



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CRIMINAL APPEAL 108 OF 2008

DENNIS MUASYA MUTUMA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence in Machakos Senior Principal Magistrate's Court Criminal Case No. 2211/99 by Hon. Tororey, SRM on 18/5/2000)

JUDGMENT

Denis Muasya Mutuma, hereinafter "*the appellant*" was charged before the Chief Magistrate's Court, Machakos for the offence of robbery with violence contrary to section 296(2) of the Penal Code. After a lengthy trial he was found guilty, convicted and sentenced to death as mandatorily provided by Hon Torrey, SRM.

Having been dissatisfied with both conviction and sentence, the appellant immediately lodged an appeal in the High Court of Kenya at Nairobi, being Criminal Appeal Number 543 of 2000. This he did within the statutory period of 14 days. The grounds of appeal were:-

- 1. That the learned magistrate erred in law and facts in upholding the evidence of PW1, respectively (sic) identification without considering the circumstances under which the (sic) was made.***
- 2. That the learned magistrate erred in law and facts in failing to appreciate the facts(sic) that, circumstances(sic) evidence can be fabricated to cast suspicion on the other and thus the planting of the exhibit in the case were not excluded (sic) with moral certainty bearing in mind that there were exhibits recovered at the scene.***
- 3. That the learned magistrate erred in law and facts in failing to find the pro/case (sic) as a whole was filled with loopholes and consistent (sic) which ought to have resolved in my favour.***
- 4. That the prosecution failed to prove the case beyond reasonable doubt the charge as laid in the charge sheet.***

The appellants Criminal Appeal No. 54 of 2000 was subsequently transferred to the High Court of Kenya at Machakos, way back in 2002 for hearing and final determination. Since then the appeal has not been heard and determined; reasons, the original record of the trial court cannot be traced both in the High Court of Kenya at Nairobi and the original trial court. Since 19th February, 2009, the appeal has been mentioned severally with the sole aim of having lower court file availed. Attempts to reconstruct the court

file have also failed since even the police file can also not be traced.

On 14th June, 2012, when the matter came before me, both the appellant and **Mr. Mwenda**, learned State Counsel threw their hands in air and left the matter to court. Indeed **Mr. Mwenda** stated that they had been unable to trace the police file to assist them in the reconstruction of the court file since the record of the trial court was unavailable. In the premises he opted to leave the matter to court. Similarly, the appellant also said that he wished to leave the matter to court.

The Criminal Procedure Code has not addressed this scenario where sometimes an appellate court is confronted as here, with an appeal where no written records of the lower court's decision are available. However, the courts have attempted to fill the lacunae. They have done so by ordering a retrial where circumstances permit. The reason being that there being no written record of the decision nor any reasons for the decision, the only proper cause is to remit the case for retrial. See generally **Misana vs Republic [1967] E.A. 334 and Zaver vs Republic [1952] 19 EACA 244.**

However, in the circumstances of this case, an order for retrial will be in vain since even the police file has disappeared. The offence appears to have been committed sometimes in 1999, almost 13 years ago. I doubt therefore whether, even if the police were able to reconstruct their file, they will be able to trace their witnesses and mount a successful prosecution. Again to retry someone for an offence committed about 13 years ago, may fly in the face of the articles on fair trial in our constitution.

Considering all the foregoing, the order that best commends to me is to bring this sordid affair to a closure. Accordingly, the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty at once unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.

ASIKE-MAKHANDIA
JUDGE