



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 917 OF 1998**  
**(From original conviction(s) and Sentence(s) in Criminal case No. 2173 of 1997 of the  
Principal Magistrate's Court at Kibera (Ms. Nzioka– S.R.M.)**

**SANINGO JEREMIAH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant in this case **SANINGO JEREMIAH**, was convicted by the Kibera Senior Resident Magistrate's Court on 30th July 1998 of the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was sentenced to death as mandatorily provided by the law. Being dissatisfied with the conviction and sentence he lodged his Appeal to this Court on 5th August 1998.

We have the Petition of Appeal which he lodged and which is stamped received by the High Court Registry on 5th August 1998. No proceedings were annexed to the said petition. Paragraph (4) of his petition states as follows: -

***“THAT as I cannot re -call all what transpired in the lower court during the trial, I kindly beg leave to be issued with a copy of the trial proceedings and also be present during the hearing of this Appeal.”***

We have confirmed from the Appeal file that the proceedings from the trial court have never been received. It is quite apparent that the Appellant prepared his Petition of Appeal out of memory of what had transpired in court. There are numerous letters from the Appellant to the High Court Criminal Registry seeking to have his Appeal set down for hearing. The Registry does not seem to have replied to his letters and since there were no proceedings from the lower court, it could not set the case for hearing either. The Registry did however write letters to Kibera Court asking for the proceedings and judgment of the case. It was by order (Administratively) of the judges in Criminal Appeals that this case, among several others with a similar background were given hearing dates.

On the first date set for hearing, no proceedings had been received from Kibera Law Courts. The Senior Executive Officer, Kibera was then summoned to court on 28th September 2004, to produce the trial court proceedings being Kibera CC No. 2173 of 1997. The Senior Executive Officer, Mrs. Karanja, came with an extract of the Register showing that no such case with the Appellant's name existed in their records and that no such person was entered in their Register of cases between 1997 and 1999.

The Appellant in his response to Mrs. Karanja's information said that he was tried by one **MRS. NZIOKA**, SRM Kibera in the year 1997 in Court No. 3. The court directed that the warrant first committing the Appellant to prison after his conviction be produced. Even though the court's attention

was not drawn to that fact on the 5th October 2004 when the case was mentioned again, we have confirmed from the police that the committal warrant was produced as ordered. That warrant confirms that the Appellant was convicted by **MRS. NZIOKA**, SRM on 30th July 1998 under Kibera Senior Principal Magistrate's Court Criminal Case No. 2173/1997. The proceedings of that case were never produced to court and therefore, the Appellant on 7th October 2004, was asked to make his submission in his Appeal without them.

In his brief submission, the Appellant informed the court that he lodged his Appeal in August 1998 and at the same time asked for the proceedings of his case. He said he had not received it up to that date. He submitted that it was not his fault that his proceedings were never found. He also said he could not recall anything in his trial.

**MISS GATERU** learned counsel for the State left everything to court.

This is unfortunately not an unusual occurrence in the courts. It did happen before. There is one case that found its way to the Court of Appeal – **JACKSON MACHARIA MWAURA Alias KAMANDE and JAMES THEMBA MUIRURI vs. REPUBLIC C.A. No. 58 of 1989**. In that case, the Court of Appeal was not furnished with a certified Record of Appeal. The record in the cited case could not be certified because the original record could not be found.

In the case at hand, we do not have any record at all, from the trial court, leave alone an uncertified copy. What can this court do in the circumstances without the record of the proceedings and judgment of the trial court; it means that this court, as the first Appellate court, has nothing to go by in determining the Appellant's fate. Should the court order a retrial? That was an issue the Court of Appeal dealt with in the case of **MWAURA alias KAMANDE & ANOTHER vs. REPUBLIC (Supra)**. Quoting from its earlier decision in the case of **PIUS LIMA & ANOTHER vs. REPUBLIC C.A. No. 110 of 1991**, it observed as follows: -

*“Our attention was drawn to authority that deal with the 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 1966 EA 343; MUYIMBA & OTHERS vs. UGANDA 1969 EA 433 and MERALI & OTHERS vs. REPUBLIC 1971 EA 221 . The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interest of justice so 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.”*

From the **PIUS** case (Supra) the three conditions that must exist before an order for retrial can be made are as follows: -

- 1) **The original trial must have been defective.**
- 2) **Interest of justice require it.**
- 3) **No prejudice is caused to the accused.**

A fourth one is not a condition but a consideration which is that whether an order for retrial should be made will depend on the particular facts and circumstances of each case.

The issue to consider is whether a retrial can be ordered if only part of these conditions are made. While answering that question **AKIWUMI J.A., in the MWAURA alias KAMANDE case** (Supra) observed:

*“The three conditions that must be satisfied are conjunctive and not disjunctive...”*

The other two JJA, in that case **M. COCKAR** and **M. MULI** agreed with **AKIWUMI J.A**, and their holding is therefore binding on this court being a Higher Court to this one. The three conditions should all be met before the order can be made.

In the instant case, we cannot say that the original trial was defective. The order for retrial is therefore not open to this court to make in this case.

Drawing from the same MWAURA alias KAMANDE case (Supra) AKIWUMI JA, concluded, a conclusion that was accepted by his two brothers JJA, thus: -

*“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 the Application before us is that the trial in the superior Court cannot be said to have been defective. For my part, it being impossible to discover the facts of the case because of the absence of a certified record of appeal, the appeal cannot be determined. But since the appeal had not been heard on its merit and the issue now before us is not for the quashing of the conviction of the Appellants, the proper order that should be made is to set aside the conviction of the Appellants by the superior court rather than to quash it which could lead to a successful plea of autre fois acquit , and to discharge the Appellants and set them free .”*

In this case, this court cannot find that the original trial was defective since, because of the absence of the entire record of the trial court we cannot discover the facts. It has not been suggested that the Appellant was privy to the loss of the trial court record. He has been in custody all along, efforts were made even by this court to trace the trial court records but it bore no fruit. In the circumstances of this case we find that the right order to make is to set aside the judgment of the trial court, discharge the Appellant and set him free. We so order. The judgment of the trial court is set aside and the Appellant discharged. We order that he be set free unless he is otherwise lawfully held.

**Dated at Nairobi this 21st day of October 2004.**

**LESIIT**

**JUDGE**

**OCHIENG’**

**Ag. JUDGE**

**Read, signed and delivered in the presence of;**

**Appellant in person**

**No appearance for state**

**LESIIT**

**JUDGE**

**OCHIENG’**

**Ag. JUDGE**