



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO.123 OF 2009

SAMUEL NJERU NJUE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant appeals against his conviction and sentence of death imposed upon him by the court of the Chief Magistrate at Embu in respect of a charge of robbery with violence contrary to Section 296 (2) of the Penal Code. This is according to his affidavit.
2. He listed six grounds of appeal which is signed and dated 11th June, 2009 as set out in his affidavit.
3. According to his grounds of appeal, he has attacked his identification by the complainant on account of being doubtful. Furthermore, he has stated that he was framed by a brother and his sister in what he described as “*conspired evidence*.”
4. Additionally, he has attacked the change (sic) which was not supported by medical evidence for actual violence.
5. Finally, he has attacked the judgement for failing to take into account the differences and grudge between the complainant and himself “*over trespass down the river*” and for rejecting his defence evidence without giving sufficient reasons.
6. On 2nd September, 2013, the appellant's appeal was listed before the High Court (*Ong'udi, J*). The record shows that the appellant was absent. And on that day, the court issued a production order for the appellant to be brought to court on 09.09.13.
7. There was a further order directing the Deputy Registrar to explain the cause of the delay. The Deputy Registrar was also ordered to produce in court the original court record plus the proceedings before 02.09.13.
8. On 09.09.13, the appellant appeared in court. He told the court that he filed his appeal in June 2009 and that he had never been supplied with the court proceedings. The executive officer on behalf of the Deputy Registrar of the court stated that he had been unable to trace the appeal file. Thereafter, the court ordered the registry staff to make further efforts to trace the appeal file.
9. The court proceedings show that efforts were made to trace the appeal record without success until 24.12.13, when the appellant and the state appeared in the High Court (*Ong'udi & Ngaa, JJ*). The High Court then issued the following directions:
 1. The Deputy Registrar to file sworn affidavits from all officers concerned explaining the whereabouts of the court record.
 2. The O.C.S Embu police station to file sworn affidavits by concerned officers on the

whereabouts of the police file.

3. The appellant to file a sworn affidavit showing he filed his appeal.
4. The appeal was to be mentioned on 25.02.14 to confirm compliance.
10. The directions were complied with. The Executive Assistant in charge of Embu Chief Magistrate's criminal registry filed his sworn affidavit on 5th November, 2014. In his affidavit he confirmed that the appellant's appeal record was not traceable, despite efforts to trace it.
11. The O.C.S Itabua Police Station filed a sworn affidavit in court sometimes towards the end of 2014. He too stated that the police file in respect of the appellant case was not traceable.
12. It seems that in the course of searching for the police file, it came to light that the case of the appellant was investigated by Itabua police station and not Embu police station.
13. In the meantime, further efforts were made to trace both the court file and the police file. Then on 06.11.14, both parties appeared in the High Court (*Muchemi, J*) who then directed that their submissions be made before giving further directions.
14. The record further shows that on 04.12.14, both parties appeared before Muchemi, J. On that date, the appellant told the court that he had been in prison for a long time and that he did not know how the file disappeared. He requested the court to proceed and make a ruling as it thought fit.
15. In response to what the appellant told the court, the state speaking through Ms Matere applied for a re-trial given that the court record was missing. She informed the court that they had copy of a skeleton file to re-start the investigations afresh. She further pointed out that the appellant had been convicted of a very serious offence of robbery.
16. Ms Matere cited **Article 50 of the 2010 Constitution** in support of the application by the state. She also cited the Court of Appeal judgement at Mombasa in **Criminal Appeal No. 103 of 2001, Pius Mukave Mulewa & another v. R**, in which that court ordered a re-trial under similar circumstances as in this case.

That court in turn cited with approval the decision of the **Court of Appeal in Haiderali Lakhoo Zaver v. R (1952) 19 E.A.C.A in 244**, in which an order for re-trial was made in similar circumstances. In that case, the court stated that:

“Mr. Wilkinson's second point was based upon more general considerations of justice and equity. The learned Judges of the High Court were faced with a situation which the 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 www.kenyalawreports.or.ke 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 or justice, and they considered that the 'nearest approach to justice' in the circumstances would be to order a re-trial after quashing the existing conviction”.

17. The authorities cited by the state show that an order of a re-trial is one that serves the interests of justice. In the absence of the record of appeal, this court is unable to re-assess the evidence produced at trial as is required of a first appeal court. This right of appeal that is given to the appellant has been given constitutional status by **Article 50 (2) (Q) of the 2010 Constitution**.

- Those authorities are good law and are binding on this court.
18. In considering the circumstances of this appeal, we have borne in mind that the appellant has been in prison since June 2009 to date. We also bear in mind that the appellant stands convicted of robbery with violence, which in our view is a serious offence.
 19. In balancing the conflicting interests of society and that of the appellant, the scales of justice do favour a re-trial of the appellant.
 20. Having considered all the circumstances of this exceptional appeal in the light of the applicable law, we hereby set aside the order of conviction and sentence. In its place, we substitute an order for the re-trial.

F. MUCHEMI

J.M. BWONWONGA

JUDGE

JUDGE

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 12th day of May, 2015

In the presence of the appellant in person and Ms Matere for the Respondent/Republic

Court clerk Mr Nyaga

Right of Appeal explained

F. MUCHEMI

J.M. BWONWONGA

JUDGE

JUDGE