No. 317/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 50 OF 2006

JOSEPH MUTINDA MUTUNGI …………………………..APPELLANT

VERSUS

REPUBLIC …...RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 1132 of 2003 on 7/10/2005)

JUDGMENT

1. This skeleton file was placed before me by the **Deputy Registrar, Ms Rose Makungu.** Pursuant to her write-up the appellant, **Joseph Mutinda Mutungi** was charged in **Criminal Case Number 1132** of 2003 at **Kithimani Court** with the offence or rape contrary to **Section 140** of the **Penal Code.** He was convicted and sentenced to serve **fourteen (14)** years imprisonment.

2. He appealed on grounds that :-

   i. That the trial magistrate erred in law and fact by convicting him to serve **fourteen (14) years** imprisonment without ascertaining that he committed the offence.
   ii. That the trial magistrate did not address the provisions of **Section 150** of the **Criminal Procedure Code.**
   iii. That the Hon. Magistrate did not analyze and put to test the doctors evidence to see that it was not conclusive enough to warrant a conviction.
   iv. That the trial magistrate was not keen enough to realize that the investigations conducted in this case were shoddy and inconclusive.
   v. That the trial magistrate erred in law and fact by not considering his defence.

3. The appellant applied to appeal out of time. Leave was granted by **Lessit,J** on the **18th May, 2006.** On the **24th May, 2010 Waweru, J** noted that the appellant had not been produced in court since the year 2006. Per his order the appellant was to be produced in court without further delay.

4. On the **21st** day **August, 2012 Makhandia, J** (as *he then was)* admitted the appeal to hearing. It however turned out that the file used for admission of the appeal was **Criminal Case No. 1132** of **2005.** There was an error.

5. Further investigations carried out revealed that following leave granted by the Chief Justice pursuant to records disposal (*Courts Rules*) on the **15th September, 2009,** Criminal proceedings for the year **1980-**

2003 at Kithimani Law Courts were destroyed. A certificate of destruction thereof was issued. This meant that the Lower Court record was destroyed.

6. The Court of Appeal has considered cases where records have gone missing. The court has been reluctant to automatically acquit the appellants on that ground. All circumstances must be taken into consideration (see ***Joseph Maina Kariuki versus Republic CRA No. 534 & 105 of 2004).***

7. In the instant case the mistake did not emanate from the part of the appellant but on the part of the court. In an ideal situation a retrial would be the answer. In the case of ***Fatehali Manji versus Republic [1966] E.A. 343.*** It was held that;-

"The length of time elapsed since the arrest and arraignment of the appellant; whether on a proper consideration of the admissible or partially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and sentences and an order for retrial should only be made where interests of justice require it".

8. This court did not have an opportunity of seeing the Lower Court record. It cannot tell if the prosecution's case was cogent enough to return a verdict of guilty. Further, it cannot be said with certainty that the police will be able to trace their file or if witnesses will be available.

9. Circumstances prevailing would not favour a retrial. The appellant has served **nine (9) years** imprisonment**.** The substantial part of the sentence meted out has already been served. In the interest of justice, this is a case that calls for an acquittal. For reasons given, the appellant shall be released forthwith, unless otherwise lawfully held.

10. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **12TH** day of **JUNE, 2014.**

L.N. MUTENDE

JUDGE