



**Salim v Republic (Criminal Appeal 128 of 2016)  
[2021] KEHC 212 (KLR) (10 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 212 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL 128 OF 2016  
JM MATIVO, J  
NOVEMBER 10, 2021**

**BETWEEN**

**MOHAMED SAID SALIM ALIAS MAJOR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein was convicted on 25<sup>th</sup> October 2016 in CMC Criminal case No. 1227 of 2010, Mombasa for the offence of trafficking in Narcotic drugs contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act*<sup>1</sup> and sentenced to serve 10 years imprisonment.
2. On 31<sup>st</sup> October 2016, he lodged his Petition of Appeal to this court seeking to overturn both conviction and sentence. On 1<sup>st</sup> November 2016, the Deputy Registrar of this court wrote to the Executive Officer, Mombasa Law Courts, requesting for the original records, certified copies of proceedings and judgment serially numbered in red after every 10<sup>th</sup> line on the right-hand side of the record and exhibits if any. The said letter was followed by further reminders dated 13<sup>th</sup> June 2016, 12<sup>th</sup> July 2019 and 28<sup>th</sup> May 2021. But the subsequent history of this file is what should prick the conscience of those who care about justice because it has the corrosive force of eroding the justice delivery system.
3. For starters, from the record, no action was taken for almost 2 years, that is from 31<sup>st</sup> October 2016 when the appeal was filed up to 5<sup>th</sup> July 2018. This lull is unacceptable. There should be a system in place of keeping appeals active once filed. The best way of doing it is to place the file for mention for directions immediately an appeal is filed. After the unexplained stillness, on and 7<sup>th</sup> August 2018, the matter was placed before Chepkwony J who ordered the record to be availed. On 2<sup>nd</sup> October 2018, Mwangi J directed the Executive Officer to avail the records. On 26<sup>th</sup> November 2018, the learned judge granted the Executive Officer 30 days to avail the records. On 21<sup>st</sup> January 2019, the judge ordered the

<sup>1</sup> Act No. 4 of 1994.



Executive Officer to attend court on 18<sup>th</sup> February 2019 to explain why the typed proceedings are not ready. It was only after this order that the Executive Officer attended court on 18<sup>th</sup> February 2019 and informed the court that he had requested the Chief Executive Officer to help him to trace the file, but he had been unwell for 3 weeks. The judge directed the Executive Officer to follow up the matter and fixed the matter for mention on 27<sup>th</sup> March 2019. On the said date, the Executive Officer attended court again and requested for 30 days which was granted but on 25<sup>th</sup> June 2019, the Executive Officer did not attend court prompting the court to issue summons and scheduled the matter for mention on 22<sup>nd</sup> July 2019.

4. On 22<sup>nd</sup> July 2019, the appellant's counsel urged the court to release the appellant on bail pending appeal since the court file was unavailable. The learned judge referred the file to the presiding judge. On 8<sup>th</sup> June 2021, Ogola J directed the parties to file submissions addressing the court on why the appellant should not be released for lack of the court file. The parties complied and filed written submissions.
5. In his submissions, the appellant's counsel cited *Hairdrali Lakhoo Zaver v Rex*<sup>2</sup> in which the East African Court of Appeal faced with a similar situation held that a re-trial must be held describing the occurrence as exceptional. However, the court noted that the leading guidance should be the need to do justice to the parties. Counsel submitted that courts have ruled that a re-trial or an acquittal is not automatic but justice needs to be done. Additionally, counsel cited *Pius Mukabe Mulewa & another v Republic*<sup>3</sup> in which the court held that an acquittal on account of missing record is not automatic. He urged the court to treat this case as exceptional since the records are not available and set aside the conviction and sentence.
6. The Respondent's counsel cited *John Karanja Wainaina v Republic*<sup>4</sup> in which the court records were missing and the Court of Appeal stated: -

“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.”

7. Counsel submitted that section 4 of the Narcotic Drugs and Psychotropic Substance Control Act provides for a fine of one million or three times the market value of the drug or substance whichever is greater and in addition to imprisonment for life. She cited *Kingsley Chukwu v Republic*<sup>5</sup> in which the Court of Appeal judicially construed the above section and argued that the sentence imposed in this case was lenient.

<sup>2</sup> {1952} EACA 244.

<sup>3</sup> Criminal Appeal No. 103 of 2001.

<sup>4</sup> Criminal Appeal No. 61 of 1993.

<sup>5</sup> {2010} e KLR.



8. Further, the Respondent’s counsel argued that there is no report showing that the file cannot be found. She cited *James Onyango Nyakoiro v Republic*<sup>6</sup> which underscored the need for the court to hold the scales of justice and in doing so, it must consider the circumstances of the case including whether the appellant is responsible for the loss and whether he should benefit from his mischief. It held that in the final analysis the order made should be the one which serves the interests of justice. Counsel urged the court to consider the offence and bear in mind that fair trial entails the interests of the accused, the victim and the society. (Citing *Natasha Singh v CBI*<sup>7</sup>)
9. A useful point of reference in addressing the issue at hand is to mention that two principles are discernible from decided cases. One, that the absence of a trial courts record does not as a matter of course necessitate an acquittal. This appears to be the rule rather than the exception. The Court of Appeal has consistently accentuated that there cannot be an automatic acquittal merely because all the records for the case have disappeared. (See *Francis Ndungu Wanjau v Republic*,<sup>8</sup> *Joseph Maina Kariuki v Republic*,<sup>9</sup> *Pius Mukabe Mulewa & another v Republic*,<sup>10</sup> *Justus Cheruiyot Chumba v Republic*<sup>11</sup>). Also, in *Mwangi v Republic*<sup>12</sup> the court was emphatic that loss of a court file does not mean that an acquittal would automatically follow except where there exist exceptional circumstances, in which case the court will acquit as it.
10. Two, in such a situation, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss of the file occurred. The court is also required to consider who occasioned the loss of the file and whether the appellant is responsible, and whether the applicant should benefit from his own mischief and illegality. The paramount consideration must be whether the order proposed to be made in the one which serves the best interests of justice.
11. Talking about the order which serves the best interests of justice, it must be remembered that while the common thread in such cases is the loss of a court file, cases are context sensitive and each case will depend on its own peculiar facts and circumstances. For example, in *Peter Mwangi Waitthaka v Republic*<sup>13</sup> the court of appeal ordered a retrial after it turned out that the high court judgment which was being appealed was missing from the record. The court was persuaded that since the only document which was missing was the judgment, a re-trial would not be prejudicial to the appellant because he will be afforded an opportunity to be heard afresh and he would still have an opportunity to appeal to the Court of Appeal if need be. But as was held in *Rwaru Mwangi v Republic*,<sup>14</sup> it was held that ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant.

<sup>6</sup> {2021} e KLR.

<sup>7</sup> {2013} 5 SCC741.

<sup>8</sup> {2011} e KLR.

<sup>9</sup> {2008} e KLR.

<sup>10</sup> {2002} e KLR.

<sup>11</sup> {2019} e KLR.

<sup>12</sup> {2005} KLR 495.

<sup>13</sup> {2013} e KLR.

<sup>14</sup> Cr. Appeal No. 18 of 2006 (ur).



12. In *Patrick Randu Yeri v the Republic*<sup>15</sup> this court confronted with an appeal involving a lost lower courts' file observed that while it is true a party who files an appeal is asking the appeal court to change the trial court's decision, an appellate court suffers one significant restriction, that is, it cannot consider anything that was not presented to the trial court. The task of an appellate court is not to decide whether the trial court's decision was right or wrong. Its task is to assess whether that decision is a sustainable result when the facts presented at the trial through testimony and exhibits are measured against the applicable law. Simply put, its task is to consider whether the law as applied to the facts presented to the trial court support the decision.
13. In the said case I was emphatic that "the only thing the appellate court is permitted to work with is the record of appeal—the trial court record. The appellate court may not consider any facts or arguments not originally considered by the trial court. In this regard, the record is a very critical component of an appeal. A record can be described as a "packet" that contains the important information the appellate court will need to fully understand what occurred in the trial court to make its final determination. Ultimately, the record limits the scope of information that parties can utilize in their arguments and that the appellate court will consider as it moves to review the case. It follows that when this court is told that the trial court record cannot be found, it is not a simple matter which the court can wish away. It cannot be business as usual.... how can the court administer justice when the blame on the lost files lies squarely at its door steps?"
14. Additionally, in the same judgment I warned that disappearance of court records if not checked and eliminated once and for all, now, not tomorrow, can become the bane of the justice delivery system in this country, a serious threat to the justice delivery system. I proceeded to state as follows: -

In my view, this dangerous obstacle to the efficient administration of immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused either to frustrate a trial process or for ulterior purposes. Tampering with the administration of justice indisputably involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse should not be complacently tolerated consistent with the good order of society.

Disappearance of court records constitutes a serious assault on the justice delivery system. It erodes public confidence in the administration of justice. It is not an injury to the appellant alone. It hurts the prosecution, the public who have an interest in ensuring that offenders are lawfully punished and the guilty are acquitted. Disappearance of court files is inconsistent with two fundamental requirements for due administration of justice. First, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. Second, is that unless the court protects its ability to function in that way, its failure will lead to erosion of public confidence. The court processes will be seen as lending themselves to oppression and injustice if courts were to tolerate disappearance of court records. Court records play a pivotal role and overlap with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when court proceedings vanish in the hands of those obligated by law to protect them?"

15. I adopt my above reasoning. Just like in the above cited case, there was no attempt to trace the movement register and to hold into account those responsible.

<sup>15</sup> Criminal Misc Application No 78 of 2014.



16. The appellant’s counsel has invited the court to set aside the conviction and sentence meted on the appellant. In arriving at the order which best accords to the interests of justice, I must bear in mind that the case of a convicted person lacks one of the strongest elements normally available to an accused person, namely, the presumption of innocence. True, the law recognizes the possibility of a conviction being erroneous or the punishment excessive, (a recognition which is implicit in the legislation creating the right of appeal in criminal cases). However, there is a presumption that the conviction was lawful until it is overturned by way of appeal. It follows that the mere fact that the record is unavailable is ipso facto not a ground to invalidate a conviction or sentence.
17. The court must be careful not to set a dangerous trend of creating an avenue for allowing appeals in a manner not contemplated by the law. Also, the court should not condone theft or disappearance of court files nor should it allow convicted persons to languish in jail owing to mistakes attributed to court staff. In balancing the scales of justice, the court must bear in mind that such an acquittal amounts to allowing an appeal without hearing it on merits as the law permits. This jurisdiction which is not expressly permitted by the law and must be exercised in the rarest circumstances with great care and circumspection.
18. The danger of exonerating a person tried and found guilty by a court of law without hearing an appeal on merit must be considered. The peculiar facts of the case must be weighed. The existence of exceptional circumstances must be evident or demonstrated. There is no acceptable definition of the word’s exceptional circumstances, but the following statements borrowed from a leading South African decision can offer useful guidance: -<sup>16</sup>
19. Borrowing from paragraph (iii) above, the existence of special circumstances is not a matter of judicial discretion. Their existence is a matter of fact for the court to decide. I have read several decided cases allowing appeals on account of lost trial records citing “exceptional circumstances.” I have not read any defining what constitutes exceptional circumstances. The court should be careful not to lower the threshold. Talking about the disappearance of the court file, I think a certificate from the Deputy Registrar of this court confirming that the unavailability of the lower court’s file could have assisted. Its presence, though not conclusive, could have strengthened the existence of special circumstances. The movement register could have shed light on the matter and assist in identifying the culprits if there is foul play.
20. The impact of the acquittal to the criminal justice system must be considered as well as the interests of the appellant. It is in public interest that the guilty are punished. On the other hand, it is in public interest that the innocent is not punished. In fact, it is better to release an innocent person, than to jail

<sup>16</sup> In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

- i. What is ordinarily contemplated by the words “exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different ...”
- ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
- iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
- iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
- v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.



him. But as I stated, the case of a convicted person lacks the presumption of innocence. The court will proceed from the presumption that the conviction and sentence are lawful and can only be interfered with upon hearing the appeal on merits. Flowing from the above discussion, I find myself unable to interfere with both the conviction and sentence.

21. However, because the lower courts file joins a list of many other files which have mysteriously disappeared from our criminal court registries without any explanation, a worrying trend which must be curbed, I am compelled to order as follows: -
  - a. That the Deputy Registrar of this court is directed to immediately write to the Director of Criminal Investigations, Mombasa to lodge a complaint regarding the disappearance of the court file, i.e. Mombasa CMCN No. 1227 of 2010 and request that the DCI to investigate the alleged disappearance with a view to establishing the circumstances surrounding its alleged disappearance and possible legal action.
  - b. That since this ruling and the findings/observations made have an impact on the criminal justice system, I direct that a copy of this ruling be supplied to the Director of Public Prosecutions.

Right of appeal 14 days.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2021**

**JOHN M. MATIVO**

**JUDGE**

