IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Muli & Akiwumi JJ A)

CRIMINAL APPEAL NO. 58 OF 1989

BETWEEN

1. JACKSON MUTHARIA MWAURA..... 1ST APPELLANT

2. JACKSON THEMBA MUIRURA..... 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence, judgment of the High Court of Kenya at Nairobi (Mr Justice Osiemo) dated 25th April, 1989 in Criminal Case No 52 of 1988)

RULING

Akiwumi JA. The appellants were on 25th April, 1989, convicted on the charge of murder and as provided by law, sentenced to death. Within a month thereafter, notices of appeal were filed on behalf of the 1st appellant on 4th May, 1989, and on behalf of the 2nd appellant on 9th May, 1989. When the appeal first came before this Court on 8th May, 1990, this Court having noted that the record of appeal was illegible and therefore in contravention of rule 13 of this Court's Rules, ordered this defect to be rectified and a fresh hearing date given by the registry.

Nothing happened until 17th June, 1993, when the appeal came up again for hearing before this Court. Counsel for the appellants who had received their copies of the bulky record of appeal only three days before, quite rightly and successfully sought and obtained an adjournment of the hearing of the appeal to sometime in September, 1993, to enable them to study the record of appeal. On 17th September, 1993, when the matter came up before this Court for the third time, it was discovered that the record of appeal which had been retyped from the first record of appeal which this Court had rejected as not being in compliance with rule 13 of its Rules, was incomplete and contained blanks. It was further noted that the record of appeal was not certified as required by the mandatory provisions of rule 61 (6) of this Court's Rules. In an endeavour to see what could be done to rectify the position, this Court ordered that the matter be mentioned on 18th November, 1993, and that in the meantime, steps be taken to find the original record of the trial which had gone missing, and to investigate why the record of appeal had not been certified.

Things did not move any further and on 8th June, 1994, this Court ordered that the matter be fixed for the hearing on 20th June, 1994, of the preliminary objection whether the record of appeal was competent or not for the purposes of the appeal. On 20th June, 1994, counsel for the appellants argued that the record of appeal was incompetent, that the appeal could not therefore proceed and that the judgment of the trial

judge should be set aside. Their grounds for these propositions were that the record of appeal had as required by the mandatory provisions of rule 61 (6) not been certified and that the original proceedings had not also as required by rule 62 (2) been sent to this Court by the Registrar of the superior court. Mr Okumu for the respondent conceded that appeal on the ground that there was before this Court no certified record of appeal, but urged this Court to order a retrial on the grounds that failure to certify the record of appeal being a procedural irregularity, it would be a miscarriage of justice to acquit the appellants rather than to order a retrial, particularly since the appellants would not be prejudiced if there was to be a retrial.

At this stage, it would be pertinent to observe that the delay that had been caused in the hearing of the appeal which amounts to over five years, can not be attributed to the appellants who were sentenced to death on 25th April, 1989. But would the appellants be prejudiced if a retrial is ordered? I would not like to say having regard to the long time that has elapsed since the appellants were sentenced to death and in the absence of a certified record of proceeding, that the appellants would not be prejudiced by a retrial. To quote the words of Lord Griffith in the recent land mark Privy Council decision in the case of *Pratt v AG for Jamaica* [1993] 4 All ER 769 at 783:

"There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive

revulsion? The answer can only be our humanity. We regard it an inhuman act to keep a man facing the agony of execution over a long extended period of time..... If delays is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedure which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime."

In addition to this, this Court had occasion recently in the case of *Pius Olima & another v Republic* Criminal Appeal No 110 of 1991 to consider the circumstances in which it will order a retrial. In its judgment, this Court laid down the principles as follows:

"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- *Ahmed Sumar v Republic* [1964] EA 481; *Manji v The Republic* [1966] EA 343: *Muyimba and others v Uganda* [1969] EA 433; and *Merali and others v Republic* [1971] EA 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case".

The three conditions that must be satisfied are conjuctive and not disjunctive and one of them which must be present but which is absent in this application before us, is that the trial in the superior court cannot be said to have been defective. For my part, it being impossible to discover the facts of the case because of the absence of a certified record of appeal, the appeal should be allowed. But since the appeal has not been heard on its merits and the issue now before us is not for the quashing of the conviction of the appellants, the proper order that should be made is, having allowed the appeal, to set aside the conviction of the appellants by the superior court rather than to quash it which could lead to a successful plea of *autre fois acquit*.

I would so order.

Cockar JA. On 25th April, 1989, Osiemo, J found the two appellants guilty and so convicted both of murder contrary to section 203 as read with section 204 of the Penal Code. This appeal is against conviction and sentence. It is to be noted that both the appellants have been in custody since 6th September, 1987 – the murder having been committed on the night of 30 – 31st August, 1987. When the appeal first came up for hearing on 8th May, 1990, the two advocates for the appellants, Mr T Njugi and Mr P L Otieno, and the state counsel Mr Etyang were of the view, which was shared by the bench, that

the record was illegible and so did not comply with rule 13 (2) of the Court of Appeal Rules. The hearing was in consequence adjourned with the order for the High Court to prepare a clear and legible record which complied with the said rule and for the copies thereof to be supplied to the three learned counsel.

The appeal was next fixed for hearing on 17th June, 1993, when it had again to be adjourned because the fresh record that had been prepared was served on both the advocates for the appellants only 3 days earlier. That had not given them enough time to prepare.

When the appeal came up for hearing on 16th September, 1993, it emerged that apart from the five pages in which there were blank spaces in some sentences, the record was still illegible and that the original hand-written record of evidence and notes made by the trial judge had disappeared. The hearing of the appeal was again adjourned and eventually it was on 14th January, 1994, when Mr Omondi who was the Executive Officer in charge of the High Court criminal registry at the material time, was summoned from his retirement that he explained that when he received the first order dated 8th May, 1990, made by this Court he found that the original hand-written record compiled by the judge had disappeared from the registry and despite every effort it had not been traced. The present record was re-typed from the typed record which was rejected by this Court on the 8th May, 1990, for being illegible. The exhibits file, however, was safe in the registry's custody and was available. The appeal was then fixed for hearing of the preliminary point challenging the competency of the record for 27th June, 1994.

At the hearing of the preliminary point both the learned advocates for the appellants attacked the competency of the record on two grounds. These were that the record was not certified as required by rule 61 (6) of the Court of Appeal Rules and that the record was illegible. Mr Okumu for the Republic very properly conceded the preliminary point on the issue of the record not being certified by the Registrar of the superior

court as required by the sub-rule. It is to be observed that certification by the Registrar under sub-rule (6) is a mandatory requirement. It is not in dispute that the record before the Court has not been certified as required under the sub-rule. That is not surprising because the sub-rule requires the record to be certified as being a true copy of the original proceedings. As the original hand-written record compiled by the trial judge had gone missing before this record could be prepared it clearly was not possible for it to be so certified. The record of appeal is, therefore, not a competent record and so must be struck out.

I have had the benefit of perusing in draft form the ruling by my Lords Muli and Akiwumi, JJ A who have dealt with this issue and also with the point raised with regard to the record being illegible in much greater details. I entirely agree with their views. As to the consequences that would follow the record being struck off the first and foremost consideration is clearly with regard to the fate of the judgment of the trial court. As the evidence has not been gone into at all by us this Court is incompetent to give any final and for that matter any decision at all regarding the merits or otherwise of the trial court's judgment. At the same time the judgment cannot be allowed to remain. Nor are the appellants expected to spend the rest of their lives in prison. If the judgment is quashed then clearly justice would not be done because that would mean an acquittal without the merits of the evidence having been gone into. A fresh charge would be met with a defence of *autre fois acquit*. The appellants were tried and convicted for a capital charge-murder. At the same time the appellants have been living under the constant shadow of death since their conviction on 25th April, 1989. They are in no way to be blamed for long delay in the hearing, and now the final abortion, of their appeals. Very pertinent to the situation in the present appeal is the view expressed by Lord Griffith in the decision of the Privy Council in the case of *Pratt v AG for Jamaica* [1993] All ER in the passage so aptly quoted by my Lord Akiwumi, JA, in his ruling. I respectfully agree with the views held by this Court in Criminal Appeal No 110 of 1991 *Puis Olima & another vs Rep (UR)* which are also quoted in the ruling of my Lord Akiwumi, JA with whose final proposed orders I entirely agree.

Muli JA. On 29th April, 1988, the Attorney General, on behalf of the Republic arraigned the appellants herein on the information filed at the sessions held at Nyeri with the offence of murder contrary to sections 203 and 204 of the Penal Code, particulars of the offence being that the appellants, Jackson Mutharia Mwaura alias Kamande and Jackson Themba Muirura with others not before the Court,

murdered one Anderson Ngugi on the night of 30th/31st August, 1987. The trial commenced on 14th

March, 1987 and ended on 25th April, 1989 with the conviction of both the appellants of the offence of murder as aforesaid. The learned trial judge sentenced them to the only sentence permitted by the law and that was death by judicial hanging.

The appellants appealed to this Court against their convictions and of course their sentences of death. When the appeal came up for hearing on 17th September, 1993, Mr Timan Njugi and Mr Otieno for the 1st and 2nd appellants respectively pointed out to the Court that the record was still not correct despite the earlier order of the Court dated 8th May, 1990 that the record be prepared again from the original record. Efforts to trace the original record were fruitless. On 18th November, 1993 the Court ordered that Mr Omondi, then in-charge of the criminal registry of the High Court, be summoned to appear and explain the disappearance of the original record. Several adjournments were granted with the hope that the original record could be found. After every effort had been made to trace the original file or record, Mr Omondi finally said that the original file cannot be found. With the disappearance of the original file or record, what is before the Court is a cyclestyled record prepared from the illegible and incomplete record of what was before the Court on 8th May, 1990. The authenticity of that illegible and incomplete record is not known and worse still, it is not certified. Both the illegible and incomplete record and the purported record therefrom now before the Court cannot be regarded as the true record of what transpired at the appellant's trial. Faced with this predicament Mr Njugi and Mr Otieno Oyoo for the appellants took a preliminary point of law that the record before the Court was uncertified and unauthenticated and therefore unsafe to rely on it because it cannot be regarded as the true record of the original record or file.

Rule 61 of the Rules of this Court provides for the preparation of the record of appeal and in particular rule 61 (2) provides:-

"(2) For the purpose of an appeal from the superior court in its original jurisdiction, the record of appeal shall contain copies of the following documents in the following order –

(a) .....;

(b) .....;

(c) The trial judge's notes of the hearing, including the proceeds on and after sentence;

(d) to (k).

It is mandatory that the record of appeal must contain copies of the documents listed from (a) to (k). In the absence of the original record or

file it is likely that copies of the documents listed, other than (c), may very well be missing or copies thereof uncertified. It has been accepted and conceded on behalf of the Republic that the original record or file cannot be traced or found with the result that the mandatory requirement of "(c) the trial judge's notes of hearing, including the proceedings on and after sentence", (underlining is mine), are irretrievably lost. The breach of the mandatory requirement of rule 61 (2) of the Rules renders the record of appeal incomplete and consequently not properly before the Court. Mr Njugi sought also to rely on the Evidence Act maintaining that the record, being uncertified and unauthenticated is inadmissible evidence. If I understood him correctly, he argued that such evidence was also inadmissible in this Court. With respect, the matter before the Court was whether the uncertified and unauthenticated record before the Court was sufficient record of appeal within the meaning of rule 61(2) of the Rules. I would agree with Mr Njugi if the record, as it is, was being sought to be admitted as additional evidence under rule 29 of the Rules. That is not the case here. There was no suggestion that the admission of evidence before the trial judge was irregular. If that be the case, then the issue would properly be taken during the hearing of the appeal itself.

For the purpose of the present preliminary point of law, the appeal itself, not being heard, the trial before

the High Court was not illegal or defective. The authorities cited by Mr Otieno for the 2nd respondent *Abdi Moge and others vs Rex* (1948) 15 EACA 86, and *AJ Simpson v District Council of Nakuru* (1948) 19 KLR 17 were clearly distinguishable on the facts. In both cases, the trials were defective *ab initio* for lack of complete record (*Abdi Moge* case) and impossible to discover the facts of the case from the record of the trial (*AJ Simpson v District Council of Nakuru*). In the case of *Otieno v Republic, Ochieng v Republic* [1989] 2 KAR 251, the record of the trial was said to be "gibberish and utterly incomprehensible and so was the judgment". It was held that a retrial would only be ordered where the original trial was either illegal or defective and that the conviction can only be quashed when the merits of the same have been gone into.

The above authorities emphasize the principles to be followed where the trial, having taken place, it is subsequently on appeal found to have been illegal or defective and the propriety of a retrial. This is not the case here. The issue before us is simply this: the original record of the trial or file having been found to be lost or unavailable, is the record of appeal which does not contain "the trial judges notes of the hearing, including the proceedings on and after sentence" and which is uncertified and unauthenticated properly before the Court?

Mr Horrace Okumu for the Republic was at great pains to answer this question. He cited the authority in *Mawenye v Rex* (1942) 9 EACA 70 and the recent decision of this Court in *Pius Olima & another v Republic* Criminal Appeal No 110 of 1991 (Gicheru, Cockar & Akiwumi, JJ A). He urged us not to rely on procedural matters but to ensure that the ends of justice are met. He urged that non-compliance with rule 61 of the Rules was merely procedural and the appeal be allowed to proceed to hearing. Alternatively he urged us to find the case one suitable for retrial. I am unable to agree with Mr Okumu on these propositions. Firstly because the trial before the superior court was not illegal or defective. Secondly the appeal has not been heard on its own merit. As I have observed on more than once in this ruling the point before us is the competence or otherwise of the record of appeal which is fatally defective and incomplete. That being the case the intended appeal cannot proceed to hearing based on defective, incomplete, uncertified and unauthenticated purported record of appeal.

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.

Dated and Delivered at Nairobi this 1st day of July 1994.

A.M.COCKAR

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

A.M.AKIWUMI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR