



**Mutuvi v Republic (Criminal Appeal E109 of 2019)
[2025] KEHC 12533 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E109 OF 2019
TM MATHEKA, J
SEPTEMBER 11, 2025**

BETWEEN

NZOKA MUTUVI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was convicted for defilement contrary to section 8(1) as read with s.(2) of the [Sexual Offences Act](#) on 27/10/2015 and sentenced to serve life imprisonment. He filed a miscellaneous criminal application at Machakos High Court which was subsequently transferred to this court. An appeal was subsequently filed but it has never proceeded as the lower court file has been missing and efforts to trace it have been futile.

History of the matter

2. The record shows that the unavailability of the trial court file has been the subject of mentions by this court since 25/09/2019 as follows;

25/09/2019

The Deputy Registrar (DR)- Hon. Otieno, indicated that the lower court file was yet to be availed and ordered that the matter be forwarded to the Executive Officer-Makueni.

23/10/2019

The DR (Hon. Otieno) indicated that the court file had not been availed.

20/11/2019

The DR (Hon. Otieno) indicated that the file is missing and cannot be traced.

27/11/2019



The DR (Hon. Otieno) indicated that the lower court file was unavailable and forwarded the file to the Presiding Judge (PJ).

30/04/2020

The PJ (Ong'udi J) directed the DR and Head of Station to do a comprehensive report showing the movement of the lower court file and the efforts made to trace it.

30/06/2020

The PJ (Ong'udi J) indicated that; “ From the write up from the DR, it is clear that the file Makueni Cr Case No 427 of 2013 was forwarded to Machakos High Court for purposes of appeal. What was forwarded here as Machakos High Court Misc. Criminal Application No. 190 of 2015 did not contain the said lower court file. Searches have been conducted at Machakos High Court Registry and Makueni Lower Court Registries to no avail....a final decision will be made after we are sure there is completely no trace of the record. I therefore call upon the ODPP and the Appellant to search their records and avail to this court a copy of the judgment in Makueni SPMs Cr Case No 427/13 which was delivered on 27/10/2015.”

30/11/2020

The PJ (Dulu J) gave the ODPP more time to avail the trial court judgment.

25/02/2021

The prosecution (Ms. Gakumu) indicated that they do not have a copy of the judgment and sought directions from court.

The PJ (Dulu J) gave a further mention to consider whether the appeal should be transmitted to Machakos High court.

22/04/2021

A further mention date was given to confirm if trial court file was found.

03/06/2021

Further mention

01/07/2021

Further mention

22/09/2021

The PJ (Dulu J) directed the DR to trace the file within 11 days and indicated that; “ the file is said to have been sent to Makueni High Court from Machakos on 16/03/2017.”

02/11/2021

The DR was directed to discuss, with the PJ, the efforts made to trace the file within 14 days.

29/11/2021

The DR was directed to discuss, with the PJ, the issue of the missing file within 7 days.

25/01/2022

The prosecution (Mr. Tanui) proposed that the police file be traced and a re-trial be held.

A further mention was given for the prosecution to inform the court whether they had traced the police file.



10/03/2022

The prosecution (Mr. Tanui) stated that he had written to the OCS of Kalawa Police station who responded that they were unable to trace the police file as it is an old matter.

The DR was directed to avail the trial court file within 15 days.

10/03/2022

The DR (Hon. Otieno) indicated that;

“ I hereby certify that efforts to trace the file Makueni Cr 427/2013 have failed to bear any fruit. The E.O’s letter dated 08/11/2022 is attached as explanation. The trial court file is untraceable. The DR’s report earlier made to the judge is also....

18/05/2022

The PJ (Dulu J) indicated that; “As the file has not been traced, the matter will be mentioned next term. The DR to continue searching for the file.”

18/10/2022

The PJ (Dulu J) indicated that there was a similar matter of a missing court file and directed the DR to still look for the trial court file.

19/10/2022

Further mention given and DR directed to avail the trial court file.

20/12/2022

Court was away on official duties.

21/02/2023

Further mention for directions given.

22/03/2023

The PJ (Mumbua T Matheka J) directed the Court Administrator and DR to pursue the tracing of the file and produce correspondence on the matter.

19/04/2023

The PJ (Mumbua T Matheka J) Indicated that there was no action on the orders of 22/03/2023 and directed that the matter be placed before the DR for compliance.

19/04/2023

The DR (Hon. E. Kemei) gave a further mention for direction to understand the issues and give a way forward.

27/04/2023

The DR (Hon. E. Kemei) indicated that she was in the process of compiling correspondence together with the E.O.

03/08/2023

Court not sitting

17/08/2023



The DR (Hon. E. Kemei) indicated that the lower court file is still missing.

14/09/2023

The DR (Hon. E. Kemei) indicated that the lower court file is yet to be traced.

26/10/2023

The DR (Hon. E. Kemei) gave a further mention.

09/11/2023

The DR (Hon. E. Kemei) gave a further mention.

07/12/2023

The DR (Hon. E. Kemei) gave a further mention.

29/02/2024

The DR (Hon. E. Kemei) indicated that the lower court file is yet to be traced.

25/04/2024

The DR (Hon. F. Ng'etich) indicated that the lower court file has been missing.

16/04/2024

The DR (Hon. F. Ng'etich) indicated that the lower court file had not been availed.

30/05/2024

The DR (Hon. F. Ng'etich) stated: "I note the age of this appeal. The matter has been mentioned severally for lower court file. Summons are hereby issued to court administrator to come explain why he has not availed the file.

06/06/2024

The DR (Hon. F. Ng'etich) indicated that the lower court file had not been availed.

13/06/2024

The DR (Hon. F. Ng'etich) extended the summons.

18/07/2024

The DR (Hon. F. Ng'etich) extended the summons.

08/08/2024

The DR (Hon. F. Ng'etich) extended the summons.

20/08/2024

The DR (Hon. F. Ng'etich) stated: "I note that the summons were not extracted. Summons be extracted & served upon the Court Administrator as issued.

17/10/2024

The Court Administrator was present and he stated that; "letter was done on 29/7/2021 by the DR explaining that on 2017, this court stated file was a Machakos matter which was transferred but it didn't have Makueni file. We are unable to trace the trial court file."

The DR (Hon. F. Ng'etich) noted the sentiments and placed the file before the judge for directions.



05/03/2025

The prosecution (Mr. Kazungu) informed court that they had asked Kalawa police station to avail the police file.

12/03/2025

The prosecution (Mr. Kazungu) informed court that they had written a reminder to Kalawa police station.

03/04/2025

The prosecution (Mr. Kazungu) informed court that they had filed submissions and were yet to receive the summons for Kalawa Police station.

3. The PJ (Mumbua T Matheka J) directed that the submissions be filed and served upon the Appellant
4. It is in the backdrop of that record that the court directed the parties to address the court on what ought to happen when the court record has disappeared. The e DPP complied and filed its submissions, appellant filed none.

Submissions by the Prosecution

5. 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.
6. 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

7. 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

8. 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 commoedum 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.”

9. 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

10. 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.”

11. 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

12. 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.”

13. 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

14. 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

15. 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.”

16. 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

17. It is evident that the trial court file Makueni Cr Case No 427 of 2013 has been missing since the appeal was transferred from Machakos High court to this court. The record shows that all the Judges and Deputy Registrars who have handled the matter have made efforts to trace it without success. Additionally, there is a myriad of correspondences on record involving the Deputy Registrars of Makueni and Machakos High Courts as well as the Court Administrator-Makueni concerning the missing file.
18. The record shows that after conviction by the Makueni Subordinate Court on 27/10/2015, the Appellant applied for leave to appeal out of time on 21/12/2015 vide Machakos High Court Misc. Criminal Application No. 190 of 2015. Consequently, a letter dated 11/07/2016 was written by the DR-Machakos High Court to the Principal Magistrate of Makueni Law Court asking for the trial court file. Another letter dated 18/08/2021 written by the DR-Machakos to the DR-Makueni indicates that the trial court file No. 427 of 2013 was transferred to Makueni High Court by Hon. Justice D. Kemei on 16/03/2017. This is an acknowledgement that indeed the trial court file had been taken to Machakos High Court.
19. Upon transfer to Makueni High Court, the file was assigned a new number to wit; Makueni High Court Misc. Criminal Application No. 113 of 2017. The leave to appeal out of time was granted and an appeal was subsequently filed i.e., Makueni HCCRA No. 109 of 2020.
20. A letter dated 08/11/2021 from the Court Administrator-Makueni to the DR-Makueni indicates as follows;

“We have tried to locate the original record in our archives but our efforts have not yielded the desired results. However, we doubt the Machakos claim indicating that they had sent the file back due to the fact that in July 2018, the station embarked on an exercise to identify files for destruction and others for retention. During the said exercise, lists were prepared for the same. Amongst criminal files for the year 2013, criminal case no 427 of 2013 is neither appearing on the list for retention nor on the list for destruction. I do hereby attach copies of the said lists for your ease of reference.”
21. From the above correspondence and lack of evidence showing that Makueni High Court acknowledged receipt of the file, it appears as though the file was never returned to Makueni High Court. In my view, this is a lapse between the two courts as I haven’t found anything to indicate that the Appellant was involved in the loss of the file. The numerous correspondences on record are a confirmation that indeed the trial court 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 -vs- 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. So, the issue here is in the circumstances of this case, what is the best course of action in the interests of justice?
24. The Appellant was convicted in October 2015 and the appeal was filed in 2020. It has been approximately five years since the appeal was lodged and it has never taken off due to the missing file. Article 51(1) of *the Constitution* of Kenya 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.
25. The record also shows that there have been efforts to trace the investigations file to no avail. In fact, the prosecution has, in their submissions, requested for more time to retrieve the investigation file and locate witnesses. A long period of time has also passed since the Appellant was convicted and sentenced. This means that an order for retrial is not feasible at this juncture as it may be the beginning of another delayed trial.
26. In *Danson Maina Muchoki -vs- Republic* (supra), 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.”
27. In this case there is no allegation /evidence that the appellant may have had anything to do with the loss of the lower court file.
28. 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.
29. In the circumstances and considering the effluxion of time, an order 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.



30. Following the authorities cited herein above, it is my view that the avenue available is for the appellant to benefit from a conditional release.
31. The appellant will be set at liberty on condition that he signs a personal bond of Ksh 500,000 and avails one surety 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.
32. 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

