

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 138 of 2007

HABEL MUSAR KIPTUM APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant, Habel Musar Kiptum, has appealed to this court against conviction and sentence for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence read as follows:-

“HABEL MUSAR KIPTUM: on diverse date (sic) between 26th day of September 2003 and 3rd October 2003 in Mombasa Township of Mombasa District within Coast Province with intent to defraud obtained from Christine Chesire cash money Kshs. 510,000/= by falsely pretending that you were in a position to import a tractor for her.”

He also faced two other counts of making a document without authority contrary to section 347 (c) of the Penal Code.

After two adjournments for reasons stated on the record, the appeal came for hearing on 19th May, 2008. The Appellant appeared in person while the Republic was represented by Mr. Onserio. Mr. Onserio told the court that he was conceding the appeal since the originals of the exhibits which he had requested on the previous hearing day had disappeared without trace. As a result, the Provincial Criminal Investigation Officer could not comply with an order of the court to provide legible copies of the exhibit now missing. He submitted that in the circumstances, it would be proper for the court to order a retrial as this was the only avenue offering an opportunity for a judicial determination on the merits of the case. He further submitted that the main ground for retrial was that the evidence on record was sufficient to form the basis of a conviction, and that the State was not seeking a retrial to seal any loopholes. He relied on PIUS MUKABE MULEWA and KAZUNGU KENGA v. REPUBLIC Criminal Appeal No. 103 of 2001, and submitted that the prosecution will be able to call all the witnesses including the document examiner.

The appellant opposed the application for retrial because of the suffering he had undergone during the trial and the conviction slapped on him. He argued that he had suffered irreparably as the Investigating Officer and the Provincial Criminal Investigation Officer were aware of his condition, and yet they compelled the court to do the case when he was in custody for 18 months. They were aware that he had kidney failure but denied him access to specialist treatment. It would be absurd, he further argued, if the application were allowed considering the sections of the law under which he was prosecuted. He said that he was charged under section 313 which provided for 3 years imprisonment but he was sentenced to 4 years which was a deliberate error. The second count was based on section 347 (c) which does not state the sentence unless it is read with another section of the law. He therefore opposed the application for retrial and urged the court to release him unconditionally so that he may be able to go for medical

treatment.

Mr. Onserio insisted that this matter qualifies for retrial and submitted that the appellant's medical condition was not a ground for acquittal. Furthermore, the Prison authorities were capable of providing adequate medical attention.

I have considered the application by the learned State Counsel that the appellant be retried, and the stiff resistance mounted by the appellant. It is significant that if the exhibits in question had not gone missing, the State would not have conceded the appeal. They only conceded the appeal because they stood no chance of success in the appeal without those exhibits. We are not involved here in any blame game, but disappearance of court documents and records is not purely accidental. It is the culmination of a process which is well planned and executed. At the end of the day, it is calculated to delay if not to derail altogether the course of justice.

In PIUS MUKABE MULEWA & ANOR v. REPUBLIC (supra), the Court of Appeal referred to HAIDERALI LAKHOO ZAVER v. REX (1952) 19 EACA 244 in which Zaver was tried by a District Magistrate's Court at Mengo, Uganda, on a charge of dishonest receipt of stolen goods. He was found guilty, convicted and sentenced to a term of imprisonment. He was granted bail pending appeal, but before the appeal could be heard, the District Magistrate's file could not be traced. On these facts, the High Court was of the clear view that the order which would best serve the interests of justice was to quash the appellants conviction, set aside the term of imprisonment, and order a retrial. The appellant's appeal to the Court of Appeal against that order was dismissed.

In the matter before this court, the appellant applies that his appeal be allowed unconditionally. This could set a precedent that where the Respondent is unable to proceed with criminal appeal because some documents have disappeared, the Appellant will be acquitted. On a wider spectrum, however, should it follow that if and when court records or documents go missing at the appellate stage, and the appeal cannot proceed without those documents, an acquittal must follow? In PIUS MUKABE MULEWA & ANOR v. REPUBLIC (supra) the Court of Appeal answered that question in the negative, remarking that such a course of action "can only be detrimental to the course of justice." I could not agree more. They further stated –

"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 occurred. Who stands to gain from the loss? ... 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 interests 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 he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

The circumstances surrounding this appeal are that all the relevant documents are mercifully intact save for the originals of one exhibit which had several pages to it. Some copies had been made from that exhibit, but some pages therein were totally illegible. That exhibit is very central to the Respondent's case. Without it, the Respondent can't move one step in this appeal. Without attempting to answer the questions posed by the Court of Appeal in PIUS MUKABE MULEWA's case, I think that the interests of justice in this matter demand that this appeal be allowed with an order for retrial.

I accordingly quash the Appellant's conviction, set aside the sentence of imprisonment, and order a retrial on the original charge and counts. I trust that the prosecution will expedite the process to the uttermost.

The Appellant is remanded pending trial.

Dated and delivered at Mombasa this 10th day of June, 2008.

L. NJAGI

JUDGE