



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA**

**AT KISUMU
CRIMINAL APPEAL 198 OF 2004**

JACTON AYIEYO ADUKE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kisumu (Tanui J) dated 2nd October, 2003

in

H.C.CR.C. NO. 23 OF 2001)

JUDGMENT OF THE COURT

The appellant was arraigned before the superior court on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge stated, among other things, that on 7th June, 2001, the appellant murdered Monica Adhiambo Ogesi.

The appellant pleaded not guilty to the charge after which the superior court held a trial with the aid of assessors. The prosecution called a total of 12 witnesses. The appellant made a long unsworn statement at the trial. The evidence showed that the deceased was cut with a panga several times. She had a deep cut wound on the neck which severed the blood vessels. The cause of death was diagnosed as due to haemorrhage as a result of assault.

The appellant in his unsworn statement narrated his relationship with the deceased who was his in-law in the clan. The recorded evidence shows that there was a strained relationship between the appellant and the deceased arising from the land which the appellant's father, Erasto Andungo had given to the deceased and the deceased's brother-in-law, one Luka Ogonji. The appellant stated, among other things, that on the material day, there was confrontation between her and the deceased at the land in dispute. According to the appellant, the deceased had a panga and as they struggled over the panga the deceased was cut on the hand. Thereafter, the deceased slipped and fell on stones and died. The appellant stated that he did not intend to kill her.

It seems that the appellant was convicted for the offence of murder by Tanui J and sentenced to death on 2nd October, 2003 for he filed a notice of appeal dated 13th October, 2003 against the conviction and sentence.

The notice of appeal institutes an appeal to this Court under **Rule 58 (1)** of the Court of Appeal Rules.

The appeal has not however been heard because the judgment of the superior court cannot be traced. Every effort has been made to trace the judgment without any success.

At the hearing of the appeal, Mr. Maina, learned counsel for the appellant submitted that the appeal cannot proceed to hearing because the judgment of the superior court is still missing. He wondered whether a re-trial was practicable.

Mr. Musau, the learned Senior Principal State Counsel, sought a re-trial, saying that the witnesses would be traced.

In ***Pius Mukabe Mulewa & Kazungu Kenga vs. Republic***, Mombasa Criminal Appeal No. 103 of 2001 (unreported) this Court applying ***Haiderali Lakhoo Zaver vs. Rex*** – [1952] 19 EACA 244 said in part:

“We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a re-trial, an acquittal must follow as a matter of course. After all a person who has been tried or pleaded guilty before a court with competent jurisdiction and has been convicted by such court has lost the benefit of the presumption of innocence given to him by section 77 (2) (a) of the Constitution and on appeal the burden is on him to show that the court which convicted him did so in error. The loss of the file may deprive him of the 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 just as a whole must be considered”.

In ***Mwangi vs. Republic*** [2005] 1 KLR 495 this Court reiterated that the loss of a file does not automatically lead to an acquittal and stated ineffect that whether the loss of a file will lead to an acquittal, (discharge?) or re-trial will depend on the peculiar circumstances of each case. In ***Mwangi’s*** case, (supra) the appellant had been sentenced to death some 16 years (actually 14 years) before and the High Court file, the police file and the magistrate’s file containing the committal proceedings were all missing. Moreover, most of the witnesses were dead. This Court found the circumstances of the case exceptional, quashed the conviction and set aside the sentence.

In the present case, it has not been said that the police file containing the statements of witnesses is missing or that the court record containing the evidence of the witnesses and the exhibits is missing. Indeed, the record of the proceedings of the trial including the copies of exhibits are part of the record of this appeal. The appellant was convicted about four years ago. The witnesses are neighbours and relatives of the appellant.

It is apparent from the recorded evidence and the defence of the appellant that if a re-trial is held, the appellant is likely to be convicted for the offence of murder or manslaughter or any other minor and cognate offence. The State Counsel has confirmed that the witnesses can be traced.

In the circumstances of this case, the ends of justice will be best served by holding a re-trial.

In the result, we set aside both the conviction and sentence and order that the appellant shall be re-tried by the superior court on the same charge – murder before a different judge. The appellant shall be held in custody while awaiting trial.

Dated and delivered at Kisumu this 20th day of June, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR