Mbilo v Republic (Criminal Appeal 266 of 2017)
[2025] KEHC 12560 (KLR) (11 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12560 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL 266 OF 2017

TM MATHEKA, J

SEPTEMBER 11, 2025

BETWEEN

JAMES KILAVI MBILO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was convicted for defilement and sentenced to life imprisonment in Makueni PMCR 654 of 2011. He appealed at the Machakos High Court vide HCCRA 75 of 2012 whereupon a re-trial was ordered. He was re-tried at Makueni Law Courts in PMCR 812 of 2014 whereupon he was convicted and sentenced to life imprisonment. He moved the Machakos High Court once again for leave to appeal out of time vide Misc Criminal Application No. 189 of 2015 which was allowed and Appeal number 31 of 2016 subsequently filed. The Appeal was eventually transferred to this court, after its establishment in 2017, and assigned a new number to wit Makueni HCCRA 266 of 2017.

2. The appeal has never proceeded due to unavailability of Makueni PMCR 812 of 2014 (herein after 'the re-trial file').

3. Directions were given for parties to submit on the way forward. the DPP complied and filed its submissions.

Submissions by the Prosecution

SUBDIVISION - History of the matter

4. The record shows that the unavailability of the re-trial file has been the subject of mentions by this court since 14/11/2018 as follows;

   14/11/2018

The Deputy Registrar (DR)-Hon. Ruguru directed that the lower court file should be availed.

23/01/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

20/11/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

27/03/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

19/04/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

12/06/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

23/09/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

09/10/2019

The DR (Hon. Otieno) noted that there was a possibility of the lower court file being in Machakos. She undertook to contact the DR-Machakos.

23/10/2019

The DR (Hon. Otieno) indicated that the lower court file was yet to be availed.

04/11/2019

The DR (Hon. Otieno) indicated that there was no response from the DR-Machakos.

20/11/2019

The DR (Hon. Otieno) indicated that the file was evidently missing. She forwarded the file to the Presiding Judge (PJ) for directions.

27/11/2019

The DR (Hon. Otieno) indicated that the lower court file was still missing and noted that the available file was a skeleton for Criminal file No. 654 of 2011 which was the original file before a re-trial was done. The matter was placed before the judge for directions.

08/10/2020

The PJ (Hon. Ongudi J) indicated that;

"The original record has not yet been traced from Machakos High Court. The trial court has availed the skeleton file with certified proceedings. That is what shall be used to avoid further delays. Appeal is hereby admitted for hearing at Makueni before a single Judge."

5. Following 'admission' of the appeal, the matter was mentioned twice before the DR to confirm service of the Record of Appeal. On 19/06/2020, the PJ (Hon. Ongudi J) directed that the appeal be canvassed through written submission and the matter was returned to the DR to confirm compliance. Subsequently, the matter was mentioned before the DR (Hon. Otieno) for five times and before the PJ

(Hon. Dulu J) for four times until 23/06/2021 when the Appellant alerted the court that the Record of Appeal related to the original file instead of the re-trial file.

6. On 07/10/2021, the PJ (Hon. Dulu J) indicated that he would proceed with the appeal using the skeleton file but on the subsequent mention of 01/12/2021, it was once again brought to the attention of the court that the Record of Appeal related to the original file. Subsequently, the matter was mentioned approximately 24 times and upto this date, the re-trial file is yet to be traced.

7. The state, through prosecution counsel Victor Kazungu, submitted that in a matter of lost records, every case should be dealt with based on the peculiar facts of the case and that whatever decision the court makes, the interest of justice has to be the overriding persuasion. It was submitted that the following issues should be considered when dealing with a matter of this nature.

Certification of loss

8. It was submitted that an appellate court has to certify itself through the court administrator that indeed the records are missing and efforts have been made to retrieve them without success in which case, a certificate of loss signed by the court administrator is filed. Reliance was placed on James Onyango Nyakoiro v Republic [2020] KEHC 7312 (KLR) where the court stated;

> " When an appellate court is faced with a situation such as this where the lower court file is missing and proceedings cannot be reconstructed, the first step is to certify that the file is, indeed, missing and cannot be located. A certificate of loss signed by the Court Administrator suffices for this."

Interrogation of whether the Appellant was involved in the loss

9. It was submitted that an Appellant should not benefit from loss of court records and it is therefore critical for a court of law to interrogate the loss and determine whether the Appellant was involved. Reliance was placed on Onyango Nyakoiro (supra) where the court stated;

> " Once certified lost, in determining the appropriate orders to make, the court must determine whether there is any evidence or indications that the appellant was involved in the loss of the file. If there is evidence of such involvement or collusion, the court declines to make any orders in favor of the appellant. The legal principle in application there is nullus commondum capere protest de injuria sua propria-no one should be allowed to profit from his own wrong. Thus, our courts have uniformly held that if it is shown that an appellant colluded in the disappearance of the file, he will not benefit from any favorable orders of the court."

10. Further reliance was placed on Kennedy Mugendi Njagi v Republic [2017] KEHC 225 (KLR) where the court stated;

> " In a case like this one where the court file has gone missing without a trace, the court must interrogate the occurrence of the loss as to whether someone is likely to benefit from it. In this case, the appellant is likely to benefit from the loss and also from an order of acquittal if it has to be made by this court. The victim who was a seven-year-old girl at the time of the trial would be the loser for she would be left 'home and dry' without justice."

The need to balance between the rights of the victim and the Appellant

11. It was submitted that both the Appellant and victim are entitled to enjoy certain constitutional rights and it is therefore imperative to consider the rights of both parties in determining how to proceed with an appeal where court records are missing. Reliance was placed on Kennedy Mugendi Njagi (supra) where the court stated;

> "It would not be in the interests of justice to solely consider the appellant's rights for expeditious disposal of the appeal or for acquittal and ignore the rights of the victim."

12. Further reliance was placed on Danson Maina Muchoki v Republic [2013] KEHC 6961 (KLR) where the court stated;

> "In determining the most appropriate action to take, courts must seek to uphold the overall interests of justice. It therefore cannot follow automatically that the missing of court records should result in an acquittal. If we took this course as boldly suggested by the learned counsel for the applicant, it would be detrimental to justice and we dare add, create grounds for people to collude to defeat the ends of justice by making files disappear..."

Retrial is an option

13. It was submitted that where an appeal is impossible due to missing court records, the appellate court may order a retrial. Reliance was placed on the case of Kennedy Mugendi Njagi above where the court stated;

> "The Appellant has been in prison for five years now and was sentenced to serve life imprisonment. I am fortified by the fact that the investigation file is available and that the witnesses are traceable. I am convinced that a retrial would therefore serve the interests of justice for both parties. For the foregoing reasons, I hereby quash the conviction and sentence in Runyenjes Criminal case No. 560 of 2011 and hereby order retrial before a different magistrate at Runyenjes court to be concluded within three months."

14. Further reliance was placed on the case of James Onyango Nyakoiro (supra) where the court stated;

> "In the present case, the appellant was convicted of defiling a young child of less than 12 years old. Given this and noting the potential impact of the crime to the individual victim, one convicted of the offence of defiling a child of tender years should as a matter of public interest only be acquitted in the clearest of cases where it is established that a retrial is not possible. The prosecution and the victim of the crime should be given every opportunity to mount another trial.
>
> ...It seems eminently clear that a re-trial is the order that is more in keeping with the overall interests of justice in this case. If it turns out that the prosecution does not have the necessary evidence or witnesses in the court below, then the prosecution can seek a withdrawal of the case"

Retrial only possible if the investigation file and witnesses are available

15. It was submitted that in the absence of the investigation file and witnesses, it is futile for an appellate court to order for a retrial. Reliance was placed on Danson Maina Muchoki where the court stated;

> " In this case, the learned counsel for the state while urging us to consider ordering a retrial did not pursue this line of submissions further even to suggest the possibility of availability of witnesses. Furthermore, the CID file which was the basis of the prosecution is not available. A long period has also elapsed since the applicant was convicted and sentenced. Considered in totality, the circumstances of this case render a retrial not feasible."

Setting aside of a conviction is an option

16. It was submitted that where the court is satisfied that the Appellant has not been involved in the loss of the court records, the court may set aside the conviction. Reliance was placed on the case of Danson Maina Muchoki (supra) where the court stated;

> " This Court has no evidence as to who is responsible for the loss of the records after a thorough investigation into the said loss. Ultimately, the duty rests on the Court to ensure security and integrity of Court documents. Without the record of appeal, the Applicant is not able to prosecute his appeal. The Court cannot prescribe a uniform finding in matters involving missing records since the circumstances of each case may vary widely.
>
> Each case must be treated according to the peculiar circumstances. In the very unique circumstances, of this case the decision that best commends itself to us is to set the applicant free. However, we hasten to add that this is not an acquittal or a discharge since the appeal has not been determined on merit. We are therefore obliged to set conditions for the said release. Accordingly, the applicant shall only be set at liberty if he executes a personal Bond of Kshs.500,000/=. Secondly, he must get two (2) sureties of Kshs.500,000/= each.
>
> The Bond and the sureties shall commit the signatories to ensuring that the applicant will make himself available to the court should he be required at a future date, whether for a retrial, the appeal or other lawful reason as may be specified by the court."

17. In conclusion, it was submitted that this court has discretion to order retrial, set aside the Appellant's conviction or order otherwise. The court was urged to give the prosecution more time to retrieve the investigation file and locate its witnesses. Further, it was submitted that if this court sets aside the conviction or sets the Appellant at liberty, surety should be provided as was done in the case of Danson Maina Muchoki (supra).

Analysis & Determination

18. It is evident that the re-trial court file Makueni Criminal Case No 812 of 2014 has been missing since the appeal was lodged. The record shows a myriad of correspondences involving the Deputy Registrars of Makueni and Machakos High Courts as well as the Court Administrator-Makueni concerning the missing file.

19. A letter dated 25/01/2022 from the Court Administrator-Makueni to the DR-Makueni states that;

> " We have scrutinized the registry to locate an extract for sending the file to Machakos without success. We have gone to the extent of attempting to locate the original record by re-

arranging the archives, which currently has ample space but our efforts have not borne fruits. As a result, we have not succeeded to avail the original record."

20. Another letter dated 28/06/2022 from the DR-Machakos to the DR-Makueni states;

> "In response to your letter dated 23/06/2022, as per our records, Machakos HCCRA 31 of 2016 was ordered transferred to Makueni High Court by Hon. Justice D.K Kemei on 14/3/2017. We have perused our archives and the said lower court file no 812 of 2014 cannot be traced from our end."

21. From the above correspondence it appears as though the re-trial file was never taken to Machakos as there is no forwarding letter from Makueni High Court or acknowledgement of receipt by Machakos High Court. Be that as it may, the correspondences are a confirmation that the re-trial file is missing without a trace.

22. It is trite that an acquittal does not automatically follow when court records cannot be traced. In Pius Mukabe Mulewa & Another v Republic, Criminal Appeal No. 103 of 2001(UR), the Court of Appeal observed that;

> "In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality if he is? In the final analysis the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person like the appellant has lost the benefit of the presumption of innocence given to him by section 72 (2) (a) of *the Constitution*, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of 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."

23. Some courts have dealt with the issue of missing records by ordering a re-trial for instance, in Kennedy Mugendi Njagi the court stated;

> "The Appellant has been in prison for five years now and was sentenced to serve life imprisonment. I am fortified by the fact that the investigation file is available and that the witnesses are traceable. I am convinced that a retrial would therefore serve the interests of justice for both parties. For the foregoing reasons, I hereby quash the conviction and sentence in Runyenjes Criminal case No. 560 of 2011 and hereby order retrial before a different magistrate at Runyenjes court to be concluded within three months."

24. There is also James Onyango Nyakoiro v R where the court stated;

> "In the present case, the appellant was convicted of defiling a young child of less than 12 years old. Given this and noting the potential impact of the crime to the individual victim, one convicted of the offence of defiling a child of tender years should as a matter of public interest only be acquitted in the clearest of cases where it is established that a retrial is not possible. The prosecution and the victim of the crime should be given every opportunity to mount another trial.

> ...It seems eminently clear that a re-trial is the order that is more in keeping with the overall interests of justice in this case. If it turns out that the prosecution does not have the necessary evidence or witnesses in the court below, then the prosecution can seek a withdrawal of the case"

25. In our case, I have not found anything on record to suggest that the Appellant was involved in disappearance of the file and I am of the view that if the Appellant ever harbored such an intention, then he had an opportunity to execute it in the course of the first appeal but he did not do so.

26. The issue then is , in the circumstances of this case, what is the best course of action in the interests of justice?

27. The Appellant was convicted on 27th October 2015 and the appeal was filed in 2016. It has been approximately ten years since the appeal was lodged and it has never taken off due to the missing file. Article 51(1) of *the Constitution* provides that; 'a person who is detained, held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.' The Appellant has therefore retained the right under Article 50 (1) (e) to; 'to have the trial begin and conclude without unreasonable delay.' Considering all the efforts made to trace the file since 2017, it is unlikely that the appeal will begin and conclude without unreasonable delay.

28. Further, there is no indication on record as to the availability of the investigation file and witnesses. A long period of time has also passed since the Appellant was convicted and sentenced hence my view that an order for re-trial is not feasible at this juncture as it may be the beginning of another delayed trial. I am also of the view that subjecting the Appellant to a third trial is prejudicial and contravenes the right to a fair hearing under Article 50 of *the Constitution* of Kenya.

29. In the case of Danson Maina Muchoki a two-judge bench of the High Court dealt with the issue as follows;

> This Court has no evidence as to who is responsible for the loss of the records after a thorough investigation into the said loss. Ultimately, the duty rests on the Court to ensure security and integrity of Court documents. Without the record of appeal, the Applicant is not able to prosecute his appeal. The Court cannot prescribe a uniform finding in matters involving missing records since the circumstances of each case may vary widely.
>
> Each case must be treated according to the peculiar circumstances. In the very unique circumstances, of this case the decision that best commends itself to us is to set the applicant free. However, we hasten to add that this is not an acquittal or a discharge since the appeal has not been determined on merit. We are therefore obliged to set conditions for the said release. Accordingly, the applicant shall only be set at liberty if he executes a personal Bond of Kshs.500,000/=. Secondly, he must get two (2) sureties of Kshs.500,000/= each."

30. To reiterate , the appellant was first tried in Makueni PMCR 654 of 2011. On 7th June 2012, he was found guilty of defilement c/s 8(1) as read with s. 8(2) of the *Sexual Offences Act* convicted and sentenced to life imprisonment. He lodged an appeal in Machakos HCCRA 75 of 2012 the result of which was an order for re-trial was ordered. This proceeded in Makueni PMCR 812 of 2014.A judgment was delivered on 27th October 2015 where he was found guilty of incest c/s 20(1) of the *sexual Offences Act*, no. 3 of 2006 and sentenced to life imprisonment.

31. The appellant was found guilty by two differently constituted courts and sentenced to the mandatory life sentence.

32. He has a right of appeal but this fact says something.

33. However , there is no allegation /evidence that the appellant may have had anything to do with the loss of the lower court file. It appears to have disappeared in the process of the transfer of the file to Makueni.

34. The victim in this case was 5 years' old at the material time. That child is now 19 years old. The appellant has been in custody since 2011.

35. The use and reliance on physical hard copy files always presented the risk of the loss of the file either by design or inadvertence. With e- filing, and digitization of records , and the recording of proceedings , it is now difficult for a file to be completely lost. The Courts, the DPP and the Investigation agencies are all increasingly getting digital. 'file imepotea will be a memory of the distant past.

36. In the circumstances and considering the effluxion of time, an order for retrial at the moment would not work as the DPP does not have their file nor have they demonstrated that it will be available in the near future. In these circumstances , an acquittal would be not be an appropriate order.

37. Following the authorities cited herein above, it is my view that the avenue available is for the appellant is a conditional release.

38. The appellant will be set at liberty on condition that he signs a personal bond of Ksh 500,000 and avails two Sureties each of Ksh 500,000 for the purpose of ensuring that the appellant will make himself available to the court should he be required at a future date, whether for a retrial, the appeal or other lawful reason as may be specified by the court.

39. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY ON 11TH SEPTEMBER 2025.

MUMBUA T MATHEKA

JUDGE

CA Mwanatumu

Appellant Present virtually @Kamiti Maximum Prison

Kazungu for state