**Wainaina v Republic**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Judgment:** 30 July 2004

**Case Number:** 61/93

**Before:** Tunoi, Githinji JJA and Deverell AJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Criminal procedure – Appeal – Trial court file lost – Prosecution and investigation files also lost –*

*Impossible to reconstruct case files for purpose of appeal – Whether appellant should be acquitted as of right – Whether in the circumstances of this case appellant should be acquitted.*

*[2] Criminal procedure – Appeal – Whether convicted appellant still enjoys benefit of presumption of innocence.*

**Editor’s Summary**

The appellant had been convicted of a capital offence and sentenced to death. He subsequently lodged an appeal. The appeal was not prosecuted because the trial court file as well as the prosecution and investigation files mysteriously disappeared. 15 years after his conviction, the appellant applied to the

Court of Appeal for an acquittal.

**Held** – When court and/or police files are missing, the Court must try to hold the scales of justice and must consider all the circumstances under which the loss has occurred. The paramount consideration must be whether the order proposed to be made is the one that best serves the interest of justice.

An acquittal should not follow as a matter of course where a file has disappeared. Once the appellant is convicted by the trial court, he loses the benefit of the presumption of innocence granted to him under the Constitution.

In this particular case, the appellant has been in prison for 15 years. All files are lost and can therefore not be reconstructed. A retrial is also not feasible. Above all, no appeal can be prosecuted as there are no records. In the exceptional circumstances of this case, the conviction of death will be quashed and the appellant set at liberty.

**No cases referred to in judgment**