Case Number:	Miscellaneous Criminal Application 41 of 2018
Date Delivered:	15 Dec 2020
Case Class:	Criminal
Court:	High Court at Naivasha
Case Action:	Judgment
Judge:	Richard Mururu Mwongo
Citation:	Issa Musa Hussein v Republic [2020] eKLR
Advocates:	Ms Maingi for the DPP
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. F. Muchemi
County:	Nakuru
Docket Number:	-
History Docket Number:	Criminal Case 1701 of 2004
Case Outcome:	Accused acquitted
History County:	Nakuru
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

MISCELLANEOUS CRIMINAL APPLICATION NO. 41 OF 2018

ISSA MUSA HUSSEIN.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an application from the Original Conviction and Sentence of Hon. F. Muchemi

in Naivasha Criminal Case No. 1701 of 2004 delivered on 3rd May, 2007)

JUDGMENT

1. The applicant was charged and convicted for robbery with violence vide CMCR Case No. 1701 of 2004. The convicting magistrate was Hon. F. Muchemi (Now Judge) delivered judgment on 3rd May 2007. The applicant was at the time 28 years old.

2. He filed an appeal against conviction and sentence on a date that cannot now be identified due to absence of records. After he did not receive a hearing, he filed a reminder application regarding that appeal in December, 2015. It was filed as a Miscellaneous Application No. 41 of 2015, this application.

3. Unfortunately, despite numerous attempts to trace the lower court file to facilitate the appeal, the said file cannot be found. The lower court file would, of course, contain the original record of proceedings together with documentary and other exhibits, all of which would assist with the review of the case.

4. The only information presently available is that the lower court file was archived in Nakuru. The Nakuru Archive Record Centre shows that the file had Archival Reference No. BBA 2/1590 on 9th April 2009. When the file was requisitioned from Nakuru, the Kenya National Archives forwarded Form RM3 which shows that the said file was collected by a judiciary staff member namely, P. Kagia, on 9th April 2009. They reconfirmed this by a letter dated 22nd October, 2019. It is not clear who the said P. Kagia was and his whereabouts.

5. There is also no record of where the file went after it was released to the said P. Kagia of the judiciary. This is despite various orders being given by this court for the Executive Officer. Consequently, the court ordered the Prisons Service and through office of the DPP, to seek to recover any documents in respect of the applicant's case that could help to reconstruct a skeleton file. Both institutions have no information available.

6. When all routes for recovery of information bore no fruit, the court asked for submissions from the applicant and the DPP on how to move the matter forward. The court also ordered reports from the Prisons Service concerning the conduct of the applicant in prison. Similarly, the court required a Social Report on the applicant to be filed by the Probation Officer.

7. The following documents were filed following the court's orders:

1. Kenya Prisons Service Report on the Applicant dated 19th November 2020.

2. Probation Officers Report dated 9th November, 2020.

3. Submissions by the DPP dated 2nd October, 2020.

8. The DPP filed submissions to the effect that it is not automatic that when an appeal file or records of the lower court go missing, that acquittal should follow. Each file must be considered on its own circumstances. She cited the following authorities:

- Joseph Maina Kariuki v Republic Criminal Appeal No. 53 and **105 of 2004 (UR)** quoted in **John Otieno Ombok v Republic [2004] eKLR**. There the court stated:

"……in such a situation as this, the court must try to hold the scales of justices and in doing so must considered 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 in 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 of 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."

- Mwangi v Republic [2005] KLR 495 where the Court of Appeal stated:

"The High Court file, the police file and the magistrate's file containing committal proceedings are all missing. We cannot order a retrial as that would subject the appellant to a second trial and in any case most of the witnesses, as we have been told by the learned counsel for the appellant, are dead. The appellant has been in prison for about 16 years. As already stated, it cannot be said that he is responsible for the disappearance.

We must send a strong message to the effect that the loss of files does not mean that an acquittal would automatically follow. Each case must be considered on its own peculiar circumstances. We have now carefully considered the matter before us. We would place this case on an exceptional category of cases. 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."

- Again in **Francis Ndungu Wanjau v Republic Criminal Appeal No. 187 of 2002** the Court of Appeal again said of missing proceedings:

"……[the] question to be answered must be whether the order proposed to be made is the one which serves the best interests 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 court."

The principle is thus now well established that in cases such as this, whatever order it is that has to be made, the interests of justice as a whole must be considered, but acquittal is not automatic." (Emphasis supplied)

9. In the result, from the above cases the following proposition can be made: The court must hold the scales of justice considering the circumstances under which the loss of records occurred; the court must consider whether any particular side stood to gain from the loss of records; whether it is reasonably feasible for a retrial to be held; and also what order the court should give that best serves the interests of justice.

10. This case is amongst many other similar cases where a total loss of case records is evident. Numerous cases of the same nature have been dealt with by our courts e.g. **John Karanja Wainaina v Republic Criminal Appeal No. 61 of 1993** (Unreported); **Zavers (Haiderali Lakhoo & Zaver v Rex [1952] 19EACA 2464**; **Danson Maina Muchoki v Republic Criminal Application**

No. 246 of 2010; **Justus Cheruiyot Chumba v Republic [2016] eKLR**; and more recently in **Boniface Obati Obamba v Republic [2020] eKLR**.

11. In the **Boniface Obamba** case, Kimaru J, found that the circumstances of the loss of the file raised an eyebrow, putting at stake the principles that the administration of justice cannot be frustrated or sabotaged by the deliberate or dereliction of duty on the part of those who have access to the courts records. In the end, Kimaru J ordered a retrial notwithstanding that the applicant had been in lawful custody for a period of more than fifteen years serving a life sentence-after the death sentence had been commuted by Presidential decree. The conviction was quashed but retrial ordered.

12. Going beyond the records of files, and as requested by the court, the Probation Officer presented a social evaluation report. It indicates that the applicant spent three (3) years in custody form 2004 and 13 years imprisonment since conviction in 2007. At the time of his arrest he had been working as a mechanic; and was married and had one child, who is now 18 years old. The applicant used his prison rehabilitation well and developed his skill set; He acquired carpentry certificate Grades 3, 2 and 1; and is a Muslim spiritual leader in the prison facility; he has had no record of indiscipline; he is remorseful and attributes his involvement in the crime to peer pressure and had bad company.

13. The victim's family could not be reached, and the victim was indicated to have since died. The Probation Officer ultimately recommended that the court do grant the applicant a second chance.

14. The Prisons Service Report on the applicant shows that, from their records, the Applicant's conviction had resulted in a sentence of death. This was likely commuted to life imprisonment by Presidential decree. The report shows that the applicant achieved national test trade certificate Grades I, II and III (NITA), Carpenter Joiner, Grade Test III; Certificate in Islamic Education; Certificate in Bible Course Level Three Lamp & Light Correspondence Courses.

15. Spiritually, the applicant has trained to the level of being an Imam in his accommodation block. In terms of discipline, he is well disciplined, honest and hardworking; he has a clear discipline record. His family has also kept close ties with him by visiting prior to Covid 19.

16. The Prison's Report concludes:

"The inmate is remorseful and regrets a lot on what crime has cost him, however all is not lost since he has gained skills which he will depend on and has learn (sic) through the hard way that crime does not pay. The inmate has achieved the purpose of imprisonment by reforming and gaining the skills which will enable him live a life that can be useful to him and the society. We propose him for your consideration."

17. I have considered all aspects of this case carefully. I am awake to the fact that the loss of a file should not result in automatic acquittal notwithstanding that the applicant's constitutional rights to a fair trial on appeal cannot be achieved; I do not see consider that the applicant had any role in the loss of the lower court file: the problem appears to have been a chain of custody breakdown between the lower court and the National Archives where the file was take, then returned to the Judiciary.

18. It is unfortunate that neither the DPP nor the Prisons Service have even a copy of the judgment convicting the applicant.

19. Taking all the matter into account I am of the view that the first step would be to ensure that the accused has a determinate period of his imprisonment term. From that standpoint, he would then be entitled to rely on his good conduct and character rehabilitation to enable him to earn and qualify for remission under the Prison Act, since one of the key objects of imprisonment is rehabilitation.

20. Accordingly, taking into account the applicant's documented rehabilitation, his age, length of custody and home circumstances, I would and do hereby, impose a determinate sentence of twenty-five (25) years imprisonment. The term shall commence from the date he was remanded in custody in 2004.

21. Given the applicant's good prison record in terms of his commendable conduct and industry, he shall be entitled to remission of one-third of his prison term in accordance with **Section 46 (1) (i)** of the **Prison Act** which provides as follows:

"1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall-

i. Any remission granted result in the release of a prisoner until he has served one calendar month."

22. From the Prisons Report already filed, it is clear that the applicant qualifies for remission of eight years and three months from the sentence I have imposed. That would leave a remaining sentence period yet to be served by him of sixteen (16) years and nine (9) months. As earlier noted, he has already served over 16 years imprisonment.

23. In the premises, the appropriate order to make, which I hereby make, is to set the applicant at liberty forthwith unless he is otherwise lawfully held.

Administrative directions

24. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

25. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

26. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 15th Day of December, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. Issa Musa Hussein - Applicant in person - present in Naivasha Maximum Prison

3. Court Assistant- Quinter Ogutu

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