



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.82 OF 2015

BETWEEN

JAMES KHALOKOLI OMINDE PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE REGISTRAR, COURT OF APPEAL 2ND RESPONDENT

THE REGISTRAR, HIGH COURT OF KENYA AT NAIROBI,

CRIMINAL DIVISION3RD RESPONDENT

THE OFFICER-IN-CHARGE, KAMITI MAXIMUM

SECURITY PRISON 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, James Khalokoli Ominde, has filed the present Petition, dated 3rd March 2015, alleging contravention of various constitutional rights, as shall be shown shortly. He has instituted the same against the Director of Public Prosecutions, whose office is mandated to undertake criminal prosecutions on behalf of the State pursuant to **Article 157** of the **Constitution**; the 2nd Respondent, the Registrar of the Court of Appeal and the 3rd Respondent, the Registrar of the High Court at Nairobi, Criminal Division, both offices which are established pursuant to **Article 161 (3)** of the **Constitution**; and the 4th Respondent, the Officer-in-Charge, Kamiti Maximum Security Prison, an office established under **Section 2** of the **Prisons Act, Chapter 90** of the **Laws of Kenya**.

The Petitioner's Case

2. In his Affidavit in support of the Petition sworn on 3rd March 2015, the Petitioner stated that he is currently imprisoned at Kamiti Maximum Security Prison for allegedly committing the offence of robbery

with violence contrary to **Section 297 (2)** of the **Penal Code** and having been charged on 19th October, 2004.

3. That having been found guilty by the Trial Court, he preferred an appeal to the High Court being **Nairobi H. C. Criminal Appeal No.287 of 2007** but his conviction was upheld. Further, that being dissatisfied with that decision, he appealed to the Court of Appeal on or about September, 2010 and since doing so, he has allegedly never received any communication from the Court of Appeal in regard thereto.

4. Further, that in late October, 2014, he retained the services of M/s Ekin and Associates Advocates to assist him in getting his file and prosecute the appeal and on 3rd November, 2014, the said firm wrote a letter to the Deputy Registrar of the Court of Appeal at Nairobi requesting to be allowed to peruse the said file. That firm was subsequently informed that the High Court file had never been forwarded to the Court of Appeal and it was requested to inquire of the same from the High Court Criminal Division Registry.

5. The Petitioner added that on 5th November 2014, the said law firm wrote another letter to the Deputy Registrar of the High Court's Criminal Division seeking to peruse the said file and that on 10th November, 2014 the Advocates went to the Registry to inquire about the file but the same could not be traced. On 11th November 2014, his Advocates again wrote a letter to the same Deputy Registrar seeking assistance in tracing the file and while the letter was received by the Registry on the said date, no response has ever been given to his lawyers.

6. The Petitioner has now alleged that his right to a fair trial has been breached and in particular, his right to appeal as envisaged under **Article 50 (2) (q)** of the **Constitution** has been violated and will continue being violated solely on the ground that his file cannot be traced. Further, that his right to have the trial begin and conclude without unreasonable delay under **Article 50 (2) (e)** of the **Constitution** has been breached as it is over four years since he made the appeal to the Court of Appeal and yet the hearing thereof has never began and there is no indication as to when it will commence. His right to information pertaining to the appeal has also been breached as he has not been supplied with the record of appeal.

7. That as a consequence of the aforesaid actions, he has further been subjected to psychological torture and mental anguish contrary to **Article 29 (d)** of the **Constitution** and in addition, his right to a fair trial as guaranteed by **Article 25 (c)** of the **Constitution** has been breached.

8. It was his other contention that his continued detention without his appeal being heard on the grounds of a lost file, cannot be justified on any ground.

9. In his Written Submissions dated 18th December, 2015, he further argued that the right to a fair trial covers the entire duration of a suit which includes any appeal that an accused person may lodge after a conviction. He also pointed out that the delay in having his appeal heard has been attributed to a missing file as opposed to the ordinary causes of delay such as the backlog in the number of cases and hence, the said delay is unreasonable.

10. The Petitioner in addition submitted that the 3rd Respondent is in charge of the safe custody of all criminal files including his, and the 3rd Respondent's failure in accounting for the missing file has not been explained as no Affidavit in Reply has been tendered in these proceedings. He also pointed out that although the 1st, 2nd and 3rd Respondents are not responsible for the safe custody of the Petitioner's Court file, they have been enjoined as parties as the orders sought herein may affect them.

11. In support of his case, the Petitioner has relied on the decision in **Jackson Mutharia Mwaura and Another v Republic [1994] eKLR**, where, because a High Court file could not be traced and the Record of Appeal could not be certified, the Court held that the Appellants therein were not to be blamed for the missing file and the Court rejected the purported Record of Appeal and ordered that it be struck out. Further, he relied on **Danson Maina Muchoki v Republic [2014] eKLR** and noted that although the Court in that case did not order an acquittal or discharge of the Applicant where his appeal find was untraceable, the Court released the Applicant on condition that he should appear in Court when required

for the retrial, appeal or for any other lawful reason.

12. For the foregoing reasons, the Petitioner has urged the Court to be guided by the said decisions and either acquit or discharge him and in the event that the Court orders a discharge or an acquittal, it should be on condition that he will appear in Court when required. The Petitioner specifically seeks a grant of the following orders:

(a) Declaratory orders do issue, declaring the continued detention of the Petitioner illegal and unconstitutional on grounds that his right to appeal and fair hearing have been violated and hence the Petitioner should be set free forthwith.

(b) An order do issue prohibiting the 4th Respondent from continuing to detain the Petitioner in regard to the decision of the High Court [at] Nairobi in Criminal Appeal No. 287 of 2007.

(c) Any other order that this Honourable Court shall deem just.

(d) Costs of the Petition be borne by the Respondents.

The Respondent's Cases

13. Based on the record of this Court, whereas the Respondents entered appearance on various dates, they did not file any pleadings and as such, the allegations in the Petition remain uncontroverted.

Determination

14. In the circumstances as set out above, the key issue for determination is whether the orders sought in the Petition should be issued. In that regard, at the core of the Petitioner's case is the issue of the loss or disappearance of his Court file in High Court **Criminal Appeal No. 287 of 2007**. It has been submitted that the loss thereof has inconvenienced him in that he has been unable to lodge his appeal to the Court of Appeal and which fact has allegedly resulted in an infringement of his right to a fair trial guaranteed under **Article 50 (2) (e), (q), (3), and (5) of the Constitution**. The said Articles provide that:

“Every accused person has the right to a fair trial, which includes the right-

(e) To have the trial begin and conclude without unreasonable delay;

...

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in a language that the person understands.

(5) An accused person-

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.” (Emphasis added)

15. There being no response to the Petition, and having seen copies of letters from M/s. Ekin & Associates on the subject, it can only be my conclusion that the Petitioner's complaint regarding loss of the aforesaid file must be true.

16. In that regard, this Court notes that the predicament of missing and disappearance of Court files has been a ghost that has haunted the Judiciary for quite some time, even before the promulgation of the **Constitution 2010** and the transformations initiated afterwards. That is why, in 2006, in **Francis Amazimbi Milimo v Republic**, Misc. Crim. App.24 of 2006, faced with a similar situation, Ibrahim J. (as he then was) stated thus:

“The Appellant lodged an appeal in 1993. This is his right under the Law. It is my view that in light of the Rights and Freedoms of the individual as enshrined in the Constitution of Kenya, protection of the Law implies that the right of appeal is indeed a fundamental right. It is provided by the Criminal Procedure Code. Since it touches on questions of liberty and other rights associated with it, the right of appeal is a Constitutional right. It cannot be taken away whatsoever.

Once a convicted party lodges an appeal, then strictly, the presumption of innocence until proven guilty, resumes in the eyes of the law, as long as the appeal is pending. This is a matter of principle of the law albeit the existence of conviction and sentence.

As a result of the foregoing, an appellant just like an accused at the trial stage has a right to a fair hearing within a reasonable time. In this case, the appeal has not been heard for 13 years. During the pendency of the appeal the file has gone missing. It is not a surprise that a file which has been pending for so long “disappears” totally. What should we expect?

An appeal cannot pend forever. Had the court file been available this is one case, I would have heard on the spot and made a decision within a day or two. This court if necessary would not have had a break or gone to sleep. This is because the right of appeal and exercise of it, brings in the possibility that this appellant could be found to be innocent after all. So, imagine if the appeal were to be in his favour if at all the file was to be traced, then this means that an innocent man was held for 13 years for his appeal to be heard. That would be a tragedy and a calamity.

In this case, the situation is worse, the Appellant’s file has gone missing and there is no chance for the appeal to be heard whatsoever without the court file and record. The Appeal cannot be heard. The Respondents also have no records in respect of this appeal and they could not be of any assistance.

The legal system and administration of Justice in Kenya therefore faces a dilemma of substantial proportions in this matter. On one hand the Appellant was convicted and faced the death penalty on the other hand his Appeal can never be heard. He can neither be executed in satisfaction of the judgment neither can he be released before determination of his appeal and acquittal, if successful.” (Emphasis added)

17. Like in the above case, this Court is also in a dilemma because on one hand, the Petitioner was lawfully convicted by a Court of competent jurisdiction and his appeal to the High Court was dismissed after a lawful hearing. Yet it is now apparent that without the record of both the trial Court and the High Court, his appeal may never be heard. In that context, in normal circumstances, he can neither be released before the determination of the Appeal to the Court of Appeal neither can he be acquitted on any merit without having the appeal being heard and determined.

18. The above uncertainty must however be addressed and resolved by this Court having been called upon to do so and the question that arises is this; what is the appropriate remedy to grant? Can this Court order a re-trial in the circumstances? Faced with a similar predicament, the Court in the case of **Haiderali Lakhoo Zaver v Rex (1952) 19 EACA 244** stated:

“.....Mr. Wilkinson’s second point was based upon general consideration of justice and equity. The Learned Judges of the High Court were faced with a situation which framers of the Code had not foreseen. The first part of the subsection (1) of Section 333 prescribes, as a condition precedent to the determination of the Appeal, that the Appellate Court shall peruse the record.

If this is made impossible by the absence of a record, has the High Court any jurisdiction to exercise its powers as an Appellate Court? The Learned Judges thought that the logical course would be to decline to exercise such powers, but that it would be tantamount to the denial of justice. With that view we agree. They then considered whether it would be possible to determine the Appeal on such material as was available or could be made available. The possibility of reconstructing the record was reduced by the fact that the death of the trial Magistrate had intervened. It is perhaps unfortunate that the Judges were not informed, as we have been, that Counsel had taken notes of the evidence on the information they had. The Learned Judges decided that, in the present instance, it would be quite useless to attempt to do so. The Appellant naturally wished them to allow the Appeal but this they refused to do on the ground that simply to quash the conviction because the record was lost would be to act wholly without logic, reason and justice and they considered that the nearest approach to justice in the circumstances would be to order a retrial, after quashing the existing conviction.....”

19. In the above regard, this Court notes that the Petitioner lodged his Appeal on or about September, 2010, and to date, no response has been forthcoming and his appeal therefore remains uncertain. However, since the Petitioner was convicted by a competent Court under the laws of Kenya, his incarceration was sanctioned by the law and he was therefore serving a lawful sentence. This Court cannot in the circumstances pre-empt what the outcome of the Appellate Court would have been and as such, it would not be appropriate in the circumstances to hold that the Petitioner’s incarceration was illegal. While the Court also acknowledges that the Petitioner’s right to a fair trial as stated above has been infringed, the appropriate remedy in the circumstances and pursuant to **Article 23 (3) of the Constitution** must be one that takes into account those conflicting facts as well as the rights of the victim(s) of the robbery with violence charge.

20. In that context, I can do no better than to reiterate the holding in **Haiderali Lakhoo Zaveri v Rex (supra)** where the Court made the following observation:

“What we can take from Zaver’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 it must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.” (Emphasis added)

21. In agreeing with the above findings, this Court cannot do much more in the circumstances of the present case but to hope that the judicial transformation and gains anticipated by the **Constitution, 2010** will cure such cases of missing and disappearances of files. It is interesting however that the above sentiments were expressed in the 1950s long before the advent of the more robust **Constitution 2010**. The sentiments however retain their strength and value even today. Having so said, the Petitioner has made two prayers:

- i) That his continued detention should be declared to be illegal and unconstitutional.
- ii) If (i) is in the affirmative, that an order do issue prohibiting his continued detention.

22. Noting the above prayers, it is obvious to me that an appellant’s detention cannot be either unlawful

or unconstitutional only because the trial Court record together with the record of the first appellate Court are missing. The reason for that is obvious: both Courts acted lawfully to convict and uphold his conviction, respectively. The result of their separate findings is therefore that he is lawfully and constitutionally in detention.

23. Further, in both the decisions in **Mwaura (supra)** and **Muchoki (supra)**, the Court did not *per se* find that loss of a Court record invalidated either the conviction or the detention of the applicants therein. I shall adopt the same approach in this matter and the answer to issue No.(i) above also answers issue No. (ii).

Conclusion/Disposition

24. Having so said however, the Court is obligated to grant the Petitioner an appropriate remedy because the right to an appeal under **Article 50(2)(q)** cannot be thrown away whimsically more so where the Respondents have chosen not to respond to the Petition.

25. In the event then and striking a balance as I must, the following orders are the ones I deem fit to grant;

i) The Deputy Registrar, High Court Criminal Division is directed to present a report to this Court within 45 days of this Judgment detailing out the history from records held by that office of **Nbi H. C. Criminal Appeal No.287 of 2007** including whether that file (and the trial Court's record) can be traced for purposes of an appeal to the Court of Appeal.

ii) Should the files(s) not be traceable, the Petitioner's conviction and sentence shall stand set aside and an expeditious retrial shall commence forthwith by an order of this Court.

iii) I shall make no orders as to costs.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2017

E. CHACHA MWITA

JUDGE