



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 71 OF 2008**

**RICHARD KURGAT BUNEI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(An Appeal from the Judgment in Eldoret Criminal Case No. 9703 of 2007 dated 12<sup>th</sup> September, 2008)***

**JUDGMENT**

According to the scanty information presented to this court, the appellant herein, one *Richard Kurgat Bunei* was charged tried and convicted in case File No. 9703 of 2007 in the Chief Magistrate's court Eldoret, for an offence of defilement and sentenced to serve 20 years in prison. This was on 12<sup>th</sup> September, 2008. On 15<sup>th</sup> February, 2012 he applied for leave to appeal out of time and had a draft petition of appeal. The said application was unopposed and on 10<sup>th</sup> May, 2012 was granted.

However the appeal could not be processed further as the original court's record went missing. It was mentioned several times thereafter, allowing for the search of the file, but in vain.

Probably out of frustration, the appellant filed a Notice of Motion on 10<sup>th</sup> March 2016 in which he urged the honorable court to compel the Chief Magistrate and the Executive Officer, both of Eldoret Law court, to avail criminal case file No. 9703/2007 for the purpose of hearing of the appeal. The said Notice of Motion was never heard. Eventually following on the issue, the Executive officer, one *T.O Mokaya*, made a written declaration to the court that the said file could not be traced and is therefore lost.

The appellant had appealed on the grounds that:-

- (1) He did not follow the proceedings as he had applied for an interpreter but the request was overlooked.
- (2) The language the court clerk used was not appropriate to him.
- (3) He was denied witness statements
- (4) The trial court was not impartial.
- (5) He was not accorded enough time to defend himself
- (6) Prosecution witnesses were directed while offering evidence.

The above shows the appellant is questioning quality and fairness of his trial. Such raises triable issues on appeal. However given the scenario, where the record is missing, this court is not in a position to adjudicate on the issues raised. The court is the custodian of court records and can hardly blame others for the loss without blaming itself. Any decision by the court given the scenario is therefore sensitive to other parties who may not have had a hand in the loss of the records. The police investigated the case and found that there was enough evidence against the appellant to warrant him be charged with the said offence. Prosecution agreed with the opinion and effectively prosecuted the case leading to the said conviction and sentence. Though we are aware that mistakes at times are made during trial and corrected on appeal, at times leading to acquittal of the appellant, the opposite also do happen. The tricky question is, who should benefit from the current scenario? There is no evidence that the appellant had a hand in loss of the said records. He claims he was wrongly convicted and sentenced and hence the appeal.

He has consistently followed up on the issue since his appeal on 15<sup>th</sup> February, 2012. In the case of ***John Karanja Wainaina –vs- Republic, Criminal case No. 61 of 1993***, the court faced with a similar scenario observed that: -

***“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 prepared to be made is the one which serves the best interest of Justice.”***

The appellant herein have served sentence from 12<sup>th</sup> September, 2008 when he was sentenced and have waited for his appeal to be processed and heard since 15<sup>th</sup> February, 2012 when he filed it. He has served more than 10 years of the said sentence of 20 years in prison. The appeal if heard would have gone either way. The best interest of justice is to accord him the benefit of doubt and allow the appeal. I have done that. The conviction is therefore quashed and the sentence. He is set free unless otherwise lawfully held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 5<sup>th</sup> day of December, 2018**

In the presence of:-

- (1) The appellant
- (2) Ms. Mumu for State
- (3) Mr. Mwelem - Court clerk