



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPLICATION NO. 1 OF 2017

BETWEEN

JUSTUS CHERUIYOT CHUMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Nakuru (Koome and Kimaru, JJ.) dated 15th February 2007 in HCCRA No. 56 of 2002)

RULING OF THE COURT

The applicant, **Justus Cheruiyot Chumba**, in this appeal is aggrieved by the decision of the High Court upholding the decision of the trial magistrates' court which had convicted and sentenced him to death as mandatorily prescribed by law for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The applicant's appeal from the High Court's decision has been pending before this Court for the last 12 years.

By a Notice of Motion dated 13th February 2017, the applicant sought the following orders, *inter alia*;

- i. that the honourable court be pleased to declare that the pendency of the applicant's second appeal for nine (9) years because of missing files of the trial court and the High Court is an infringement of his right to fair hearing within reasonable time;
- ii. that this court declares that the confinement of the applicant in the circumstances amounts to torture and inhuman and degrading punishment hence illegal, unlawful and unconstitutional;
- iii. that this court exercises its original and inherent jurisdiction to protect fundamental rights and freedoms quashing the applicant's conviction and setting aside the sentence and consequently discharging the applicant and releasing him forthwith from his illegal confinement.
- iv. that this Court grant any other orders deemed expedient in the circumstances.

The motion was brought on the grounds that the applicant was convicted and sentenced by the trial court on 20th September 2002 for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**, and thereafter lodged an appeal in the High Court at Kericho, which appeal was heard and dismissed on 15th February 2007; that thereafter the applicant lodged a second appeal to this Court, which appeal has been pending for reasons that the records in both the trial court and the High Court cannot be traced, and all efforts to trace the files have not borne any fruit; that the right of appeal is a fundamental one; that once a convicted person lodges an appeal, then the presumption of innocence until proven guilty resumes in the eyes of the law while the appeal is pending; and that the applicant's circumstances amounts to inhuman and degrading punishment, and is illegal and unlawful and this Court should exercise its original and inherent jurisdiction to protect his fundamental rights, and set aside the conviction and release him forthwith. On 4th December 2018 Andrew Omutelema, Senior Assistant Director of Prosecutions, swore a replying affidavit in response to the motion.

When the motion came up for hearing, **Mr. Langat**, learned counsel for the appellant, submitted that the appeal has been pending for 12 years as the trial court and the High Court files cannot be traced; that the loss of the files has infringed on the appellant's rights to a fair

hearing under **Article 50** of the **Constitution**. The appeal in the High Court was dismissed, and an appeal was lodged in this Court, that is pending hearing.

Ms. Malimu, learned counsel for the State, opposed the application. Relying on the respondent's replying affidavit, it was submitted that the copy of the High Court judgment was attached; that the application was for acquittal. The applicant is serving a lawful sentence, and that innocence was not presumed just because the file had gone missing; that the applicant lost the presumption of innocence after being tried and convicted by a court of competent jurisdiction, and the judgment was available, with the proceedings having been analysed in the judgment. It was argued that the court required to discern who would benefit from the lost file, and the circumstances surrounding its disappearance. We were urged to dismiss the application and to rely on the judgment of the High Court in determining the appeal.

In a reply, Mr. Langat submitted that the appeal cannot proceed merely on the basis of the judgment. The court also requires to rely on the exhibits, and the proceedings. The issue of the missing file is unfortunate; the appellant's life has remained in limbo for over a decade; that each case should be considered on its own merits.

We have considered the motion, the replying affidavit and the parties' submissions, and find that the thrust of the applicant's motion is that since the proceedings and exhibits in the trial court and the High Court are missing and cannot be traced, that firstly, as long as the appeal was pending before this Court he was to be presumed innocent until proven guilty, and secondly, his appeal pending before this Court cannot be heard, as a consequence of which, his fundamental rights to a fair hearing within a reasonable time had been violated.

As regards the assertion that following the filing of an appeal the presumption of innocence under **Article 50 (2)** of the Constitution is reinstated, our view is that this cannot be the case. The applicant was tried, convicted and sentenced by a court of competent jurisdiction; the conviction and sentence were affirmed by the High Court and the conviction, as well as the sentence remain lawful unless set aside by a Court on Appeal.

In the case of ***John Karanja Wainana vs Republic [2004] eKLR*** this Court stated;

“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 77(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.”

In this case, it is uncontroverted that the applicant was tried and convicted by the magistrate's court in Criminal Case No. 1023 of 2002 and then an appeal to the High Court in *Criminal Appeal No.56 of 2002*, was dismissed. In effect, the High Court having upheld the trial court's finding of guilt, the question of innocence for reasons that he has filed an appeal to this Court cannot be said to arise. It would also follow, that having been sentenced to death by a court of competent jurisdiction, his confinement cannot be held to be unlawful, and we so find.

With respect to the assertion that the lower courts' proceedings and exhibits cannot be traced which has impeded the hearing of his second appeal, and violated his rights to a fair hearing within reasonable time, **Article 50 (2) (e), (q), (3), and (5)** of the **Constitution** are clear. They provide that;

“Every accused person has the right to a fair trial, which includes *the right-*

e. To have the trial begin and conclude without unreasonable delay;

....

q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

3. If this Article requires information to be given to a person, the information shall be given in a language that the person understands.

(5) An accused person-

a. charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

b. has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.”

The provisions specify that the applicant has a right to appeal, which should be concluded without unreasonable delay, and that for this purpose the record of the proceedings should be made available to him on request.

In this case, the appellant was convicted and sentenced by the Magistrates Court on 20th September, 2002. The High Court upheld the same on 15th February 2007. The delay in hearing his appeal was occasioned by the missing records of the lower courts. As to whether this was a violation of his rights requires to be weighed out, having regard to the surrounding circumstances. The applicant has found himself in a

situation where he can either proceed to have the appeal heard with the available records, or to wait until the records of the lower courts are located in order that his appeal can be fully and exhaustively heard. In balancing the scales of justice, we think that in the circumstances of this matter, the prejudice or injustice that may be occasioned to the appellant by the delay in hearing and determining the appeal before this Court occasioned by a delay in tracing the missing records is by far outweighed by the wider interests of justice. To deny the applicant a full hearing on the basis of the entire record, would in our view lead to a miscarriage of justice, as would quashing the conviction and setting aside the sentence. As stated above, the applicant was convicted and sentenced by two courts of competent jurisdiction, and therefore his confinement is lawful. And having found that an acquittal cannot be the result of missing proceedings, we are of the view that the interests of justice would be better served by the missing records being located so as to enable the applicant receive a fair trial. And we so find.

That said, it is rather uncanny that the trial court’s file comprising the proceedings and the exhibits has disappeared without a trace, as have the proceedings in the High Court. We have been through the record, and save for the confirmation from the High Court at Kericho that the trial court file was sent to the Nakuru registry, and the averment by Mr. Omutelema that save for the judgment the respondent’s records cannot be traced, there is nothing to show that significant effort has been made by the Nakuru registries, either of the High Court or this Court to locate those records. More importantly, the judgment of the High Court that was attached to Mr. Omutelema’s replying affidavit shows that when the applicant argued his appeal before the High Court, it was on the basis of the trial court’s records upon which, the appellant has not told us what happened to the trial court’s records upon which he based his appeal. Consequently, he cannot be heard to complain that the record is not available, yet at the time he argued his appeal before the High Court he had the record, and it is that same record which constitutes a part of the record to be placed before this Court.

In the case of **John Maina Kariuki vs Republic [2008] eKLR** this Court succinctly observed;

“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 would agree and adopt the above sentiments expressed by this Court, and would add that by the same token, to forestall the possibility of the violation of his right to a fair hearing, the interests of justice would be better served by having the lower courts’ proceedings traced so as to enable the applicant fully ventilate his appeal before this Court.

Accordingly, the motion dated 13th February 2017 is hereby dismissed with 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.

It is so ordered.

Dated and delivered at Nairobi this 6th day of December, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR