



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 53 & 105 OF 2004**

**JOSEPH MAINA KARIUKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 29<sup>th</sup> July, 2003*

**In**

**H.C.Cr.A. Nos. 199 & 201 of 2002)**

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**RULING OF THE COURT**

Joseph Maina Kariuki, the appellant herein, was apparently tried and convicted before a magistrate on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. Upon his conviction on the said charge, he was sentenced to death. He appealed to the High Court against the conviction and sentence but that court (Mbaluto & Onyancha, JJ) dismissed his appeal on 29<sup>th</sup> July, 2003. 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 disappeared 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. In those circumstances, Mr. Wetangula, who appeared before us on behalf of the appellant, told us to acquit the appellant because his fundamental rights under the Constitution are being violated. The appellant has a right of appeal to the Court and he cannot exercise that right because of the total loss of the records of the two courts below. Accordingly Mr. Wetangula asked the Court to acquit the appellant, as it is not even possible to order a retrial.

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 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.”***

The Court in the above cited case then proceeded to consider the relevant factors; found that the appellant therein had been in prison for about fifteen years, that it could not be said that he was in any way responsible for the disappearance of the files, proceedings and documents relating to the charge against him and that a retrial was virtually impossible in the circumstances. The Court, under those conditions, quashed the conviction and set the appellant free. What is important, however, is that the Court emphatically rejected any notion of an automatic acquittal merely because all the records of the case have disappeared.

Earlier in the case of **PIUS MUKABE MULEWA & ANOTHER VS. REP.**, Criminal Appeal No. 103 of 2001, the Court had taken exactly the same stand and rejected the idea of an automatic acquittal. Luckily in the latter case, the proceedings which had been supplied to the appellant in prison, just as they were supplied to the present appellant, were available and the hearing of the appeals were subsequently conducted on the basis of the records supplied by the appellants.

In the present appeal there is no direct evidence to show that the appellant was involved in the loss of all the records, i.e. from the magistrate’s court to the High Court, to those of the police and even those of the office of the Attorney-General. But we ask ourselves: Is it a mere coincidence that all these records have simply vanished into thin air and for no apparent reason at all?

The appellant was himself supplied with a copy of the record containing the proceedings and judgment of the Magistrate. That record has also mysteriously disappeared and the appellant now demands that we must acquit him. Of course, the basic truth is that it is the duty and responsibility of the courts to safely and securely keep such documents. But it is known that documents can be made to disappear particularly by those who stand to gain from such disappearance. That is the basis of the Court’s insistence that an acquittal cannot automatically follow upon such loss. The appellant, who stands to gain from the loss of all the records, was himself given a copy of the record and as we have said, that too has disappeared. Taking into account all the surrounding circumstances, we are unable to conclude that the appellant is himself blameless in the disappearance of all the documents. At the very least, he is entirely to blame for losing the copy supplied to him by the court. In those circumstances, we refuse to order that he be acquitted. After all, he was tried and convicted by a competent court and the conviction was later on confirmed by the High Court. He cannot, therefore, claim the presumption of innocence and as to the entire loss of all the records, he has at least contributed to it by losing the copy which had been supplied to him. We accordingly reject his claim that we should quash the conviction and set him at liberty. 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.

Dated and delivered at Nairobi this 14<sup>th</sup> day of November, 2008.

**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.**