IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO.3 OF 2013

BETWEEN

PETER MWANGI WAITHAKA..…….....APPELLANT

AND

REPUBLIC.....…….... RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Warsame & Khaminwa, JJ) dated 20th December, 2011

in

HC.CR.A. NO.171 OF 2007)

****

JUDGMENT OF THE COURT

We were about to commence the hearing of this appeal when it became apparent that the judgment of the first appellate court which was delivered was signed by Hon. J. Khaminwa, J, alone. It was not dated.

The appeal to the High Court followed a conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code by Mr. Kiarie W. Kiarie, Senior Principal Magistrate.

The record of the proceedings in the High Court shows that the appeal was heard by Khaminwa, Warsame, JJ. up to the end. Khaminwa, J. drafted the judgment and this is evidenced by her handwritten script. The draft was typed and she alone signed the judgment in issue at the time of delivery.

Put to counsel, Mrs. Ouya Senior Assistant Deputy Public Prosecutor, took note of the omission of the second signature – Warsame J. as he then was, and absence of the date of delivery of the judgment. In her opinion, those were serious omissions even as the evidence recorded pointed to a strong case against the appellant. She sought directions from court.

On her part, Ms Mwango, learned counsel for the appellant, remarked that without the certification of the Hon. The Chief Justice that the appeal before the High Court be heard by one judge as per Section 359(1) of the Criminal Procedure Code, the undated judgment signed by Khaminwa, J. alone was a nullity. She urged the court not to order the rehearing of the appeal as that would prejudice the appellant who has been

in custody since arrest on or about 20th November, 2006, and on death row from the date of conviction.

After Section 168 of Criminal Procedure Code has directed as to the mode of delivering a judgment, Section 169(1) says:

> ***"169(1). Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."*** (Underlining added.)
>
> ***(2)…. (3)…"***

The requirement to date and sign a judgment is couched in mandatory terms using the word "*shall*." Thus omitting to comply must have serious consequences.

Hearing of appeals in the High Court is governed by ***Section 359(1) of the Criminal Procedure Code***:

> ***"359(1) Appeals from the subordinate courts shall be heard by two judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court.***
>
> ***(2)…" (***Underlining supplied***)***

It is a mandatory requirement that appeals from the lower courts to the High Court be heard by two judges unless the Chief Justice has given written authority that a single judge shall entertain such appeal.

The cumulative import of the two sections above is that the presiding officer or officers of a court should date and sign the decision of that court. However, hearing and determining of appeals from the subordinate courts to the High Court should be by 2 judges and the two must sign and date their judgment.

As regards the appeal to the High Court which is the subject of appeal before us, there is no question that it was to be heard by two judges. The lower court had imposed a death sentence. In fact two judges (Khaminwa, Warsame, JJ.) heard that appeal. Only the judgment of one judge, signed but undated was placed before us, instead of the one signed by both judges. Such judgment could not be traced on the two files. In the circumstances, should we consider it as a nullity? Or should we consider a rehearing of the appeal in the High Court?

Considering the order of a *retrial*, the case of ***Julius Ole Koikai Vs Republic Criminal Appeal No.214 of 2001*** readily comes to mind. In it, this Court observed that both counsel appearing had acknowledged that the trial court's original record had been tampered with and thus it was not possible to trace the true record of proceedings. The person who had done that tampering had only one intention: to subvert the course of justice. In considering whether to order a *retrial* or not, the court cited and quoted from the case of ***Rwaru Mwangi vs Republic Criminal Appeal No.18 of 2006***:

> ***"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether mistakes leading to the quashing of the conviction were entirely (of) the prosecutions making or not. See*** *Muiruri vs Republic [2003] KLR 552****, it is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial See*** *Mwangi vs Republic [1983] KLR 533****."***

That court remarked also that there are other possible factors upon which a retrial may be ordered and that each case should always be considered on its own merits because of peculiar circumstances. All the time

an order for retrial, if made should be one to serve the best interests of justice.

In our present appeal it is not tampering with trial court record. It is not the retrial issue on our mind. Here the issue revolves around the signed two-judge decision missing from both files. That is the judgment upon which the appeal herein was premised. The High Court record shows that the Hon. Justice Ochieng delivered it on 20th December, 2011.

We are unable to say whether the missing judgment was by human error like misplacing/dropping it while the file was in the registry or it was removed from the file by some mischievous design. We say no more and do not wish to speculate. However, to ensure that justice is done, we direct that the matter be remitted to the High Court for *rehearing* the appeal, followed by rendering a judgment.

While issuing this directive we are conscious of the need to serve justice on both sides. The appellant will be heard all over again on his appeal and in the event it is dismissed, he will have an opportunity to appeal to this Court again. In the circumstances we do not need to address the issue about the time he has spent in prison so far. And because it is not a retrial the prosecution need not worry about the availability of witnesses who testified in the trial court. It will be a straightforward case of putting the appeal record together and then listing the matter before the High Court for a fresh hearing. All this is to be done in the spirit of balancing interests of justice between the appellant and the State on behalf of the public.

And so we order. Arrangements to be made for the rehearing of the appeal without delay.

Dated and Delivered at Nairobi this 20th day of September, 2013

J. W. MWERA

…….....

JUDGE OF APPEAL

D. K. MUSINGA

….....

JUDGE OF APPEAL

S. GATEMBU KAIRU

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/jkc