IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, LAKHA & OWUOR, JJ.A.)

CRIMINAL APPEAL NO. 103 OF 2001

BETWEEN

1. PIUS MUKABE MULEWA
2. KAZUNGU KENGA .....APPELLANTS

AND

REPUBLIC .....RESPONDENTS

Appeal from the Judgment of the High Court of Kenya at Mombasa (Justice Waki and Commissioner of Assize, Khaminwa (Mrs) dated 3rd April, 2000

in

H.C.CR.A. NO. 289 & 288 OF 1995)
****

RULING OF THE COURT:

Pius Mukabe Mulewa, the 1st appellant, and Kazungu Kenga,the 2nd appellant, have appealed to this Court from the judgment of the superior court (Waki J. and Mrs. Khaminwa,Commissioner of Assize) dated 3rd April, 2000. By thatjudgment the superior court dismissed their appeals to that court and confirmed the conviction and sentence of death which had been recorded against each appellant by the then Chief Magistrate of Mombasa, Mr. J. K. Kanyi. The magistrate had tried and convicted the two appellants on a charge of robbery with violence contrary to section 296(2) of the Penal Code, or so we understand.

The appellants' appeals to the Court first came up for hearing on 23rd July, 2001. On that day, the Court made the following order:

> ***This appeal is taken out and adjourned to next sessions in January, 2002. In the meantime, the Attorney General is hereby ordered to trace the original court file reported to be missing so that it is made available to this Court in January, 2002."***

The appeals duly came up in the January sessions at Mombasa. When the hearing was due to open before the Court on 21st January, 2002, Mr. Magolo, learned counsel for the two appellants, boldly asked us to acquit the appellants. As is apparent from the order of the Court set out above, the original file of the trial magistrate has disappeared and is untraceable. Not only has the original file of the trial magistrate disappeared, but we were also informed from the bar that even the police file which was used in the

investigation and prosecution of the appellants has also disappeared and is also untraceable. So that as matters stand before us, we do not even have in the record before us the charge sheet containing the charge on which the appellants were tried and of which they were convicted.

So basing himself on the case of ***HAIDERALI LAKHOO ZAVER V. REX*** (1952) 19 E.A.C.A. 244, Mr. Magolo demanded of us that we acquit the appellants because, in his view, even if we were to order a retrial as was done in the case we have cited, the order for a retrial would serve no useful purpose because even the police file has disappeared.

In ZAVER's case, ante, what happened was that sometime in 1951, Zaver was tried by a District Magistrate's Court at Mengo, Uganda, on a charge of dishonest receipt of some stolen goods. The magistrate found him guilty of the charge, convicted him and sentenced him to a term of imprisonment. Zaver gave a notice of intention to appeal, applied for bail pending appeal and was granted bail. He subsequently filed his appeal in the High Court, but by the time that appeal came up for hearing the file of the District Magistrate had simply disappeared and was untraceable. Faced with that position, ***PEARSON & AINLEY, JJ.*** were of the clear view that the order which would best serve the interest of justice in the circumstances was to quash Zaver's conviction, set aside the sentence of imprisonment and order a retial on the original charge. Zaver then appealed against the order for retrial but the Court of Appeal for Eastern Africa had no difficulty in dismissing the appeal. We think Mr. Magolo was contending that there is a distinction between Zaver's case and that of the appellants and the distinction must be that in Zaver's case the order for a retrial was feasible because there, the police file, and we assume the police witnesses, were still available while in the case of the appellants before us, the police file, as we have pointed out, has simply vanished and it may well be impossible to trace some vital witnesses for the prosecution. Richard Haidn (P.W.l) who was one of the victims of the alleged robbery was an Austrian who had come to Kenya as a tourist and it may well be impossible to trace him, taking into account that the robbery took place on 25th February, 1992, nearly ten years ago. In these circumstances, Mr. Magolo contends, there is no point in making an order for a retrial and hence Mr. Magolo's bold stand that we acquit the appellants.

Are the courts obliged, in law, to acquit each and every accused person where it is shown that a court file and even the police file have disappeared and there is no way in which a retrial can reasonably be held? The judgment in ***ZAVER's***case opens with the declaration: ***"This appeal has arisen from circumstances which are fortunately exceptional."***

That statement was made on 17th September, 1952 and we must accept the statement at its face value that the disappearance of court files or police files or any other files was an exceptional occurrence then. If any judge were to make such a declaration today, he or she would be treated, and rightly so, as an ***IGNORAMUS,*** totally blind to the ways of the world. The disappearance of files is today a fact of life with us and were ***SIR BARCLAY NIB= (President), SIR NEWNHAM WORLEY (Vice President), and GRIFFIN,*** *C.J.* (Uganda) sitting in our places today, we very much doubt whether they would have held as we are asked to hold, that where a file has disappeared and it is not reasonably feasible to hold a retrial then an acquittal must follow as a matter of course. Not that man's desire to extricate himself from unpleasant situations is of recent origin. Victor Hugo, writing in 1830, explained what he thought had led to the burning down of the Palace of Justice in Paris in 1618. He wrote:

"It is certain that if Ra vaillac had not assassinated Henry IV, there would have been no documents about the trial of Ravaillac recorded in the registry of the Palace of Justice, no accomplices interested in causing the disappearance of said documents, consequently no incendicirie s obliged, for want of any better expedient, to burn the registry in order to burn the documents, and to burn the Palace of Justice in order to burn the registry - in short, no fire of 1618. The old Palace would still be standing with its Great Hall, **and** ***I could say to the reader, 'Go see it'*** **and** ***thus we would both be spared trouble - myself the trouble of writing, and him that of perusing, such a description. All of which proves this very novel truth - that great events have incalculable consequences. It is quite possible that Ravaillac's accomplices had nothing at all to do with the fire of 1618. We have two other very plausible***

explanations. The first is the great fiery star, a foot wide and a foot and a half high, which fell, as everyone knows, from the sky right upon the Palace, just after midnight, on the seventh of March. Second is this quatrain of

Theophile's:

Indeed it was a sorry sport
When in Paris Dame Justice,
For having eaten too much spice, Set fire to the Palace.

Whatever you may think of these three explanations political, physical and poetical - concerning the conflagration of the Palace of Justice in 1618, it is unfortunately a certain fact that there was a fire ...".
See ***VICTOR HUGO,*** The Hunchback of Notre-Dame - Penguin Popular Classics, Penguin Books, Paper Back Edition, at pgs. 12 to 13.

What Victor Hugo was saying is that following the assassination of King Henry IV of France, one Ravaillac wascharged and tried at the Palace of Justice in Paris. Of necessity the record of the trial had to be kept and was in fact kept in the registry of the Palace of Justice. Ravaillac's accomplices wanted to get hold of the records and as there was no other way of getting at them the registry of the Palace of Justice had to be, and was in fact burned down and the burning of the registry resulted in the burning of the Palace of Justice itself. Leaving aside Hugo's other two comical explanations as to why the Palace of Justice could have been burnt, - like Dame Justice eating too much "pilipili" and to relieve herself of the consquence thereof, setting her own palace on fire - what is of interest to us in this story is that interested parties may themselves resort to very extreme measures to make court records disappear and then tell the court:
"Aha! You have made my file disappear and there is no evidence upon which you can say I committed any crime. Please set me free."

Must the courts, of necessity accede to such demands?
As we have seen ***ZAVER's*** case appears to suggest that if the courts cannot order a retrial, then an acquittal ought to follow. Even the High Court in Uganda from which ***ZAVER's*** appeal came recognised the injustice of an automatic acquittal in such circumstances and the Court of Appeal for Eastern Africa agreed with them:
"The Courts must in this matter try to hold the scales of justice evenly between the parties and, whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of* affairs *as this appeal discloses, we think t he course followed by the learned Judges on first appeal was on balance the fairest and most just, and is the only solution which offers an opportunity for a judicial determination on the merits of the case".
see pg. 246 of the Report.

We repeat that in ***ZAVER's*** case, a retrial was feasible while in the appeal before us an order for a retrial will serve no useful purpose at all. We, however, must also repeat that the disappearance of court files in the days of ***ZAVER*** wasan exceptional occurrence. That is no longer the position now. Indeed, if it were to be known that as soon as the court file and that of the police disappear, that would be the end of the matter, the courts would expect many more disappearances and justice would be the loser. How are the courts to deal with our circumstances?
We think we can derive some guidance from ***UMUOFIA CLAN*** written about by Chinua Achebe, who had to deal with new and complicated troubles which their fore-fathers did not have to deal with. Addressing the clan members, Okika says:
"This is a great gathering. No clan can boast of greater numbers or greater valour. But are we all here? I ask you: Are all the sons of Umuofia with us here? A deep murmur swept through the crowd.

'They are not, he said. They have br oken the clan and gone their several ways. We who are here this morning have remained true to our fathers, but our brothers have deserted us and joined a stranger to

soil their fatherland. If we fight the stranger we shall hit our brothers and perhaps sh ed the blood of a clansman. But we must do it. Our fathers never dreamt of such a thing, they never killed their brothers. But a whiteman never came to them. So we must do what our fathers would never have done. Eneke the bird was asked why he was alw ays on the wing and he replied; 'Men have learnt to shoot without missing their mark and I have learnt to fly without perching on a twig'. We must root out this evil. And if our brothers take the side of evil we must root them out too. And we must do i t now. Wemust bale this water now that it is only ankle -deep..." See CHINUA Ad IEEE, Things Fall Apart, EastAfrican Educational Publishers,* at pg. *143 to 144".

The teaching in this passage must be that new problems require new solutions. Previously, the courts did not have to deal with the issue of numerous court files getting lost andthe loss, in most cases would involve corrupt practices. The Judges in ***ZAVER's*** case did not have to deal with such aprevalent and pernicious state of things. They could, understandly, afford to suggest that if a file is lost and it is not possible to reconstruct it or to order a retrial, an acquittal might follow. We cannot afford to lay down any such hard and fast principle now. It can only be detrimental to the course of justice.

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 coincidence 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 aparty be allowed to benefit from a situation of his own making Ithe 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 wholemust be considered. What are the circumstances surrounding these two appeals?

It is agreed that before the disappearance of the magistrate's file, typed copies of proceedings had been fully prepared and one such copy was made available to at least one of the appellants. When it became clear to the appellants that the magistrate's record had vanished into thin air, and that the appeals filed by them could not be heard, the appellant to whom a copy of the proceedings had been supplied and who still had that copy with him in prison kindly made the copy available to the High Court. The record before the High Court was prepared from the copy so made available to it and it was agreed by all the parties involved that the record prepared in those circumstances reasonably reflected what had taken place before the magistrate. In fact no demand was made before the High Court that the appellants be acquitted on the ground that the file of the trial magistrate had disappeared and the High Court dealt with the appeal on the basis that all that which had taken place in the magistrate's court was available to it. The recordofwhat took place in the High Court is the same record we have before us. It is true we do not have the actual charge sheet before us, but even on that aspect of the matter the judgment of the magistrate under the heading **"CHARGE"** is as follows:

"The seven accused persons are now facing a charge of robbing Mr. Mwongoi who was the van driver, the van valued at Kshs.800,000/=. The particulars of the charge read that at or immediately after the time of such robbery, used persona 1 violence on Michael Kazungu thereby killing him."

It is not alleged before us that this portion of themagistrate's judgment is not correct. Indeed it must be correct because in their very detailed submissions before the High Court the appellants had contended that the charge was itself defective because it was not clear whether they were charged with robbing Mwongoi or with murdering Michael Kasungu. In these circumstances, would it be in the best interest of justice to ignore the record which was before the High Court and which was admittedly supplied by one

of the appellants and to hold that since the actual file of the magistrate has disappeared and it is not reasonably feasible to order a retrial the appellants must be acquitted? We think it would be an affront to justice to do so. We return to ZAVER's case and at pages follows:- 245 to 246, the Judges state as

> **"Mr. Wilkinson's second point was based upon more general considerations of justice and equity. The learned Judges of the High Court were faced with a situation which the framers of the Code had not foreseen. The first part of the subsection (1) of section 333 prescribes, as a condition precedent to the determination of the appeal, that the appellate court shall peruse the record. If th is is made impossible by the absence of a record, has the High Court any jurisdiction to exercise its powers as an appellate court? The learned Judges thought that the logical course would be to decline to exercise such powers, but that it would be tantam ount to the denial of justice. With that view we agree. They then considered whether it would be possible to determine the appeal on such material as was available or could be made available. The possibility of reconstructing the record was reduced by the fact that the death of the trial magistrate had intervened. It is perhaps unfortunate that the Judges were not informed, as we have been, that counsel had taken notes of the evidence on the**
> **information they had. The learned Judges decided that, in the present instance, it would be quite useless to attempt to do so. The appellant naturally wished them to allow the appeal but this www.kenyalawreports.or.ke they refused to do on the ground that simply to quash the conviction because the record was lost**
> **would be to act wholly witho ut logic, reason or justice, and they considered that the 'nearest approach to justice' in the circumstances would be to order a re -trial after quashing the existing conviction."**

These remarks were made over fifty years ago, but we think that with any such necessary modifications to suit our times,they still represent solid reasoning and common sense. Inthese appeals, the High Court could not have ordered a retrialwere that course found to be necessary. But it was notnecessary because the record of the High Court wasreconstructed from the copy of proceedings supplied by one of the appellants. The record could even have been reconstructed from the notes of the trial taken by counsel if such notes were available. The devil himself must knowwhat is to happen when absolutely nothing is available. It is our hope and prayer that that kind of situation will never arise but even if it did, we emphatically reject any notion or misconception that an acquittal must follow as a matter of course.

We have said enough, we think, to show that the appellants' contention before us that we ought to acquit them without hearing their appeal must fail. There is more than sufficient material before the court upon which their appeals can be determined one way or the other and that being our view of the matter, we over-rule their preliminary arguments and demand for acquittal at this stage and order that their appeals must be heard and determined on merit. That shall be our order in the matter.

Dated and delivered at Mombasa this 15th day of February, 2002.

R.S.C OMOLO
.....
JUDGE OF APPEAL

A.A. LAKHA
.....
JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL