REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU
CRIMINAL APPEAL 137 OF 2002

JOHN OOKO OTIENO ……..…… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Wambilyangah J) dated 20th February, 2002

in

H.C.CR.C. NO. 10 OF 1997)

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JUDGMENT OF THE COURT

This criminal appeal came up for hearing before this Court differently constituted on 20th November, 2006 when it could not be heard and was adjourned on grounds that the entire records and files containing the proceedings and judgment of the trial court (which was the superior court) were not available and could not be traced. In adjourning the appeal, the Court directed the Deputy Registrar to make further attempts, including contacting the prosecution and police together with the previous counsel of the appellant to see that the records were found. When the appeal came up before us on 16th June, 2008, the same position obtained. No record of appeal was availed before us and no judgment was annexed to the skeleton record availed to us. The only documents that were availed is the Notice of Appeal Form (B) (2). As we view it, in the circumstances of this case, to be an important document, we do reproduce it here under: It reads:

"*Notice of Appeal Form (B) (2)*

IN THE KENYA COURT OF APPEAL AT KISUMU

HIGH COURT CRIMINAL APPEAL NO.

FROM ORIGINAL HIGH COURT KISUMU CR. CASE NO. 10/97.

Take note that KMU/199/2002/ Con. John Ooko Otieno appeals to the Kenya Court of Appeal against the decision of Honourable Justice I.C.C. Wambilyangah (Judge) dated 28th of February, 2002 when the appellant was convicted and sentenced to suffer death for the offence of Murder c/s 203 as read with

section 204 of the Penal Code.

"*(a) That the appeal is both against conviction and and sentence.*

(b) That I pleaded not guilty to the trial.

(c) That the appellant intends to be present at the Hearing of this appeal.

(d) Dated this 5th day of March, 2002".

From that document it is clear that the appellant, John Ooko Otieno (referred to in this judgment as the appellant) was charged, found guilty and convicted on the offence of murder. He was sentenced to death. He appealed against that conviction and the sentence of death. In our efforts to trace any document that could help us appreciate the appeal in which no original memorandum of appeal was filed or if filed, was not made available, we have seen the scanty documents in the original committal file. The information there reads as follows:

"*STATEMENT OF OFFENCE*

MURDER

Contrary to Section 204 of the Penal Code, as read with Section 203 of the same code.

PARTICULARS OF OFFENCE

John Ooko Otieno: On the 16th day of August, 1993, at Nyalenya s/location in Siaya District of Nyanza Province, murdered PAUL OPANDE ADENYA".

The information was produced to court on 25th June, 1997 although it was dated 28th October, 1996. The above, is all that was available before us. Upon those circumstances, the firm of the advocates on record for the appellant have filed a supplementary memorandum of appeal which was filed on 16th June, 2008 and in which the following five grounds are raised, namely:

"*(1) That as a court of record pursuant to section 4 (1) of the Constitution of Kenya, the appellant' s right to mount an appeal has been interfered and consequently ends of justice cannot be served by reason that there is no record of which grounds of appeal can be extracted.*

(2) That the superior court has erred in law by failing to resolve the appellant (sic) constitutional rights which were violated.

(3) That the superior court has failed in its duty and/or neglected to furnish the appellant with the record of the appeal as entitled pursuant to Rule 62 of the Appeal Rules CAP 9.

(4) That superior court of record has nothing before it to determine whether the appellant was properly tried and convicted and in such circumstances a court has no reason to sustain and uphold conviction as this is a court of record pursuant to Section 64 (1) of the Constitution.

(5) That the superior court has failed to avail the record of appeal to the appellant. The appellant is completely unable to determine whether the appellant was properly tried and convicted."

On those reasons, the appellant, through his counsel seeks that the appeal be allowed, conviction quashed and sentence set aside. In her address to us, the learned counsel holding brief for Mr. Lunani for the appellant, Miss. Arati urged us to allow the initial appeal but that as there is nothing the court could rely on, she also asked that the sentence be set aside. However, on further consideration, she left the matter to the Court. Mr. Musau, the learned Senior Principal State Counsel, on the other hand submitted that as

there was no judgment, no proceedings and indeed no appeal, a retrial should be ordered. He added that although it might be difficult to trace the witnesses, however the relevant authorities could be contacted to have them traced and a successful retrial would be mounted.

We have anxiously considered the appeal. Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court file, judgment, police file and Attorney Genera's file is a rare occurrence. It has however, occured 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 case is that the courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has 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 final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest 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 course. After all a person who has been tried or has 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 justice as a whole must be considered".*

That was a decision on a second appeal. In this appeal, as we have stated above, the matter is before us on first appeal as the appellant was charged with murder and was tried in the superior court. However, the principle as pronounced above is the same and that is that the interest of justice as a whole must be considered before either a retrial is ordered or the appeal is fully allowed, but acquittal is not automatic merely because the file and records are missing. In the more recent case of ***Mwangi vs. Republic*** [2005] 1 KLR 495 a situation closer to the present case arose. We say closer situation because in that case of ***Mwangi*** (supra) the appellant was convicted of murder and sentenced to death, like in this case the appellant was also convicted of murder. The only differences are, that in ***Mwangi's*** case, the Court was told that most of the witnesses were dead, and that the appellant was convicted of murder on 17th May, 1991 some fourteen years (erroneously reported as 16 years) prior to the Court's decision, whereas in this case, Mr. Musau has told us that there are good prospects of getting witnesses and mounting a retrial and the appellant was sentenced to death on 28th February, 2002, about six years back. However, even in that ***Mwangi's*** case in which the conviction was quashed and sentence set aside, the court did so only because the circumstances of that case were considered as peculiar and the case was placed in an exceptional category. The Court however maintained the above principle and held as follows:

"***Loss of files does not mean that an acquittal would automatically follow. Each case must be considered on its own peculiar circumstances".***

In this case, there is no evidence as to how the files, judgment and all important parts of the record such as exhibits got lost. We would not accept the appellant's submission that the only institution to blame is the superior court. In so far as there is no evidence as to who was responsible for the loss, it would be illogical to blame any party or any institution. It is true that the superior court registry was supposed to be in custody of the court file, but in this case, it is not only the court file that is missing but also the prosecution file, the Attorney General's file and police file are all missing. That cannot be by coincidence. If it is by coincidence then it must be one of the rarest coincidences. Those circumstances point to a collusion and whereas we would not be prepared to put blame on any person or persons, we would not rule out any such conspiracy to enable a party escape justice.

We are not in a position to decide fully this appeal because of the missing documents. We however, have

jurisdiction drawn from the notice of appeal we have referred to which in a criminal matter like the one before us amounts to an appeal and with that jurisdiction, we can decide this appeal but with a limited jurisdiction in that we cannot decide and determine it either way as we do not have before us material to enable us do so.

As the learned Senior Principal State Counsel says he can still mount a re-trial and as the matter seems to have involved people from one locality as can be seen from the committal proceedings, what commands itself to us is to order a re-trial.

The appeal is allowed. The conviction and sentence of death are each set aside. The appellant is to be re-tried on the same charge in the superior court. He is to remain in custody till such re-trial. Orders accordingly.

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

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR