IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 348 OF 2010

HARRISON MUIRURI……..……APPELLANT
VERSUS
REPUBLIC…….....…..….RESPONDENT

RULING

The appellant, Harrison Muiruri was charged with 8 counts under the **Penal Code** relating to **making a document without authority**, **uttering a document with intent to defraud** and **obtaining money by false pretences**. The prosecution called all its witnesses and closed its case on 13th June 2008. Submissions on whether or not the appellant had a case to answer, was reserved for 30th June, 2008. After the call-over in the morning, the submissions were slated for 2.30p.m. of the same day. At 2.30p.m., the court file, the court was informed, had disappeared. The matter was reported to the D.C.I.O. for investigations while the appellant's bond was cancelled but that order was shortly reversed by the High Court.

A skeleton file was reconstructed and the case mentioned several times without the original file being traced. Due to that history, the file was ordered to be kept in the strong room henceforth. The trial court opted to recall all the witnesses and the trial concluded whereby the appellant was acquitted of the first count but convicted of the other seven counts for which he was sentenced to serve, on each count three (3) years imprisonment – to run concurrently.

The decision aggrieved the appellant who brought the present appeal on 24th November, 2010 simultaneously with a motion seeking for his admission to bail or in the alternative that the sentence be suspended pending the hearing and determination of this appeal. Before the application could be heard, or the appeal admitted/rejected, the court learnt that the lower court file had disappeared without trace. Investigations by the DCIO, Nakuru as well as an affidavit sworn by the Executive Assistant in charge of the Chief Magistrate's Criminal Registry, Nakuru pointed to the culpability of a registry clerk, Oscar Soi. Oscar Soi, on his part has confirmed receiving the file at the registry after the judgment was delivered but denied playing any role in its disappearance. He also denied knowledge that the file was meant for the strong room.

The bottom line is that neither the application for bond nor the appeal can proceed in the absence of the lower court record. The appellant in what is headed Petition, has asked the court to consider that he has served part of the sentence yet the appeal has not been heard thereby violating his rights guaranteed under **Article 50(2)(q)** of the **Constitution**; that it would be contrary to the provisions of **Article 50(6)(a)** and **(b)** of the **Constitution** to order for a retrial without being moved by the appellant.

It is clear from those averments that the appellant is asking the court to set him free if the appeal cannot be heard as a result of the disappearance of the record. The State has not confirmed whether or not the police file is available. It was stated, however, from the bar by the State Counsel that if the record of

the lower court has disappeared with the exhibits, then no purpose will be served by ordering a retrial; that the appeal was not brought in compliance with **section 350** of the **Criminal Procedure Code.**

I have considered the appellant's concern and the foregoing submissions by the State Counsel. It is now settled by a long line of authorities that:

i) the mere disappearance of the record in the circumstances like those in this case does not automatically result in an acquittal and that to hold otherwise would spell doom to justice as suspects or convicts will ensure the loss of record expecting an automatic acquittal;

ii) that the person who has been tried or has pleaded guilty before a court with competent jurisdiction and who has been convicted by such a court has lost the benefit of the presumption of innocence given to him by the Constitution;

iii) that in situations like this the interest of justice as a whole must be considered;

iv) that each case and its circumstances must be dealt with differently considering the different situations under which the loss of the record occurred;

The oldest case in this regard was **Haiderali Lakhoo Zaver** V. **Rex** (1952) 19 EACA 244. That case was considered in some detail in a ruling by the Court of Appeal in the case of **Pius Mukabe Mulewa & Another** V. **Republic**, Criminal Appeal No.103 of 2001. I reproduce excerpts from that ruling:

"We, however, must also repeat that the disappearance of court files in the days of ZAVER was an exceptional occurrence. That is no longer the position now. Indeed, if it were to be known that as soon as the court file and that of the police disappear, that would be the end of the matter, the courts would expect many more disappearances and justice would be the loser. How are the courts to deal with our circumstances? ……

The judges in ZAVER'S case did not have to deal with such a prevalent and pernicious state of things. They could understandly, afford to suggest that if a file is lost and it is not possible to reconstruct it or to order a retrial, an acquittal might follow. We cannot afford to lay down any such hard and fast principle now. It can only be detrimental to the course of justice.

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 any 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."

(Emphasis mine)

Similar sentiments were recently (11th March, 2011) repeated in the case of **Francis Ndungu Wanjau**, Criminal Appeal No.187 of 2002. The judges in that case quoting from the decisions of **John Karanja Wainaina** V. **Republic**, Criminal Appeal No.l61 of 1993 and **John Ooko Otieno** V. **Republic** Cr. Appeal No.137 of 2002, respectively said:

"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 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."

(See **John Karanja** (supra)

"Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgment, police file and Attorney General's file is a rare occurrence. It has however, occurred and this Court is not a stranger to such a situation. This court has on more than one occasion in the past encountered such a situation. In the case of Pius Mukabe Mulewa and Another V. Republic, Court of Appeal Criminal Appeal No.103 of 2001, this Court, faced a similar situation ……"

(See **John Ooko** (supra)

I have considered most carefully the circumstances surrounding the disappearance of the trial court record and whereas I find no evidence linking the appellant with it, there can be no doubt that he is the only person who stood to benefit from that disappearance. It is curious that this was the second time the file mysteriously disappeared without trace. The courts have battled this menace for decades as evidence by the cited cases. It will be eradicated only if the registry staff became vigilant; when they will stop being tempted to engage in corrupt practices leading to the disappearance of files and, as was observed in **Francis Ndungu**, when the process of digitization would be complete. The courts must not, on the other hand, appear to encourage soft options where situations such as this arise.

In view of the nature of the charges and the fact that all the seven charges involved only two persons, Chuma Mburu, Advocate and Peter Njoroge Maina, I am of the considered view that a retrial is feasible. The trial before the court below was concluded only in November, 2010 (one year ago) compared to the case of **Francis Ndungu** (supra) where a retrial was ordered eleven (11) years after the conclusion of the trial. **Article 50(6)(a)** and **(b)** aforesaid is not applicable, so is **Section 350** of the **Criminal Procedure Code.**

In the result, I order that the conviction and sentence of three years be and is hereby set aside and the appellant shall be re-tried on counts 2 to 8 by another court of competent jurisdiction. He will be produced before the Chief Magistrate Nakuru within 24 hours of this order for directions on the retrial. In the meantime, he shall be placed in the police custody. At the same time, action must be taken against the members of staff who may have been involved in the disappearance of the file.

Dated, Signed and Delivered at Nakuru this 14th day of December, 2011.

W. OUKO
JUDGE