



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL PETITION NO. 86 OF 2018**

**MICHAEL ODHIAMBO OLUOCH.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**EXECUTIVE OFFICER, MASENO LAW COURTS.....2<sup>ND</sup> RESPONDENT**

**THE OFFICER IN-CHARGE KODIAGA MAXIMUM PRISON.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Petitioner, **MICHAEL ODHIAMBO OLUOCH**, has moved the court seeking the following reliefs;

*“(a) A declaration that the Petitioner’s right to a fair trial guaranteed under Article 50 (2) (q) of the Constitution was violated by being denied his right of appeal and the right to a true copy of the record of proceedings. A declaration that the Petitioner’s rights to fair administrative action guaranteed under Article 47 (1) of the Constitution was violated by being denied his right to an expeditious, efficient, lawful, reasonable and procedurally fair process.*

*(b) A declaration that the continued detention of the Petitioner, **MICHAEL ODHIAMBO OLUOCH**, was illegal and unconstitutional on grounds that his right to appeal and fair hearing as well as his right to a true copy of the records of proceedings have been violated and hence the Petitioner should be set free.*

*(c) An order do issue against the 2<sup>nd</sup> Respondent to present a report to this court within 30 days of the Judgment detailing out the history from the records held by that office of Maseno Criminal Case No. 889 of 2015 including whether that file can be traced for purposes of an appeal to the High Court.*

*(d) An order setting aside the Petitioner’s conviction and sentence and compelling the Chief Magistrate’s Court at Maseno to commence a re-trial forthwith.*

*(e) An order do issue against the 3<sup>rd</sup> Respondent from continuing to detain the Petitioner, **MICHAEL ODHIAMBO OLUOCH**, in regards to the decision of **MASENO CRIMINAL CASE NUMBER 889 OF 2015**.*

*(f) Any other order that this court may deem fit and just to grant in the circumstances.*

*(g) Costs of this Petition to be borne by the Respondents.”*

1. The Petition was amended on 27<sup>th</sup> February 2019, and the reliefs set out above are from the said Amended Petition.
2. In support of the Amended Petition, the Petitioner filed an affidavit, summarizing the facts giving rise to it.
3. It is common ground that the Petitioner was convicted for the offence of Defilement and that he was sentenced to imprisonment for 20 years.
4. It was the Petitioner’s case that the learned trial magistrate did not read out the whole judgment.
5. She is said to have read out only the final verdict, and to have highlighted the conclusion.

6. After the court had pronounced the Judgment and the Sentence, the Petitioner made an oral application for a copy of the Judgment and the typed proceedings, as he wished to read the same, with a view to lodging an appeal.
7. A copy of the Petitioner's letter dated 5<sup>th</sup> February 2018 was provided to this court, and it shows that on 6<sup>th</sup> February 2018 the Petitioner made a formal request for the typed proceedings and Judgment, for the purpose of filing an appeal.
8. On 8<sup>th</sup> February 2018 a complaint was lodged with the Ombudsman. The said complaint, which was about the delay in issuance of proceedings, was lodged by **JOSEPH OLUOCH OTHUTHU**, who is the Petitioner's father.
9. By a letter dated 19<sup>th</sup> April 2018, Messrs Mwamu & Company Advocates wrote to the High Court, at Kisumu, seeking intervention on the issue of the missing proceedings and Judgment.
10. By a letter dated 6<sup>th</sup> November 2018, Messrs Odhiambo Oronga & Company Advocates wrote to the Chief Registrar of the Judiciary, seeking assistance in tracing the Court file.
11. As the file had been missing, and because he was being held in prison custody, the Petitioner asserted that the file had been intentionally lost or hidden, so as to make it impossible for the Superior Court to overturn the concocted evidence which had led to his malicious conviction.
12. By an affidavit filed by **HON. REUBEN KIPSANG STALIN**, the (then) Head of Station at the Maseno Law Courts, it was stated that the learned trial magistrate, **HON. DOLPHIN OKUNDI** had resigned from the Judiciary on 31<sup>st</sup> January 2018.
13. However, Hon. Kipsang Stalin deponed that as at 11<sup>th</sup> February 2019, Hon. Okundi had not yet returned to the Maseno Law Courts, the Petitioner's court file.
14. Following intervention from the Presiding Judge at the High Court in Kisumu, Hon. Okundi personally delivered the court file to the High Court in Kisumu.
15. According to the Petitioner, he was shocked to see that the court records contained only the hand-written proceedings containing the testimony of **PW1**.
16. The evidence of all the other witnesses were not made available to the Petitioner, in the original handwritten notes of the trial court.
17. In the circumstances, the Petitioner was apprehensive that the original handwritten proceedings were lost, misplaced or destroyed during the period of time when the court file was in the hands of the former magistrate Hon. Okundi.
18. If that were not the case, the Petitioner submitted that nothing would be easier than having Hon. Okundi make available the handwritten record of proceedings.
19. As far as the Petitioner was concerned, the typed record of proceedings does not reflect the testimony of the witnesses who testified.
20. Considering that the court records continued to be in the hands of a magistrate who had already left the Judiciary, the Petitioner said that the contents of the court file cannot be verified by the Officer at Maseno Law Courts, who has the mandate to keep court files in his custody.
21. The Petitioner expressed the view that the court file got lost before the trial court delivered its verdict, hence the decision by the said court to only read the conclusion.
22. He said that he has a constitutional right to have the trial court read the whole judgment, so that he could have heard the court's reasoning, which led to his conviction.
23. The inability to make available the original hand-written record of proceedings was described as an attempt by the trial magistrate or by the court to cover-up mistakes, or an attempt to have the Petitioner rot in jail.
24. As the Executive Officer at the Maseno Law Courts did not have control over the court file, the Petitioner submitted that the said Executive Officer cannot therefore authenticate the veracity of the record which Hon. Okundi had now made available.
25. In the absence of records whose authenticity was verifiable, the Petitioner submitted that his right to a fair hearing at the appellate court, cannot become a reality.
26. In determining this Petition, I start from the premise that the learned Magistrate who was the Head of Station at the Maseno Law Courts when this matter was presented to the High Court, confirmed that the original Court File was not in the custody of that Court from 31<sup>st</sup> January 2018 when the trial court delivered judgment.
27. I also find that the Court File continued to be in the hands of Hon. Dolphin Okundi after 31<sup>st</sup> January 2018.
28. As Hon. Okundi retired from the Judiciary on 31<sup>st</sup> January 2018, I have found no lawful justification for her continuing to have custody

of the Court File. However, I must hasten to add, as I hereby do, that Hon. Okundi is not a Respondent in this Petition. Therefore the finding I have made herein, touching upon her cannot be deemed to be an absolute final determination, because the retired Judicial Officer has not been invited by the Petitioner, to answer to the allegations levelled against her.

29. In this case the 1<sup>st</sup> Respondent is the Director of Public Prosecutions. The Petitioner has not indicated what his complaint is against the said Director of Public Prosecutions.

30. The 2<sup>nd</sup> Respondent is the Executive Officer, Maseno Law Courts.

31. The Petitioner has not demonstrated that the said 2<sup>nd</sup> Respondent was culpable for the complaints raised in the Petition.

32. The 3<sup>rd</sup> Respondent is the Officer In-Charge of the Kodiaga Maximum Prison.

33. Once again, I find that the Petitioner has failed to make out a case against the said 3<sup>rd</sup> Respondent.

34. Neither the Director of Public Prosecution nor the Officer In-Charge of the Kodiaga Maximum Prison had any responsibility in ensuring that the Court File was in safe custody.

35. Meanwhile, as regards the Executive Officer, Maseno Law Courts, it has not been demonstrated that he did something which he ought not to have done or that he failed to do something which he ought to have done.

36. In my considered view it is Hon. Okundi who may be able to explain;

*(a) why the court file was not made available when the Head of Station first requested for it;*

*(b) why the files which were ready were returned in batches;*

*(c) why the court file was not made available to this court soon after the court first asked for it;*

*(d) why the handwritten proceedings in the court file were only those of PW1, whilst the evidence of other witnesses was typed;*

*(e) why is it that the typed proceedings were on clean sheets of paper; does that suggest that the proceedings were typed and then printed at the same time?*

37. In the circumstances I do not understand why the Petitioner expected the named Respondents to answer for matters that only Hon. Okundi could provide answers to.

38. The Petitioner has not specified the particular statutory or constitutional provision which was allegedly breached when the trial court did not read the entire judgment.

39. But in the event that the trial court failed to summarize the evidence or failed to analyze the evidence, those could form grounds of appeal.

40. The Petitioner asked this court whether or not I can vouch for the proper safe keeping, custody and integrity of the record of the proceedings of the trial court.

41. As the proceedings in issue were not before this court, it is not the responsibility of this court to vouch for the same.

42. Records of the proceedings are kept by the court before which such proceedings took place. Therefore, it is the Magistrate's Court, Maseno, which ought to indicate whether or not it was able to vouch for the integrity of the record of the proceedings.

43. The said Magistrate's Court indicated that the learned trial magistrate did not return the court file for one full year. I therefore believe that the Maseno Magistrate's Court is not in a position to vouch for the integrity of the record of proceedings which was not in its custody for a considerable length of time.

44. The Petitioner submitted that if he had not continually and vigorously pursued the Judiciary, with a view to trace the court file;

*“... his right to a fair trial would have been extinguished by the unlawful actions of the Trial Magistrate and clear failure by the 2<sup>nd</sup> Respondent.”*

45. I have already made a finding that the Petitioner did not satisfy this court that there was any particular failure on the part of the Executive Officer of the Maseno Magistrate's Court.

46. As regards the learned trial magistrate, I find myself unable to condemn her for the alleged concoction of the record.

47. In the case of **FRANCIS NDUNGU WANJAU V. REPUBLIC, CRIMINAL APPEAL NO. 187 OF 2002**, the Court of Appeal dealt with a case in which:

*“..... justice or due process of the law was subverted by evil, and yet unidentified, forces.*

*The subversion has taken various forms including disappearance of whole or part of court records including records supplied to intending appellants and the Attorney General; disappearance of original handwritten records, falsification of court proceedings and judgments; substitution of signed judgments with unsigned ones and alterations of court records.”*

48. It is to be noted that in that case Mr. Nyaga Njage, who had been one of the trial magistrates, re-examined the records and stated that some parts of the record were written by him whilst some other parts had not been written by him.

49. In the circumstances, the Court of Appeal held that there was no authentic record upon which an appeal can be properly grounded.

50. In this case the Petitioner has cast doubts about the authenticity of the typed record of proceedings. Meanwhile, the bulk of the handwritten record of proceedings has not been made available by the learned trial magistrate.

51. Therefore, the Respondents cannot verify the authenticity of the record.

52. Accordingly, any appeal that is grounded upon a record of proceedings whose authenticity cannot be objectively verified, is a non-starter.

53. In the circumstances, there are only two options available; first, that the Petitioner cannot pursue his appeal and must therefore continue to serve the sentence, or, secondly that there should be a retrial.

54. As the Court of Appeal restated in the case of **FRANCIS NDUNG’U WANJAU Vs REPUBLIC, CRIMINAL APPEAL NO. 187 OF 2002**, when records of proceedings go missing in whole or in part, or if the authenticity of the records cannot be verified, 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 not reasonably feasible to order a retrial, an acquittal must follow as a matter of course.*

*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.”*

55. In this case, the Petitioner was convicted in January 2018, which is relatively recent.

56. Secondly, the evidence on record, and which appears to be admissible, could, in my humble opinion lead to a conviction.

57. In the circumstances, considering that the Petitioner played no role in the events which have made it difficult to verify the authenticity of the record of the proceedings, I find that the interests of justice demand that there should be re-trial.

58. Accordingly, I now set aside the conviction and the sentence which was handed down by the trial court, and I order that the Petitioner shall be re-tried by another magistrate of competent jurisdiction, at the Maseno Law Courts.

59. The Petitioner shall be produced before the Head of Station at the said Maseno Law Courts within the next **SEVEN (7) DAYS** for Directions on the re-trial.

60. Finally, I direct that a copy of this Judgment be placed before the Hon. Chief Justice for his information. I so order because I firmly believe that there is every reason for His Lordship the Chief Justice to give due consideration to the formulation of appropriate guidelines on how a Judicial officer or a Judge who has retired or resigned or in any other manner ceased to hold office, ought to be dealt with if he or she does not promptly surrender court files to the Judiciary.

61. In my considered view, there is no justification in holding onto a court file after a Judge or Judicial Officer has ceased to hold office. The question therefore is whether or not there should be well-defined repercussions for failing to promptly surrender court files.

**DATED, SIGNED and DELIVERED at KISUMU**

**This 17<sup>th</sup> day of September 2019**

**FRED A. OCHIENG**

**JUDGE**