IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & AGANYANYA, JJ.A)

CRIMINAL APPEAL NOS. 53 & 105 OF 2004

BETWEEN

JOSEPH MAINA KARIUKI ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ.) dated 29th July, 2003

in

H. C. CR. A. NOS. 199 & 201 OF 2002)

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RULING OF THE COURT

This case has presented a situation which at the very least, we can describe as mysterious and a blatant subversion of justice by a person or persons yet to be identified. It is a situation which this same bench summarized in an earlier ruling in this matter in the following terms:

"The appellant then lodged a notice of appeal intending to appeal to this Court against the High Court's dismissal of his first appeal. That is as far as the matter went. As it has now been established, the record of the trial magistrate and that of the High Court on first appeal have simply vanished into thin air and cannot be traced. The police file has also vanished in the same way. Nor can any record be traced in the office of the Hon. The Attorney General. In court the appellant told us that he had himself been supplied with the record of proceedings both in the Magistrate's Court and in the High Court. That is understandable because the appellant had to conduct his first appeal in the High Court and he could not have done so without the record of the Magistrate. But the appellant told us that the copy of proceedings supplied to him has also disappared and he cannot trace it either. In short this Court cannot hear any purported appeal from the High Court because there is absolutely no record upon which it can proceed."

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:

"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."

In the end we ruled thus:

"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."

Indeed this appeal has continued to pend since then. On 24th May, 2010, about a year and half after the above order, the appellant's counsel, Prof. Githu Muigai, who has since been appointed the Attorney General of this country pleaded with us to grant him an opportunity to persuade us that in absence of all the relevant documents, we should order the release of the appellant. Following that request the appeal was relisted for orders.

On 7th April, 2011 Prof. Muigai filed a statement setting out in resume form, the chronology of events relating to the appeal and submitted on the question whether or not we should order a retrial. In his submission Prof. Muigai stated that in his view, this is not a fit and proper case for the court to order a retrial. It was his view that as the primary records were in the custody of the court and the court is not able to trace them immediately it may be inferred that they are unlikely to be found. He said that a retrial is only possible and would be ordered in very clear circumstances, and for that proposition he cited three authorities, namely, ***Fatehali Manji v. R [1966] EA 343; Ekimet v. R [2005] l KLR 182*** and ***Ephraim Karanja Mwangi v. R. Criminal Appeal No. 49 of 1991***. These were not the only authorities he was relying on, as there were three others on a list of authorities he filed. In the first of the cases, he specifically cited, it was held that a retrial may only be ordered when the original trial was illegal or defective. In the second case, the court there said that whether or not to order a retrial will depend on the facts and circumstances of each case; and in the third case it was held that the length of the appellant's incarceration and death of most essential witnesses militated against a retrial. Learned counsel continued that we have no evidence as to who is responsible for the loss of the records, the court will need more material to come to a decision one way or the other on the issue at hand, for instance an affidavit from the investigating officer, the appellant has been in prison for a long time (since 2003) and there is no evidence to connect him with the loss of the documents, and for that reason he should be released.

Earlier, Mr. O'Mirera, Senior Principal State Counsel, had stated from the bar that the police had succeeded in tracing their documents and that the exhibits were within the precincts of the court, but he did not have concrete evidence to establish that fact. He also stated that he had read the police file and he was able to ascertain that some of the witnesses were available and were based, some in Nairobi and others in Meru. In view of the fact that Mr. O'Mirera's were bare statements from the bar we directed that the state file a replying affidavit or affidavits affirming the availability of the police records and any other relevant matters. The state was granted 30 days to do so, but the period elapsed before the State could do so. It has not done so to date, over six months since the order was made.

This appeal was placed before us for orders on 14th November, 2011. When it was called, Mr. O'Mirera, like before, stated from the bar that as a result of the change of guard at Buruburu Police Division the police were able to trace the files relating to the two appeals before us. He added that the D.C.I.O, Buruburu did write to the Director of Public Prosecutions indicating that one of the two complainants works outside jurisdiction in Australia, but the exact location of his place of work has not been identified. The second complainant, a flight attendant, could not be traced, as also a witness by the name Sharon Mukakana, who is said to have relocated to South Africa and her exact whereabouts was unknown. Another witness, Frida, died about four years ago. Lucy Njeri Mwangi, a former hotel receptionist, in the hotel where a rape relevant to the matter before us was committed, left the hotel and her whereabouts are unknown. Details regarding the second case are unavailable. These are matters which in our view should have formed part of the affidavit we ordered to be filed, but which, alas, has not been filed as stated earlier. The bottomline is that the state is unlikely to get witnesses in the event that we order a retrial. That much Mr. O'Mirera, conceded. But that notwithstanding Mr. O'Mirera urged the Court to uphold the appellant's conviction.

As stated earlier, Prof. Muigai is now the Attorney General; and he was such on 14th November, 2011, when the appeals came before us for orders. The appellant had other counsel, Mr. Emmanuel Wetangula. Learned counsel, in response to submissions by Mr. O'Mirera, stated that the Court has a duty to balance the public interest against the individual rights. In doing so he said, the court must bear in mind that the law grants the individual the right to due process of the law. The appellant cannot possibly pursue his appeals in absence of the relevant records and in his view if the court order directing that the appeals continue pending is sustained the right to a fair trial would be compromised. He added that the appellant has been in custody for well over 12 years, and was sentenced to death, which sentence has since been commuted to life imprisonment. In those circumstances, Mr. Wetangula submitted, it would be in the best interest of justice that the appellant's incarceration be terminated. He prayed that the appellant be set free.

Mr. O'Mirera in reply expressed the view that the court files are not lost, but are hidden somewhere. He believes that given time the Judiciary staff will trace them. He suggested that if staff are reshuffled, there is a likelihood of those files being traced as happened with the police.

The policy of the law with regard to punishment of criminals is clear. For the orderly and effective management of human affairs several laws have been promulgated and several sentences prescribed for acting in breach of those laws. The sentences range from discharge to the death penalty. The law sets out procedures for dealing with offenders and has established institutions responsible in that regard. Some of those institutions deal with detecting the commission of offences while others deal with the prosecution of those offenders and other laws have created institutions which try offenders. There is in a way division of services and each institution has its mandate cut out by law.

The law also recognizes that sometimes institutions charged with trying offenders may themselves err in the discharge of their work. It is for that reason that appellate processes are provided by the law. The appellate institutions' work is to re-evaluate the case against a given individual or individuals, and correct any errors that it might detect which might have been committed by other institutions below it in the course of its work.

The law does also make provision for the protection of certain rights of the persons who appear before these institutions. The protective provisions guarantee certain rights including the right of appeal in the event a decision is made against them. ***Section 77*** of the Old Constitution of Kenya since repealed, devoted itself to provisions relating to securing the protection of the law. In particular, the section provided in subsection (1) that unless a criminal charge against an accused is withdrawn the case should be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. When the law talks about an impartial court it includes an appellate court or tribunal.

The 2010 Constitution has more or less similar provisions. ***Article 159 (2)*** on the main, sets out the manner of exercising judicial authority. ***Article 50*** of the same Constitution has provisions relating to a fair hearing and provides for the right of appeal. By ***Article 50 (5) (b)*** of the 2010 Constitution, an accused has the right to a copy of the record of proceedings within a reasonable period after they are

concluded, in return for a reasonable fee as prescribed by law.

As we stated in our earlier ruling, the appellant, upon his conviction for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, was sentenced to death. He appealed to the High Court as he had the right to do, and following that appeal, he was supplied with a copy of the concluded proceedings for purposes of appeal. Other copies of the same proceedings were given to the High Court, which heard the appellant's first appeal and eventually dismissed it. He filed a notice of appeal on each of the two cases he stood convicted of by the subordinate court. It was then that problems started. The records in the custody of the court vanished. It also transpired that even the record of proceedings with the Attorney General as also the record with the police vanished. The appellant too informed the Court that even the copies of proceedings he had been supplied with also vanished. It was in these circumstances that we stated that the appellant could not be said to be blameless.

Efforts have been made by the Judiciary staff and other groups to trace the lost records to no avail. It cannot be gainsaid that the High Court shares the blame in the disappearance of the court records. It had the duty of ensuring that the court records were securely kept. It failed in that duty. We do not lose sight of the fact that the disappearance of the records was the work of criminals and the criminals must have had their accomplices in the High Court, in the Attorney General's office and the police department. The same cannot be said of the appellant. The appellant is in prison custody and it cannot be said that criminals went to the prison cell to steal a copy of proceedings relating to his trial. Of what benefit will those proceedings be to them? Be that as it may it is a fact that the record of proceedings cannot immediately be traced. The Constitution says that an accused person is entitled to a fair hearing, without unreasonable delay. He has exercised his constitutional right by filing these two appeals. Yes, he was supplied with a copy of the proceedings, but it is not that copy which was intended to facilitate the hearing of his appeal. The copy supplied to him was meant for his own use.

We appear to have come to a dead end. We cannot proceed to hear the appellant's appeal in absence of the necessary copies of proceedings. And yet public policy demands that persons convicted of criminal offences be duly punished. The appellant cannot be punished unless his appeals are heard by an impartial court established under the law and are dismissed for lack of merit. The appeals cannot pend indefinitely, because such pendency of the appeals would work unfairness to the appellant.

We have no hesitation in stating that the disappearance of the relevant documents is clearly for the benefit of the appellant. It is too much of a coincidence that all the documents from every place which had them, could disappear at the same time without any trace of them or part thereof. That notwithstanding, as the High Court is also much to blame for losing the records it will be unconscionable to let the appellant's appeals pend indefinitely due to the loss. We need to strike a balance somewhere between the public policy requiring that offenders be punished and the public policy which requires that offenders be given a fair, transparent and expeditious hearing of their matters.

The appellant has been in custody for about 15 years. His death sentence has since his conviction been commuted to life imprisonment. This Court has held, though not expressly, in the case of ***Fred Michael Bwayo vs Republic – Criminal Appeal No. 130 of 2007*** that life imprisonment means an imprisonment for a definite term of imprisonment. In arriving at that decision the Court considered decisions of other jurisdictions, among them **Uganda, England, DRC, Congo, Argentina and Belgium**. In all those countries, except England, life imprisonment has been defined to mean a term of imprisonment not exceeding 30 years. In view of that, and considering what Mr. O'Mirera said before us that a retrial is impracticable, we think that a retrial will not be possible as of now. And notwithstanding that the appellant is, in our view, not innocent regarding the loss of the official records of the court below, we have come to the conclusion that we need to terminate these proceedings and leave the appellant to face his conscience, if he has any, and his Maker.

What final order should we make? The appellant's appeal was not heard. Had that been the case then we would have either affirmed the decision of the High Court or reversed it, or varied it or remitted the proceedings to the High Court with specific directions as considered appropriate, or ordered a new trial, or quashed the conviction and set aside any sentence passed against the appellant. (See rule 31 of the

Court of Appeal Rules). The appeal having not been heard we cannot properly make any of the aforesaid orders. We shall be able to do so once the lost records are found and the appeal heard on its merits. We cannot allow the appellant to remain in prison indefinitely when it is not possible for his appeal to be concluded according to law. In the result the order which commends itself to us to make is that the appellant's conviction and sentence be and are hereby set aside, and the appellant be set at liberty forthwith.

Should the lost records be found, since the search for the same is still going on the appellant shall be required to attend court for the hearing of his appeal.

Dated and delivered at Nairobi this 3rd day of February, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR