



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 11 OF 2006**

**DAVID MUTWIRI GIKENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The appellant appealed to this court against his conviction and sentence to suffer death for the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** in Nkubu Criminal Case No. 2397 of 2002.
2. In order for his appeal to be heard, it was imperative that the trial court record be availed to this Court. According to the report dated 22/1/2018 by the Executive Officer, Nkubu Law Court, that file could not be traced at Nkubu Law court registry despite all effort being made. It indicated that some records from the year 1958 to 2007 had been destroyed.
3. In a report dated 11/7/2018, by the Deputy Registrar of this Court, it was indicated that investigations at the Prisons and ODPP offices revealed that the appellant had not preferred any other appeal except this one. That the Archivist of this Court had confirmed by a letter dated 1/2/2018 that the file may have been destroyed together with the old files of between 1958 and 2007 when Nkubu Law Courts destroyed old files under the **Records Disposal Act, Cap 14 of the Laws of Kenya**.
4. On its part, the prosecution indicated that it had contacted the OCS and DCI offices in Nkubu with a view to retrieve the police file to confirm if a retrial can be ordered but it was in vain. In the circumstances, Mr. Namiti for the prosecution told the court that a retrial would be impossible.
5. In **Joseph Maina Kariuki v Republic [2008] eKLR**, the court of Appeal rendered itself on a similar issue thus: -

***“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 justice and in doing so must consider 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 is 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 by 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.”***

***The Court in the above cited case then proceeded to consider the relevant factors; found that the appellant therein had been in prison for about fifteen years, that it could not be said that he was in any way responsible for the disappearance of the files, proceedings and documents relating to the charge against him and that a retrial was virtually impossible in the circumstances. The Court, under those conditions, quashed the conviction and set the appellant free. What is important, however, is that the Court emphatically rejected any notion of an automatic acquittal merely because all the records of the case have disappeared.”***

6. I will reiterate the foregoing pronouncement of the Court of Appeal in this case. An acquittal is not automatic when records have vanished but the whole situation must be looked at in totality.
7. In the present case, the appellant may not be presumed to be innocent as he had been found guilty by the trial court. But under **Article 50 (2) (q) of the Constitution**, he has a right to appeal to, or apply for review by a higher court as prescribed by law.
8. He submitted that he had appealed before but from the report dated 11/7/2018, it is clear that no appeal had been preferred by him. This however, does not diminish the fact that this appeal or an application made with regard to his appeal may not proceed when the file trial court file cannot be traced or reconstructed. This misfortune was not as a result of the appellant's doing for he has been in custody for about ten (10) years.
9. In view of the foregoing, I am of the view that the unavailability of the file makes it difficult for the appellant to exercise his right of

appeal. Accordingly, I quash the conviction meted on him and set aside the sentence. He is to be set forthwith at liberty unless otherwise lawfully held.

**DATED and DELIVERED at Meru this 11<sup>th</sup> day of December, 2019.**

**A. MABEYA**

**JUDGE**