



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 71 OF 2015

(CORAM: J.A. MAKAU – J.)

JOHN OTIENO OMBOK.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 10.12.2010 in Criminal Case No. 867 of 2009 in Bondo Law Court before Hon M. Obiero-SRM)

J U D G M E N T

1. The appellant **JOHN OTIENO OMBOK** according to a petition of appeal dated 23rd June 2014 appeals against a judgment delivered in Senior Resident Magistrate's Court at Bondo in Criminal Case No. 867 of 2009 on 10th December 2010. The appeal is against both the conviction and the sentence. The petition did not state the nature of the charge or charges the appellant faced at the trial court neither does it state the sentence that was meted against the appellant.

2. I am referring to the petition of appeal as that is the only relevant document that was availed by the appellant in this appeal. This court called for the Lower Court records to be availed through the Deputy Registrar of the High Court and set this matter severally for mention to confirm availability of the Lower Court record but the exercise has been fruitless. It has been confirmed by the Principal Magistrate at Bondo Law Courts, that the Lower Court file, the PMCR 867 of 2009 Republic V John Otieno Ombok, containing the charge sheet, proceedings and judgment cannot be traced and that there are no indications in their computer that it was ever typed and further the file movement register in respect of that period cannot be traced. The State Counsel was directed by this court to retrieve the record from the police files and the DPP's file to enable the court make an informed decision, however, M/S Odumba, Learned State Counsel, informed the court, the police file, the DPP's file and witness cannot be traced. The PM's court at Bondo, however, forwarded to the Deputy Registrar of this court, the photocopies of the records they could get from the original register being as follows: -

867/2009: 1. John Otieno Ombok

2. Nehemiah Ouma

Count 1: Robbery contrary to Section 296(1) of the Penal Code

Alternative charge: Handling stolen goods contrary to Section 322(2) of the Penal Code

Count 2: Robbery contrary to Section 296(1) of the Penal Code

Alternative charge: Handling stolen goods contrary to Section 322(2) of the Penal Code

Count 3: Robbery contrary to Section 296(1) of the Penal Code

Alternative charge: Handling stolen goods contrary to Section 322(2) of the Penal Code

27/5/2009:

19/11/10 - 2nd Accused acquitted under Section 215 of Penal Code

19/11/10 - Count 1: To serve 10 years imprisonment

Right of appeal of 14 days

19/11/10 - Count 2: To serve 10 years imprisonment

Right of appeal of 14 days

- Count 3: To serve 10 years imprisonment

Right of appeal of 14 days

- Count 4: To serve 1 year imprisonment

3. As I deal with this appeal, as of now, I have no record to peruse nor do the Advocates, over this appeal.

4. At the hearing of this appeal, Mr. Wakla, Learned Advocate, appeared for the appellant whereas M/S M. Odumba, Learned Prosecution Counsel, appeared for the state. Mr. Wakla urged that on 10th December 2012, the appellant was convicted of the offence of robbery and sentenced to serve a term of ten (10) years in jail by the Senior Resident Magistrate at Bondo Court. He then filed appeal at Kisumu High Courts in Criminal Appeal No. 43 of 2014, which upon establishment of the High Court at Siaya in 2015, the said appeal was transferred to this court now being HCCRA No. 71 of 2015. That the court on 9th December 2015 set this appeal for hearing on 23rd March 2016, and further directed the order issued on 21st October 2015 calling for the Lower Court record be availed and upon its availability be placed before the Judge for admission of the appeal. That on 23rd March 2016 the Lower Court file was not availed triggering a series of several subsequent mentions of the matter but the position remained unchanged hence the court directed the counsel to address the court on the matter. Mr. Wakla, addressed this court on the unfortunate situation caused by the loss of the trial court's file in this appeal urging it is impending the hearing and determination of the appeal on merits. Upon referring on a number of authorities dealing with similar situation and the developed law on how to deal with cases when trial court file or record of appeal is lost and upon summarizing on the emerging trend, he urged the court to find and hold that in the circumstances of the case, the order that best commands itself to the court is to set aside the conviction and sentence of the appellant.

5. M/S Maurine Odumba, the State Counsel, in response submitted that this matter had severally been mentioned to enable the trial court to avail the Lower Court file and records but none has been availed which has made it impossible for the appeal to be heard and determined on merits. M/S M. Odumba, Learned State Counsel urged that various decisions have been made by Court of Appeal in regard to the issue at hand in which some decisions have resulted to the acquittal or retrial of the appellants adding that it is however, important to note the interest of justice as a whole must be considered and that each case must be considered on its own merits. She urged the disappearance of the files today is not a strange thing but a fact of life. That the respondent's efforts to trace the original file has been futile and that it is strange that the Lower Court file cannot be traced let alone any document in reference to this case and

that the respondent cannot even tell the date when the appellant was sentenced and/or if there was a trial or whether the appellant was convicted on his own plea of guilt. She urged the police file, the Lower Court trial file and the exhibits, the DPP's file and witnesses cannot be traced. She urged the disappearance of records is not a mere coincidence but disappearance is by design. She urged the appellant was charged with a serious charge and sentence given of 10 years imprisonment is illegal and the appellant is unable to tell why he was given such as sentence. Secondly, she urged the defence filing of the appeal is unexplained and there is no evidence leave to appeal out of time was given as the appeal was filed 4 years after conviction. She urged the appellant move was well calculated. The state counsel submitted a retrial in this case may not be viable neither is reconstitution of file viable. She urged following the conviction of the appellant he has lost the benefit of presumption of innocence as it is now upon him to show that the court which convicted him did so in an error. She urged the appellant's failure to seek leave to file his appeal out of time leaves this court with no appeal at hand, however, if leave was given, it is states submission that no prejudice has so far been caused to the appellant as he is serving an illegal sentence by design.

6. The appellant's and the respondent's counsel referred this court to myriads of authorities in regard to the issue before the court. In all these authorities referred to the court, the court of appeal held that there would be no automatic acquittal merely because all the records for the case have disappeared.

7. In **Joseph Maina Kariuki V Republic, Criminal Appeal No. 53 and 105 of 2004 (UR)** where it had been established that: -

“the record of the trial magistrate and that of the High court on first appeal have simply vanished into thin air and cannot be traced. The police file had also vanished in the same way. Nor can any record be traced in the office of the Attorney General. The appellant’s own copies of the records of proceedings in both Lower Court, which had been supplied to him had disappeared”.

The court was urged to acquit the appellant in those circumstances but it stated:-

“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 justices and in doing so must considered 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 in 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 of 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.”

8. Similarly, the Court of Appeal in **John Ooko Otieno V Republic, Criminal Appeal No. 137/2002 (UR)** where the entire records and files containing proceedings and judgment of the trial court not be traced and the court was urged in the circumstances to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In rejecting that plea, the court stated, thus:-

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgment, police file and Attorney General’s file is a rare occurrence. It has however, occurred and this court is not a stranger to such a situation. This court has on more than one occasion in the past encountered such as situation. In the case of Pius Mukaba

Mulewa and Another vs Republic , Court of Appeal Criminal Appeal No. 103 of 2001, this court, faced with that situation had the following to say: -

“What we can make from ZAVER’S (Haiderali Lakhoo and Zaver V Rex (1952) 19EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must considered all the circumstances under which the loss occurred. Who stands to gain from the loss? Is It merely coincident 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 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 interests of justice. We reject any proposition that in cases where a file has disappeared, and it is reasonably feasible to order a retrial, an acquittal must follow as mater of course.”

9. This principle is now well settled in various decisions of the Court of Appeal that in cases where the records have disappeared or cannot be traced such as in this case, whatever order it is, to be made, the interest of justice as a whole must be considered but acquittal is not automatic mainly because all records for the cases are missing or has disappeared. The appellant’s counsel and the state counsel did not root for a retrial, though whether or not there ought to be retrial in a particular case is a matter for discretion of the court based on the circumstances of the case. In **Pius Olima and Another V Republic, Criminal Appeal No. 110 of 1991**, it was held thus: -

“Our attention was drawn to authorities that deal with principles that should be applied when considering whether a retrial should be ordered or not. The principle that emerge are that a retrial may be ordered where the original trial, was found by the High Court and with which we agree, is defective, if the interest of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case...”

Similarly, in **Benard Lohimo Ekimat V Republic, Criminal Appeal No. 15 of 2004 (UR)**, it was held as follows: -

“There are many decisions on the question of what appropriate case could attract an order of retrial but on the main principal that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require.”

Some of the factors which court in reaching a decision as to whether to order a retrial or not have been stated in **Rwaru Mwangi V Republic, Criminal Appeal No. 18 of 2000(UR)** where the court addressed itself thus:-

*“Ordinarily a retrial will be made where the interest of justice require it and if it unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not. See **Muiruri Vs Republic (2003) KLR 552**. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial – see **Mwangi Vs Republic (1983) KLR 522**.”*

10. In the instant case, the underlying consideration is that of the interest of justice. As stated by both counsel, the appeal cannot proceed on, in that the trial courts record, DPP’s file, the exhibits, the police file which contains the list of witnesses and witness statements cannot be traced hence witnesses cannot be availed. There is no way of knowing how many witnesses recorded the statements and whether they are still available. The report received from the Principal Magistrate’s Court at Bondo Law Courts is that **PMCR Criminal No. 867 of 2009, Republic Versus John Otieno Ombok** cannot be traced, that there is no indication in the computer that it was ever typed and further the court is unable to trace the file movement register in respect of that period. I find that there is therefore irresistible inference that the

court assistant, the registry which was charged with the duty of safe custody of court documents and those who work in that registry, played a key role in disappearance of the court file and the records. The appeal cannot be heard on the basis of missing records. The trial was concluded over 6years ago on 10th December 2010 and the appeal filed on 23rd June 2014, after 3½years. The offence which appellant was facing was of utmost gravity, attracting upon conviction and sentence of upto 14years. The appellant was sentenced to serve 10years which was under the provisions of the law and not illegal sentence as submitted by Learned State Counsel (*see the Provisions of Section 296(1) of the Penal Code*). In absence of the Lower Court records, this court is unable to state whether evidence was adduced before conviction or the appellant pleaded guilty to the offence of robbery contrary to **Section 296(1) of the Penal Code** but the sentence meted is lawful and not illegal sentence as urged by the state. The court cannot at this stage comment as to whether the conviction may well be sustained or not as it lacks the necessary documents. In view of the circumstances, it is my considered view that interest of justice will not be served by ordering a retrial nor by ordering a reconstitution of a file as that is not viable.

11. I now turn to examine the circumstances surrounding this appeal. The appellant was convicted of robbery contrary to **Section 296(1) of the Penal Code** way back on 10th December 2010. The police file, the DPP's file, and the Magistrate's file containing essential proceedings are missing.

12. I wish to state as I deal with this matter that I do not agree with the 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. Faced with a similar situation, the Court of Appeal in **Mwangi V Republic (2005)KLR 495** stated thus: -

“The High Court file, the police file and the magistrate’s file containing committal proceedings are all missing. We cannot order a retrial as that would subject the appellant to a second trial and in any case most of the witnesses, as we have been told by the learned counsel for the appellant, are dead. The appellant has been in prison for about 16 years. As already stated, it cannot be said that he is responsible for the disappearance

We must send a strong message to the effect that the loss of files does not mean that an acquittal would automatically follow. Each case must be considered on its own peculiar circumstances. We have now carefully considered the matter before us. We would place this case on an exceptional category of cases. In the circumstances, we quash the conviction and set aside the sentence of death. The appellant is set at liberty forthwith unless otherwise lawfully held.”

13. In **Mwangi's case (supra)** the Court of Appeal pronounced itself very clearly and send a strong message that the loss of files does not mean that an acquittal would automatically follow, however, each case must be considered on its own peculiar circumstances and that cases can be placed on an exceptional category of cases. It follows therefore each case should be determined on its own peculiar facts. The facts of the case as stated by both counsel must be considered on its own merits. I have already found an order of retrial does not command itself in the circumstances. The appellant has been in custody for the last six (6)years, and it has not been alleged he played any role leading to the disappearance of court file, police file and DPP's file. No disclosure has been made that the appellant has had a hand in the disappearance of the court file. It has not been stated how the appellant who is already convicted and serving a 10year jail will stand to gain by causing the court file, police file, the movement register and DPP's file to disappear as by doing so then he would stand to serve the whole sentence without his appeal being heard. The response given to this court by state counsel and the magistrate's court do not link the appellant with the disappearance of the court file as submitted by the State Counsel. That the Magistrate's report tends to link the disappearance of the court records with the judicial staff who either acted recklessly or in cohort with other interested parties who could even include other parties, interested in seeing that the appeal is not heard and determined on merits and appellant serving the whole sentence. That is possible and cannot be ruled out. It is of great importance to note there is no indication that the court file disappeared at any one time during the hearing of the case. The appellant was convicted on 10th December 2010 but did not lodge his appeal till on 23rd June 2014. The petition of appeal did not show whether the appellant sought and obtained leave to file appeal out of time. **Section 349 of the Criminal**

Procedure Code sets a limitation period within which an appeal should be filed. It provides: -

“349. An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefore.”

14. The court is alive to the fact that no appeal can be accepted by court out of time without court's leave. The appellant's appeal was filed four years after the conviction and sentence at Kisumu High Court. The petition of appeal is as it appears homemade and does not indicate whether leave was sought or not. I am at the moment not dealing with the merits of the appeal nor whether the appeal was filed within time or not. It is well within the courts knowledge that leave to file appeal out of time are lodged at the High Court through a miscellaneous file which do not usually form part of the record of appeal and it would be speculative for this court to find that the appellant did not seek leave to file appeal and secondly that the appeal was filed late as submitted by Learned State Counsel, because the appellant had a hand leading to the disappearance of the court's record and that as leave was not granted there will be no prejudice to the appellant as he is already serving an illegal sentence by design. I do not agree with that proposition as the sentence meted against the appellant is legal and where it is illegal then the appellant would be prejudiced by serving an illegal sentence.

15. Having said that much, it would be pertinent to observe the delay that has been occasioned in the hearing of the appeal which amounts to over 6years to date cannot be attributed to the appellant herein. I then ask what should an appellate court do faced with the situation as the one in this case and where the escape route for retrial or reconstitution of the file is not possible as is the case in this case? In whichever way one looks at this case, the order of retrial and reconstitution of records does not command itself in the circumstances of the case. This is a peculiar case as all documents related to this case cannot be traced from the court record, police and even DPP's file. The appellant do not even have any documents. The file definitely must have reached registry after judgment was delivered but what followed after reaching the registry is not clear. No explanation was offered why the police file and DPP's file cannot be traced. I find that this is not coincidental that the file and the records relating to this case cannot be traced. I think the missing of the file is by design but cannot attribute that to the appellant as there is no evidence to this effect. I find that this case must be placed in exceptional category of cases as held in **Mwangi V Republic (supra)**. I find that this is an exceptional case in that the disappearance of the court's record and all files related to this case affects the appellant's constitutional rights to a fair trial as enshrined under **Articles 50(i)(q) of the Constitution of Kenya 2010**, which provides: -

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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

16. The High Court faced with similar situation as the one pertaining in this case in **Nisho Noor Isaack V Republic Criminal Appeal No. 509 of 2000[2006]eKLR** stated this: -

“In the end then and since the appeal has not been heard in its merits. I cannot make the order quashing the Appellant's conviction. I suppose the proper order to make in the circumstances would be to set aside the conviction of the appellant because in the event of the order quashing the conviction, the Appellant could in future lead a successful plea of autre fois acquit. Accordingly I set aside the conviction and sentences imposed by the Lower Court and discharge the Appellant.”

17. I fully associated myself with the holding in **Nisho Noor Isaack** case (supra). That as the appeal has not been heard and determined on merits, I find that it won't be proper to make an order quashing the Appellant's conviction but in the circumstances of this case, **I find it would be proper instead to set aside the conviction and sentence meted by the Lower Court and accordingly discharge the appellant. I order that there shall be no retrial. The appellant is set at liberty unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 9TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH 2017.

In the presence of:

Mr. Wakla: for Appellant

M/S Odumba: for State

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE