Chumba v Republic (Criminal Appeal 113 of 2007)
[2022] KECA 622 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 622 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 113 OF 2007

W KARANJA, F TUIYOTT & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

JUSTUS CHERUIYOT CHUMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the decision of the High Court of Kenya at Nakuru (Koome and Kimaru, JJ.) dated 15th February 2007 in Nakuru H.C. Criminal Appeal No. 56 of 2002)

RULING

1. The hearing of this second appeal has been hampered by an utterly wanting record of appeal. When it came up before us for hearing, the record comprised of a Notice of Appeal and various correspondence, but without the original or copies of the proceedings and judgments of the two courts below. How did we get here?

2. Briefly stated, Justus Cheruiyot Chumba (the appellant) was convicted for the offence of robbery with violence by the Kericho Principal Magistrate's Court in Criminal Case No. 1023 of 2002 and sentenced to death. He lodged an appeal against both conviction and sentence in Kericho High Court Civil Appeal No. 56 of 2002. His appeal was dismissed by the High Court (Hon. Koome, J. (as she then was) and Hon Kimaru, J). on February 15, 2007.

3. Not one to give up, the appellant lodged the instant appeal on February 26, 2007. It is now 15 years and the appeal remains unheard. The reason, substantially, is that both the trial court record and the first appellate court record, save a copy of the judgment, are missing from the court registries. In what is a perfect storm, the Office of the Director of Public Prosecution is unable to trace copies of those records and so is the appellant.

4. Copies of various letters, which are in the record of appeal before us, give the impression that the court registries at the lower court in Kericho, and at the High Court in Nakuru, are completely unable to

trace the missing records. Taking the view that the hearing of the appeal had delayed for an inordinately long time, the appellant moved this Court through a Notice of Motion dated February 13, 2017 for the following orders:

1. That this Honourable court be pleased to declare that the pendency of the applicant's second appeal for nine (9) years because of the missing file and records is an infringement of his right to fair hearing within a reasonable time.

2. That this honourable court be pleased to declare that the confinement of the applicant in the circumstances amounts to torture and inhuman and degrading punishment hence illegal, unlawful and unconstitutional.

3. That this honourable court be pleased to exercise its original and inherent jurisdiction to protect fundamental rights and freedom by quashing the applicant's conviction and setting aside the sentence and consequently discharging the applicant and releasing him forthwith from his illegal confinement.

4. That the honourable court be pleased to grant any other orders deemed expedient in the circumstances.

5. After considering that motion, this Court (Musinga, Kairu, and Murgor, JJ.A.), in a Ruling dated December 6, 2019 dismissed it and instead made the following orders;

   i. The Deputy Registrars of both the High Court and this Court are directed to present a report to this Court within 60 days of this ruling providing details of the movement and efforts made to trace the trial court and High Court files proceedings and exhibits.

   ii. Thereafter, the Criminal Appeal Number 113 of 2007 to be placed before this Court for directions on the hearing of the appeal.

   iii. No orders as to costs.

6. So as to confirm the progress made in the tracing of the records, the matter came up for mention before this Court. Things remain unchanged as the records had still not been traced. The Court nevertheless made the following orders on November 14, 2021:

   1) Criminal Appeal No 113 of 2007 be and is hereby directed to be listed for hearing and disposal and or for necessary action as deemed fit before any bench.

   2) The record in this Criminal Application No. Nyr 1 of 2017 be and is hereby directed to form part of the record in Criminal Appeal No. 113 of 2007 for ease of reference.

   3) Both the Deputy Registrar of this Court and that of the relevant High Court to comply strictly with the directions given in this Court's ruling of December 6, 2019.

   4) The registry staff to ensure compliance with directions number 1, 2 and 3 above before the hearing of the appeal.

7. It is on the basis of those orders that the substantive appeal came before us for hearing. The appellant, through learned counsel Onesmus Langat, submits that this Court cannot hear this appeal because there is no record upon which it can proceed. He argues that as there is no evidence of his involvement or collusion in the loss of the records, then he should be set free. The appellant asks us to be persuaded by the decision of this Court in Criminal Appeal No. 53 and 105 of 2004 *Joseph Maina Kariuki – vs- Republic*.

8. In the alternative, the appellant requests this Court, in its discretion, to review the sentence to the 20 years already served and to proceed to set him at liberty as he will have paid his "debt" for the wrong he committed.

9. Miss Chelangat, learned prosecution counsel appearing for the Director of Public Prosecution, opposed the appeal but relied on written submissions dated 4th February, 2022 which addressed the merit of the appeal. We will not rehash those submissions because, as will be apparent shortly, we shall not be making a merit determination of this matter.

10. We have given the matter our anxious consideration. Fortunately, we do not find ourselves in unfamiliar territory as there have been past instances where records have disappeared in the course of pending appeals. This Court has pronounced itself on how to deal with such instances. In Joseph Maina Kariuki v Republic [2011] eKLR Criminal Appeal Nos. 53 and 105 of 2004 (supra) the 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 vs. 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."

11. We agree that this is the correct way to approach a matter of this nature. To be emphasized is that an acquittal will not follow as a matter of course simply because a file has disappeared. Each case must be dealt with in its peculiarity. One instance where an acquittal will not follow is where the appellant himself is not blameless for the disappearance of the record. In this regard, this Court in *John Maina Kariuki vs Republic* [2008] eKLR 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."

12. From the submissions made by his counsel, the appellant admits that he was supplied with the record of proceedings both of the Magistrate's Court and the High Court, which he used to conduct his first appeal. He says that those copies have also disappeared without trace. The explanation proffered in the submissions is,

> " It is understandable given that it has been 15 years since he lodged the appeal and with the confines and several searches being conducted in prison it easy (sic) to lose records"

13. This statement from the bar does not sufficiently explain why the appellant does not have his copy of the proceedings. We are therefore unable to say that he is blameless for his predicament. Indeed, as there is no evidence that the prison authorities were to blame for the loss of the records, it is not possible to say that the loss of his copies is not attributable to him. Having taken this view, we are neither inclined to quash the conviction nor to review what is a lawful sentence. The order that commends itself to us is to direct that all persons involved (the court registries, the DPP) and not in the least the appellant must continue to look for the said proceedings. For now, the appeal will pend while a search for the records continues. Those are our orders.

DATED AND DELIVERED AT NAIROBI 8TH DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

DR. K.I LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR