



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 76 OF 2016

DANSON MAINA MUCHOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in

criminal Case No. 2165 of 2003 at Chief Magistrate's Court in Thika)

R U L I N G

1. This appeal is one of several that were affected by the mysterious disappearance of the original trial records. The Appellant herein was tried for the offence of Attempted Robbery with violence contrary to Section 297(2) of the Penal Code before the Chief Magistrate's Court Thika, in **Cr. Case No.2165 of 2003**, later consolidated under **Cr. Case No. 2417 of 2003**. He was convicted and sentenced to death. He filed an appeal subsequently. However, as a result of the loss of the original file, the appeal has never been heard.

2. As a consequence, the Appellant filed several miscellaneous applications before the High Court at Nairobi, concerning the appeal, which rested with the ruling of **Ochieng** and **Achode JJ** in **Misc. Cr. Application No.246 of 2010** delivered on 28th August 2013. As at 6/6/18, the Appellant had one pending **Miscellaneous Criminal Application, No. 411/14 (High Court, Nairobi)** and had written to the Registrar of that court on 4/10/17 intimating his intention to withdraw the appeal.

3. Having perused the entire record which includes the Miscellaneous Applications, this court directed on 6/6/18 that the Appellant be produced to confirm his intention to withdraw appeal and/or take directions on the outstanding Miscellaneous application which primarily sought a review of the ruling of **Ochieng, Achode J** of 28th August 2013. When he appeared before me on 10th July 2018, the Appellant confirmed that he had written to the court to withdraw the appeal but had since changed his mind.

4. He also stated in connection with the outstanding miscellaneous criminal application that:

“My father died so I discontinued the pursuit of bond terms (review). I do not want to pursue application for reduction of bail terms granted by the court. I did not want bond, I wanted to be released by the High Court. I have made written submissions which I place before the court.”

5. The DPP's response was to ask the court to order an inquiry into the disappearance of the original trial record. I have looked at the Appellant's submissions. He is categorical that he is not interested in being released on bond and seeks an acquittal as he was not privy to the circumstances in which the trial file disappeared. He emphasized his long incarceration and delay in the hearing of the appeal.

6. The court has considered the record before it and the history of this matter as outlined in the elaborate ruling delivered in **Nairobi Misc. Cr. Application No.246 of 2010** by **Ochieng** and **Achode JJ**. No useful purpose will be served in replicating these matters here. Suffice to say that by the said ruling the court confirmed not only the unexplained loss of the original court record but also the police file. The substance of the application then before the court was that because of the said loss, and the consequent delay in hearing the appeal the Appellant was entitled to an acquittal.

7. The court stated *inter alia* in its ruling that:

“It is a well settled principle that an acquittal does not automatically follow when the court records are untraceable. The case before us clearly manifests that there was an orchestrated plan to have the files disappear. We say so because all the files connected to the case have mysteriously disappeared, that is the lower court file, and the police investigation file. High Court Misc. Cr. Application No. 246 of 2010 now before us had at one time disappeared. That cannot be sheer coincidence.”

8. Noting that an acquittal is ordered pursuant to a finding of no fault, the fact that Appellant had been convicted before a competent court, the extinguished presumption of innocence and the Appellant's burden on appeal, the wider interests of justice and guiding authorities, the court concluded by stating that:

“In the very unique circumstances of this case, the decision that best commends itself to us is to set the Applicant free. However, we hasten to add that this is not an acquittal or a discharge since the appeal has not been determined on merit we are therefore obligated to set conditions for the said release. Accordingly the Applicant shall be set at liberty if he executes a personal bond of KShs.500,000/=. Secondly he must get two (2) sureties of KShs.500,000/= each The applicant will make himself available to the court should he be required at a future date, whether for retrial, the appeal or other lawful reason.”

9. The Appellant did not appeal against that decision. He has categorically withdrawn the application to review the above bail terms and asserts he has no interest in release on bond pending appeal. Rather, he is seeking an acquittal as he did before **Ochieng** and **Achode JJ**. This court can do no better than reiterate the decision of the two honourable judges as the circumstances obtaining as at 28/5/13 remain unchanged: the lower court record and police file are still missing. The appeal herein has not and cannot be heard. On what basis would this Court order an acquittal in favour of the Appellant without upsetting the findings and orders of a court of concurrent jurisdiction?

10. In my considered view, following the decision of the court on 28th August 2013, and in light of the irretrievability of the original record of which the Appellant is well aware, the most appropriate option was for the Appellant to file an appeal to the Court of Appeal even as he availed himself of the opportunity to be released on bond. On the question of acquittal, this Court's hands are tied. Until or unless the decision of **Achode** and **Ochieng ,JJ** of 28/8/13 is set aside, or by miraculous happenstance the missing files are traced, no order of acquittal without the hearing of the appeal can be properly made. In the circumstances, this court rejects the Appellant's plea for acquittal.

11. Nevertheless, this Court notes that the Appellant was convicted in November, 2003. The copy of the charge sheet on record in respect of **Cr. Case No. 2417/03** stated that the Appellant was charged jointly with two others with the offence of Attempted robbery with violence contrary to Section 297(2) of the Penal Code. In that on 19th March 2003 at Mbombo village Maragua District, jointly with others, while armed with dangerous weapons, namely a toy pistol and other crude weapons, they attempted to rob **Henry Karanja Njuguna** of a motor vehicle registration **No. KAP 208Y Toyota Hiace matatu** valued at KShs.1, 200,000/= and at or immediately before or after the time of the attempt threatened to use actual violence against the said **Henry Karanja Njuguna**.

12. This offence no longer attracts an automatic death sentence in light of the recent decision of the Supreme Court of Kenya in **Francis Karioko Muruatete and Others V R (2017) e KLR** and various and pronouncements by the High Court as to the appropriateness of the sentence. Notwithstanding the absence of the original records, this court is inclined, in the unique circumstances of this case to consider the possibility of resentencing of the Appellant though not sought by him. For this purpose, the court, bearing in mind the conviction of the Appellant which still stands, will act on the basis of the particulars of charge sheet in lieu of the trial record.

13. As such the Court directs that the Appellant does prepare and appear to raise mitigation in respect of the proposed resentencing. The DPP will if possible, avail copies of any records of past convictions against the Appellant. Equally, I direct that a pre-sentence report be furnished by the respective probation office. Resentencing is hereby scheduled for 11th November,2019.

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

C. MEOLI

JUDGE

In the presence of:

Appellant

Miss Mbevu - DPP

Court Clerk - Kevin