IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 214 OF 2007

BETWEEN

JULIUS OLE KOIKAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT
(An appeal from a judgment of the High Court of Kenya at Nairobi
(Makhandia & Kimaru JJ.) dated 11th March, 2004

in

H.C.CR.A. NO.649 OF 1997)
****
RULING OF THE COURT

The hearing of this appeal has stalled because it was discovered that there was variance between the typed copies of proceedings of the trial court and the handwritten record. The trial magistrate, Mrs. Jane Ondieki swore an affidavit in which she disowned a substantial part of the handwritten proceedings. The impugned parts of those proceedings show that witnesses who testified were not sworn before they did so, and that the trial court did not comply with the provisions of **section 211** of the Criminal Procedure Code, which requires a trial court on finding that an accused has a case to answer to explain to him his rights in putting up his defence to the charge or charges against him. It is trite law that a failure to comply with that provision renders the proceedings thereafter fatally defective, and whoever tampered with the trial court's handwritten record must have intended to create a reason for seeking to declare the proceedings a nullity.

Likewise if witnesses are shown on appeal to have testified without first being sworn, the effect of it is to render the proceedings relating to that witness fatally defective, except of course in those cases, like where an accused opts to give unsworn evidence, or in the case of children of tender years where upon **a voir dire** examination, they appear to the trial court not to understand the meaning of an oath.

When this appeal came up for hearing before us on 20th September, 2011, both **Mr. Mogikoyo** for the appellant and **Mr. Monda, Principal State Counsel**, acknowledged that the trial court's original record had been tampered with and it was not possible to trace the true record of the proceedings. They therefore urged the court to order a retrial of the case, in their view, because it was the only way justice will be best served.

Previously this Court has been saddled with cases where files disappear, or a judgment appealed against is not traceable. This may be the first case where the trial court's original record is tampered with obviously

with a view to subverting the course of justice. Whether a case involves a tampering with the record or loss of the record or part thereof, the effect is the same. The intention can only be one; to subvert the course of justice.

In **Rwaru Mwangi v. Republic** Criminal Appeal No. 18 of 2006 (ur) this Court considered what factors inform the court in determining whether or not a retrial should be ordered. The court stated:

"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 the mistakes leading to the quashing of the conviction were entirely the prosecution's 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 522."

It cannot be said that the court in the above excerpt exhaustively covered all the possible factors a court will consider in determining whether or not to order a retrial. The position in law is that each case is different from the other and a decision one way or the other will largely depend on the peculiar circumstances of each case. We however, wish to point out that this Court in the case of **John Ooko Otieno vs. Republic** Criminal Appeal no. 137 of 2002 while considering a related situation as the one here cited with approval a passage from the case of **Pius Mukaba Mulewa & Another vs. Republic**, C.A. Criminal Appeal No. 103 of 2001, where the court rendered itself thus:-

"What we can take from ZAVER'S (Haiderali Lakhoo & Zaver v. R [1952] 19 EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss occurred. Who stands to gain from the loss?

Is it merely coincident that both the magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making? In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course."

Mr. Mogikoyo cited to us the case of **Francis Ndungu Wanjau vs. R.** Criminal Appeal No. 187 of 2002 which may be the latest on the issue relating to loss or tampering of files.

Is this a proper case in which a retrial should be ordered? Before we answer that question, a resume of the background facts is essential. Following his conviction after a trial, on three counts of robbery with violence and unlawful wounding the appellant, **Julius Koikai**, was sentenced to death on the robbery counts and for an imprisonment term on the offence of unlawful wounding. He was dissatisfied and lodged his first appeal to the High Court. In his petition of appeal the appellant challenged his conviction on amongst other grounds, that identification evidence did not show he was positively identified; an identification parade held was not conducted according to law; circumstantial evidence was not water tight; the defence case was not properly considered and that the evidence against him was weak.

The High Court (*Makhandia and Kimaru JJ*.) allowed the appellant's appeal on count 3, namely one of the three counts of robbery with violence contrary to **section 296 (2)** of the Penal Code, but dismissed his appeal on the remaining three counts – two of robbery with violence contrary to **section 296 (2)** of the Penal Code and one of unlawful wounding, contrary to **section 237** of the Penal Code. This appeal is against that decision.

It is noteworthy that neither side challenges the accuracy of the typed record. Nor has either side said that it does not reflect the record which the High Court used in coming to its decision. If anything the record

when looked at *vis a – vis* what the trial magistrate has deponed to in her affidavit which we referred to earlier, do reflect what took place at the trial. The record shows that each witness was sworn before testifying, and that at the close of the prosecution case there was reasonable compliance with the provisions of **section 211** of the Criminal Procedure Code.

Having said that we pose the question, whether in absence of any other acceptable record, the typed record is reasonably adequate for purposes of the appellant's appeal? Before we answer that question, it is important to state categorically that whoever tampered with the original record must have done so with a view to helping the appellant in this appeal. We do not want to be categorical that the appellant personally did it or caused it to be done, but what emerges clearly from the sequence of events is that once the appellant's first appeal was dismissed, the need for other approaches to bolster his chances of success was realized. Whoever was responsible appears to us to have solicited and received support from errant judiciary staff. Ordering a retrial will in effect ensure success of the culprits' scheme and will certainly not be in the best interests of justice.

As the authorities say, the court must put the matter on the scales of justice and see whether by ordering a retrial the best interests of justice would be served. The court must also consider any likely prejudice to the appellant.

The typed record, in our view, appears complete and accurate. It was used by the High Court to come to a decision. As of now there is no other better record. The original record of the trial court is normally required in case an issue as to the correctness of the typed record arises. Mr. Mogikoyo, in an attempt to deal with this aspect implied in his submissions, that because the appellant was unrepresented when he appeared before the High Court he would not have appreciated the fact that witnesses may not have been sworn or that there was probably no compliance with the provisions of **section 211** of the Criminal Procedure Code. We do not think that much turns on that submission moreso considering the conduct of the appellant when this matter was listed before this Court.

On 30th January, 2009 when this appeal first came for hearing it was at the instance of the appellant, not his advocate, that the appeal was taken out of the hearing list for that day. He wanted to be supplied with a further record of appeal, yet his advocate had one supplied to him by the court. During the third appearance it was the appellant, not his advocate, who pointed out the fact that there was variance between the typed and original trial court's record, regarding the non swearing of witnesses. It shows that the appellant knew much more than his advocate. He was able to discover that some witnesses had not been sworn before testifying, and yet he did not raise the issue at the hearing of his first appeal. A rebuttable presumption arises that he was aware as to how the trial court's original record was altered and by whom, and he will be hard put to it if he complains that the typed record is inadequate in view of his aforesaid conduct.

It should be noted that two courts have already made findings of fact regarding the appellant's case. He has lost the presumption of innocence. His case is almost in ***pari material*** with **Pius Mukabe Mulewa** (supra) in which the original record of the trial magistrate was missing at the time his first appeal was heard. The typed proceedings and judgment were also not available, and the record had to be reconstructed before his first appeal could be heard. This Court differently constituted held that there was sufficient material before the court on which a decision could be based. The court there said:

"There is more than sufficient material before the court upon which their appeals can be determined one way or the other and that being our view of the mater, we over-rule their preliminary arguments for acquittal at this stage and order that their appeals be heard and determined on merit."

As the tampering with original trial court record may not be relied upon, it is as if the original record of that court is not there altogether. That being our view of the matter, and considering what we have said above, we are unable to agree with counsel that this is a fit and proper case for a retrial.

In the event we order that this appeal be relisted and be determined one way or the other on the basis of

the typed record and other material before the court, which we think are sufficient for that purpose.

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

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR