



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

HC MISC CRIMINAL APPLIC NO. 35 OF 2019

(FORMERLY HCCRA NO 124 OF 2003, NAKURU)

ELIJAH NGOTHO NJOROGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being and Appeal from Orig Case Naivasha CMCRC 1771 of 1999)

JUDGMENT

Background

1. Over twenty years ago, on 7th April, 2000, the applicant was sentenced to death by the Naivasha Chief Magistrate's Court for robbery with violence contrary to section 296(2) of the Penal Code. This is according to the applicant's affidavit in support of his application filed on 25th March, 2019. The applicant further deposed that his sentence was commuted to life imprisonment by the President.
2. According to the applicant, he then filed an appeal against his conviction in Nakuru High Court and was furnished with an appeal case number HCCRA No 124 of 2003, Nakuru. His contention was that he had not been accorded a fair trial. He was incarcerated, and after waiting many years, he heard nothing concerning his appeal.
3. Dissatisfied with the situation, whilst in Naivasha Maximum Prison, he filed this application seeking that the Court do determine his application for re-hearing of the sentence meted upon him.
4. The matter was mentioned in court several times with the Court seeking to have the lower court records availed. The High Court Registry at Naivasha has unsuccessfully sought to trace the lower court and the Nakuru Criminal appeal files, and reported to the court.
5. In the attempts to trace the file, the last information relating to it indicated that the file had been archived at the Kenya national Archive., Nakuru. Communications with the Archives shows that the file, among others, had indeed been deposited in the archives under deposit and serial number reference BBA 2/393. However, on 9th April, 2009, the applicant's file No CR 1771/1999 was requisitioned for, retrieved and collected by one P Kagia, a Judiciary officer.
6. The aforesaid information is contained in a letter from the Ministry of Sports, Culture and heritage Ref NPRC 4/3 VOL IX (91) of 22nd October, 2019, from the Nakuru National Archives. The letter reads:

"...Following your request for the above case file, the (sic) is not in our custody as it had retrieved earlier on 9th April, 2009. Your officer Mr Kagia, took the file from our office. Attached is a copy of the signed and retrieved requisition form for the file"

7. Attached to the letter, was a request for records for case No CR 1771/99 and the records requisition form dated 9/4/2009 in respect of seven archived files sought to be retrieved including the Applicant's file reference No CR 1771/99.
8. When this information was availed to the court, the court directed the state to file submissions in the matter as to what the court ought to do in a situation where the lower court records in circumstances such as had been brought to the court's knowledge. The applicant on his part

merely stated that he had been arrested in 1999 and jailed on 7th April, 2000, and wanted his matter resolved.

9. The DPP's submissions were filed and he reiterated that no records for the accused were available; the lower court and High Court records having gone missing and cannot be traced. He cited and attached several authorities and concluded:

“We submit that it is clear from the authorities that each case is to be taken on its own special circumstances.”

10. The DPP cited the case of **John Otieno Ombok v Republic [2017] eKLR** where a similar situation of missing court records was addressed and the court referred to **Joseph Maina Kariuki v Republic, Criminal Appeal 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 had also vanished in the same way. Nor can any record be traced in the office of the Attorney General. The appellant's own copies of the records of proceedings in both Lower Court, which had been supplied to him had disappeared.

The court was urged to acquit the appellant in those circumstances but it stated:-

“faced with that kind of situation, this court remarked as follows in the case of John Karanja Wainaina Vs Republic, Criminal Appeal No. 61 of 1993 (unreported): -

“in such a situation as this, the court must try to hold the scales of justices and in doing so must considered 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 in 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 of 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.”

Similarly, the Court of Appeal in John Ooko Otieno V Republic, Criminal Appeal No. 137/2002 (UR) where the entire records and files containing proceedings and judgment of the trial court not be traced and the court was urged in the circumstances to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In rejecting that plea, the court stated, thus:-

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgment, police file and Attorney General's 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 one occasion in the past encountered such as 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: -

“What we can make from ZAVER'S (Haiderali Lakhoo and Zaver V Rex (1952) 19EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must considered all the circumstances under which the loss occurred. Who stands to gain from the loss? Is It merely coincident 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 making? In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is reasonably feasible to order a retrial, an acquittal must follow as matter of course.”

11. Counsel further cited the Court of Appeal case of **Francis Ndungu Wanjau v Republic [2011] eKLR** where the Court variously made the following significant statements:

“What is to be done? Order a retrial, acquit the appellant or proceed with the appeal, the defects in the record notwithstanding? Fortunately for us, this Court has previously dealt with similar matters where all those options were considered and applied, and therefore it is not a matter without precedent.

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.

...

The principle is thus now well established that in cases such as this, whatever order it is that has to be made, the interests of justice as a whole must be considered, but acquittal is not automatic.....

....

Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case.

....

Once again the underlying consideration is that of “the interests of justice”.

As stated earlier the appeal cannot proceed on the basis of records which are admittedly adulterated. There is no way of knowing the contents or retrieving the authentic originals which are confirmed to have been falsified. No direct or other evidence is available to connect the appellant with the falsification of the records although, as observed by Mr. Monda, he would be a beneficiary of such situation. The irresistible inference is nevertheless that the court registries which are charged with the duty of safe custody of court documents, and those who work in those registries, played a key role in the falsification. The appeal cannot be heard on the basis of falsified documents. The trial was concluded about eleven years ago on 4th April, 2000 and the first appeal was decided about eight years ago in October, 2002. The offences facing the appellant are of utmost gravity, attracting the death sentence, now commuted to life. There were nine prosecution witnesses who testified, and seven of them, including the two complainants were police officers. On the admissible and the potentially admissible evidence, the conviction of the appellant may well be sustainable. In all those circumstances it is our considered view that the interests of justice will be served by ordering a retrial. We think the State is still capable of mounting such a trial considering that most of the witnesses were police officers.”

12. Having carefully considered the matter, I think that the principles to be drawn from all these cases are that the following questions and considerations are critical in deciding how to treat missing records:

- Under what circumstances did the loss of records occur? Is there any indication that any role was played by the applicant/appellant in the disappearance of the missing records? Who stands to gain from the loss?
- The court must consider the following: whether to proceed with the matter under the circumstances; or to acquit the applicant/appellant; or to order a retrial; and in doing so whether the interests of justice will be best achieved.
- That each case must be treated on its own facts and circumstances; and finally,
- How is the court’s decision going to demonstrate that the court upholds the best interests of justice as a whole?

13. *Circumstances of the loss:* In this case, it appears that the applicant appealed against the judgment of the lower court and waited. There is no indication that he was involved in any way in the records going missing. Instead the loss appears to be the result of failures by the registry to maintain proper records and of the movements of the files. I am unable, from the information available, to draw any inference of sleight of hand by the applicant.

14. *How to proceed:* The options open to this court are: to order retrial; to acquit the applicant; or to order the hearing of the application to proceed.

15. A retrial of this case would result in injustice to the applicant. Not only are there no records held by any party or state agency, the trial was over twenty years ago. A rehearing by the trial court would require the tracing of witnesses and investigation officers from a time twenty years ago. Finding an identifying witnesses will be impossible and the process would merely lead to a frustrating legal circus without end. Even if witnesses were found, the length of time the matter would potentially take, given the backlogs in the court system, would not augur well for a fair system of justice.

16. The application for re-sentencing cannot proceed for there will be no material on which the court can rely to determine whether or not sentencing was properly done in the first place. This option will also lead to injustice.

17. The final option, acquittal, commends itself to me. The applicant was sentenced to life imprisonment; he has served twenty years in jail awaiting his appeal. His right to be appeal and to be deemed innocent until finally proven guilty is extinguished by the fact of the loss of his court records. Whilst loss of files cannot automatically lead to acquittal, in this case the circumstances all point to the fact that that is the only plausible and prudent action that the court can take.

18. **Article 48** of the Constitution avails the applicant access to justice. He has been denied it by virtue of the loss of the documents in circumstances that clearly show a failure by the court administrators to take proper precaution in file movements. He appears to have had no role in that loss. Is he then to lose his right to access to justice? **Article 50** of the Constitution entitles the applicant to a right to a fair hearing. That right includes the right, if convicted, to appeal or apply for review by a higher court. Is he to lose such right willy nilly?

Disposition

19. Having considered all the available options, I am persuaded that the proper order to make in the circumstances of this case is to order that the applicant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Administrative directions

20. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the

Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

21. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

22. Orders accordingly.

Dated and Delivered in Nairobi via teleconference this 2nd Day of July, 2020

RICHARD MWONGO

JUDGE

Attendance list at Zoom Video/teleconference:

1. Mr Elijah Ngotho Njoroge, the Applicant in person
2. Mr Michuki for the ODPP
3. Court Clerk – Quinter Ogutu