Yeri v Republic (Criminal Miscellaneous Application 78 of 2014)
[2021] KEHC 182 (KLR) (3 November 2021) (Ruling)

Neutral citation: [2021] KEHC 182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL MISCELLANEOUS APPLICATION 78 OF 2014

JM MATIVO, J

NOVEMBER 3, 2021

BETWEEN

PATRICK RANDU YERI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This file has a very upsetting chequered history. A brief summary of the history is necessary. On 30th June 2010, the applicant was convicted and sentence to suffer death for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* in criminal case number 2742 of 2009 by M. K Mwangi, SRM at the Chief Magistrates' Court, Mombasa.

2. On 6th July 2010, he filed a Petition of Appeal being Mombasa High Court Criminal Appeal No. 312 of 2010 seeking to overturn the said conviction. The same day he lodged his appeal, the Deputy Registrar of this court wrote to the Chief Magistrates Court, Mombasa, calling for the original records, certified copies of proceedings and judgment serially numbered in red after every 10th line on the right-hand side of the record and exhibits. The said letter was followed by numerous reminders to the lower court calling for the records, but all in vain.

3. On 9th September 2014, four years after filing the appeal, the applicant filed the instant application seeking this courts intervention lamenting his inability to prosecute his appeal on account of the "missing" file. On 13th July 2015, after several court attendances, Muya J ordered the Deputy Registrar, Mombasa Law Courts to furnish the appellant and the Office of the DPP with the records of the proceedings. A similar order was made on 14th April 2015, 27th April 2015, 29th May 2015, 15th June 2015, 29th June 2015 and 13th July 2015, all in vain.

4. On 7th September 2015 Chepkwony J issued summons to the Executive Officer, (the E.O.), Mombasa Law Courts to show cause why proceedings cannot be availed. The E.O. attended court on 14th

September 2015 and requested for time to trace the file. On 14th October 2015, the EO informed the court that he was unable to locate the file. A further mention was granted for 16th November 2015 but on the said date the EO did not attend court prompting the court to issue summons against him to attend court, but on the scheduled date he did not attend, so the court issued fresh summons for him to attend court on 18th December 2015 but he did not attend prompting the court to direct the Deputy Registrar to take up the matter.

5. On 15th February 2016 the court issued summons to the E.O. who attended court on 15th March 2016 and requested for time to locate Criminal Appeal No. 312 of 2010. On 19th April 2016, the court again directed the E.O. to locate HCC No. 312 of 2010 as previously directed. Subsequent, the record shows there have been more than 30 other court attendances and the story remained the same, the lower courts file has not been found.

6. The applicant now argues that his constitutional right to a fair trial has been infringed. He states that he has been unable to prosecute his appeal. He urged the court to give such orders and directions as would meet the interests of justice.

7. Miss Anyumba, counsel for the state urged the court to consider the plight of the victim of the offence and to bear in mind that the trial was before a competent court. Acknowledging that the executive officer confirmed that the file is missing, she argued that a de novo trial would be ideal in this case and cited *John Karanja Wainaina v Republic*[1] in which the court records were missing as in the instant case but the court 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."

8. Counsel also cited *John Ooko Otieno v Republic*[2] in which the Court of Appeal stated: -

> " ...Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court file, judgment, police file and Attorney General's file is a rare occurrence. It has however, occured and this Court is not a stranger to such a situation. This Court has on more than one 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 2001, this Court, faced with that situation had the following to say:
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> "What we can take from ZAVER'S case is that the courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has occurred. Who stands to gain from the loss? Is it merely coincident that both the magistrate's file and

[1] Criminal Appeal No. 61 of 1993.

[2] {2008} e KLR.

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 final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest 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. After all a person who has been tried or has pleaded guilty before a court with competent jurisdiction and has been convicted by such court has lost the benefit of the presumption of innocence given to him by section 77 (2) (a) of the Constitution and on appeal the burden is on him to show that the court which convicted him did so in error. The loss of the file may deprive him of the 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".

9. Decisional law is in agreement that the absence of a trial courts record does not as a matter of course necessitate an acquittal. In fact, the Court of Appeal has consistently held that there cannot be an automatic acquittal merely because all the records for the case have disappeared. (See *Francis Ndungu Wanjau v Republic*,[3] *Joseph Maina Kariuki v Republic*,[4] *Pius Mukabe Mulewa & another v Republic*,[5] *Justus Cheruiyot Chumba v Republic*[6]). The same position was explicated in *Mwangi v Republic*[7] which held that loss of files does not mean that an acquittal would automatically follow except where there exist exceptional circumstances, in which case the court will acquit as it did in the said case.

10. The other principle discernible from decided cases is that 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 has 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. In this regard, as was held in *Rwaru Mwangi v Republic*[8] ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. For example, in *Peter Mwangi Waithaka v Republic*[9] 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 of Appeal 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.

11. 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

3 {2011} e KLR.

4 {2008} e KLR.

5 {2002} e KLR.

6 {2019} e KLR.

7 {2005} KLR 495.

8 Cr. Appeal No. 18 of 2006 (ur).

9 {2013} e KLR.

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.

12. Th above being the position, 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. The cavalier manner in which the court registry treated the matter including unexplained failures to obey court summons issued by a judge exhibits an entrenched and a well calculated move aimed at erecting barriers to the administration of justice. This raises a fundamental question, namely, how can the court administer justice when the blame on the lost files lies squarely at its door steps. How come no one is held to account when the files disappear. 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.

13. In my view, this dangerous obstacle to the efficient administration of justice is not 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.

14. 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. Talking about those entrusted to safeguard court records, the history of this file is unpleasantly sickening. The court on numerous occasions issued summons to the Executive Officer to attend court, many of which were not honoured. At the end of the process, nothing came out of it. This court will be condoning this grave assault on the due administration of justice if it turns a blind eye on disappearance of court files. It will be a serious dereliction of duty if the court fails to act in the circumstances. The court will not allow itself to appear helpless in the hands of those entrusted with files. No attempt was made to trace the movement register or administratively hold into account those responsible. It is common knowledge that this is one on the many files said to have vanished, yet nothing has been done administratively to address this menace.

16. The applicant prays that this court allows his appeal on account of the "missing file." Courts of law exist to administer justice and in so doing they must balance between competing rights and interests within the confines of law. However, the case of a convicted person lacks one of the strongest elements normally available to an accused person, namely, the presumption of innocence. Even though the law frankly 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), there is a presumption that the conviction was lawful until it is overturned by away of appeal. It follows that the mere fact that the record is unavailable is ipso facto not a ground to invalidate a conviction. The court should be careful not to set a dangerous trend of creating an avenue for allowing appeals in a manner not contemplated by the law. It can also amount to condoning theft or disappearance of court files. I am aware of court decisions allowing appeals under such circumstances which to me should be the exception rather than the rule otherwise such a trend would amount to opening a flood gate for "files to disappear." To the extent that such an acquittal amounts to allowing an appeal without hearing it on merits as the law permits, it is a jurisdiction which is not expressly permitted by the law and must be exercised in the rarest circumstances with great care and circumspection. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob Current Legal Problems, adopted the following definition of 'inherent jurisdiction'[10]

> ". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

17. Jerold Taitz, in his book, The Inherent Jurisdiction of the Supreme Court[11] succinctly describes the inherent jurisdiction of the high court as follows: -

> ". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

18. I.H. Jacob in "The Inherent Jurisdiction of the Court' [12]quoted by Jerold Taitz (supra) states:

> "(it) exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and

[10] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.*

[11] *Jerold Taitz, University of Cape Town, Juta, 1985.*

[12] *(1970) 23 Current Legal Problems 23 at pp. 51-52.*

> viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."

19. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.[13] However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd[14] it was held: -

> "While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute. . ."

20. It must be mentioned at the outset that the inherent powers of the court are not an open license for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law so as to hold the scales of justice where no specific law provides directly for a given situation. The danger of exonerating a person tried and found guilty by a court of law without hearing an appeal on merit must be considered and balanced against the circumstances upon which the file disappeared and the impact of such an acquittal to the criminal justice system.

21. Taking into consideration the above discussion and the peculiar circumstances of this case, in order to protect the pure stream of justice from pollution and to safeguard the due administration of justice, I find that the following orders will serve the interests of justice and fairness: -

    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 CMCR No. 2742 of 2009 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.

    c. That the applicant's prayer that his appeal be allowed on account of the "missing file" is refused.

    Right of appeal 14 days.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT MOMBASA THIS 3RDDAY OF NOVEMBER 2021

JOHN M. MATIVO

JUDGE

13 *Ritchie v Andrews (1881-1882) 2 EDL 254*; *Conolly v Ferguson 1909 TS 195.*

14 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6