



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P. KIHARA KARIUKI (PCA), MWILU & OUKO J.J.A)

CRIMINAL APPEAL NO. 49 OF 2006

BETWEEN

ISAIAH MUTUMA *Alias* DUNCAN MURITHI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Justice J. Lesiit & F. Ochieng) dated 8th March, 2005

in

HCCR.A NO. 812 OF 2005)

RULING OF THE COURT

Isaiah Mutuma, the applicant, was after his trial and upon being convicted sentenced to death for the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code.

His first appeal to the High Court was dismissed, conviction and sentence upheld on 8th March 2005. He then preferred this appeal challenging the decision of the High Court. That appeal was filed in 2006 and todate it has not been heard on account of the state of the record. The following events will explain the problem.

On 11th October, 2006, this Court noted that the record of appeal did not contain the appellant's statement under inquiry which was produced in evidence before the trial court and further that various documents on the record were not legible especially the charge sheet.

On 18th March, 2009, the Court's notice was drawn to the fact that there were missing pages in the record held by both the appellant's advocate and the Senior State Counsel. In addition, the court observed that the court record itself was not properly compiled and did not make sense. As a result, the court directed the Deputy Registrar, Court of Appeal to fully investigate these events and ascertain whether there was any attempt of falsification and if necessary, compile fresh records.

Pursuant to this, the Deputy Registrar, Court of Appeal communicated the Court's concern and forwarded

the above court order together with both trial court and High Court records to the Deputy Registrar, High Court – Criminal Division for compliance with the order. The Deputy Registrar, High Court - Criminal Division responded by a letter dated 15th October, 2009 and stated as follows:-

“I am unable to ascertain the correctness of the proceedings and judgment from the lower court and High Court files. However, the Attorney General has supplied this office with certified copies of proceedings and judgments in the lower court and High Court (copy attached) which I have reason to believe are true copies of the originals. As a result, I am unable to re-compile fresh records of appeal as directed vide the Court of Appeal order dated 18th March 2009.

Forwarded please find the above quoted files for your Lordships further directions.

T.W.C. WAMAE (MRS)

PRINCIPAL DEPUTY REGISTRAR”

After this letter was brought to the attention of the Presiding Judge, he directed that the appeal be listed before the bench that had ordered the investigation into the state of the record. That was on 13th November 2009. The matter was never listed as directed and instead the appeal was listed for hearing several times between 2009 and 2013 without mention of the state of the record. It was on 23rd April 2013 that the Court revisited the issue directing that the hearing be adjourned to enable it consider the issue fully before giving directions.

In the meantime, it also directed Mt. Ondieki, learned counsel for the applicant to consult with the appellant on the notice of motion filed by him in person on 23rd April 2013, the same date the appeal was before the court. On the subsequent hearing date Mr. Ondieki, opted to argue the motion. Being home-made the prayers in that motion are jumbled-up but our plain reading of it is that the applicant seeks:-

- i. That the hearing of the appeal be stayed pending the determination of the question whether on account of the state of the original court record, the court can entertain this appeal, and
- ii. That upon determination of (i) above the court to order for a retrial.

Relying on the cases of **BensonNdirangu Ndungu V. Republic** Criminal Appeal No. 206 of 2007 and **Francis Ndungu Wanjau V. R.** Criminal Appeal No. 187 of 2002, Mr. Ondieki urged us to set aside the conviction and order for a retrial. Ms. Nyamosi for the respondent supported both the application and the prayer for an order of a retrial. In 2011 in the case of **Francis Ndung’u Wanjau** (supra) this Court faced with a similar dilemma of adulterated record observed as follows:-

“Fortunately, the era of interference with court records will soon come to an end after completion of the on-going process of digitalization of the court records.”
(Emphasis)

The Judges in that case genuinely believed that we would not today in 2013 be dealing with a similar situation with no prospects or signs of digitalization in sight. The only consolation for us in the present matter is that this Court has dealt with several similar cases in the past and therefore it is not a matter without precedent. For instance, way back (in 1952) in the case of **Heiderali Lakhoo & Zaver V. Rex** (1952) 19 EACA 2464 in which it was stressed that the court, in circumstances like the one before us must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss occurred. Who stands to gain from the loss? Does the available evidence point to anyone as being responsible for the loss? If so, can such a party be allowed to benefit from a situation of his own making? Any order arising from such a situation must be one that will serve the best interest of justice.

In **John Karanja V. Republic** Criminal Appeal No. 61 of 1993 this Court reiterated that in situations

where a fair trial or an appeal cannot be had as a result of the loss of the court file, the Court must try to hold the scales of justice by considering all the circumstances under which the loss occurred, that an acquittal should not follow as a matter of course where a file has disappeared, because, after all, the appellant has lost the benefit of the presumption of innocence given to him by 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, that the loss of the file may deprive him of ability to discharge that burden but that alone is no basis to treat him as innocent.

Similarly, in **John Ooko Otieno V. Republic**, Criminal Appeal No. 137 of 2002 where the entire original record could not be traced the Court rejected the application to quash the conviction and set the appellant at liberty holding that there is no general rule that in such circumstances an acquittal must follow. See also **Joseph Maina Kariuki V. Republic** Criminal Appeal No. 53 & 105 of 2004.

From the foregoing and all available authorities, it is clear that the Court has consistently held that there is no automatic acquittal merely because all the records or part of them have disappeared or been falsified. It is thus established that whatever order has to be made, the interest of justice as a whole must be considered.

In this appeal, we ourselves cannot lay blame for the state of the record on anyone, not even the appellant. All we know is that that state is so hopeless that hearing this appeal will be in vain. Both Mr. Ondieki and Ms. Nyamosi have urged us to order a retrial. In our considered view, based on our perusal of the entire record of both the trial and the first appellate court and upon our finding that the former record is intact, what commends itself to us, in the circumstances is to remit the case to the High Court for the rehearing and determination of the first appeal.

This view is anchored in **Section 381 (2)** of the Criminal Procedure Code which vests jurisdiction and authority in this Court, on second appeal, to remit the case, together with its judgment or order thereon, to the first appellate Court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as this Court may think necessary.

It is on the basis of that law that we now order that this judgment and order as well as the record of the trial court be and are hereby remitted to the High Court for the rehearing of the appeal. The Registrar, High Court will make immediate and urgent arrangement of the typing of the proceedings and judgment of the trial court before placing the matter before the Presiding Judge, Criminal Division for the empanelling of a bench, which will exclude J. Lesiit and F.A. Ochieng JJ, to rehear the appeal, consideration being given to the fact that the trial before the subordinate court commenced in 2001. We further direct the Registrars of this Court and the High Court to ensure safe storage of these files.

Dated at Nairobi this 22nd day of November 2013.

P. KIHARA KARIUKI

.....

PRESIDENT, COURT OF APPEAL

P.M. MWILU

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm