REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 605 of 2000

(From original conviction and sentence in Criminal Case No. 20 of 2000 of the Principal Magistrate's Court at Mandera)

NISHO NOOR ISAACK ……..……. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

JUDGMENT

The Appellant was on 30th March, 2000, convicted on the charge of rape and was sentenced to 30 years imprisonment. Two months thereafter the Appellant filed the instant Appeal. When the Appeal first came up for hearing on 25th January, 2006 it was noted that the record of proceedings of the trial Court were missing. The Court then issued summons to the Executive Officer, Resident Magistrate's Court, Mandera to avail himself and explain the fate of the record of the Lower Court. On 27th February, 2006 one Nehemiah Lagat, a Senior Clerical Officer, Mandera Law Courts appeared and informed the Court that according to the records kept by them, the original record was transmitted to this Court but was later returned to their station for the typing of the proceedings. He pleaded for more time to trace the proceedings. The Court duly acceded to his request and stood over the matter to 27th March, 2006. On this occasion the same officer appeared and this time informed the Court that from their records, they had discovered that the original file as well as typed proceedings were forwarded to this Court on 12th August, 2003.

He showed the Court the forwarding letter which was addressed to **A. EL KINDY**, the then Deputy Registrar in Charge of this Division. It was Lagat's case therefore that they did not have the original file as well as the typed proceedings.

On the basis of this information the Court directed the Senior Executive Officer in charge of the Criminal Appeals Registry, to try and trace the proceedings of the Lower Court. In the meantime, it was ordered that the Appeal be set down for hearing. When the Appeal again came up for hearing on 8th May, 2006, the Criminal Appeals Registry had not been able to trace the record aforesaid in which event I made an order that the Appeal be set down for hearing and that if by the time the Appeal next came up for hearing and the record of the Lower Court was still missing or unavailable, then the Judge who would have been seized of the Appeal would make appropriate orders.

The Appeal then came up for hearing before me on 2nd October, 2006. Mrs. Obuo, Learned State Counsel stated that the proceedings of the Lower Court had not been traced and since it was now apparent that the record will never be traced Counsel opted to leave the matter to Court for appropriate

orders.

The Appellant in response stated that he was convicted for the offence of rape and sentenced to a jail term of 30 years. That he filed his Appeal in time. That he was suffering and since the proceedings of the Lower Court could not be traced for no fault of his he urged this Court to release him ad recommend his repatriation back to Somalia.

At this stage, it would be pertinent to observe that the delay that had been occasioned in the hearing of the Appeal which amounts to over 6 years cannot be attributed to the Appellant. What should an Appellate court do in situation such as the one we find ourselves in – where there is no record of proceedings and Judgment of the Lower Court? The escape route in my view would be to consider ordering a retrial or reconstruction of the Court file. However the latter option may well nigh be impossible. Both the original and typed proceedings are missing. Would the Appellant be prejudiced if a retrial is ordered. I would not like to say, having regard to the long time that has elapsed since the Appellant was sentenced that the Appellant would not be prejudiced by a retrial.

The Court of Appeal in the case of ***PIUS OLIMA & ANOTHER VS REPUBLIC CRIMINAL APPEAL NO 110 OF 1991*** had occasion to consider the circumstances in which an appellate court would it will order a retrial. It stated:-

"…….***..Our attention was drawn to authorities that deal with principles that should be applied when considering whether a retrial should be ordered or not. These are AHMED SUMAR VS REPUBLIC (1964) EA 481, MANJI VS REPUBLIC (1960) EA 343, MUNYIMBA AND OTHERS VS UGANDA (1969) EA 433 and MERALI AND OTEHRS VS REPUBLIC (1971) EA 221. 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 require 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….."***

The three conditions that must be satisfied are conjunctive and not disjunctive and one of them which must be present but which is absent in this Appeal before me is that the trial in the Lower Court cannot be said to have been defective. As it is not possible to discover the facts of the case because of the absence of the record of proceedings from the Lower Court the Appeal cannot be determined either way.

I wish however to state that I do not agree with the 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. Faced with a similar situation, the Court of Appeal in the case of ***HAIDERALI LAKHOO ZAVER VS REX (1952) 19 EACA 244*** stated:-

"……***Mr. Wilkinson's second point was based upon general consideration of justice and equity. The Learned Judge's of the High Court were faced with a situation which framers of the Code had not foreseen. The first part of the subsection (1) of Section 333 prescribes, as a condition precedent to the determination of the Appeal, that the Appellate Court shall peruse the record. If this is made impossible by the absence of a record, has the High Court any jurisdiction to exercise its powers as an Appellate Court? The Learned Judges thought that the logical course would be to decline to exercise such powers, but that it would be tantamount to the denial of justice. With that view we agree. They then considered whether it would be possible to determine the Appeal on such material as was available or could be made available. The possibility of reconstructing the record was reduced by the fact that the death of the trial Magistrate had intervened. It is perhaps unfortunate that the Judges were not informed, as we have been, that Counsel had taken notes of the evidence on the information they had. The Learned Judges decided that, in the present instance, it would be quite useless to attempt to do so. The Appellant naturally wished them to allow the Appeal but this they refused to do on the ground that simply to quash the conviction because the record was lost would be to act wholly without logic, reason and justice and they considered that the nearest approach to justice in the circumstances would be to order a retrial, after quashing the existing conviction….."***

Although these remarks were made close to 54 years ago, I am of the view that they still represent solid reasoning and common sense. However and as already stated, each case must be determined on its own peculiar facts. The alleged offence herein was committed almost six years ago. The Appellant is a foreigner. I am not so sure that if a retrial was ordered, the witnesses will be found or even the exhibits. It is also necessary in determining whether to order a retrial to look at the evidence tendered during the initial trial so that if the Court is satisfied that if the self same evidence was to be re-tendered, a conviction may result, it can order a retrial. In the instant case that is not possible as the trial record is missing. So that whichever way one looks at the issue, the order for retrial does not commend itself in the circumstances of this case.

In the end then and since the appeal has not been heard on its merits, I cannot make the order quashing the Appellant's conviction. I suppose the proper order to make in the circumstances would be to set aside the conviction of the appellant because in the event of the order quashing the conviction, the Appellant could in future lead to a successful plea of *autre fois* acquit. Accordingly I set aside the conviction and sentences imposed by the Lower Court and discharge the Appellant. There shall be no order of retrial. The Appellant is set free unless otherwise held in lawful custody. However, since he is a foreigner, it is recommended that upon his release he should be repatriated to Somalia.

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

…….

MAKHANDIA

JUDGE

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

Appellant

Mrs. Obuo for State

Erick/Tabitha: Court clerks

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MAKHANDIA

JUDGE