Bosire v Republic (Criminal Appeal E040 of 2021)
[2025] KEHC 16808 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E040 OF 2021

RC RUTTO, J

NOVEMBER 13, 2025

BETWEEN

MICHAEL OMONDI BOSIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Before this Court for determination is the Appellant's/Applicant's application dated 24th February 2025 which seeks the setting aside of the conviction and sentence imposed on the Appellant in Criminal Case S.O. No. 17 of 2020 at the Chief Magistrate's court at Mavoko. The application is premised on the ground that the Appellant's constitutional rights to a fair trial particularly the right to have this appeal expeditiously heard and disposed off has been violated.

2. The crux of the application, as deposed by the Appellant's counsel, M. Morgan J. Muinde, is that the Appellant was convicted on 20th June 2021 and sentenced to ten (10) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Mavoko S.O. No. 17 of 2020. Counsel stated that the Appellant, being aggrieved by the decision of the trial court, filed the present appeal on 29th June 2021.

3. That following the filing of the appeal, the Deputy Registrar wrote to the Mavoko Law Courts requesting for the lower court's file and typed proceedings. Meanwhile, the Appellant continued to appear before this Court for mentions on numerous occasions, specifically on 23/8/2021, 2/9/2021, 27/9/2021, 30/11/2021, 8/2/2022, 5/4/2022, 24/5/2022, 31/5/2022, 17/7/2022, 13/9/2022, 14/9/2022, 8/10/2022, 11/10/2022, 17/11/2022, 28/2/2023, 6/3/2023, 3/4/2023, 3/5/2023, 21/6/2023, 17/7/2023, 25/9/2023, 31/10/2023, 16/1/2024, 11/3/2024, 6/5/2024, 19/5/2024, 3/7/2024, 16/9/2024, 12/11/2024, and 10/2/2025. It was his averment that despite all these numerous mentions, the lower court's file was never availed.

4. Counsel further stated that on 12th November 2024, pursuant to an order by this Court directing the Court Administrator, Mavoko Law Courts, to appear and explain the whereabouts of the file, the administrator appeared and informed the Court that staff at Mavoko Law Courts had searched extensively but the lower court file could not be traced. Counsel added that on 17th February 2025, the Appellant requested that Mavoko Law Courts issue a Certificate of Loss confirming that the lower court file S.O. No. 17 of 2020 was missing and could not be located despite diligent efforts. However, despite this request, the Court Administrator failed to provide a duly executed Certificate of Loss confirming that the file was indeed missing.

5. Counsel urged this Court to acquit the Appellant unconditionally in light of the missing lower court file, emphasizing that there is no evidence to suggest that the Appellant was responsible for its disappearance. He further submitted, without prejudice, that the Appellant has been in custody since 2020, and that ordering a retrial would be unjust and prejudicial. It was his position that the prosecution has not advanced any sufficient reason to justify denying the Appellant's unconditional release. Consequently, the Appellant's constitutional rights to a fair trial and to have his appeal heard and determined expeditiously have been violated. Counsel therefore urged the Court to set aside the conviction and sentence on this basis.

6. Despite the Respondent having been granted sufficient time to file a response to the application, none is on record as at the time of writing this Ruling. However, both parties filed written submissions addressing the issues raised herein. The Appellant's/Applicant's submissions are dated 27th March 2025, while the Respondent's submissions are dated 9th May 2025.

Appellant's/Applicant's submissions

7. The Applicant commenced his submissions by providing a brief background of the matter, as outlined in the grounds of the present application. Referring to the case of John Otieno Ombok v Republic [2017] eKLR, counsel submitted that it is a well-established principle that where court records have disappeared or cannot be traced, any order made by the court must be guided by the overarching interests of justice. He, emphasized, however, that an acquittal is not automatic merely because all records relating to a case are missing.

8. Counsel further submitted that in the present circumstances, neither party has expressly sought a retrial. He argued that the decision to order retrial lies within the discretion of the court, and must be exercised based on the peculiar facts of each case. The Applicant also relied on the authorities of Pius Olima & Another v Republic, Criminal Appeal No. 110 of 1991, Benard Lohimo Ekimat v Republic, Criminal Appeal No. 15 of 2004, and Rwaru Mwangi v Republic, Criminal Appeal No. 18 of 2000 (UR), which underscore that the overriding consideration in such cases is the interest of justice.

9. Counsel contended that in the present matter, the appeal cannot proceed to hearing because the trial court record, the Director of Public Prosecutions' file, the police file which contains the list of witnesses and witness statements and the exhibits have all gone missing. Consequently, there is no way to ascertain how many witnesses testified or whether they are still traceable. He urged that under these circumstances, the continued detention of the Appellant would amount to a violation of his constitutional right to a fair trial.

10. In conclusion, the Applicant submitted that if the court find an irresistible inference that the court assistant, the registry responsible for safeguarding courts documents, or any officer working therein played a role in the disappearance of the court file and related records, then the appeal cannot be heard on the basis of the missing records. Counsel emphasized that the trial had concluded and the Applicant was on 20th June 2021 convicted and sentenced to ten (10) years' imprisonment. Without the lower

court's record, the Applicant argued, the appellate court lacks the necessary materials to meaningfully determine whether the conviction was properly sustained.

11. The Applicant contended that the interests of justice would not be served by ordering either a retrial or the reconstitution of the record, as such an exercise would not be viable under the present circumstances. Referring to the decision in Mwangi v Republic [2005] KLR 495, counsel noted that the Court of Appeal was categorical that the mere loss of court files does not automatically result in an acquittal; rather, each case must be assessed on its own peculiar circumstances, and some cases may fall into an exceptional category justifying different treatment.

12. In this regard, the Applicant urged the Court to find the present case to be one of such exceptional instances. He highlighted that the Appellant has been in custody for six (6) years since 2020; that there is no allegation by the Respondent linking him to the disappearance of the court file, the police file or the DPP's file, and that it would be illogical to suggest that a convicted person serving a ten year sentence would cause the disappearance of these files, as doing so would only prolong his incarceration without his appeal being heard. Counsel also pointed out that no response has been filed by the State Counsel or the trial court establishing any nexus between the Appellant and the missing file, and there is no indication that the file went missing during the pendency of the trial. He therefore submitted that an order for retrial or reconstitution of the record is not warranted in the circumstances.

13. The Applicant urged the Court to categorise this matter as exceptional as recognized in Mwangi v Republic (Supra) and to find that the disappearance of the record and all associated files has effectively infringed the Appellant's constitutional right to a fair trial and to have his appeal heard without undue delay. He also relied on Nisho Noor Isaack v Republic, Criminal Appeal No. 509 of 2000 [2006] eKLR, where the court set aside the conviction of the Appellant on the basis that, upon such quashing, the Appellant could successfully plead autrefois acquit. Counsel concluded by submitting that since the appeal has not been heard or determined on its merits, this court should set aside the conviction and sentence imposed by the lower court, discharge the appellant and order that there shall be no retrial.

Respondent's submissions

14. The Respondent commenced their submissions by providing a brief background of the matter. They stated that the Applicant filed a Petition of Appeal on 29th June 2021 challenging the conviction and sentence of ten (10) years' imprisonment imposed by Hon. Onkwani on 23rd June 2021 in Mavoko S.O. Case No. 17 of 2020. The Respondent noted that at Ground 6 of the Petition of Appeal, the Applicant prayed to be supplied with the trial court's proceedings and judgment to enable him to raise additional grounds, as he could not recall all that had transpired during trial. The Respondent submitted that despite that although the original lower court file has not been traced to date, a skeleton file was forwarded to the court containing typed proceedings that capture the prosecution's case and the ruling on a case to answer, although the proceedings for the defence case and the subsequent judgment are unavailable.

15. The Respondent further submitted that no inquiry has been conducted into the availability of the police file or the prosecution witnesses. While acknowledging that a fire incident occurred in 2024 at the Mavoko Law Courts, which razed down a section of the court, the Respondent noted that no Certificate of Loss has yet been issued to formally certify the loss of the file in question. They added that, according to the last status report dated 5th November 2024, the search for the original file was still ongoing. It is also noteworthy that by the time of the fire incident, several attempts to trace the file had already proved futile.

16. Citing the case of Okeno v Republic [1972] EA 32, the Respondent submitted that a first appellate court must, as a matter of course, consider the evidence tendered before the lower court as well as the judgment arising from those proceedings when determining an appeal. The Respondent argued that, in the present, no record of appeal has been filed, and therefore the court lacks a proper basis upon which it can either confirm or vary the findings of the trial court. Additionally, the Respondent contended that since the Applicant was tried and convicted by a competent court, he no longer enjoys the presumption of innocence, notwithstanding his right to pursue an appeal. Accordingly, the court was urged to balance the competing rights of both the Appellant and the victim whose interest were already adjudicated in the trial court.

17. The Respondent's counsel submitted that the Appellant should however not benefit simply from the disappearance of a court file especially when the victims of his actions had no role in its loss. Counsel referred to the case of Joseph Maina Kariuki v Republic Criminal Appeal No. 53 and 105 of 2004 (UR). To rebut the Applicant's submissions, counsel cited the case of John Otieno Ombok v Republic Siaya HC CR. Appeal No. 71 of 2015, where the court file and exhibits as well as the police file could not be traced and a retrial was therefore not feasible in the circumstances. Counsel also referenced Nairobi High Court Cr. Appeal 605 of 2000 Nisho Noor Isaack v Republic where Makhandia J (as he then was) declined to acquit the Appellant to prevent a later pea of autrefois acquit instead, he set aside the lower court's sentence and conviction and declined to order for a retrial, noting that six years had passed since the sentence and a retrial would be prejudicial to the Appellant. The Respondent's counsel emphasized that each case must be determined on its unique circumstances and that the unavailability of the lower court record should not be automatic disadvantage to the victim of the offence in favour of the Appellant.

18. While making reference to the case of Danson Maina Muchoki v Republic [2013] KEHC 6961 (KLR) and John Ooko Otieno v Republic [2008] KECA 318 KLR, the Respondent's counsel concluded that although the proceedings before this Court, are incomplete, they show that the Appellant was charged on 21st April 2020, and that the prosecution called five witnesses. It is evident that the witnesses are close family members except for the Investigating officer who is a public servant and therefore easily accessible. Counsel added that the medical records may be produced by any authorized officer from the treating facility under Section 77 of the *Evidence Act* and that there is no evidence to suggest that the police file was also lost. The Respondent submitted that a retrial is feasible, considering that only three years that have lapsed since the Appellant was sentence.

Analysis and Determination

19. Having considered the grounds set out in the present application, as well as the rival submissions by both parties, the pivotal question before this Court is the legal consequences of the disappearance or unavailability of the lower court record and whether, in the absence of such records, this Court can meaningfully and justly determine the appeal on its merits.

20. The Appellant contended that the complete absence of the lower court record renders it impossible for this Court to undertake a meaningful or lawful appellate review. He submitted that without the trial proceedings, judgment, or exhibits, this Court is deprived of the evidentiary and procedural material necessary to assess the correctness or fairness of his conviction. He argued that the right to appeal is an integral component of the right to a fair trial under Article 50(2)(q) of *the Constitution*, and that the loss of the record has effectively extinguished this right. According to him, the missing record constitutes a fatal procedural gap that cannot be remedied by reconstruction especially after an inordinate lapse of time.

21. The Respondent, on the other hand, acknowledged that the trial record was missing despite diligent efforts to locate it, but submitted that this alone should not automatically result in the quashing of the conviction. Learned prosecution counsel urged the Court to consider the jurisprudence where reconstruction of missing records has been ordered and or ordered a retrial.

22. Having considered these arguments, the Court notes that the right of appeal is a substantive constitutional right, not a mere procedural privilege. It is a core sub set of the right to fair trial decreed in Article 50 of *the Constitution*. Article 50(2)(q) states:

Every accused person has the right to a fair trial, which includes the right-

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

Article 25(c) goes further to provide that the right to a fair trial is among the rights that cannot be limited.

23. For this Court to properly exercise its appellate jurisdiction, it must have before it the trial court's record, which forms the evidentiary basis for assessing the propriety of conviction and sentence. Without the record, this Court would be engaging in speculation. Although reconstruction is sometimes feasible, such a process depends on the existence of partial records, judicial notes, or other secondary materials. In this instance, the Registrar's report confirms that neither the original nor certified copies of proceedings, judgment or exhibits could be traced despite exhaustive searches. The absence of all these materials therefore renders it impossible to determine the appeal on its merits. Placed in the constitutional context, it means that the Appellant is unable to access his right to have his conviction and sentence subjected to appellate review.

24. This then raises the question; if the appeal cannot be determined on its merits, what remedy is appropriate, whether to order a retrial, reconstruction or discharge. The Appellant submitted that a retrial would be oppressive and unconstitutional. He contended that he had served a significant portion of his sentence and that the uncertainty and anxiety caused by the loss of the record should not be visited upon him. The Respondent, however, urged the Court to consider ordering a retrial. This Court is mindful that a retrial is not automatic whenever records are lost. The decision must depend on the peculiar circumstances of each case, including the seriousness of the offence, the period already served, the availability of witnesses and whether the original trial was conducted lawfully.

25. In Nisho Noor Isaack v Republic [2006] KEHC 3509 (KLR), the court faced a similar predicament where the lower court record could not be traced despite diligent efforts. The learned judge underscored that the absence of a record is not, in itself, an automatic ground for acquittal. Rather, the court must interrogate whether the missing record can be reconstructed and whether such reconstruction can yield a fair and reliable basis for the determining the appeal. In that case, the court found that the loss of the record was irreparable and that reconstruction was impossible, leading to the quashing of the conviction and the setting aside of the sentence. Importantly, the court held that justice must not be sacrificed at the altar of procedural failure by state agencies, and where the fault lies squarely with the prosecution or the court administration, the benefit of doubt must lean in favour of the Appellant.

26. Similarly, in John Otieno Ombok v Republic [2017] KEHC 5652 (KLR), the High Court, faced with the loss of the lower court record, reiterated that while reconstruction is the preferred course, it must be premised on genuine feasibility. Makau J in that matter held that;

> " 17. I fully associated myself with the holding in Nisho Noor Isaack case (supra). That as the appeal has not been heard and determined on merits, I find that it

won't be proper to make an order quashing the Appellant's conviction but in the circumstances of this case, I find it would be proper instead to set aside the conviction and sentence meted by the Lower Court and accordingly discharge the appellant. I order that there shall be no retrial. The appellant is set at liberty unless otherwise lawfully held."

27. In the present case, the Appellant was charged with the offence in the year 2020 and convicted on 20th June 2021. He argued that the offence occurred several years ago, and that he has been in custody for a considerable period, almost half the sentence period, having been sentenced to 10 years in prison. The Respondent argued that the loss of the file, though regrettable, does not necessarily translate into an acquittal, urging the Court to exercise caution so as not to create a precedent that rewards administrative errors. While this is true, administrative errors should also not result in denial of a litigant's right to a fair trial, which includes the right to an appeal.

28. In this matter, it is not in dispute that the disappearance of the record has prevented the hearing of the appeal within a reasonable time as envisaged under Article 50(2)(e) and (q) of *the Constitution*. Indeed, constitutional rights and guarantees are not contingent upon administrative convenience. It is evident that despite repeated efforts by the registry, the trial court file, police file and related exhibits have not been traced. From the High court record, ten reminders have been made to the court registry in Mavoko for the trial court file to be availed with several letters written to no avail and the court administrator also confirmed that the search has been extensive but fruitless. The possibility of reconstruction has also been explored without success. Section 354(3) of the Criminal Procedure Code grants the appellate court broad discretion to make such orders as the justice of the case may require, including the power to order a retrial. The jurisprudence on retrials, however, has evolved with caution. In Nisho Noor Isaack (supra), the court held that a retrial should not be ordered where it would occasion prejudice to the appellant, particularly where the disappearance of the record is attributable to the state or court officials. Similarly, in Ombok (supra), it was emphasised that a retrial should only be ordered if the interests of justice demand it. The guiding principles are whether the retrial would cause injustice, who is to blame for the loss, and whether the passage of time has rendered a fair trial impossible.

29. In the present matter, the record demonstrates that the Appellant has been convicted and sentenced to 10 years and the appeal has been pending since 2021 solely because the trial court record has been missing. There is no suggestion that the Appellant contributed in any way to the disappearance of the file. Ordering a retrial in these circumstances would subject the Appellant to further hardship, delay and uncertainty, contrary to the spirit of Article 50(2)(e) and (q) of *the Constitution*, which guarantee a fair trial. Moreover, given the loss of crucial exhibits and witness records, it is doubtful that the prosecution could mount a fair and credible retrial. The principle of finality of criminal process, coupled with the constitutional imperative to uphold fair trial rights, therefore weighs heavily against the a retrial.

30. This Court therefore finds that the continued detention of the Appellant based on a conviction that cannot be judicially reviewed would perpetuate an illegality and offend the principles of justice. However, having been duly tried and convicted by a competent court of law, that conviction cannot be replaced by an order of acquittal without a substantive consideration of an appeal. The Court is thus called upon to strike a balance. I have no doubt that in the circumstances, the Appellant is entitled to be released forthwith.

31. Accordingly I set aside the conviction and sentence imposed by the Lower Court and discharge the Appellant. There shall be no order of retrial. The Appellant is set free unless otherwise held in lawful custody.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF NOVEMBER, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant/Applicant

.....for Respondent

Selina Court Assistant