**Baffour v Republic (Criminal Appeal 124 of 2020)**
**[2024] KECA 520 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 520 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 124 OF 2020**

**MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA**

**APRIL 26, 2024**

**BETWEEN**

**PRINCE KADUOR BAFFOUR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the Ruling of the High Court at Nairobi delivered on 4th July 2018 of (Kimaru, J. (as he then was) in HCCA No. 305 of 2008)***

## JUDGMENT

1. The appellant, Prince Kaduor Baffour was convicted on 5th September 2008 of trafficking in narcotic drugs contrary to section 4(a) of the *Anti Narcotic Drugs and Psychotropic Substances Control Act*. He was fined Kshs. 60,000 or in default to serve one (1) year imprisonment. In addition, he was sentenced to serve life imprisonment.

2. The appellant being aggrieved by his conviction and sentence, filed an appeal to the High Court. Unfortunately, the court was unable to hear the appeal in time as the trial court's file could not be traced despite all efforts being made by both the Chief Magistrate, Kibera and by the Deputy Registrar. It was in that regard, that the appellant filed the application dated 7th December 2018 seeking to have his conviction and sentence set aside on the basis that his constitutional rights to a fair trial, especially the right to have his appeal expeditiously heard and disposed of, had been infringed. The application was supported by the affidavit of the appellant and was based on Articles 48, 50(2) (q) and 51 of the *Constitution*.

3. Upon appreciating that the lower court file could not be traced, in a ruling, the Judge quashed the appellant's conviction and set aside the sentence imposed. The court instead ordered that, the appellant be retried before the JKIA Law Courts and be presented before that court on 15th July 2019 so that he could take plea for the retrial.

4. The appellant was aggrieved by the decision of the learned Judge, and filed an appeal to this Court on grounds that; the learned Judge was wrong to order that the appellant be retried with the knowledge that a fresh trial was in violation of his right to a fair trial as envisioned under Article 50 of the *Constitution*; in failing to appreciate that the appellant was serving an illegal sentence for a period of over 10 years; in failing to consider that a retrial after over 10 years in custody was prejudicial to the appellant and would not serve the interests of justice; in relying on the respondent's submissions to the exclusion of the appellant's; in failing to appreciate that the appellant had no access or benefit to gain from the missing records; in failing to appreciate that a fresh charge sheet prepared 12 years later may not be framed with the same particulars; and in failing to consider the special circumstances of the appellant's case.

5. During the hearing on a virtual platform, learned counsel, Mrs. Mwenesi highlighted the appellant's submissions, and stated that, Article 50(5)(b) of the *Constitution* provides that an accused person has the right to a copy of the record of the proceedings within a reasonable period after conclusion of the trial, in return for a reasonable fee as prescribed by law. It was submitted that it is the responsibility of the court to ensure that once a person has been convicted and sentenced to imprisonment for an offence, that proper records including typed proceedings are availed to him or her to facilitate the lodging of an appeal; that despite repeated requests the court records could not be traced.

6. Counsel contended that the learned Judge was wrong to blame the appellant for the missing records, notwithstanding the admissions that the records were poorly kept by the court and police officers; that at no time during the period was the appellant accused of being responsible for loss of the records. Counsel faulted the learned Judge for punishing the appellant for an offence committed on him rather than by him.

7. Counsel further submitted that the appellant was arrested in 2007 for the aforementioned charges and has been in prison for the last 14 years cumulatively; that subjection to a retrial simply because he has not assisted the court to trace the missing file is tantamount to unfair treatment as a retrial would be unjustifiable since exhibits and documentary evidence produced in court cannot be produced without substantial injustice being occasioned; that the guidelines for the period of preservation of Police documents are outlined in Chapter 59 of the *National Police Service Standing Orders 2011* indicate that case files and completed *Penal Code* files shall be kept for five (5) years after the date of the last entry; that under ordinary circumstances the police file is kept and maintained by the investigating officer at the Police Station that investigated the case and a retrial would be based on newly created evidence which would be highly prejudicial to the appellant.

8. In rebuttal, the learned counsel for the State Mr. Kimanthi contended that an acquittal does not automatically follow in situations where the court records cannot be traced; that where the record disappears after conviction and sentence, the appellant no longer enjoys the presumption of innocence under Article 50(2) (a) of the *Constitution*; that the appellant was already serving a legitimate sentence after having been convicted by a court of competent jurisdiction, whereupon, the burden shifted on appeal. Counsel went on to submit that the court should order that the case be remitted for retrial in the magistrates' court, and that the learned Judge having examined all the circumstances of the case, reached the right conclusion, when it was ordered that the appellant's case be remitted for retrial.

9. We have considered the motion, the affidavit in support and the parties' submissions. In this application the applicant seeks to have his conviction quashed on the basis that his constitutional right to have his appeal expeditiously heard and determined was infringed. The application brought under Articles 48, 50(2) (q) and 51 of the *Constitution* was supported by the affidavit of the appellant who contended that following the trial, the file went missing and 12 years later it has not been traced; that as a result he

has been unable to pursue his appeal in the High Court which is a violation of his rights, and that since the court file cannot be traced he should be acquitted. He faulted the learned judge of the High Court for declining to exercise his discretion and acquit him, and instead to order that the case be remitted back to the magistrates' court for retrial.

10. Hence, what arises for our determination is the question whether the trial judge rightly exercised his discretion to decline to acquit the appellant and instead to order a retrial of the appellant's case.

11. In arriving at the decision, the learned Judge took into account firstly, that, the appellant's file could not be traced. The Judge stated thus:

> " The issues at play in this application are fundamental: the first issue is the Appellant's constitutionally guaranteed right to have his appeal heard and determined expeditiously. The adage justice delayed is justice denied clearly applies in this case. The second issue at play is the protection of the integrity of the criminal trial process. Disappearance of a trial court's file undermines the entire criminal justice system. If the court were to issue an order that loss of a trial court's file can automatically result in the discharge of the Appellant, such an order would send a wrong message to consumers of justice. It would imply that the court would be giving a stamp of approval to subversion of the criminal justice system".

12. Clearly, in answering the first issue, the Judge was not persuaded that the appellant should be discharged just because the trial court's file was lost.

13. In considering whether the learned Judge arrived at the correct decision, there are various authorities of this Court that are supportive of the position taken. In the case of *Joseph Maina Kariuki v Republic* [2011] eKLR this Court stated:

> " On the basis of the circumstances stated above, this Court on 14th November, 2008 rejected a claim which was made on behalf of the appellant that his conviction for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* be quashed and the sentence imposed thereon be set aside and he be set at liberty. In coming to that conclusion we were guided by the remarks made by this Court in the case of *John Karana Wainaina v Republic* - Criminal Appeal No. 61 of 1993 (unreported), that:
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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 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."

Also, in the case of *John Maina Kariuki vs Republic* [2008] eKLR this Court observed:

> "Of course, the basic truth is that it is the duty and responsibility of the courts to safely and securely keep such documents. But it is known that documents can be made to disappear particularly by those who stand to gain from such disappearance. That is the basis of the Court's insistence that an acquittal cannot automatically follow upon such loss. The appellant, who stands to gain from the loss of all the records, was himself given a copy of the record and as we have said, that too has disappeared. Taking into account all the surrounding circumstances, we are unable to conclude that the appellant is himself blameless in the disappearance of all the documents. At the very least, he is entirely to blame for losing the copy supplied to him by the court. In those circumstances, we refuse to order that he be acquitted. After all, he was tried and convicted by a competent court and the conviction was later on confirmed by the High Court. He cannot, therefore, claim the presumption of innocence and as to the entire loss of all the records, he has at least contributed to it by losing the copy which had been supplied to him. We accordingly reject his claim that we should quash the conviction and set him at liberty. The relevant authorities, i.e. the various court registries the police and the Attorney-General must continue to look for the documents. In the meantime, the appellant's appeal must continue to pend while the documents are being searched for. We so order."

Again, in the case of *Francis Ndungu Wanjau vs Republic*, Criminal Appeal No. 187 of 2002 the Court had this to say of missing proceedings:

> "...[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."

14. In the case of *John Ooko Otieno v Republic* [2008] eKLR this Court held that;

> "We have anxiously considered the appeal. Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court file, 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 case is that the courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has 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 final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest 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. After all a person who has been tried or has pleaded guilty before a court with competent jurisdiction and has been convicted by such court has lost the benefit of the presumption of

> innocence given to him by section 77 (2) (a) of the *Constitution* and on appeal the burden is on him to show that the court which convicted him did so in error. The loss of the file may deprive him of the 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".
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> That was a decision on a second appeal. In this appeal, as we have stated above, the matter is before us on first appeal as the appellant was charged with murder and was tried in the superior court. However, the principle as pronounced above is the same and that is that the interest of justice as a whole must be considered before either a retrial is ordered or the appeal is fully allowed, but acquittal is not automatic merely because the file and records are missing. In the more recent case of *Mwangi vs. Republic* [2005] 1 KLR 495 a situation closer to the present case arose."

15. There is however one case that stands out where this Court ordered an acquittal. This is the case of *Mwangi v Republic* [2005] KLR 495, where this Court 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.
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> 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."

16. As indicated, the decision should be distinguished on its own peculiar set of facts, and as a consequence, we see no reason to apply it to the facts of the instant case.

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.

18. In the instant case, both the appellant and the prosecution concur that the file is missing and has not been traced. The appellant contends that since he had no control or access to court records, and was never furnished with copies of the proceedings, he is not to blame for the loss. But what stands out is that, none other than the appellant will be the beneficiary of the loss of files, in the event that an acquittal were to result. Be that as it may, in terms of the above cited authorities, and as concluded by the learned judge, loss of a file does not of necessity lead to an acquittal. We have no reason to depart from this position, and in so finding we agree with the learned judge, that having regard to the circumstances of this case, an acquittal was unwarranted.

19. So, was the learned judge right to order a retrial? In addressing this question, the learned judge stated:

> " The circumstances in which the trial court's file disappeared raises suspicion. The only beneficiary of the disappearance is the appellant that being the case, this court is of the view that for the ends of justice to be served, the Appellant must be retried".

20. In arriving at this determination, the learned judge considered both the appellant's and the respondent's case in order to discern the way forward in respect of the case. The court took into account the respondent's submission that the appellant should be retried, and that the prosecution was ready to prosecute the case if an order for retrial was issued. This proposition was restated to us by counsel for the respondent during the hearing, because, in counsel's view, the best interest of justice would be better served by an order of retrial.

21. In the case of *Muiruri v Republic* [2003] KLR 552, the Court held that:

> "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala v Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

22. And in the case of *Francis Ndungu Wanjau v Republic* [2011] eKLR this Court made the following significant statements:

> " Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case".

23. As earlier indicated, the learned judge ordered a retrial for the reasons that the circumstances of the case did not warrant an acquittal. The court was also cognizant that the appellant's appeal was hampered by the loss of the trial court's file. Having weighed the circumstances, the learned judge concluded and rightly so, that the interests of justice were better served by, remitting the appellant's case to the magistrates' court for retrial. In exercising his discretion to decline to grant an acquittal and instead to remit the case for retrial, we are satisfied that the learned judge took into account the matters that he ought to have considered, and by so doing reached the right conclusion. Consequently, we have no reason to interfere with the learned judge exercise of discretion.

24. In sum, the appeal is unmerited and is accordingly dismissed.

It is so ordered

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL,2024.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**S. OLE KANTAI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**