REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CRIMINAL APPLICATION NO.7 OF 2016

JUSTUS CHERUIYOT CHUMBA……..……...…..APPLICANT

VERSUS

REPUBLIC……..…….…….RESPONDENT

RULING

1. In his application dated 16th April 2016, the applicant seeks orders that his conviction be quashed, the sentence against him set aside, and that he be discharged. The basis of his application is that the delay of 9 years in the hearing of his second appeal before the Court of Appeal is an infringement of his right to fair hearing, and amounts to torture and cruel and degrading punishment and is therefore illegal, unlawful and unconstitutional. He therefore asks the Court to exercise its original and inherent jurisdiction to protect his fundamental rights and freedoms and quash his conviction and sentence.

2. According to the applicant, he was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in **Kericho Criminal Case No. 1023 of 2002**. He was tried and convicted on 20th September 2002 of the said offence and sentenced to death. He then lodged **Criminal Appeal No. 56 of 2002** which was heard and dismissed by a two judge bench of the High Court sitting in Nakuru on 15th February 2007. The applicant states that he then lodged his second appeal to the Court of Appeal on 26th February 2007 and filed a supplementary petition of appeal on 13th October 2008.

3. The applicant complains that since 2007, his appeal has been pending as the records from both the trial court and the High Court have been missing and cannot be traced, and all efforts to trace them have not borne any fruit. He argues that the right of appeal is a fundamental right which cannot be taken away, and once a person lodges an appeal, the presumption of innocence until proven guilty resumes in the eyes of the law as long as the appeal is pending.

4. When the application came up for hearing, the State through Learned State Counsel, Mr. Mutai indicated that it wished to raise preliminary points of law on why the matter is not properly before this court. This ruling relates to those preliminary issues.

5. According to the DPP, the application is incompetent as the Court has no jurisdiction to hear it. The application relates to an appeal before the Court of Appeal, to wit Criminal Appeal No.113 of 2007 filed at the Court of Appeal in Nakuru. This second appeal emanated from Kericho High Court Criminal Appeal No.56 of 2002, which was the appellant's appeal against his conviction and sentence in **Kericho CMCC No.1023 of 2002**. In the DPP's view, once this Court heard the first appeal and delivered its judgment, it became *functus officio*. The judgment of the Court was final at that point, and the Court cannot make any further order.

6. It was the DPP's argument further that given that this Court is *functus officio*, the issue that the applicant raises with respect to the missing High Court and Lower Court records is one that he can raise on appeal, before the Court of Appeal, and not before this court. Mr. Mutai relied on section **3(2)** of the **Appellate Jurisdiction Act** which, he submitted, gives the Court of Appeal powers to deal with applications of this nature. This section provides that, ***"for all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."*** In his view, there was no legal basis for the orders that the applicant is seeking from this Court.

7. With respect to the applicant's contention that he is illegally confined, the DPP argued that this is not the case, his submission being that the applicant was convicted and sentenced and his appeal dismissed by this Court. Counsel relied on the decision in **Said Yusuf Makanzu vs Republic Mombasa HCCRA No. 99 of 2004** in which the record of the lower court had gone missing and the High Court ordered a retrial. Mr. Mutai noted that the application was heard before the court handling the appeal, and in his view, the present application should have been made before the Court of Appeal as this will be in the interests of justice and will prevent possible abuse of the Court process.

8. In reply, Mr. Langat reiterated the essential facts of the applicant's case; that he was serving a life sentence which was commuted to life imprisonment on 3rd August 2009; that he had filed Kericho High Court Criminal Appeal No. 56 of 2002 which was heard in Nakuru and dismissed on 12th February 2007; that he filed his appeal before the Court of Appeal, being Criminal Appeal No. 113 of 2007, which has been pending for the last 9 years; and that he wrote to the Chief Justice in 2014 and was advised to seek the intervention of the High Court.

9. Mr. Langat submitted that the Court was seized of the jurisdiction to determine the issue of violation of human rights. That the right of appeal is a constitutional right which cannot be taken away. That once the applicant filed his appeal, the presumption of innocence resumes as long as the appeal is pending.

10. It was Mr. Langat's submission further that it is the High Court which is seized with the inherent jurisdiction to determine a violation of human rights. He relied on the decision in **Francis Amasiba Mulimo vs Republic Misc. Appl. No.24 of 2006** to submit that as the custodian of justice, the Court has to exercise courage. In his view, the Court of Appeal has no original jurisdiction and all it can do is refer the matter to the High Court to determine the question of rights.

11. With respect to the decision cited by the DPP, **Said Yusuf Makanzu vs R**, in which the High Court ordered a retrial, Mr. Langat's submission was that it was not relevant to the facts of this case as this is a second appeal and the applicant is entitled to a third appeal. He urged the Court to find that the applicant, who has been incarcerated for close to ten years and who has no control over record keeping, is entitled to have his appeal heard.

12. In reply, Mr. Mutai submitted that an appeal is not a fundamental right but a legal statutory right. In his view, the submission that the presumption of innocence resumes upon a filing of an appeal was erroneous. While the applicant's application may have some basis, it was in his view before the wrong forum.

13. I have considered the submissions of Counsel on the preliminary point raised by the DPP. I have also considered the authorities relied on by the parties. Under Article 50(2) (q), the right of appeal is one of the components of the fundamental right to fair trial guaranteed to an accused person. It provides that an accused person is entitled ***"if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."*** Thus, I believe that the submission on behalf of the DPP that a right of appeal is not a fundamental right is erroneous.

14. However, I also do not agree with the applicant that once he appeals, the presumption of innocence under Article 50 (2) (a) resumes. He has been tried and convicted by a court of competent jurisdiction, and the High Court, having heard his appeal, dismissed it. While he is entitled to a second appeal, he

cannot by any stretch of the imagination be said to be presumed innocent in the circumstances. As was held in the case of **Pius Mukabe Mulewa & Another vs Republic Criminal Appeal No. 103 of 2001** and followed in **John Karanja Wainaina vs Republic - Criminal Appeal No. 61 of 1993** (unreported) and **Joseph Maina Kariuki vs Republic Criminal App. No. 53 and 105 of 2004:**

> ***"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."*** (Emphasis added)

15. The question, however, is where the appropriate forum for raising the issue of the missing court records is. The applicant argues that it is the High Court which has the jurisdiction to consider and determine whether the loss of court records so that he is unable to prosecute his appeal for nine years is a breach of his fundamental rights, and what should be the consequence of the said loss.

16. I have considered various decisions that have been determined before our courts on this subject. What is evident from the outset is that the applications with regard to the loss of court records, and the consequences, is invariably made before the court which is seized of the appeal.

17. In **Criminal Appeal No. 187 of 2002 Francis Ndungu Wanjau vs Republic**, the Court of Appeal was seized of an appeal emanating from the High Court in which it was alleged that the records of the lower court and the High Court were missing. The Court considered various decisions on the subject and noted as follows:

> ***"On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of Joseph Maina Kariuki vs. Republic, Cr. App. No. 53 & 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 has 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 record of proceedings in both lower courts which had been supplied to him had also disappeared."***

18. In reaching the decision not to acquit the applicant as it had been urged to do, the Court observed as follows:

> ***"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): -***
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> ***"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 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 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."***

19. In **John Ooko Otieno vs Republic, Cr. Appeal No. 137 of 2002 (UR)** the entire records and files containing proceedings and judgment of the trial court could 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 declining to accept this invitation, the Court stated:

> ***"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 a 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: -***
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> ***"What we can take from ZAVER's (Haiderali Lakhoo & Zaver vs Rex (1952) 19 EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must consider 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 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 interests 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."***

20. I have also considered the decision of the Court in **High Court Misc. Criminal Application No. 246 of 2010- Danson Maina Muchoki vs Republic.** In that case, the High Court was seized of a matter arising from the applicant's conviction and sentence in **Criminal Case No. 2165 of 2003** in the Chief Magistrates Court at Thika. The applicant had filed an application under **Articles 50** and **159** of the **Constitution** seeking orders to compel the Registrar to provide him with records of appeal, failing which the applicant/appellant's conviction and sentence be quashed and set aside. In arguments not too disimilar to those presented before this Court, Counsel in that matter urged the High Court to preserve the applicant's right to a fair hearing as provided for in **Article 50(2) (q)** of the Constitution, noting that his appeal should not be left pending indefinitely.

21. The High Court (Ochieng and Achode JJ) considered and dispensed with the argument that an acquittal should follow where court records are alleged to be missing. In its view, the appropriate orders to make where court records are alleged to be missing was not an azquittal, for an appellant had, by his conviction, lost the presumption of innocence. Rather, depending on the circumstances of the case, the appropriate orders to make were for a retrial.

22. I cite these judicial decisions, not to determine the question with respect to which the application has been made, but to demonstrate the reasoning for my finding that this is not the appropriate forum to determine the question of what should result as a consequence of the loss of court records which, according to the applicant, have frustrated his ability to prosecute his appeal before the Court of Appeal.

23. In all the cases that I have cited above, the application came before the court properly seied of the appeal. Where the appeal was pending before the High Court, it was the High Court which addressed its mind to the issue. Where both the lower court and High Court records were missing in an appeal pending before the Court of Appeal, the forum for addressing the question was the Court of Appeal.

24. There is a very good reason for this, in my view, and the facts and circumstances of the present case aptly illustrate the point. The High Court in the present case has already heard and dismissed the applicant's appeal. It has found him to have been properly convicted, and has upheld both his conviction and sentence. How can it then, properly, turn around and say that ***"your fundamental freedoms have been violated as you are unable to argue your appeal against the decision of this court, and you are therefore free to go"***? It seems to me that the arguments advanced by Counsel for the applicant would lead to an absurdity and a travesty of justice.

25. It is my finding therefore that the only court properly vested with the jurisdiction to deal with an

application such as is before me, and to make appropriate orders and directions, is the superior court to which an appeal against the decision of the High Court has been preferred and is pending. It is not the High Court. The High Court, in so far as the present applicant/appellant is concerned, is *functus officio*.

26. In the circumstances, it is my finding that the preliminary issues raised by the DPP must be resolved in favour of the State. The application dated 16th April 2016 is struck out. Let an appropriate application be filed before the Court of Appeal before which the applicant alleges he lodged his Civil Appeal No. 113 of 2007.

Dated, Delivered and Signed at Kericho this 5th day of December 2016.

MUMBI NGUGI

JUDGE