



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 8 OF 2010

FRANKLIN MWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The appellant was charged with the offence of Robbery with violence contrary to **section 296 (2) of the Criminal Procedure Code**. He was convicted of the offence and sentenced to death on 28th December, 2009.
2. On 15th January 2010, the appellant filed this appeal against his conviction and sentence. The appeal raised six (6) grounds of appeal that basically contested identification. He also alleged the trial magistrate failed to consider that the prosecution relied on contradictory & uncorroborated evidence, that the prosecution did not avail any vital witnesses and that the trial court failed to consider his defence.
3. When the appellant originally filed this appeal, he had indicated that the lower court file was **Meru CM'S Cr. Case No.1632 of 2009**. However, after protracted search for the same, it was discovered that that was not the correct file. His court file was **Meru CM's Cr. Case No. 1632 of 2008**. Between 2014 and 2018, the trial court made frantic efforts to look for and avail that file to no avail. On 19/3/2018, this Court directed the Deputy Registrar, Office of the Director of Public Prosecution and the Officer Commanding Station- Meru to carry out investigation as to the missing court file got lost and compile a comprehensive report.
4. There is nothing on record to show the outcome of the investigations, if any. However, the In-Charge Criminal Registry Meru CM's court prepared and filed a report to the effect that the file may have been disposed off under the **Records Disposal (Court) Rules vide Gazette Notice No. 7846** dated 30th September, 2016.
5. The Deputy Registrar has also filed a report confirming that according to the committal warrant, the appellants correct case number is **criminal case Number 1632 of 2008**. That the lower court records cannot be traced despite frantic efforts made to trace the same. She opined that the court ought to make further directions in the matter in view thereof.
6. On 28th November 2018, the court directed the parties to file their respective submissions to enable the court give directions in the matter. Only the appellant filed his as at the time of writing this ruling. The appellant submitted that his rights under **Article 50 of the Constitution** have been infringed. He urged the court to review the sentence in line with the decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**
7. The availability of the lower court file is core to the appellant's appeal. He submitted that the loss thereof has inconvenienced him as he cannot proceed with his appeal and therefore his rights under **article 50 of the Constitution** have been infringed. **Article 50 (3)** provides for the right to a fair trial and if convicted to the right to appeal. **Article 50 (3)** provides for the right to information whereas **article 50 (5)** provides that the accused person has the right to a copy of the trial court proceedings within a reasonable period.
8. Faced with a similar situation in **James Khalokoli Ominde v Director of Public Prosecutions & 3 others [2017] eKLR**, the court cited with approval the holding in **Haiderali Lakhoo Zaveri v Rex (1952) 19 EACA 244** where it had been observed: -

“What we can take from Zaveri’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 a coincidence 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 own 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 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.” (Emphasis added)

9. In **John Otieno Ombok v Republic [2017] eKLR** while considering the loss of the trial court record, the court observed: -

“This principle is now well settled in various decisions of the Court of Appeal that in cases where the records have disappeared or cannot be traced, such as in this case, whatever order it is to be made, the interest of justice as a whole must be considered but acquittal is not automatic mainly because all records for the cases are missing or has disappeared. The appellant’s counsel and the state counsel did not root for a retrial, though whether or not there ought to be retrial in a particular case is a matter for discretion of the court based on the circumstances of the case.”

10. The circumstances of this case shows that the lower court file has been missing for close to 9 years now. There is no indication that the appellant was involved in the disappearance of that file. The investigations by the court does not reveal that the loss was by design or by an unforeseen human error. There was no suggestion that the police file is missing.

11. The appellant pleaded that as an alternative, this court considers the decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** and proceed to review the sentenced imposed by the trial court. The court could only do so if the appellant would have exhausted his rights of appeal up to the court of Appeal. This has not occurred.

12. Weighing all matters on the scales of justice, I think the interests of justice demand a retrial.

13. Accordingly, I order that the conviction and sentence of death imposed on the appellant be and is hereby set aside. However, the appellant shall be retried. He shall therefore remain in custody and shall be taken for plea before the Chief Magistrates Court, Meru on 7th October, 2019.

It is so ordered.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE