REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Misc Crim Appli 24 of 2006

FRANCIS AMAZIMBI MILIMO…....…….....……APPLICANT

VERSUS

REPUBLIC…….....……...RESPONDENT

ORDER

The Appellant, Francis Amazimbi Milimo was convicted on 6th July,1993 with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He lodged an appeal, Criminal Appeal No. 165 of 1993, about 13 years ago.

On the 26th October, 2006, the Appellant appeared before this court purportedly to prosecute Misc. Application No. 24 of 2006 for leave to file appeal out of time. The Appellant took the opportunity to point out to the court that despite the filing of his appeal in 1993, the same had not been heard and he has been in the dark about his fate ever since. I ordered that the file be placed before the court on 2nd November,2006 to enable the court give discretions. On the said date the court was informed that the file was missing. In view of the missing file I directed the Executive Officer and the Chief Magistrate to give this court a written report within 14 days as to the fate or whereabouts of the trial court file and records.

At the next mention date on 16th November, 2006, the court perused the Executive Officer's Reports. The reports set out all efforts to trace and locate the court file and records at the Nairobi High Court Criminal Registry. One report was by Mr. Tom Mutoro, Executive Officer, High Court, Eldoret and one from Mr. Abedi K. Tallam, the Executive Officer 1, at Eldoret. Both officers asked for more time in order to get a formal response from Nairobi. The matter was put off to 14th December,2006.

On 14th December, 2006 no response had been received. It was felt that the time given was inadequate. The court extended the period to 21st December,2006. On the said date, the court was told that a letter was expected from Nairobi in the course of the day. I adjourned the matter to 22nd December,2006.

On 22nd December,2006, the court was informed that the letter from Nairobi had not reached Eldoret Courts, however, it was clear that the Appeal record had not been traced.

In view of the foregoing, I felt that this court as the High Court of Kenya and the ultimate custodian of the Constitution of Kenya had to make a firm decision in the matter.

Section 77 of the Constitution of Kenya provides for the protection of the Law for the individual. Section 77 (1) stipulates:-

"77(1) if a person is charged with a criminal offence, then unless, the charge is withdrawn; the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

We can say nothing about the trial in which the Appellant was convicted, i.e. Eldoret Chief Magistrate's court Criminal Case No.3070 of 1992. It is deemed that the said case was heard and determined in accordance with the requirements of speedy trial. It is my view, that the aforesaid provisions S. 77(1) not only applies to the trial of an accused person at this first instance but also applies to the hearing of any appeal he may have filed after conviction.

The Appellant lodged an appeal in 1993. This is his right under the Law. It is my view that in light of the Rights and Freedoms of the individual as enshrined in the Constitution of Kenya, protection of the Law implies that the right of appeal is indeed a fundamental right. It is provided by the Criminal Procedure Code. Since it touches on questions of liberty and other rights associated with it, the right of appeal is a Constitutional right. It cannot be taken away whatsoever.

Once a convicted party lodges an appeal, then strictly, the presumption of innocence until proven guilty, resumes in the eyes of the law, as long as the appeal is pending. This is a matter of principle of the law albeit the existence of conviction and sentence.

As a result of the foregoing, an appellant just like an accused at the trial stage has a right to a fair hearing within a reasonable time. In this case, the appeal has not been heard for 13 years. During the pendency of the appeal the file has gone missing. It is not a surprise that a file which has been pending for so long "disappears" totally. What should we expect?

An appeal cannot pend forever. Had the court file been available this is one case, I would have heard on the spot and made a decision within a day or two. This court if necessary would not have had a break or gone to sleep. This is because the right of appeal and exercise of it, brings in the possibility that this appellant could be found to be innocent after all. So, imagine if the appeal were to be in his favour if at all the file was to be traced, then this means that an innocent man was held for 13 years for his appeal to be heard. That would be a tragedy and a calamity.

In this case, the situation is worse, the Appellant's file has gone missing and there is no chance for the appeal to be heard whatsoever without the court file and record. The Appeal cannot be heard. The Respondents also have no records in respect of this appeal and they could not be of any assistance.

The legal system and administration of Justice in Kenya therefore faces a dilemma of substantial proportions in this matter. On one hand the Appellant was convicted and faced the death penalty on the other hand his Appeal can never be heard. He can neither be executed in satisfaction of the judgment neither can he be released before determination of his appeal and acquittal, if successful.

During deliberations in this matter and after appreciation of the monumental task before the court, Counsel for the state, inquired whether this is a matter which could be appropriate for presidential pardon or clemency, since there is no provision in the Criminal Procedure Code to deal with the present situation. Upon consideration I am of the view that this case cannot be for presidential pardon or Clemency. First or foremost, the President would have no jurisdiction, power or authority to pardon a convict who is convicted of a capital offence. Secondly, the Appellant does not need to beg for any pardon since he has an appeal pending. It is a right which he must exercise. It cannot be taken away. He is not obliged to compromise which for all we knew his appeal could have been successful. One does not beg when he is innocent and the Legal system works.

I believe that the legal system in Kenya must work and the Rule of Law must be protected, and enhanced. The only way to do so is to be steadfast in the Law and not to flinch from making hard decisions in the upholding of the provisions of the Constitution of Kenya which protect the Fundamental rights and freedoms of the individual. This must be done at any costs.

It is my view that the inefficiencies, red tape and procedures in our legal system have led to the infringement of the appellant's rights to a fair hearing within a reasonable time. As a result his right to be heard has been denied and possibly his liberty. This is not a simple case of delay due to the bottlenecks and problems usually faced in our less than perfect legal and administration of justice system. This is a case of an atrocious miscarriage of justice.

Since there is no solution through the relevant statutes this court as the High Court of Kenya will not allow the further unjust incarceration of the Appellant. I do hereby hold that the confinement of the Appellant in the circumstances amounts to torture and inhuman and degrading punishment. One can imagine what anxiety uncertainty and loss that has befallen him for the last, at least one decade.

The Appellant must know that while the legal system and the institutions in charge of the administration of justice may have let him down, the Constitution of Kenya which is alive and in continued force shall not let him down. It is the one thing that has sustained and continues to carry this, our country. That's why it is so dear to us all as we endeavor to improve upon it and perfect it.

Now, in exercise of this court's original and inherent jurisdiction under the provisions of section 84 of the Constitution which are for the enforcement of the protective provisions i.e. protection of the Fundamental rights and freedoms of the individual, I do hereby make the following decision:-

The said section envisages a complaint or an application on the part of the affected person or by another on his behalf. However, in this case there is no formal and express application for protection and redress. But, we just have to consider how the appellant's woes got the court's attention. He ingenuously applied for leave to file an appeal out of time but in so doing brought up the matter. He used the application in order to appear before the court. He otherwise did not have any other way. He had no file. The Appellant had virtually been forgotten by our judicial system.

In the premises, I do hereby deem that the application which brought the Appellant before me was a cry in the night by a forgotten and broken soul. I shall treat it as an application under section 84 (1) of the Constitution for redress from this court.

Having considered his plea or application for his appeal to be heard expeditiously and in the absence of the court file and his records, I do hereby declare that the Appellant's incarceration and imprisonment today and in the circumstances is illegal, unlawful and unconstitutional.

This court has no other option but to have the Appellant released from his illegal confinement.

As a result, the Appellant's conviction is hereby quashed and the sentence set aside. The Appellant shall be and is hereby discharged. He shall be released forthwith unless otherwise lawfully held.

Francis, welcome back.. You are free to go home to your family and loved ones. Have a Merry Christmas and a Happy New Year!

Dated and delivered on this 22nd day of December, 2006

M. K. IBRAHIM

JUDGE

FURTHER ORDER

The orders be typed and certified and supplied to the Appellant and the Respondent.

M.K. IBRAHIM

JUDGE.