



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 161 OF 2010

SILAS MURUNYA.....1ST APPELLANT

OLIVER SIMIYU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable D. Kemei in Eldoret Criminal Case No. 7098 of 2009 dated 29th October, 2010)

JUDGMENT

This is an extra ordinary matter where *Silas Murunya* and *Oliver Simiyu* appealed separately from conviction and sentence in Criminal Case No. 7098 of 2009, heard before *Hon. D. Kemei* (PM) as he then was, in Eldoret Magistrate's Court, whereby each one of them was convicted for the offence of Robbery with violence contrary to *Section 296(2)* of the *Penal Code* and sentenced to death. This was on 15th October, 2010. They appear to had lodged the appeals on 29th October, 2010. However the original record went missing and the appeals could not be processed. *Silas Murunya* appeal was in Criminal File No. 161 of 2010 while that of *Oliver Simiyu* was 162 of 2010. Both were consolidated in Criminal Appeal No. 161 of 2010.

Efforts were made since to have the court file traced for purposes of hearing the appeal but in vain. *Silas Murunya* (the first appellant) out of probably frustration given the scenario, filed a notice of motion on 13th April 2018 urging the court to compel *Hon. D. Kemei* and the Executive officer to produce court file No. 7098 of 2009. He alleged the two hid his file after they learnt that he had appealed so as to frustrate the said appeal. The said notice of motion was not heard. However, this court after making several efforts to have the file sought and availed in court, eventually summoned the Executive officer to state its official position on 25th October, 2018. On 1st September, 2018 he made an official report and filed it, to the effect that the said file is lost and cannot be traced.

The court has very scanty information about the lower court trial. Even the charge sheet a very crucial document, and the judgment are missing, leave alone the entire proceedings. The information we have about the charge and the sentence is as stated by the appellants in their Memorandum of Appeal.

The first appellant grounds of appeal are that:-

- (1) He pleaded not guilty at the trial.
- (2) Hearsay evidence was weighed and the original accuser was not called as a witness.
- (3) His identification by the witnesses was improper.
- (4) Prosecution case is inconsistent and uncorroborated.
- (5) He had no possession of the exhibits.
- (6) He was not described to the police by the witnesses to ascertain they had identified him.
- (7) Source of light at the scene was not established.

(8) His defence was rejected for no cogent reason.

The second appellant grounds are that:-

- (1) He pleaded not guilty at the trial.
- (2) He was convicted on evidence of identification and no witness had given his description to the police.
- (3) Source of light at the scene was not disclosed.
- (4) The witnesses evidence-in-chief was inconsistent with their statements to the police.
- (5) Prosecution case is inconsistent and uncorroborated.
- (6) He had no possession of the alleged exhibits.
- (7) His defence was rejected and no reason was given for the rejection.

Looking at the raised grounds of appeal, they raise triable issues. On appeal the court rely mostly on the lower court record as the test is whether the decision of the lower court and sentence is correct given the charge and evidence adduced. Without the record, the court is at a loss. The scenario herein places the court in a catch 22 situation. I say so because a legitimate court of law heard the case and convicted the appellants. The prosecution may be of the position that the conviction and sentence was right, having made a decision to prosecute them in the first place. The courts are the custodian of the court records and can't therefore pass the blame on the loss of the file legitimately and entirely on any other party. If any other party may have had a hand in it, most likely is in collaboration with court officials and or employees, unless lost in a case of registry breakage and theft. We can't therefore point an accusing finger on any other person without also firmly pointing at ourselves. We might, in absence of any other evidence to the contrary, be the ones entirely to blame for the loss. If the appellant is

set free out of such a scenario, the prosecution may raise arms asking, why, they adduced evidence and proved the charge. The court convicted him, lost the records and have now acquitted him for the loss. The victim will also not be quiet. They will legitimately claim they adduced the evidence, was believed by the court, the suspects were legitimately convicted, court lost the records and then acquitted them for the loss.

Definitely the victim and the prosecution would not have been players on issues leading to such an acquittal and would point fingers of accusation mostly to court and probably the appellants.

However, this is not the first court to be faced with such a scenario. In the case of *John Karanja Wainaina –vs- Republic, Criminal case No. 61 of 1993*, the court faced with a similar scenario, held that:-

“In such a situation as this, the court must try to hold the scales of justices 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.”

In our case issues are not clear on circumstances under which the court file was lost. It appears no any other party had records of the court proceedings as the prosecution does not keep it, but statement of their witnesses. There is no indication that anyone had applied for the court proceedings and managed to obtain them before the loss of the file. The 1st appellant as indicated earlier in his filed Notice of Motion on 13th April 2018 blamed the trial magistrate and the Executive officer for the loss of the file. Apart from merely blaming them, he availed no evidence to support the allegation. The circumstances under which the said court file got lost are therefore not clear and we do not know who is to blame for it.

As I had indicated earlier, the appellants have raised some legitimate grounds of appeal especially on identification. The court is not able to consider whether they were correctly convicted or not. They can't be blamed for the scenario they have found themselves in, on this appeal. They have been in custody for the last 8 years awaiting hearing of the appeal. Given the time lapse it would prejudice them if the court orders a retrial. The witnesses may also not be traced and the exhibits. If traced they may have forgotten details about the incident. Retrial, given the time lapse, may not serve any meaningful purpose.

This catch 22 scenario is not easy to sail through as the court itself have a hand in it. However, whichever way, parties who may be innocent, and allege they are, should not be made to suffer out of it. The best interest of justice would be served by allowing the appeal, quashing the conviction and the sentence. I have done so, they are free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of December, 2018

In the presence of:-

The appellant

Ms. Mumu for state

Mr. Mwelem- Court clerk