



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 97 OF 2016

BENSON NGUGI MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in

criminal Case No. 3003 of 2010 at Chief Magistrate's Court in Thika)

R U L I N G

1. **Benson Ngugi Mwaura**, the Appellant herein was initially charged in Thika **Cr. Case No.3003 of 2010** with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. According to information relayed to this court by the Chief Magistrate's Court Thika *vide* letters and annexures filed into court on 10th July 2018 and the copy of committal warrant contained in this file dated 3rd November, 2011 as well as the Appellant himself, the original **Criminal Case No.2048/10** was withdrawn and consolidated with **Cr. Case No. 3003 of 2010**. In the latter case the Appellant was jointly charged with a second accused person by the name **Joseph Ndung'u Ndau**.

2. At the end of the trial, the Appellant herein was convicted in Cr. Case No. 3003/10 and sentenced to death. He filed his appeal to the High Court of Kenya in Nairobi on 10th November 2011. As at the date (2013) of the transfer of the appeal to the High Court of Kenya at Murang'a, the Presiding Judge Criminal Division Nairobi, *vide* a letter dated 16th April 2013 noted that the lower court record had never been forwarded to the Criminal Division in Nairobi. Subsequent to the transfer, the Deputy Registry of the High Court at Murang'a wrote on 13th March 2016 to the Chief Magistrate's Court at Thika seeking the original record.

3. There is no evidence that the record was dispatched to Muranga, and upon the subsequent transfer of the appeal to this court, several written requests had been made to the lower court. The lower court wrote letters to the Criminal Division Nairobi (on 18th December 2017) and to the High Court at Murang'a (20th December 2017) asking the courts to forward the original records. By a further letter to this Court dated 10th July 2018, the Chief Magistrate's Court at Thika confirmed the obvious; the lower court files were missing, that is both **Cr. Case Nos.2048/10** and **3003/10**.

4. In addition, the Chief Magistrate's Court attached a copy of the relevant Criminal register which showed the entries on the registration of the two criminal files. However, no entries had been made on the outcome of both matters. On his part, the Deputy Registrar of the High Court at Murang'a responded through a letter dated 16/6/18 addressed to the Chief Magistrate Thika and filed into this court on 25th July 2018. It was asserted in that letter that the file, presumably the appeal file, was forwarded to the High Court of Kenya in Kiambu on 27th September 2016. Copies of the appeals register, transfer letter dated 21st September 2016, EMS schedule and dispatch register and waybill dated 27th September 2016 were attached.

5. Upon noting the correspondence from the two courts, this Court directed on 8th October 2018 that further searches be made for the original record and for the DPP to confirm availability of the police file. The latter was confirmed by the DPP on 14th February 2019. However, to date the original record is missing.

6. Meanwhile, the Appellant maintained his plea to this Court for an order of acquittal. An acquittal cannot follow as a matter of course where the original record is missing, as the Appellant no longer enjoys a presumption of innocent. The Appellant herein was convicted by a competent court for a serious crime and though the loss of the original record presents an obstacle in his ability to challenge the conviction, this Court cannot make an automatic order for his acquittal or release. See **John Karanja Wainaina V R - Cr. Appeal No. 61 of 1993**.

7. The facts of this case suggest that the lower court record may have disappeared in the custody of the Chief Magistrate's Court at Thika.

There is no telling whether this was a deliberate act or the identity of the perpetrator. Certainly, there is nothing to suggest that the Appellant was responsible for this loss, even though I note that this is one in a series of similar disappearances affecting original records at Thika Law Courts.

8. There are two competing and equally important considerations here: the Appellant's right to be tried within reasonable time on one hand, and on the other, public interest that requires that persons convicted of serious offences be dealt with in accordance with the law providing for penalties attaching thereto. In considering the most appropriate order to make, in this case, I have noted that the prosecution file is available, despite the lengthy period since the trial. Is this a proper case for retrial?

9. A retrial will be ordered where the original trial is vitiated by illegality or procedural defect, where the interest of justice so demand and where the available evidence is likely to lead to a conviction. The court must decide each case on its own facts see **Merali v Republic (1971) EA 221; Ahmed Suman v Republic (1964) EA 481 and Mwangi v Republic (1983) KLR 3321.**

10. The Appellant has been in prison since November 2011. He cannot proceed with the appeal due to the absence of the lower court record. On the other hand, he was convicted for a serious offence attracting the death sentence at the time. In this case, it is my view that the public interest must be given emphasis, namely that persons who commit serious offences must be made to answer for their actions in the manner provided for under the law.

11. In the circumstances, I am inclined to make the following orders:

- a) That a speedy retrial be conducted before the Chief Magistrate's Court at Thika.
- b) That the retrial be given priority in view of the age of this case and be heard on a day-to-day basis until conclusion.
- c) That for this purpose the Appellant be presented before the Chief Magistrate's Court at Thika on 1st October 2019.
- d) That the DPP does immediately procure from Gatundu Police Station and forward to the DPP's office at Thika Chief Magistrate's Court, the police file related to this matter to facilitate the expedited prosecution of the matter.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF SEPTEMBER 2019

C. MEOLI

JUDGE

In the presence of:

The Applicant

Miss Mbevi – DPP

Court Clerk - Kevin