



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 99 of 2004

SAID YUSUF MAKANZU APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

The Applicant herein **SAID YUSUF MAKANZU** had been tried and convicted on the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) PENAL CODE**, by the learned Senior Resident Magistrate sitting at Kwale Law Courts. As is his right the Applicant filed an appeal against his conviction and sentence. At this point a problem arose in that the lower court file could not be traced despite several years of searching by the Executive Officer at Kwale Law Courts. Due to the non-availability of the trial file it has been impossible to compile a record of the proceedings for purposes of appeal. The Applicant then filed this Notice of Motion dated 14th October 2008, claiming that the disappearance of the lower court file and the inability therefore of this High Court to hear and determine his appeal, amounts to a violation of his constitutional rights as guaranteed by S. 72(3)(B) of the Constitution of Kenya. He asks that on the basis of this violation he be set at liberty forthwith. **MR. ONSERIO** learned State Counsel opposed the application.

We are very alive to the fact that the Applicant must be a very anxious gentleman having waited since the year 2004 for his appeal to be heard. We are also alive to the fact that the Applicant like any other accused person who is dissatisfied with his conviction, has an automatic right of appeal to the High Court. However the Applicant cites S. 72(3) (B) of the Constitution of Kenya as the basis for his prayer to be set free. This provision of the Constitution is not applicable in the present circumstances as it deals with the arraignment of a suspect before a court within a specified period of time and not delay in hearing of appeals.

We do note that the Kwale Law Courts by a letter dated 17th December 2009 have indicated that all their attempts to trace the original lower court file Criminal Case 628 of 2004 have proved futile. They ask that the file be treated as **'lost'**. Mr. Onserio whilst conceding that indeed the lower court record has been misplaced asks that the accused be re-tried before the lower court. Indeed this is a very unfortunate situation. On the one hand the Applicant's appeal cannot proceed for hearing due to no fault of his, yet on the other hand the appeal cannot be left in limbo indefinitely because of the missing file. Justice demands that a decision be made one way or another. In the case of **PIUS OLIMA & ANOTHER –VS-REPUBLIC CRIMINAL APPEAL NO. 110 of 1991** the question of what circumstances favour a retrial was considered by the Court of Appeal. They held that

“The principles that emerge are that a retrial may be ordered where the original trial was found by the High Court and with which we agree, is defective, if the interest of justice is required and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case ...”

We are not able to make a conclusive determination that the trial before the lower court was in any way defective as that record is not available to us. The Applicant has submitted that his conviction ought to be quashed and he be set at liberty since in the prevailing circumstances he is unable to prosecute his appeal. However a conviction can only be properly quashed if an appeal has been heard and determined on its merits. This clearly has not happened here. The next question we have to consider is what prejudice if any will be suffered by the Applicant if a re-trial is ordered. Obviously a re-trial will entail the Applicant having to endure once again the rigours of a trial. However we must weigh this against the fact that he had been charged with a very serious offence for which the death penalty was imposed. We cannot ignore or gloss over the fact that this conviction and sentence were imposed by a competent court of law. Taking into account all relevant factors, the fact that lower court record is lost, and the serious nature of the charge we find that this is one situation where the administration of justice would be best served by ordering a retrial of the matter. We do hereby order that this matter be referred to the Chief Magistrate Mombasa Law Courts for fresh plea and a re-trial of the case.

Dated and Delivered at Mombasa this ...28th..... day of May 2010.

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F. AZANGALALA
JUDGE

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M. ODERO
JUDGE