



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPLICATION NO. 61 OF 1993

JOHN KARANJA WAINAINA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mango J) dated 16th June, 1993

in

H.C.CR.C. NO. 15 OF 1990)

ORDER OF THE COURT:

JOHN KARANJA WAINAINA, the appellant, was convicted of murder and sentenced to death by the High Court of Kenya in *Criminal case No. 15 of 1990*. His appeal to this Court was registered on 23rd June, 1993. It has not been heard since then.

The Deputy Registrar of this Court has confirmed that he is unable to prepare the records of appeal because the entire file containing the handwritten or even typed proceedings, and the judgment including the exhibits have disappeared and cannot be traced.

Also lost without trace are the investigation and prosecution files of the police. Again, no one knows for sure which police station arrested the appellant. It would appear also that the appellant whose memory seems to be fading probably due to old age is vague of many details about his prosecution and subsequent conviction. It is strange that as matters stand now, we do not even have in the files before us the charge sheet containing the information on which the appellant was tried and of which he was convicted.

In these circumstances, Mr. Mogikoyo for the appellant has urged us to acquit the appellant as a retrial would serve no useful purpose because even the police file has disappeared.

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? 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 77(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 appellant has been in prison for about 15 years. We cannot say that he is responsible for the disappearance of all files, proceedings and documents relating to the charge against him. A retrial is not feasible in the circumstances. It would be quite useless to attempt to do so. Above all no appeal now can be prosecuted before us. Records cannot be reconstructed as none exist.

We have carefully considered the matter before us. We would place this case on an exceptional category. In the circumstances, we quash the conviction and set aside the sentence of death. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 30th day of July, 2004.

P. K. TUNOI

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR