IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, MURGOR & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 98 OF 2003

BETWEEN

DAVID KINYUA MAINGI..... 1ST APPELLANT

GODFREY MWITI …..... 2ND APPELLANT

ADAMS MUCHUI …..... 3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from judgment of the High Court of Kenya at Meru (Tuiyot & Juma, JJ.) dated 14th February, 2002

in

H.C.CR.A NO. 161 - 163 OF 2000)

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RULING OF THE COURT

1. In this appeal we are faced with the question of what the legal effect of a missing judgment of a 1st appellate court in a criminal trial is. In the instant case, neither the original handwritten nor the typed judgment dated 14th February, 2002 delivered by the High Court (Tuiyot & Juma, JJ.) is traceable.
2. The appellant herein was jointly charged with two others (both now-deceased) with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, Chapter 63 Laws of Kenya and one count of shop breaking and committing a felony contrary to ***Section 306(a)*** of the ***Penal Code*** in the Chief Magistrate's Court at Meru. The appellant pleaded not guilty to both counts. Thereafter, the trial proceeded in the subordinate court. Being convinced that the prosecution had proved its case against the appellant and his two co-accused, the trial court convicted the appellant and the co-accused of the offence of robbery with violence and acquitted all of the offence of shop breaking and committing a felony. The appellant and the two co-accused were sentenced to death. Aggrieved with the decision of the trial court, all the appellant and the two co-accused appealed to the High Court at Meru. The record shows that the hearing of the appeal before the learned judges of the High Court commenced on 15th November 2001. The High Court in a judgment dated 14th

February, 2002 confirmed and upheld the appellants' convictions and sentences. The appellants consequently appealed to this Court vide a Notice of Appeal dated 20th February, 2002.

3. This second appeal has not been heard for the last 11 years because the judgment of the High Court which confirmed the conviction and sentence could not be traced. The 2nd and 3rd appellants died while this appeal was pending before us and consequently their appeals abated. The 1st appellant has been in prison for 12 years awaiting the hearing of his appeal.
4. When this appeal came before us on 15th July, 2013, we issued a directive to the Deputy Registrar of the High Court at Meru to peruse and examine the original court file and all relevant court records to ascertain if the handwritten or typed judgment could be traced and produced in court. Vide a letter dated 11th September 2013, the Deputy Registrar regrettably advised this Court that neither the handwritten nor a typed version of the judgment delivered on 14th February, 2002, by the High Court could be traced. The relevant part of the said letter read:-

> ***"We have made all necessary efforts including liaising with the office of the Director of Public Prosecution and Prison Authorities to trace a copy of the missing judgment to no avail".***

5. Subsequently, this appeal was listed for hearing on 30th September 2013 for purposes of the parties herein to address us on the legal effect of a missing judgment in the Record of Appeal. The 1st appellant in his supplementary memorandum of appeal raised the following ground:-

> ***"That the appellant has for 11 years been deprived of his right to present and argue his appeal before this Court having not been supplied with copies of the judgment of the High Court which judgment has also not been incorporated in the Record of Appeal due to the fact that the same got lost and the appellant's rights as set out in Article 50(q) of the Constitution have been violated." (Sic)***

6. Ms Jacinta K. Ntarangwi, learned counsel for the 1st appellant, urged this Court to acquit the appellant, stating that his constitutional right to an expeditious hearing of his appeal had been violated. She submitted that the appellant had waited over eleven years for his appeal to be heard. She argued that the responsibility for custody of judgments in any trial lies with the court; and the appellant should not be blamed or prejudiced for the lost or missing judgment. Ms. Ntarangwi stated that from the Record of Appeal, it was not manifest whether the judgment of the High Court was actually written or if the decision was pronounced with reasons to be given later. She submitted that a re-hearing of the appeal before the High Court would be prejudicial because the appellant had been jointly charged with the 2nd and 3rd appellants who have since died.
7. J. Kaigai, Assistant Director of Public Prosecution, submitted that in the absence of the judgment, this case should be remitted to the High Court for rehearing of the appeal. He stated that re-hearing of the appeal would not be prejudicial to the 1st appellant because the entire proceedings and judgment of the trial court were available; and that this Court could make an order that the appellant be accorded priority in the fixing of the hearing dates for his appeal. Mr. Kaigai submitted that no prejudice will be occasioned to the appellant on account of the death of the two co-accused as their appeals have abated and the re-hearing of the appeal will proceed only in respect of the 1st appellant and no witnesses will be called to testify.
8. In the instant case, there is no judgment on record from the High Court which was the 1st appellate court in the matter. The bane of exercise of the judicial function is the judgment which is the ultimate reason for existence of the court. A judgment is a significant social and civic function. The trial process in civil or criminal case must ***ipso jure*** end in a judgment. Likewise, in appellate proceedings, the end product is a judgment. Judgment of the court is the penultimate product of the adjudication system. The purpose of judgment is to enable a court to clarify its thoughts; explain the decision to the parties and communicate the reason for the decision to the public. In the instant case, the absence of judgment from the High Court means all these purposes of judgment writing have not been met. It, therefore, follows that the entire proceedings at the High Court are null and void since the final product, that is, the judgment of the court cannot be traced.

We are further precluded in the absence of the judgment of the High Court dated 14th February, 2002 from considering the merits or demerits of the same. See ***SIMON LOKWACHARIA -VS- REPUBLIC, [2005] 2 KLR 379.***

9. In the absence of the written/typed judgment, we are unable to determine the merits of the missing judgment delivered on 14th February, 2002. However, this does not mean that the conviction and sentence of the 1st appellant by the trial magistrate court is hereby set aside; far from it, having declared the proceedings at the High Court a nullity, what remains validly on record is the conviction and sentence of the appellant by the trial magistrate. This conviction and sentence remains legal unless otherwise set aside and quashed.
10. Having expressed ourselves as above, what then is fate of the appellant's appeal before this Court? We are of the considered view that we have the following three options to take:-

    i) Exercise our powers under Section 3 of the Appellate Jurisdiction Act and discharge the duties of the High Court as a first appellate court by re-evaluating the evidence on record and making a determination as to whether the appellant was properly convicted and sentenced in law or;

    ii) Order a re-hearing of the appeal ***de novo*** at by the High Court or;

    iii) Acquit the appellant.

11. In ***Okeno-vs-Republic, [1972] EA 32,*** the predecessor of this Court stated the duties of the 1st appellate court as follows:-

> *"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA – VS- R (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA –VS– R, (1957) EA 570)."***

In the instant appeal, the absence of the High Court judgment implies that the duties of the first appellate court have not been discharged. ***Section 3 (2)*** of the ***Appellate Jurisdiction Act,*** Chapter 9, Laws of Kenya stipulates that:-

> ***"..for all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, this Court shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."***

Section 3(3) provides that:-

> ***"In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."***

In ***DANIEL KARIUKI MWAURA – VS- REPUBLIC,- Nakuru Criminal Appeal No. 25 of 1995,*** this Court while considering whether it could hear the appeal on merits rather than remit the appeal to the High Court for hearing, held that it had powers of the High Court as per ***Section 3 (2)*** of the ***Appellate Jurisdiction Act.***

Therefore, should we exercise the power granted to us vide **Section 3 (2)** of the **Appellate Jurisdiction Act** and discharge the duties of the first appellate court? If we were to do so, the appellant shall lose his right of having two appeals, one at the High Court and the second before this Court. The appellant is entitled to two appeals, in other words, he is entitled to a second bite at the cherry. It would be prejudicial for the appellant if we were to take over the role of the 1st appellate court. It is our considered view that two wrongs do not make a right.

12. Would a re-hearing of the 1st appeal before the High Court violate the fundamental rights of the appellant? ***Section 77*** of the repealed Constitution which was in force when the appellant was tried and convicted provided for protection of fundamental rights and freedoms of the individual and it stipulated, ***inter alia***, that if a person is charged with a criminal offence:-

> ***"The accused shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."***

13. In ***SUMAR – VS- REPUBLIC, [1964] EA 481,*** the East African Court of Appeal emphasized that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each cause, but it should only be made where the interest of justice require it and it is not likely to cause an injustice to an accused person. Re-hearing of the appeal does not demand witnesses to be called or recalled. If the record of proceedings and judgment of the trial court are available, what prejudice does the appellant stand to suffer if a ***de-novo*** re-hearing of the appeal is ordered? The appellant has already been tried and convicted by a competent court and is serving a legal sentence that has neither been quashed nor set aside.
14. Having perused the available Record of Appeal, it is evident that the proceedings before the trial magistrate and the judgment therein are available; and that the Notice and Memorandum of appeal filed in the High Court against the conviction and sentence by the trial magistrate are also available on record. All documents needed to conduct a re-hearing of the appeal before the High Court are available. Whereas we appreciate the delay in expeditious hearing of the appellant's appeal before this Court, we are of the view that the delay has not occasioned any prejudice to the appellant. This is because firstly, there being a finding of guilt on the part of the 1st appellant by the trial court, there is no rule or principle of law that stipulates delay in hearing of an appeal must automatically result to an acquittal. In any event, an acquittal can only be ordered on the merits of the case and in the instant case, the merits of the case have not been considered. Secondly, it is our considered view that despite the death of the 2nd and 3rd appellants, the hearing of an appeal before the High Court does not require witnesses; and further the appeals of the deceased have abated. We find that the interest of justice shall be served if the appellant is given an opportunity to exercise his right of appeal before the High Court and if necessary, to exercise the right of second appeal before this Court.
15. The upshot is that we allow the appeal and further order and direct that the appellant's appeal to the High Court be heard ***de novo.*** We direct that the 1st appellant be produced before the High Court within fourteen [14] days of this ruling for purposes of directions regarding the re-hearing of the appeal.

DATED and DELIVERED at NYERI this 6TH day of NOVEMBER, 2013.

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR