REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1251 of 2000

(From original conviction and sentence in Criminal Case No. 7 of 1999 of the Principal Magistrate's Court at Mandera)

MOHAMED ALI AHMED ……..……. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

JUDGMENT

On 25th February, 2000 ***MOHAMED ALI AHMED,*** hereinafter referred to as "**the *Appellant*"** was convicted for the offence of robbery with violence contrary to Section 296 (1) of the Penal Code and sentenced to 10 years imprisonment. The Appellant was aggrieved by both the conviction and sentence and hence lodged the instant Appeal on 2nd October, 2000.

When the Appeal came up for hearing before me on 15th February, 2006, Mrs. Kagiri Learned State Counsel indicated that the State was not ready to respond to the Appeal as it had not been supplied with the proceedings and Judgment of the subordinate Court. Similarly the Appellant pointed out that he too had not been supplied with the record of the Lower Court and sought assistance from this Court. As the matter appeared old, I directed that summons requiring the attendance of the Executive Officer, Resident Magistrate's Court, Mandera do issue so that he could come and explain the whereabouts of the record of the Lower Court.

In the response to the summons one, Nehemiah Lagat, Senior Clerical Officer at the said Court attended Court on 15th March, 2006 and stated that he had perused records kept by the Court and noted that the record had been forwarded to Garissa Law Courts for typing.

He therefore prayed for more time to follow up the matter. The Court acceded to his request and stood over the matter to 3rd May, 2006. On that day, the same officer still prayed for more time to trace the record. Consequently the matter was stood over to 5th June, 2006.

On 5th June, 2006, the said officer informed the Court categorically that despite his diligence search, he had not been able to trace the record of the Lower Court. That being the case, Miss Gateru prayed that the Appeal be set down for hearing nonetheless. The Appeal was then set down for hearing on 2nd October, 2006, the absence of the record of the Lower Court notwithstanding.

On the designated date for the hearing of the Appeal, Mrs. Obuo, Learned State Counsel, who now

appeared for the State submitted that the State was unable to respond to the Appeal in the absence of the proceedings from the Lower Court. However since the record cannot be traced and the Appeal has been pending in Court for long, counsel opted to leave the matter to Court.

As for the Appellant, he submitted that he was not to blame for the non availability of the proceedings from the Subordinate Court. That he was arrested on 7th December, 1998 and charged with simple robbery. He was convicted and sentenced to 10 years imprisonment. He continued to submit that if the record of the Lower Court cannot be traced, he should be released instead of being punished unfairly.

Every effort has been made to trace the original file or record albeit unsuccessfully. With the disappearance of the original record or file what is before this Court is only a petition of Appeal. In the absence of the original record or file, it is unlikely that this Court will be in a position to determine this Appeal. It has been accepted and conceded on behalf of the Public that the original record or file cannot be traced or found. It is therefore impossible to discover the facts of the case from the record of the trial. Faced with such an awkward situation, what should the Appellate Court do? One avenue is to consider a retrial; the other possibility is perhaps reconstruction of the Court file. However the later option would appear to be well nigh impossible. Unlike in Civil cases, where every document filed in Court, a copy thereof is retained and or served on the parties, from which copies a Court file can be reconstructed, that is not the case with Criminal cases. Other than perhaps being supplied with copies of the charge sheet and witness statements nothing else is availed to the accused person and or his Counsel.

Further the case in the subordinate court had been heard and concluded. The trial notes of the learned magistrate as well as judgment are not available thereby exacerbating the possibility of reconstructing the court file. In the premises I do not think that the reconstruction of the Court file is a viable option.

How about a retrial?

In the case of ***OCHIENG VS REPUBLIC (1989) 2 KAR 251,*** the record of the trial was said to be "***gibberish and utterly incomprehensible and so was the Judgment…"***

The court held that a retrial would only be ordered where the trial was either illegal or defective and that the conviction could only be quashed when the merits of the same had been gone into. It would appear therefore that an order for retrial would also not be a viable option in the circumstances of this case. For in the absence of the record it cannot be established that the trial in the Lower Court was illegal or defective or whether a retrial will occasion the Appellant injustice or prejudice or that such an order if given will enable the prosecution to fill up gaps in its evidence at the first trial. Finally if the absence of the record it is impossible for the Court to tell whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result. See generally ***AHMEDALI ALI DHARAMSHI SUMAR VS REPUBLIC (1964) EA 481, FATEHALI MANJI VSREPUBLIC (1966) EA 343, and M'KANAKE VS REPUBLIC (1973) EA 67.***

The above authorities emphasize the principles to be followed where a trial having taken place, it is subsequently on Appeal found to have been illegal or defective and the propriety of a retrial is being considered. Unfortunately this is not the case here. Indeed this option is not open to this Court since the intended Appeal has not been heard and a decision arrived at regarding whether the initial trial was defective. Finally iam reminded of the well established principle "***NEMO BIS VEXARI DEBET PRO EADEM CAUSA"*** which simply translates into:-

"…***That it is a rule of Law than a man shall not be twice vexed for one and the same cause…."***

In the result, there is only one channel left for this Court - to set aside the conviction and sentence imposed by the subordinate Court and discharge the Appellant forthwith and direct that the Appellant be set at liberty unless otherwise held in lawful custody.

Dated at Nairobi this 6th day of November, 2006.

……..

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Kagiri for State

Erick- Court clerk

…….

MAKHANDIA

JUDGE