



REPUBLIC OF KENYA



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**Mutua v Republic (Criminal Appeal E051 of 2021 & Criminal Revision
E037 of 2025 (Consolidated)) [2026] KEHC 3849 (KLR) (16 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E051 OF 2021 & CRIMINAL
REVISION E037 OF 2025 (CONSOLIDATED)
RC RUTTO, J
MARCH 16, 2026**

BETWEEN

ABEDNEGO MUTINDA MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion dated 9th June 2025 filed in HCCRREV. NO. E037 OF 2025 by the appellant seeking:
 - a. Spent
 - b. That this Honourable Court be pleased to revise the sentence meted against the applicant to consider the time spent in remand;
 - c. That the applicant be exempted from paying costs as he is a pauper.
2. The grounds, as expressed in the affidavit sworn by the appellant in support of the application, are that he was charged before Chief Magistrate's Court at Machakos with the offence of defilement contrary to Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006 and was convicted and sentenced to 20 years imprisonment on 9/8/2021. He deponed that he lodged an appeal, Criminal Appeal No. E051 of 2021 which has been ongoing since 2022 and that when he was before court on 26/5/2025, the court confirmed that his file cannot be traced and he was directed to therefore make an appropriate application leading to his filing of the current application.
3. On 6th October 2025, the appellant appeared before court and urged that he be acquitted since the lower court file cannot be traced. The Respondent, on the other hand, confirmed that the missing



lower court file makes it impossible for the appeal to be determined. In that regard, the Respondent left it to the court's discretion in disposing the appeal.

Analysis and Determination

4. It is evident that the trial court file Machakos Criminal Case No. 23 of 2019 has been missing since the appeal was filed before this court.
5. The record shows that the appeal was first mentioned on 19th August 2021 and following then, the matter was mentioned on 21/9/2021, 16/11/2021, 15/2/2022, 29/3/2022, 30/5/2022, 12/7/2022, 20/9/2022, 7/10/2022, 5/12/2022, 14/2/2023, 7/3/2023, 17/4/2023, 5/6/2023, 27/6/2023, 28/8/2023, 30/10/2023, 7/11/2023, 13/2/2024, 19/3/2024, 28/5/2024, 14/6/2024, 16/7/2024, 27/8/2024, 4/11/2024, 5/2/2025 and 11/2/2025.
6. On 11/3/2025, the Court Administrator, Peris Mbugua, appeared before this Court pursuant to summons and testified that upon perusal of registry records at Machakos and Wamunyu Law Courts, she was unable to trace the trial court file. She sought additional time to conduct further searches. Subsequently, by an affidavit sworn on 26th May 2025, she deponed that all efforts to trace the lower court file had been exhausted both at Machakos and Wamunyu Law Court registries, but the file could not be traced.
7. The record shows that all the Deputy Registrars who have handled the matter have made efforts to trace it without success. Additionally, the record shows that the Deputy Registrar issued thirteen (13) reminders to the Chief Magistrate's Court at Machakos requesting transmission of the original record without response until summons were issued to the Court Administrator who appeared in Court on 11/3/2025. and indicated as follows:

“I am aware why the court has required my attendance. It is because of failure to avail the court record. I received summons and began the search; checking on records the file does not appear. We had a transfer of criminal matters to Wamunyu court to find out if the file could have found its way. I request for more time of two weeks. I will have exhausted the search.”

8. In the Affidavit sworn thereafter on 26th May 2025, she stated;
 - “3. That I have exhausted all my effort to trace lower court file Number SO 23/2019 both at Machakos and Wamunyu law court registries but I am unable to trace it.
 4. That I do confirm to this Honourable court that the lower court file (SO 23/2019) has not been traced to date.”
9. It is trite that an acquittal does not automatically follow when court records cannot be traced. In Pius Mukabe Mulewa & Another -vs- Republic, Criminal Appeal No. 103 of 2001(UR), the Court of Appeal observed that:

“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 is 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.”

10. The Appellant was convicted and sentenced to 20 years’ imprisonment on 9th August 2021. He filed his appeal on 19th August 2021. It has now been about five years since the appeal was lodged, and it has not proceeded because the lower court file is missing. Article 51(1) of *the Constitution* of Kenya provides that; “a person who is detained, held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.” The Appellant has therefore retained the right under Article 50 (1) (e) to; “to have the trial begin and conclude without unreasonable delay.” Given the repeated but unsuccessful efforts to trace the file since 2021, it is evident that the appeal is unlikely to be heard and determined without further unreasonable delay, or at all.

11. Based on the circumstances of this case, I will proceed to determine the real issue which is what order best serves the interests of justice in the circumstances.

12. In the case of *Mwangi v Republic* [2005] KLR 495, the Court of Appeal stated:

“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 a recent case of *Baffour v Republic* (Criminal Appeal 124 of 2020) [2024] KECA 520 (KLR) (26 April 2024) (Judgment) the Court of Appeal held that:

“ 17. Instead, what comes out from the majority of the cited authorities is that they are unequivocal, that because a file is lost does not automatically give rise to an acquittal. However, where a file is missing, the court must hold up the scales of justice, and in so doing, it should consider all the circumstances under which the loss of the file occurred. The court should also question who occasioned the loss of the file, particularly whether, being the sole beneficiary of such loss, the appellant was responsible. What is of paramount importance is that, whether to acquit or order a retrial must be one which best serves the interests of justice.”

14. The law is settled that the loss of a court file does not, without more, entitle an appellant to an acquittal. In *Pius Mukabe Mulewa & Another v Republic* (supra), the Court of Appeal made it clear that a court must “hold the scales of justice” and consider all the circumstances under which the loss occurred.



The court emphatically stated that an acquittal should not follow as a matter of course where a file has disappeared. The court must interrogate who occasioned the loss, whether the appellant stands to benefit from it, and ultimately determine what outcome best serves the interests of justice. Similarly, in *Baffour v Republic* (supra), the Court of Appeal reiterated that the disappearance of a file does not automatically result in acquittal. Rather, the court must balance competing interests, including the seriousness of the offence, the period already served, the feasibility of retrial, and whether justice to both the accused and the public can still be achieved.

15. The reasoning in *Mwangi v Republic* (supra) is equally instructive. In that case, the Court of Appeal declined to adopt a blanket approach and stressed that each case must be considered on its own peculiar circumstances. The court only quashed the conviction after finding the matter to fall within an exceptional category, particularly because the appellant had been incarcerated for about sixteen years, witnesses were said to be dead and retrial was impracticable.
16. Applying those principles to the present matter, several considerations arise. First, the appellant was convicted by a competent court of the offence of defilement and sentenced to twenty years imprisonment. Upon conviction, he ceased to enjoy the presumption of innocence. The burden on appeal lies upon him to demonstrate error on the part of the trial court. The loss of the record undoubtedly hampers his ability to prosecute his appeal. However, as stated in *Pius Mukabe Mulewa* case, that impediment does not automatically restore the presumption of innocence or justify acquittal.
17. Second, there is no suggestion that the appellant contributed to the loss of the file. The failure appears to be institutional. That said, the absence of fault on his part is only one factor; it is not determinative.
18. Third, while the appeal has been pending for approximately five years, the conviction itself was entered in August 2021. The appellant has therefore served a portion of the 20-year sentence but not a period so substantial as to place the matter in the exceptional category described in *Mwangi v Republic* case, where the appellant had been in custody for sixteen years and retrial was plainly futile.
19. Fourth and importantly, the court must consider whether sufficient efforts have been undertaken beyond mere search of registries. The authorities contemplate not only tracing but also possible reconstruction of the record where feasible. Reconstruction may involve obtaining copies of pleadings and proceedings from counsel, the prosecution, typed judgments, charge sheets, or prison records. The material before this Court demonstrates extensive efforts to trace the physical file, but there is limited indication that a structured attempt at reconstruction has been undertaken with participation of the parties.
20. In a serious offence such as defilement, which implicates both individual rights and significant public interest, the Court must be slow to terminate proceedings conclusively without exhausting reasonable alternatives. The public interest in the prosecution and punishment of sexual offences remains weighty. At the same time, the appellant retains the constitutional right under Articles 50 and 51 of *the Constitution* to have his appeal heard without unreasonable delay.
21. Balancing these considerations, this Court is not persuaded that this matter falls within the exceptional category warranting immediate acquittal. The period served while not negligible, is not so extensive as to render further proceedings oppressive. Nor has it been demonstrated that witnesses are unavailable or that a retrial would necessarily be unjust. Equally, it has not been shown that reconstruction of the record is wholly impossible. The scales of justice therefore tilt against an automatic quashing of the conviction at this stage.
22. In the circumstances, and guided by the principles set out in the Court of Appeal authorities cited above, I find that the disappearance of the lower court file, though regrettable does not automatically



entitle the appellant to an acquittal. Accordingly, I decline to quash the conviction or set aside the sentence solely on account of the missing file. I direct, however, that: -

- a. The Deputy Registrar to convene a reconstruction process of the file involving all necessary stakeholders within sixty (60) days after which period the matter will be mentioned for further directions based on the report on the reconstruction,
- b. The application for revision of sentence shall abide the outcome of the appeal process.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF MARCH, 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....Respondent

.....Applicant

Selina Court Assistant

