compiled on account of missing court records of the trial Court's proceedings.
3. The record before us shows that the disappearance of the file has been a subject of various sittings of the Court. In March 2012, when the matter was before Court, the Applicant expressed a concern over the continuing delay in his case. This matter came up again on 4th April 2012 when the Court ordered for the production of the file. On 13th April 2012, the Court issued an order requiring the Deputy Registrar in the Chief Magistrate's Court at Thika to produce the file.
4. On 25th April 2012, the Executive Officer of the Chief Magistrates Court at Thika came before the Court and confirmed that no progress had been made in tracing the file. He referred the Court to an Affidavit he had produced in Court detailing efforts to trace the file in Misc. Criminal Application No. 246/2010 when the matter came up sometime in 2010 and the then sitting Judge ordered the police to investigate. We note that the Affidavit and documents referred to by the Executive Officer as having been filed are not contained in the file Misc. Criminal Application No. 246 of 201 that is now before us. It appears that investigations into the missing files

commenced but there is nothing on record regarding the outcome of those investigations. The Court even then, ordered the Director of Criminal Investigations Department to file a report of the findings of investigations. As of 7th June 2012, there was no feedback from the Director of Criminal Investigations Department (CID), and it appears none has been given to-date. Meanwhile the file Misc. Criminal Application No. 246 of 2011 which had also been missing was traced.

5. During the hearing, Mrs. Rashid for the Applicant submitted that the appeal should not be left pending indefinitely, and urged the Court to preserve the Applicant's right to a fair hearing as provided for in **Article 50(2)(q)** of the **Constitution**. She also urged the Court to uphold the principles of administration of justice as enunciated under **Article 159(2)** of the **Constitution**. The learned Counsel added that since it is the Court's duty to keep court records securely, the Applicant should not bear the blame having been in prison for 10 years since he filed a Notice of Appeal. Counsel urged that in the circumstances, the conviction ought to be quashed and the sentence be set aside. Learned Counsel added that the Applicant could be summoned to attend his appeal should the Court records be traced.
6. The Application was opposed. Ms. Maina for the State urged the Court not to set the Applicant free since he stands to benefit from the loss of the record. She urged the Court to consider ordering a retrial. Mrs. Rashid countered that a retrial was not feasible since 15 years had elapsed since the Applicant was arrested.
7. There are two broad issues for our determination:
 - i. whether an acquittal should follow where court records cannot be traced
 - (ii) what is the appropriate order to make in the circumstances?
8. 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 coincidence.
9. In determining the most appropriate action to take, the Courts must seek to uphold the overall interests 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 detrimental to justice, and we dare add, create ground for people to collude to defeat the ends of justice by making files disappear. The chain of records' disappearance in this case is very suggestive of a methodical plan, and the Appellant cannot be said to be entirely blameless. Similarly the concerned Court registry bears responsibility as it has the primary duty of preserving the security and integrity of court records.
10. An acquittal is a result of a finding of no fault of an accused person. The Appellant cannot come to this Court to seek an acquittal, while in fact he has been lawfully convicted by the lower Court. The presumption of innocence has been extinguished. The burden at the appeal stage is on the appellant to show the Court that that conviction was unlawful. We reiterate the words of the Court of Appeal in the case of ***Pius Mukabe Mulewa & Another v Republic, Criminal Appeal No. 103 of 2001***(unreported), where the Court had this to say:

“...what is of interest to us in this story [recalling Victor Hugo's description of the burning of the Palace of Justice in Paris in 1618 in *The Hunchback of Notre Dame Penguin Popular Classics, Penguin Books Paper Back Edition, pp12-13*] is that interested parties may themselves resort to very extreme measures to make court files disappear and then tell the Court – ‘Aha! You have made the file disappear and there is no evidence upon which you can say I committed any crime. Please set me free’...”

11. In finding the most appropriate action to take in the circumstances of the case before us, we must consider all matters in context and be guided by the interests of justice. This case presents an almost exact scenario to the case of **Joseph Maina Kariuki v Republic, Criminal App. No. 53 and 105 of 2004** that was cited to us. The established principle as stated in that case is that an acquittal cannot follow as a matter of course.
12. We find the observations of the Court of Appeal instructive as captured in the case **Pius Mukabe Mulewa & Another v Republic**, (Supra) as followed in **John Karanja Wainaina vs. Republic - Criminal Appeal No. 61 of 1993** (unreported) and **Joseph Maina Kariuki v Republic** (Supra) that:

“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? 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.”
13. The Applicant was convicted of robbery with violence and sentenced to death in 2003. He lodged an appeal, soon after in the same year. The appeal has never taken off since then, since the trial Court’s record and the police file could not be traced. It has been slightly over ten years since the Applicant lodged an appeal. We cannot also state with certainty that he was entirely responsible for the disappearance of all files. The Director of CID did not give the Court any feedback regarding the outcome of investigations into the disappearances of court records, leaving the court in the dark. Our emphasis lies to the effect that the loss of court records does not result in an automatic acquittal.
14. The interests of justice on one hand demand that the rights of an accused person be upheld. The right to a fair trial as provided for in **Section 77** of the now repealed Constitution and in **Article 50** of the **Constitution** includes the right to be tried within a reasonable period. This right extends to appeal proceedings. **Article 159** of the **Constitution** enjoins courts to ensure that justice is not delayed. On the other hand it is in the interest of public policy that persons convicted of offences serve the sentences imposed in accordance with the law. The Court will make an order that is appropriate in the circumstances of the case. In the case of **John Ooko Otieno v Republic Court of Appeal at Kisumu, Criminal Appeal No. [2008]** (unreported) where the issue of missing court records also arose, a retrial was ordered. The Court considered that the matter was a first appeal, being a murder case that was first tried in the High Court. The Court was also informed that it was possible to locate the witnesses thus the practicability of a retrial was apparent.
15. A retrial will be ordered when the original trial was illegal or defective (**Merali v Republic (1071) EA 221**); where the interests of justice require it and if refused, it is likely to cause injustice or prejudice to the appellant, (**Ahmed Suman v Republic (1964) EA 481**); a retrial should be ordered only when it is likely that it will result in a conviction (**Mwangi v Republic (1983) KLR 522**). Each case must be decided on its unique facts and circumstances. In this case, the learned Counsel for the State while urging us to consider ordering a retrial did not pursue this line of submissions further even to suggest the possibility of availability of witnesses. Furthermore, the CID file which was the basis of the prosecution is not available. A long period has also elapsed since the Applicant was convicted and sentenced. Considered in totality, the circumstances of this case render a retrial not feasible.
16. This Court has no evidence as to who is responsible for the loss of the records after a thorough

investigation into the said loss. Ultimately, the duty rests on the Court to ensure security and integrity of Court documents. Without the record of appeal, the Applicant is not able to prosecute his appeal. The Court cannot prescribe a uniform finding in matters involving missing records since the circumstances of each case may vary widely.

17. Each case must be treated according to the peculiar circumstances. In the very unique circumstances, of this case the decision that best commends itself to us is to set the applicant free. However, we hasten to add that this is not an acquittal or a discharge since the appeal has not been determined on merit. We are therefore obliged to set conditions for the said release. Accordingly, the applicant shall only be set at liberty if he executes a personal Bond of Kshs.500,000/=. Secondly, he must get two (2) sureties of Kshs.500,000/= each.

18. The Bond and the sureties shall commit the signatories to ensuring that the applicant will make himself available to the court should he be required at a future date, whether for a retrial, the appeal or other lawful reason as may be specified by the court.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 28th day of August 2013.

FRED A. OCHIENG'

JUDGE

L. A. ACHODE

JUDGE