



**Wanyonyi v Republic (Criminal Appeal 80 of 2015)
[2024] KEHC 5378 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 80 OF 2015**

DK KEMEL, J

MAY 17, 2024

BETWEEN

FRED WEKESA WANYONYI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant herein Fred Wekesa Wanyonyi was tried and convicted by Kimilili Principal Magistrate's Court vide Criminal case Number 1631 of 2012 for the offence of robbery with violence contrary to section 296(2) of the *Penal code*. He was sentenced to death but which was later commuted to life imprisonment following a presidential decree. He was aggrieved and thus filed a petition of appeal where he has raised four grounds of appeal namely:-
 - a. That the learned trial magistrate erred in law by convicting him without considering that the witnesses who testified were not present at the scene of crime.
 - b. That the learned trial magistrate erred in law and fact by convicting him without considering the fact that the prosecution had failed to call a certain woman found in possession of exhibits as a witness.
 - c. That the learned trial magistrate erred in law and fact when she failed to find that the appellant did not sign an inventory of items or exhibits which could connect him to the crime.
 - d. That the learned trial magistrate erred in law and fact by convicting the appellant yet no finger prints were dusted on the recovered items so as to link him with the alleged offence.
2. The Appellant therefore prayed that the appeal be allowed and the conviction quashed and sentence set aside and that he be set at liberty forthwith.



3. Upon the filing of this appeal, this court has never been supplied with the record of the lower court to enable it give directions on the disposal of the appeal. Several attempts have been made towards obtaining the said records to no avail. Vide a letter dated 20.4.2022, the Principal Magistrate Kimilili Law courts confirmed that the lower court records cannot be traced. Another letter dated 26.2.2024 by the DCI Kimilili Division indicted that investigations were conducted regarding the missing court file and which yielded no results. It was the view of the DCI Kimilili division that the Appellant might have colluded with some rogue officers at the Kimilili Law Courts in order to win sympathy of the High Court and go unpunished. It was also the view of the DCI that a retrial of the matter is possible since the police file and witnesses are available.
4. The report by the DCIO Kimilili Division dated 26/2/2024 was duly served upon the Appellant for his perusal. He denied being involved in the missing court file. He confirmed that he is ready for a retrial in the matter and that he expects the prosecution should be ready to present witnesses in the matter.
5. Learned counsel for the Respondent proposed for a retrial in the matter as the police file and witnesses are available.
6. I have considered the sentiments of learned counsel for the respondent and the Appellant as well as the reports by the learned Principal Magistrate currently heading Kimilili Law court and the DCI Kimilili division. It is not in dispute that the lower court file cannot be traced. It is also not in dispute that the Respondent still has the police file and is able to avail witnesses in the event a retrial is ordered. It is also not in dispute that both the Appellant and Respondent appreciate the circumstances of the matter and are in favour of a retrial.
7. The issue for determination is whether an order for retrial is appropriate in the circumstances.
8. Under Article 50 (2) (q) of [the constitution](#), the right of appeal is one of the components of fundamental right to fair trial guaranteed to an accused person . It provides that an accused person is entitled if convicted to appeal or apply for review by a higher court as prescribed by law. Thus, the Appellant herein who has lodged an appeal is entitled to have the same determined. However, what is not in dispute is that the appellant has already been convicted and sentenced and hence he does not enjoy the presumption of innocence. While he is entitled to a first appeal before this court, he cannot by any stretch of imagination be said to be enjoying the presumption of innocence in the circumstances. It should then follow that the Appellant should not expect to be acquitted due to the missing court file which has mysteriously disappeared. The Appellant is already aware that he has already been convicted by a court of competent jurisdiction and that in this appeal the burden is on him to show that the trial court convicted him in error.
9. The issue of loss of court records is not new and that the courts have grappled with the daunting question as to whether in such circumstances an appellant or accused is entitled to an acquittal. In Criminal Appeal No. 187 of 2002 [Francis Ndungu Wanjau -vs- Republic](#), the Court of Appeal was seized of an appeal emanating from the High Court in which it was alleged that the records of the lower court and the High court were missing. The court considered various decisions on the subject and noted as follows:-

“On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of [Joseph Maina Kariuki -vs- Republic](#) Cr. Appl No. 53 and 105 of 2004 (UR) where it had been established that the record of the trial magistrate and that of the High Court on first appeal have simply vanished into thin air and cannot be traced. The police file has also vanished into the same way. Nor can any record be traced in the office



of the Attorney General. The Appellant's own copies of the record of proceedings in both lower courts which had been supplied to him had also disappeared".

10. The Court of Appeal then felt that it was not appropriate to acquit the Appellant when it held as follows:-

“Faced with that kind of situation his court remarked as follows in the case of *John Karanja Wainaina -vs republic* Criminal Appeal No. 61 of 1993 (UR):

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 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 serve in 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) 9a) 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 ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interests of justice as a whole must be considered.

11. In *John Ouko Otieno -vs- Republic* Criminal appeal No. 137 of 2002 (UR) the entire records and files containing proceedings and judgement of the trial court could not be traced and the court was urged in the circumstances to quash the conviction and set aside the sentence thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In declining to accept this invitation, the court stated:

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgement, police file and Attorney Generals file is a rare occurrence. It has however, occurred and this court is not a stranger to such a situation. This court has on more than on occasion in the past encountered such a situation. In the case of *Pius Mukaba Mulewa and Another -vs Republic* (Court of Appeal Criminal Appeal No. 103 of 2003) this court faced with that situation had the following to say”.

“What we can take from *Zaber's (Haiderali Lakhoob & Zaver -vs- Rex (1952) 19 EACA 2464* case is that the court must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss occurred. Who stands to gain from the loss? Is it merely coincidental that both the magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making? In the final analysis, the question to be answered must be whether the order proposed to be made is one which serves the best interests of justice. We reject any 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”.

12. Being guided by the above cases, i find that even though the Appellant is entitled to prosecute his appeal without under delay, the circumstances caused by the loss of the lower court record demand that this court should give directions on the way forward. Already, the Appellant does not enjoy the



presumption of innocence as he has already been convicted by a court of competent jurisdiction. At the initial stages of the proceedings herein, this court had posed the question “who would benefit from the loss of the lower court record?” The Appellant vehemently denied involvement in the loss of the said records. As the Appellant has indicated that he is not opposed to an order for re trial and further since the Respondent has also indicated that the police file and witnesses are available, i find the scales of justice warrants an order for a retrial.

13. In view of the foregoing observations, it is my finding that an order for a retrial is appropriate in the circumstances. The Appellant is hereby ordered to be produced before the principal Magistrate Kimilili Law Courts on 20.5.2024. for the purposes of retrial. The Appellant’s appeal herein is compromised on those terms. This file is ordered closed.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024

D KEMEI

judge.

In the presence of:-

Fred Wekesa Wanyonyi Appellant

Miss Kibet for Respondent

Kizito Court Assistant

