REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.116'A' OF 2012

THANDE THONGORI NJOGU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Before me is the Notice of Motion dated 8th December 2017. It is supported by the affidavit of Thande Thongori Njogu sworn on the same date. He seeks orders: -

1) That this court do direct the appellant herein be subjected to a medical examination to ascertain whether he sustained burns on 10th March 2012.

2) That this honorable court do direct that the resultant medical report be filed and admitted in court as forming part of the appellant's defence.

3) Any other directions this court deems fit.

The appellant herein was charged as Samuel Thande Njogu with two counts: On the first count: Setting fire to crop of cultivated produce contrary to section 334 (a) of the Penal Code. Particulars were that on the 10th day of March 2012 at Kiawaita village in Mukurweini District within Nyeri County, willfully and unlawfully set fire to crop of cultivated produce, 29 coffee plants valued at Ksh. 13,746/=, the property of Erastus Manyara Njogu. On the second count: Setting fire to crops contrary to section 334 (b) of the Penal Code. The particulars are that on the 10th day of March 2012 at Kiawaita village in Mukurweini District within Nyeri County, willfully and unlawfully set fire to crop of cultivated produce namely nappier grass valued at Ksh. 11,250/- the property of Erastus Manyara Njogu.

At the end of the trial the trial magistrate the Hon. Wendy K. Micheni SPM (as she then was) found him guilty of the offence of setting fire to crop of cultivated produce contrary to section 334(a) of the Penal Code and convicted him under section 215. He was sentenced to 3 years' imprisonment.

The record indicates that the applicant filed an appeal expressing his dissatisfaction with the conviction and sentence. However, even as I perused the files (there were three) I did not see the record of appeal or the petition of appeal.

Be that as it may, the applicant appeared in person. The state was represented by Ms. Jebet. In the oral submissions in support of his application the applicant argued that the conviction against him was based on the theory that it was the he who started the fire and the finding of fact by the trial court that he had admitted at the time of plea that his hand was burnt as he put out the fire.

He made generous reference to the trial magistrate's handwritten proceedings and the typed proceedings. He submitted that they demonstrated the grave error upon which the trial magistrate fell in convicting him. He argued, while pointing the court to various parts of the record, that the trial magistrate's handwriting was the major contribution to his conviction not the evidence and especially her style and design of the letters 'L' and 'H'. he submitted:

> **"The trial magistrate inserted same shocking things in her handwritten proceedings by substituting the letter 'L' with the letter 'H' before 'and' to read HAND instead of LAND. As a result, the trial magistrate found that since the applicant had burnt his hands, he must have started the fire."**

It is his submission that in his whole life he has never suffered any burns and it is only through medical evidence that that can be ascertained. That even during the trial he denied ever sustaining any burns, and pointed out the state of his hands to the court but the court would not listen. That the trial magistrate ought to have subjected him to a medical examination the.

In addition, he denied ever making the statement attributed to him to the effect that the police had denied him a P3. He asked this court to note that the P3 was mentioned only twice, at the plea stage, and in the trial magistrate's judgment.

The application was opposed by Ms. Jebet for the state. She submitted that the appellant was deliberately misleading the court as the court record spoke for itself. She drew the court's attention to the fact that the photocopied version of the hand written proceedings the applicant was relying on and which he had supplied to the court had omitted a crucial part of the record. She read from the original hand written record where the following words were attributed to the applicant. This was during the taking of the plea. He stated:

> **"I will not take any plea in this court because it is my hand that got burnt. Since the police have denied me a P3 I seek this court's direction. I was putting off the fire".**

The state counsel pointed out that if the issue was 'Land' and not 'Hand', then the issue of P3 would not have arisen. She urged the court to find the application frivolous and dismiss it.

The applicant's response was that the words 'P3' were inserted by the trial magistrate to justify her entering a conviction against him.

I have carefully considered the submissions by the applicant, and the state. I have also considered his supporting affidavit. I have perused the court record both the handwritten proceedings, the typed proceedings and the judgment.

To support his claim, the applicant in his submissions spent quite a bit of time analyzing the trial magistrate's handwriting. He sought to demonstrate she wrote Hand when she meant Land and for that reason changed the whole case against him. He invited this court to: -

> **"get a clear analysis of the trial magistrate's design of her handwritten proceedings [and how] it takes a descending approach from the top of the page to the bottom".**

He also pointed out errors where for instant that during his mitigation he told the court that his 'life' was in the hands of the court yet the typed proceedings, said that it was his 'wife' who was in the hands of the court. He also annexed a list of 46 items drawn from the handwritten proceedings demonstrating how the trial magistrate wrote her 'Ls' and 'Hs'.

Clearly there are 2 issues here for determination: -

1) Whether this court is competent to analyze the trial magistrate's handwriting and determine, letter by letter whether that is what she wrote or not.

2) Whether the application has merit.

Let me begin by saying that this application is not as frivolous as it may seem. It brings to sharp focus the ever present need for transcription /stenographer services for in the Judiciary. It puts the Judiciary on trial as to why in the 21st century, in the midst of the technological revolution, judicial officers and judges have to take proceedings by long hand? It is not just an issue of transformation of services but an issue of access to justice. How much time we waste, how much paper we use every day? How many hands and arms/shoulders and backs have suffered muscular – skeletal impairments from recording proceedings and later writing if you add proceedings, and the judgments and rulings most times for 12 hours in a day. The vagaries of natural wear and tear, the weather, especially in extremely cold jurisdictions may also affect the hands, affecting the hand writing.

But more importantly to the cause of justice, how much pain, failure and delay of justice has been caused by delayed typing of proceedings and typing errors resulting from human error? Handwritings are unique to each one of us. It is not always that one has what can be termed a 'good' handwriting or one that is easily legible. Sometimes 'nice' hand writings are sacrificed at the altar of speed, of case clearance rates but mostly, with the kind of workload judicial officers and judges have, and having to record proceedings in the commitment to beat the cause list, not to send parties away who are already in court without hearing them.

Hence it is not a light issue. The recording of proceedings by long hand is an access to justice issue.

That is why I think that the applicant may have a valid point. One reading the proceedings after the fact, out of the context of the court room may look at the hand writing and draw conclusions depending on the issue they wish to prove. This is demonstrated by the applicant's allegation that the trial magistrate of tampered with the record in 2012 to justify the outcome of her judgment, his conviction of the charges facing him. That is indeed a very grave allegation. It raises is a direct attack at the trial magistrate's integrity and the integrity of the whole trial.

It cannot be allowed to be made just off the cuff like that. It cannot be the basis from such an application unless it has been investigated, and established to be a fact.

The allegations being made by this applicant are serious and could lead to dire consequences. Speaking from experience, the Judges and Magistrates Vetting Board (JMVB) in one instance, dealing with an allegation that a trial magistrate had convicted an accused person, twice accepted the complaint by the convict who relied on a typing error where the word 'save' was wrongly erroneously typed as 'same'. The JMVB went on to find on the strength of that typo inter alia that the said magistrate had indeed convicted that accused person twice, a fact that was found not to be true.

The applicant had the opportunity all that time since 19th December 2012, when he says he noticed the alleged anomaly in the proceedings to

have his hands examined by a doctor. He appears to have filed the appeal the same year. What stopped him? He has not justified this delay.

The applicant is at liberty to seek the services of experts to carry out the analysis he seeks from this court but he cannot be heard to ask this court to wear the hat of forensic experts, the handwriting and /or document examiner to determine whether the trial magistrate wrote “hand” when she meant “land”. Or indeed she tampered with the record in order to fix him.

What is untenable is that he has waited five years to raise this grave allegation. It is not only tenuous but highly suspect. To accept that as a ground for his application would amount to condemning the trial magistrate of an act that would amount to interfering with the cause of justice, unheard.

While it is true that after the court found him guilty of the offence the applicant denied saying it, the fact is that the record speaks for itself, that the applicant reluctantly took plea, the telling the court that he was the one who had sustained burns to his hands while putting off the fire and that the police had denied him the P3. That time the case was still fresh. It was the day of plea. There is no evidence in the proceedings that the appellant had any specific issues with the court that would warrant his allegations. Clearly if the issue was that his land had burnt, he would have been talking about assessment of damages and not a P3.

In any event the application does not fall within the permitted parameters. Applicant states that he wishes to use the new evidence in his defence. Where would he use it as a defence? Only in a new trial.

Under Article 50 (6) of the Constitution the prayer sought can only be sought if the applicant was a person whose appeal been dismissed by the highest court and he was seeking a new trial, in which he would be saying that the medical evidence sought would be new and compelling evidence which had just become available to him.

As it is it appears that the appellant’s appeal is still pending to be heard.

I find that the grounds for the application are not tenable. The application is in any event premature and not merited in the circumstances.

The application is and is hereby dismissed.

Dated, delivered and signed at Nyeri this 12th day of June 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Atelu

The applicant

Mr. Magoma for the state.