

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANOUS CRIMINAL APPLICATION 279 OF 2012

ANDREW NYONGESA WANYONYI.....APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

The Applicant filed a Notice of Motion dated under Certificate of urgency on 21st May 2012, in which he asked this court to note that his is the oldest appeal pending in the High Court, and he stated that the Court of Appeal had ruled that it be heard for the second time. He further stated in his supporting affidavit sworn on 17/5/2012 that the certified copy of proceedings served upon him on 16/11/2011 by the High Court Registry contradict the proceedings on which the Court of Appeal ruling was based, which had been served upon him by the High Court registrar on 23/11/07 and 12/03/2008. He asked that the hearing of his appeal proceeds on the basis of the earlier proceedings that he was given and which were presented to the Court of Appeal.

Mr. Karuri for the State in response conceded that there had been a delay in the hearing of the Appellant's appeal, cause by circumstances beyond the prosecutions control. He submitted that the record of the initial appeal before the High Court went missing, and the Court of Appeal in its ruling dated 17th October 2008 held that the hearing of the Appellants appeal proceeds *de novo* in the High Court on the basis of certified proceedings of the lower court.

We have perused the ruling delivered on 17th by of the Court of Appeal in **Fred Wafula Waminila and Andrew Nyongesa Wanyonyi, Criminal Appeal No. 434 of 2007**. The order of the Court of Appeal was that the Appellant's appeal be remitted to the High Court where the appeal from the judgment of the trial court will be heard *de novo* according to law. We have also perused the record of the appeal proceedings before this court after the said remittal. We note that on 16/11/2011, Mbogholi J. ordered that the record herein has been confirmed to be a true record of the trial court for purposes of the re-hearing of the appeal. Further, that this order had been communicated to the Appellants and the State, and that the Appellants be served with the record forthwith.

At the hearing of this matter on 13/12/2011 the Appellant raised the issue of the proceedings to be used during the hearing of the appeal, and Ochieng J. directed the Deputy Registrar to compare the typed record herein to the original handwritten record from the trial court, and to ascertain its authenticity. The Deputy Registrar was to issue his written findings within 30 days. These directions were again given by the said honourable Judge on 23/4/2012, and the Senior Deputy Registrar, G.W. Ngenye Macharia, filed a report on the status of proceedings of the trial court on the same date.

Ochieng J. and Achode J. thereupon on 24/4/2012 directed that in light of the report by the Senior Deputy Registrar, they will obtain from the Presiding Judge the record which was kept under lock and key, which would be the one to be used at the hearing of the appeal. On 7/5/2013 the two honourable Judges ruled that the record of the proceedings given to the parties by the Principal Judge is what would be relied upon for the purposes of rehearing this appeal, and that the record from the Court of Appeal which was found to have been tampered with will not be used. The Appellant consequently indicated that he wanted to file a formal application, and the hearing was adjourned to await the application. The said application is the one presently before this court for determination.

We have considered the submissions by the Appellants and the State, and having perused the court record herein, note that various steps and actions have already been undertaken to verify and certify the correct record of the trial court. It is thus our finding and order that the proceedings of the trial court that were confirmed as the authentic proceedings by Mbogholi J. and served on the parties herein shall be the proceedings to be used at the rehearing of the Appellant's appeal, and not the proceedings the Appellants used in the Court of Appeal.

Orders accordingly.

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE