Case Number:	Criminal Appeal 17 of 2017
Date Delivered:	20 Dec 2021
Case Class:	Criminal
Court:	High Court at Nyahururu
Case Action:	Judgment
Judge:	Charles Kariuki Mutungi
Citation:	Johnson Kinyua Gachingi v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyandarua
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 17 OF 2017

JOHNSON KINYUA GACHINGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with offence of ***Forgery contrary to Section 349 of the Penal Code.***

2. Particulars being that on 17th August, 2010 at unknown place in Republic of Kenya with others not before court with intent to defraud forged certain document namely certificate of confirmation of grant purporting to have been signed by Alice B. Mong'are SRM Nyahururu Law Courts.

3. He pleaded guilty to the charge and after mitigation was sentenced to serve 2 ½ years' imprisonment.

4. Being aggrieved he lodged an appeal and set out the following grounds:

i. The trial Magistrate erred in law and fact by entering a plea of guilty on facts that did not prove that the Appellant had committed the offence of forgery.

ii. The Trial Magistrate erred in law and fact by entering a plea of guilty, when the plea was not equivocal.

iii. The trial Magistrate erred in law and fact by entering a plea of guilty even after the Appellant had indicated that he was cheated thus watering down his plea of guilty and thereby impliedly shifting the blame of the said offence to other quarters.

iv. The trial Magistrate erred in law and fact by finding a conviction based on facts presented by the prosecution and subsequent thereto passing a sentence.

v. The trial Magistrate erred in law and fact by passing a sentence that was harsh under the circumstances and against the weight of facts before the court.

5. From Petition of Appeal the appeal was canvassed via submissions.

APPELLANT'S SUBMISSIONS:

6. It is submitted that this appeal is incomplete and defective, as this court will not have a chance of looking at the original record, and in particular, the exhibits that were produced before the trial court.

7. That the issue of the lack of the original trial record has been adjudicated in several matters, and the holdings have been that an appeal cannot be determined based on an incompetent trial record. Reliance is made on the cases of ***Wambua v Republic [2004] eKLR and Jackson Mutharia Mwaura & Another v Republic [1194] eKLR.***

8. The instant appeal was filed in the year 2012, and during all that period it has been hanging on the shoulders of the Appellant who has all along been eager to have it determined. It would thus be unfair to subject the Appellant to a retrial more than 10 years after his conviction.

9. In addition to the forgoing, it is evident that the original trial record that is missing contains the original documents that were produced as exhibits. On 22nd June, 2021 when the matter came up for mention, the state through its counsel confirmed that the State did not have the copies of such documents that it could avail for purposes of the appeal.

10. Thus it is submitted that, It would imply that if this matter was to be taken to the trial court for retrial, the State would not have the original exhibits to work on. It would thus be an exercise in futility to order a retrial of the Appellant, and as such court is urged to hold as such. Reliance is made on the cases of ***Ikimat v Republic [2005] IKLR 1982*** and ***Issa Abdi Mohammed v Republic [2006] eKLR*** .

11. It is submitted that, it is evident from the proceedings that the trial court did not adhere to the provisions on the procedure of finding a conviction on a plea of guilty. The trial court was under an obligation to warn the accused of the consequences of pleading guilty before proceeding to find a conviction.

12. It is evident from the proceedings that the trial court did not warn the Appellant the natural consequence of pleading guilty, the conviction and likely sentence. Thus, it is submitted that the said omission was fatal to the conviction and sentence that was meted against the Appellant. Reliance is made on the cases of ***Kennedy Ndiwa Boit v Republic [2002] eKLR and Bernard Injendi v Republic [2017] eKLR, and K N v Republic [2016] eKLR***

13. It is further submitted that the facts as read out to the Appellant did not disclose any offence. It is submitted that in the said facts nowhere did the prosecution state that on 17th August, 2010, the Appellant forged documents. In addition, it does not state how the prosecution formed an opinion that the Appellant had forged the alleged documents.

14. The facts do not also state where and how the alleged documents were found, and how they were connected or linked to the Appellant. It is thus our submissions that the said facts did not disclose any offence, and as such could not have been used to find conviction. Reliance is made on the case of ***K N v Republic [2016] eKLR.***

15. It is further evident that in his mitigation, the Appellant stated:

"I ask the court to forgive me as I was cheated. That is all I can ask the court."

16. It is evident that the Appellant was very categorical that he was cheated. It would thus imply that he did not willfully commit the alleged offence, and as such there was a vitiating factor in his plea of guilty. The said mitigation made the plea not unequivocal, and as such it was expected of the trial court to have changed the plea to that of not guilty. Reliance is made on the case of ***Ignatius Anyenga Omare v Republic [2016] Eklr.***

RESPONDENT SUBMISSIONS

17. On the issue of absence of original record, it is submitted that, the question that would then follow is whether the record before this court can be said to be complete which is in affirmative as the current record has copies of exhibits and court proceedings which were certified by this Honorable Court on 30th March, 2012.Reliance is made on the case of ***John Karanja Wainaina v Republic (2004) eKLR,***

18. In this instance, a certified copy of the record and exhibit are available and this court should proceed and make a ruling as if the original record is available. Reliance is made on the case of ***Pius Mukabe Malewa & Another v Republic [2002] eKLR,*** the court faced with similar circumstances ordered for the appeal to proceed and for it to be determined on merit.

19. Thus this appeal should proceed as if the original record is before the court and the same is determined on merit considering that a certified copy of the record is available to all parties.

20. There is absolutely no reason why the matter should be subjected to a retrial.

21. It is submitted that the plea as taken by the Appellant was equivocal. The Appellant was first produced in court on 8th February, 2012. He pleaded guilty to charge and was thus convicted and subsequently sentence.

22. That from the record it is very clear that the language used was Kiswahili, facts were read and the Appellant confirmed them to be correct. He was then convicted thus the plea was proper and this point must fail.

23. On sentence, the Appellant was convicted to 2 ½ years' imprisonment. ***Section 349 of the Penal Code*** provides for imprisonment for a period of 3 years.

ISSUES, ANALYSIS & DETERMINATION:

24. A perusal of the record discloses two core issues namely:

a) whether the loss of original file will render an automatic success of appeal"

b) And if in negative, was the plea defective for failure of trial court to warn appellant of consequences of pleading guilty" Did the facts disclose an offence and Was sentence excessive"

25. On the first issue, of the lack of the original trial record, same has been adjudicated in several matters, and the holdings have been that an appeal cannot be determined based on an incompetent trial record. See the cases of ***Wambua v Republic [2004] eKLR,*** where court observed:

"In this case, this court cannot find that the original trial was defective since, because due to the absence of the entire record of the trial court we cannot discover the facts. It has not been suggested that the Appellant was privy to the loss of the trial court record. He has been in custody for the last 5 years and 7 months. Efforts were made even by this court to trace the trial court records but it bore no fruit. In the circumstances of this case we find that the right order to make is to set aside the judgment of the trial court, discharge the Appellant and set him free. We so order. The judgment of the trial court is accordingly set aside and the Appellant discharged. We order that he be set free unless he is otherwise lawfully held."

26. Also the case of Jackson ***Mutharia Mwaura & Another v Republic [1194] eKLR,***

"I respectfully agree with Mr. Njugi that it is most unsafe to rely on the record of appeal. I would go further and hold that we have no jurisdiction to entertain the incompetent record of appeal. To do so would be tantamount to causing irreparable prejudice to the Appellants who stand convicted of a capital offence.

To send the matter for retrial would also cause the Appellants prejudice at the retrial since the prosecution may have become wiser and would wish to plug the loop-holes. In any case this option is not open to us since the intended appeal has not been heard.

In the result, there is only one channel open to this court and that is to reject the purported record of appeal and order that it be struck out. I would then set aside the judgment and orders of the superior court and discharge all the Appellants forthwith which order is in conformity with the order proposed by my Lord Akiwumi JA and direct that they be set at liberty unless otherwise held on a lawful warrant."

27. However, the record before this court can be said to be incomplete as the current record has copies of exhibits and court proceedings which were certified by this Honorable Court on 30th March, 2012.See the case of ***John Karanja Wainaina v Republic (2004) eKLR,*** where Court observed that:

"in a situation such 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 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 who 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 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."

28. In this instance, a certified copy of the record and exhibit are available and this court should proceed and make a ruling as if the original record is available. I agree with this view as there is a record certified by the court itself.

29. Likewise, in ***Pius Mukabe Malewa & Another v Republic [2002] eKLR,*** the court faced with similar circumstances ordered for the appeal to proceed and for it to be determined on merit.

30. Thus this appeal proceeds as if the original record is before the court and the same is to be determined on merit considering that a certified copy of the record is available to all parties.

31. There is absolutely no reason why the matter should be subjected to a retrial.

32. On plea of guilty and contention that appellant was not warned of consequences thus defective, the court notes that, accused pleaded guilty to charge and was thus convicted and subsequently sentenced.

33. That from the record it is very clear that the language used was Kiswahili, facts were read and the Appellant confirmed them to be correct. He was then convicted thus the plea was proper and this argument must fail to convince court otherwise.

34. The record available gives the picture of what happened during plea as here under;

Appellant appeared in court on 8th February, 2012 to take plea. The record reads:

08/02/2012

Before: Hon. V.K. Kiptoon RM

C/Pros: IP Mugambi

C/Clerk: Temu

Interpretation: English/Kiswahili

Accused: Present

Represented by: N/A

The sentence of the charge (s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands who being asked whether he/she admits or denies the truth of the charge (s) replies – in Kiswahili

Accused: ***it is true***

Court: ***plea of guilty entered.***

Court Prosecutor:

Facts are on 3rd November, 2011 at around 11.00am one by the name Stanford Mwangi stationed at Civil Registry Nyahururu

Law Courts was perusing files due to hearing in view to writing notices to the lawyers/concerned parties in respect to issue dates that were fixed. He came across Civil Suit No. 108/2011 where he noticed two documents the grant of letter of administration and certificate of confirmation of grant.

He noticed defect signatures appended on the documents purportedly signed by Alice Mongare – Senior Resident Magistrate and were being used to file succession cause No. 95 of 2010.

He informed the in-charge Civil Registry Josphine Wambui who took the file to the said Magistrate and on seeing the signatures, she discovered them as hers. The Senior Resident Magistrate Alice Mongare noticed the following anomalies in the Succession Cause No. 95 of 2010:

The name of the deceased person in the genuine Succession Cause No. 95 of 2010 was Paul Wachira Ngugi which in the forged grants the deceased was Susan Watetu Kinyua.

The genuine files 95/10 indicated the land as Nyahururu/Lesirko/969 and Nyahururu/Lesirko/1541 which was different from forged grant of Lakipia/Ngobit/Supuko Block 2/1367.

Also further scrutiny indicated the Chief's letter from genuine file was dated 3rd September, 2010 and on forged one it was dated 16th August, 2010.

The Senior Resident Magistrate instructed the Executive Officer Grace Wangeci to report the matter to Nyahururu Police Station where the matter was investigated and eventually accused person arrested and charged before this court.

I wish to produce the documents of forged letters.

· Chief's letter – Exhibit No. 1 attached with copy of identify card of the accused person.

· The death certificate of Susan Wanjiku Kinyua with supporting affidavit as Exhibit No. 2.

· The Certificate of confirmation of grant purportedly signed A.B. Mongare SRM as Exhibit No. 3.

· A grant of letter of administration intestate purportedly signed by Mongare Senior Resident Magistrate as Exhibit No. 4.

V.K. KIPTOON

RESIDENT MAGISTRATE

Accused: facts are correct.

V.K. KIPTOON

RESIDENT MAGISTRATE

Court: Accused convicted of his own plea of guilty.

V.K. KIPTOON

RESIDENT MAGISTRATE

Court Prosecutor: I have no previous records for the accused.

V.K. KIPTOON

RESIDENT MAGISTRATE

Accused: I ask the court to forgive me as I was cheated. That is all I can ask the court.

V.K. KIPTOON

RESIDENT MAGISTRATE

Court: Mitigation by the accused person has been noted. I have also noted the circumstances the accused committed the offences. The accused forged documents that were to be in court proceedings. His acts are serious and go to the process of administration of justice.

In view of the same, I sentence the accused to serve 2 ½ years' imprisonment. Right of appeal within 14 days from today.

V.K. KIPTOON

RESIDENT MAGISTRATE

08/02/2012

35. On plea taking, I have reproduced the same above, and I observe and hold view that, the Appellant was first produced in court on 8th February, 2012. He pleaded guilty to charge and was thus convicted and subsequently sentenced.

36. That from the record it is very clear that the language used was Kiswahili, facts were read and the Appellant confirmed them to be correct. The facts in the charge sheet and provisions cited have not been demonstrated to fail in disclosure of offence charged.

37. He was then convicted on admission of the content of charge and facts read to him by the prosecutor, thus the plea was proper and this point must fail. On failure to warn the appellant of consequence of pleading guilty to the charge, the court notes that the cited authorities are dealing with charges with sentences in capital offences, life sentences and long imprison terms unlike the instant one where the maximum sentence is 3years.

38. On sentence, the Appellant was convicted to 2 ½ years' imprisonment. Section 349 of the Penal Code provides for imprisonment for a period of 3 years. However, the court noted that he was first offender and he was repentant and remorseful and thus the two elements ought to have been taken into account. Thus the court will reduce the sentence accordingly.

39. The upshot of that is that, the appeal fails on conviction but partially succeeds on sentence. The court therefore makes the orders;

(i) The appeal on conviction is dismissed and same conviction is upheld.

(ii) The appeal on sentence succeeds partially thus sentence reduced to an imprisonment for 12 months from the date of this judgement.

Dated, Signed and ***Delivered*** at ***NYAHURURU*** this ***20th*** day of ***December, 2021***.

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CHARLES KARIUKI

JUDGE