IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KEIWUA, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 187 OF 2002

BETWEEN

FRANCIS NDUNGU WANJAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi & Mbito, JJ.) dated 3rd October, 2002

in

H.C.CR.A. NO. 348 OF 2002)
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JUDGMENT OF THE COURT

This matter is one of 16 others recently discovered throughout the country, in which the course of justice or the due process of the law was subverted by evil, and yet unidentified, forces. The subversion has taken various forms including disappearance of whole or part of court records including records supplied to intending appellants and the Attorney General; disappearance of original handwritten records; falsification of court proceedings and judgments; substitution of signed judgments with unsigned ones and other adulterations of court records. Fortunately, the era of interference with court records will soon come to an end after completion of the on-going process of digitalization of court records. What transpired in the case before us?

The appellant, ***Francis Wanjau Ndungu*** was convicted by Muranga Senior Resident Magistrate (F.F. Wanjiku) on 4th April, 2000 on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The said magistrate had taken over earlier proceedings recorded by another Senior Resident Magistrate, Mr. Nyaga Njage who went on transfer. It was proved in evidence tendered before those trial magistrates that on the 13th of September, 1994 the appellant was in the company of three other persons in a white car in Heho area along the main Kaharati/Kigumo Road. They were armed with three pistols and a G.3 rifle. At about 1.45 p.m., they met two police officers who were on foot patrol along the said road and the car stopped. Three armed men jumped out of the car and menacingly headed towards the police officers. One of the officers tried to draw his gun but was shot by the appellant above the right eye, and fell down. The assailants grabbed the other police officer and took away his pistol as well as the pistol of the fallen officer, and disappeared. The pistols were loaded with six rounds of ammunition each.

One week later on 21st September, 1994 the appellant was arrested in Kayole, Nairobi and from information supplied by him in a lengthy confessionary statement under inquiry (later retracted but admitted in evidence) the police raided the home of one of the accomplices who resisted arrest and was shot dead. The pistols stolen from the two police officers were recovered. The two police officers were also able to identify the deceased assailant in the mortuary as well as the appellant in an identification parade. The appellant's unsworn statement of defence that he was arrested for nothing on the night of 20th September, 1994 and was assaulted thereafter to force him to sign a prepared statement was rejected. Upon his conviction, he was sentenced to death. He appealed to the superior court (Mbogholi and Mbito, JJ.) which agreed with the findings of the trial court and dismissed his appeal on 3rd October, 2002. At no time during the process in those two courts was there a complaint relating to the propriety of the court records. It is also confirmed that the appellant's death sentence has since been commuted, as were many others on death row, to life imprisonment by the President on advice of the committee on prerogative of mercy.

The appellant filed his notice of appeal and a "*Petition of appeal*" against the decision of the superior court on 15th October, 2002 whereupon the process of compilation of the records for the hearing of the appeal commenced. Ultimately the records placed before this Court were incapable of certification by the Deputy Registrar as true records. The reason was given by one of the trial magistrates, Mr. Nyaga Njage who re-examined the records and stated as follows: -

"a) The handwritten proceedings from the date of plea i.e 5.10.94 are by my hand, upto 5th June, 1996.

b) The handwritten proceedings from 29/7/96 as envisaged by (sic) the evidence of PW1 and all the way up to 25/2/97 are purportedly written and signed by me <u>but</u> the same <u>are</u> <u>not</u> by my hand.

c) I have indicated the other portions in the proceedings which are in my handwriting by placing a yellow sticker signed by me and also by ticking the relevant page.

d) I confirm having taken the evidence of PW1 on 29/7/96 and recording the proceedings in my own handwriting but those proceedings <u>are not</u> in the file.

e) The proceedings of 29/7/96 as contained in the file are not by me and must have been substituted by removing the original proceedings as recorded by me on that date.

I therefore confirm that the handwritten proceedings of 29/7/96 are not the true record of the proceedings I recorded on that date."

The Principal Magistrate, Muranga was also able to confirm the falsification of the other trial magistrate's record (F.F. Wanjiku, who had left the services of the Judiciary) as follows: -

"I would like to confirm that the handwritten proceedings of:

30th February, 1998 24th June, 1998 15th September, 1998.
3rd November, 1998 12th November, 1998 4th February, 1999.
1st April, 1999 2nd September, 1999 4th October, 1999.
18th January, 2000 7th March, 2000 21st March, 2000
23rd March, 2000 and even judgment delivered on 4th April, 2000, are not F.F. Wanjiku's (SPM) handwriting as the same handwriting is well known by our members of staff."

The record before us was thus forwarded by the Deputy Registrar of the superior court on 6th May, 2010 with the following qualifications: -

"Pursuant to rule 62 (2) of the Court of Appeal Rules, 1972, and in compliance with your Ref. CR.APP.

No.187/2002 dated 11th December, 2009 I re-submit herewith the following:

(a) Four copies of the record of appeal which I am unable to certify as true copies since the original handwritten lower court proceedings are suspected to have been falsified.

(b) Original record in criminal case No. 2827 of 1994 of Senior Principal Magistrate's Court at Muranga.

(c) The entire above quoted High Court original criminal appeal file.

NB: The records of appeal have been recompiled using a copy of typed lower court proceedings that had been forwarded for the 1st appeal."

On the basis of that record, the appellant through learned counsel appointed by the court for him, Mr. Wamwayi, filed a supplementary memorandum of appeal raising some 11 grounds. At the hearing of the appeal, however, Mr. Wamwayi pointed out the disparities contained in the record as stated above and suggested that an order be made for retrial of the appellant despite his lengthy stay in custody. That suggestion was strongly opposed by learned Senior State Counsel Mr. Monda who did not think a retrial was feasible after such a long time. He invited us to find that the sudden disappearance and falsification of part of the court records was not coincidental as the only beneficiary in such scenario would be the appellant. Such insinuation was however resisted by Mr. Wamwayi who submitted that there was no evidence to connect the appellant with the subversion evident in the records.

It is clear from the circumstances narrated above that there is no authentic record upon which an appeal to this Court can properly be grounded. What is to be done? Order a retrial, acquit the appellant or proceed with the appeal, the defects in the record notwithstanding? Fortunately for us, this Court has previously dealt with similar matters where all those options were considered and applied, and therefore it is not a matter without precedent.

On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of **Joseph Maina Kariuki vs. Republic**, **Cr. App. No. 53 & 105 of 2004 (ur)** where it had been established that "*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 Attorney General*. The *appellant's own copies of the record of proceedings in both lower courts which had been supplied to him had also disappeared."* The court was urged to acquit the appellant in those circumstances but stated: -

"Faced with that kind of situation this Court remarked as follows in the case of JOHN KARANJA WAINAINA VS. REPUBLIC, Criminal Appeal No. 61 of 1993 (unreported): -

"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 in 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."

Similarly in **John Ooko Otieno v Republic, Cr. Appeal No. 137/2002 (ur)** the entire records and files containing proceedings and judgment of the trial court could not be traced and this Court was urged in the

circumstances to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In rejecting that plea, the court stated, thus: -

"Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e court files, judgment, police file and Attorney General's file is a rare occurrence. It has however, occurred and this Court is not a stranger to such a situation. This Court has on more than one occasion in the past encountered such a situation. In the case of Pius Mukaba Mulewa and Another vs. Republic, Court of Appeal Criminal Appeal No. 103 of 2001, this Court, faced with that situation had the following to say: -

'What we can take from *ZAVER's* (*Haiderali Lakhoo& Zaver v Rex (1952) 19EACA 2464)* case is that the court 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? Is it merely coincident that both the magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making? In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of court."'

The principle is thus now well established that in cases such as this, whatever order it is that has to be made, the interests of justice as a whole must be considered, but acquittal is not automatic. Should a retrial be ordered as suggested by the appellant's counsel?

Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case. As this Court stated in **Bernard Lolimo Ekimat vs. R. Criminal Appeal No. 151 of 2004 (ur)**:-

"There are many decisions on the question of what appropriate case could attract an order of retrial but on the main the principal that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require."

Some of the factors which the court would consider have been stated before. In **Rwaru Mwangi v Republic Cr. Appeal No. 18 of 2006 (ur)**, the court stated:-

"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See Muiruri vs. Republic [2003] KLR 552. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial – see Mwangi vs. Republic [1983] KLR 522."

Once again the underlying consideration is that of "*the interests of justice*".

As stated earlier the appeal cannot proceed on the basis of records which are admittedly adulterated. There is no way of knowing the contents or retrieving the authentic originals which are confirmed to have been falsified. No direct or other evidence is available to connect the appellant with the falsification of the records although, as observed by Mr. Monda, he would be a beneficiary of such situation. The irresistible inference is nevertheless that the court registries which are charged with the duty of safe custody of court documents, and those who work in those registries, played a key role in the falsification. The appeal cannot be heard on the basis of falsified documents. The trial was concluded about eleven years ago on 4th April, 2000 and the first appeal was decided about eight years ago in October, 2002. The offences facing the appellant are of utmost gravity, attracting the death sentence, now

commuted to life. There were nine prosecution witnesses who testified, and seven of them, including the two complainants were police officers. On the admissible and the potentially admissible evidence, the conviction of the appellant may well be sustainable. In all those circumstances it is our considered view that the interests of justice will be served by ordering a retrial. We think the State is still capable of mounting such a trial considering that most of the witnesses were police officers.

Accordingly we set aside the conviction and sentence of the appellant and order that he shall be re-tried by another court of competent jurisdiction. The appellant shall be produced before the Senior Principal Magistrate's court at Muranga within 14 days of this order for directions on the re-trial and shall in the meantime be placed in police custody. It is so ordered.

Finally, although this appeal was heard on 4th November, 2010 and the date of judgment set for 19th November, 2010, the presiding Judge fell sick thereafter necessitating several adjournments. He is still unavailable and therefore this judgment has been prepared under ***rule 32 (2)*** of this Court's Rules.

Dated and delivered at Nairobi this 11th day of March, 2011.

M. Ole KEIWUA

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR