



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & AGANYANYA, JJ.A)

CRIMINAL APPEAL NO 206 OF 2007

BETWEEN

BENSON NDIRANGU NDUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Makhandia, J) dated 18th July, 2006

In

H.C. Cr. A. No. 502 of 2003)

RULING OF THE COURT

When this appeal was called up for hearing on 20th September, 2011, the Court's attention was drawn to a letter dated 21st June 2011 addressed to the Registrar of this Court by the Director of Criminal Investigations Department informing him that both the handwritten and typed proceedings in Nairobi Chief Magistrate's Court Criminal Case No. 1756 of 2001, were forgeries. In that case the appellant **Benson Ndirangu Ndung'u** with 4 others whose appeals are not before us, were charged with 4 counts of robbery with violence contrary to **section 296 (2)**, of the Penal code, One Count of preparation to commit a felony contrary **to section 306 (a)** of the Penal Code and 7 other counts relating to possession of firearms and ammunition contrary to **section 4 (3)** of the Firearms Act **Cap 114** of the Laws of Kenya. The appellant must have been convicted on one or more of those counts, as in view of the alleged falsity of the record of appeal, it is not possible to say on which counts he was convicted. On the assumption that what purports to be the judgment of the High Court and against which this appeal relates to is an authentic judgment, the appellant was convicted on the two robbery counts and acquitted on all the others.

The issue which arose when the appeal was called is whether in view of the letter aforesaid, the appellant's appeal could be heard. Mrs. Nyamongo for the appellant was of the view, which view, Mr. Monda, Principal State Counsel, concurred with, that it was not possible for the appeal to be heard and requested that we order a retrial. In her view, whoever was responsible for the falsification of the trial court's record was malicious, and she did not think the court had any other option apart from ordering a retrial.

Mr. Monda on his part attributed the problem to improper storage of files which makes them easily accessible to undesirable elements. Like Mrs. Nyamongo, Mr. Monda, prayed that, in the interests of

justice, we order for the retrial of the appellant.

It cannot be gainsaid that whoever is responsible for forging the trial court's record and destroying or hiding the authentic one, must prima facie, have intended to benefit the appellant. We say so advisedly. The prosecution having secured a conviction of the appellant they had nothing to gain from forging the trial court's record.

Cases in which court records are stolen, mutilated or falsified are rampant. On the day this appeal came for hearing, this was not the only case in which there was a problem with the tampering of the trial court's record. There was one other case in which, like the present one, the trial court's handwritten record was stolen and were replaced with forged notes of the trial Magistrate. Luckily in that matter the typed proceedings were not affected.

What is the way forward? Clearly, in absence of an authentic record, the hearing of this appeal shall be in vain. While, prima facie, the appellant may be regarded as a possible suspect, that is only a matter of conjecture. As the facts stand we have to give him the benefit of the doubt and rule that the author of the crime is unknown and for that reason put the facts on the balance. If we hear the appeal, we shall be acting in vain as the record of appeal is not authentic. If we decide not to, then we shall be constrained either to quash his conviction and release him or order a retrial or ignore his appeal and let him face the sentence of death imposed on him. Whichever option we take we have to bear in mind that other than the last option, whichever option we take has the danger of enabling the appellant to benefit from a crime which he either personally committed or which was committed by another person for his benefit.

As we cannot with certainty blame the appellant for the forgery of the trial court's record, then he is entitled to the protection of the law. The option which will best serve the interests of justice is to order a retrial on the assumption that the prosecution will trace the witnesses and any exhibits which may have been used at the original trial of this appellant and his co-accused. The appellant shall be produced before the Chief Magistrate's Court at Nairobi forthwith for him to fix a date when the appellant's case on the basis of the original charge sheet, shall be set down for a fresh hearing before any magistrate with jurisdiction to try him for that offence. It is so ordered.

Dated and delivered at Nairobi this 11th day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.