IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: MWONDHA, TIBATEMWA-EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOKE, JJSC

CRIMINAL APPEAL NO. 48 OF 2020

UGANDA.....APPELLANT

VERSUS

OGWANG JAMES.....RESPONDENT

(*Appeal arising from Court of Appeal Criminal Appeal No.511 of 2016 before Egonda, Cheborion & Muzamiru Kibeedi JJA dated 6th August 2020*)

JUDGMENT OF THE COURT

This is a second appeal lodged by the appellant aggrieved and dissatisfied with the decision of the Court of Appeal. The memorandum of appeal had only one ground as follows:

1. The learned Justices of Appeal erred in law when they failed and or rejected to order a retrial thereby occasioning a miscarriage of justice.

Background:

The respondent was indicted on a charge of murder C/S 188 & 189 of the Penal Code Act. The particulars of the offence were that on the 30th day of June 2012 at Lyalakwe village, Alito

Parish Obalanga sub-county in Amuria District, he murdered Aucho Mary. He was tried and found guilty and convicted as charged. He was sentenced to 36 years' imprisonment. He appealed against both conviction and sentence to the Court of Appeal at Mbale.

At the hearing, the learned Justices of the Court of Appeal drew the attention of counsel for the appellant and respondent, to the fact that the record did not show whether or not the plea of the respondent was taken before the commencement of the trial. The learned State Attorney representing the respondent conceded that the error was fatal to the conviction and sentence of the respondent. Counsel prayed that the Court quashes the conviction and sets aside the sentence imposed against the respondent. The learned Counsel for the State prayed that the Court makes an order for a retrial in the interest of justice.

The learned Justices of the Court of Appeal cited Section 60 of the Trial on Indictments Act and ruled that since the provision was in mandatory terms, failure to comply with it made the trial a nullity. The learned Justices of the Court of Appeal quashed the conviction, set aside the sentence, declined to order a retrial and discharged the respondent, hence this appeal.

Representation:

At the hearing, Mr. Muwonge Emmanuel represented the respondent.

Submissions:

Appellant's submissions

The appellant's counsel sought leave of Court to amend the memorandum of appeal under Rule 17 of the Judicature (Supreme Court) Rules Directions. The proposed amendment was that after the words 36 years imprisonment the Court inserts the following words "and declined to order a retrial of the respondent" Counsel prayed that the word "rejected" is substituted with "refused" and add the words, "this honourable Court orders a retrial", of the respondent. Leave to amend was granted as it was not prejudicial to the respondent.

Counsel for the appellant submitted citing the case of **Areet Sam Vs Uganda SCCA No.20 of 2005** which held; "it is trite law that as a second appellate Court, not expected to re-evaluate the evidence.... however, where it is shown that they did not evaluate or re-evaluate the evidence or ... were proved manifestly wrong on the finding of fact, this Court is obliged to do so and ensure that justice is properly and duly served."

Counsel submitted that the learned Justices of Appeal exercised their discretion erroneously (unjudicially) by declining to order a retrial of the respondent. They did not consider the conditions that have to exist before ordering a retrial thereby arrived at a wrong decision.

Counsel submitted that a retrial may be ordered where the following conditions were met:

(i) That the original trial was null or defective see (Case of **Ahmed Ali Dharamsi Sumar Vs R (1964) EA 481**

(ii) That the interests of Justice require it. See **Rev. Father Santos Wapokra Vs Uganda CACA No. 204 of 2012** and **Ajay Kumar Ghoshal Vs State of Bihar & anor (Criminal Appeal No. 119-122 of 2017** (para. 42)

(iii) That the witnesses who had testified were readily available to do so again should a retrial be ordered and

(iv) No injustice will be occasioned to the other party if an order for retrial is made See (**A jay Kumar v State of Bihar and NNR(Supra)**

Counsel submitted further that other considerations for a retrial are: the strength of the prosecution case, whether the original trial was complex and prolonged, the expense of the new trial to the accused and the fact that a new trial is an ordeal for the accused who should not suffer a second trial unless the interest of justice so require and the length of time between the commission of the offence and the new trial and whether the evidence will be available at the new trial.

Counsel argued that the learned Justices of the Court of Appeal departed from their own guidelines which they set **in Rev. Father Santos Wapokra v. Uganda** (Supra) without giving a proper justification when they refused to order a retrial.

Counsel submitted that if the learned Justices of the Court of Appeal had scrutinised the record carefully, they would have come to the conclusion that the factors in favour outweighed those against the retrial. In the instant case, the Court pointed

out that the respondent had not taken plea, the case was not a complex one because the prosecution had called three witnesses, the respondent had been indicted for murder which is a serious offence, the prosecution case was not a flimsy one and those witnesses are readily available. That therefore, the circumstances of this case warranted a retrial. The respondent had already served 7 years at the time the Court of Appeal quashed the conviction and set aside the sentence.

Counsel submitted that the reason given for not ordering a retrial was mainly that there was uncertainty of hearing the case expeditiously because of the severe restrictions due to the Covid 19 pandemic, and leaving this grave charge to hover over the respondent (appellant then) would be inflicting further injustice upon the Appellant (respondent).

Counsel argued that the reasons given could not be sustained as they were merely speculations. Counsel submitted that though the Covid-19 pandemic slowed down business, the Courts devised means of hearing cases. Counsel submitted that the very session in which the Justices of Appeal quashed the conviction and set aside the sentence was conducted during that very time when Covid 19 was in the midst. Further that even then Covid 19 is existing and Courts are running and holding Court sessions.

Counsel submitted that the learned Justices of the Court of Appeal were only focused on a speedy trial for the Appellant (now respondent) at the expense of protecting the public from violent people such as the respondent.

Counsel submitted further that whereas the right to a fair and speedy hearing is an integral aspect of Article 28 of the Constitution, the learned Justices ought to have weighed it against factors like, the gravity of the offence, the victim's right to life that was ended arbitrarily by the respondent, the impact of the victim's death on her family, the need to instil confidence of the public in the judicial system.

Counsel further submitted that if the learned Justices had re-evaluated and considered the above factors, they would have ordered a retrial.

Counsel prayed for a declaratory order/judgment that the learned Justices of Appeal erred in law and fact when they declined to order a retrial. Counsel also emphasised that there is need to streamline the grounds for ordering a retrial by this honourable Court, being the last resort Court, to put in place clear guidelines to be followed by the lower Courts when faced with the question as to whether a retrial should be ordered or not.

Respondent's submissions

Counsel for the respondent opposed the appeal agreeing with the decision of the learned Justices that they rightly found that the provisions of S.60 of the Trial on Indictments Act which required an accused person to plead to an indictment are mandatory in nature and provide a basis upon which a trial in Court can proceed. Failure to comply with the same makes any subsequent trial a nullity.

Counsel further submitted that the learned Justices of the Court of Appeal were alive to the fact that the decision whether or not to order a retrial was a matter of discretion by the Court depending on the justice of the case. Counsel agreed with them and submitted that the learned Justices exercised their discretion judicially when they took into account the seven years the respondent had been in custody and the impossibility of having a retrial handled expeditiously in light of the then prevailing Covid 19 pandemic.

Counsel submitted that the learned Justices of the Court of Appeal were justified in finding that the justice of the case required ordering a stay of the prosecution (see Page 3 paragraph 9 of the judgment), discharging the respondent of the charges he faced and ordering for his immediate liberation.

Counsel submitted that the case of **Rev. Father Santos Wapokra versus Uganda (COA Cr Appeal No. 204 of 2012** relied on by the appellant was distinguishable from the instant case, since for the former the criminal justice system was operating normally and there was a possibility of having the appellant retried within 3 months. But the appeal before the Court of Appeal it was impossible to have the respondent retried before the end of the year. Counsel prayed that this Court upholds the decision of the learned Justices of the Court of Appeal and dismiss the appeal.

Consideration of the Appeal

This is a second appeal against the decision of the Court of Appeal refusing to order a retrial after declaring the trial a nullity.

The Court of Appeal Justices quashed the conviction, set aside the sentence and discharged the respondent.

The 2nd appellate Court is not expected to re-evaluate the evidence ... but where it is shown that the lower Courts did not evaluate or re-evaluate the evidence or were proved manifestly wrong on the finding of fact this Court is obliged to do so and ensure that justice is properly and duly served. See (**Kifamunte Henry v. Uganda SC Criminal Appeal No 10 of 1997**

It is trite law that the duty of the first appellate Court is to reconsider all material evidence that was before the trial Court, while making allowance for the fact that it never saw or heard the witnesses, to come to its own conclusion on that evidence. In so doing, the first appellate Court must consider the evidence in totality and not any piece thereof in isolation. It is only through the re-evaluation that it can reach its own conclusion as distinct from merely endorsing the conclusion of the trial Court (See **Tito Buhingiro Vs Uganda Supreme Court Criminal Appeal No. 08 of 2014; Kifamunte Henry Vs Uganda SCCA No. 10 of 1997**)

We have carefully perused the record of appeal and the Judgment of the learned Justices of the Court of Appeal. The court observed and stated in part as follows: **"When this appeal was called for hearing, we drew the attention of both counsel for the appellant and respondent to the fact that the record did not disclose whether or not the plea of the appellant had been taken before the trial commenced. Ms. Fatinah Nakafeero, Chief State Attorney in the office of the DPP appearing for**

the respondent conceded that the trial Court had not read the indictment out to the appellant nor taken his plea before the trial commenced. She submitted that this was a fatal error to the conviction and sentence. She prayed that the Court quashes the conviction and sets aside the sentence imposed and the Court orders a retrial. Counsel for the appellant Ms. Luchiya agreed with the Chief state Attorney but opposed an order for retrial and prayed that the Court acquits the appellant and set him free forthwith"

Section 60 of the Trial on Indictments Act provides:

Pleading to indictment:

The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the Court shall otherwise to order, and the indictment shall be read over to him or her by the Chief Registrar or other officer of the Court , and explained if need be by that officer or interpreted by the interpreter of the Court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the Court shall find that he or she has not been duly served with a copy.

The learned Justices of the Court of Appeal stated, *inter alia* "....the foregoing provisions are mandatory in nature upon the trial Court and provide a basis for which a trial can proceed. Without complying with the same, the subsequent trial is a

nullity". The court relied on **Rev. Father Santos Wapokra Vs Uganda (supra)**

From the foregoing, it was apparent that the Court of Appeal failed in its duty as a first appellate Court as stated in the **Tito Buhingiro Vs Uganda case (supra)** & **Kifamunte Henry Vs Uganda (Supra)** and inter alia that *"the duty of the first appellate Court is to reconsider all material evidence that was before the trial Court in totality. It is only through re-evaluation that it can reach its own conclusion.*

For emphasis we repeat that it is trite law that as a second appellate Court, we are not expected to re-evaluate the evidence. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved to be manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and timely served (See again **Tito Buhingiro Vs Uganda case (supra)** & **Kifamunte Henry Vs Uganda (Supra)**

The 1st appellate Court failed in its duty when it succumbed to quashing the conviction, discharged the respondent and refused to order a retrial without having reviewed the proceedings of the trial Court on record. There was no way the Court of Appeal could have ordered a retrial when it failed to properly exercise its duty. The point is that a retrial cannot be ordered basing on a technicality like the Court of Appeal did. Emphasis is ours. The learned Justices could therefore not have proper grounds for ordering a trial. We would also add that a technicality, *perse*,

cannot render proceedings a nullity. It would have been a nullity if the trial Judge was not seized with jurisdiction to try the case, but this was not the case. The reasoning that Section 60 is mandatory in nature (the way it was drafted) and provides a basis upon which a trial can proceed cannot be sustained because already a full-fledged trial was successfully conducted and the respondent was convicted and sentenced hence the appeal which was before the learned Justices of the Court of Appeal.

The record before us showed that much as it was claimed that there was no plea taken, the trial went on and was concluded. There was no objection from the appellant (respondent) of miscarriage of justice. That is why the appellant (respondent) lodged the appeal which had only 2 grounds in the memorandum of appeal as follows:-

(1)The learned trial Judge erred in law and fact when she failed to critically evaluate the evidence by relying on a single identifying witness without proper corroboration thus reaching a wrong conclusion.

(2)The learned trial Judge erred in law and fact when she sentenced the appellant to a harsh and excessive sentence of 36 years' imprisonment.

The appellant in the Court of Appeal had prayed that this Court:

(1)Allows the appeal

(2)Quashes the conviction

(3)Sets aside the sentence

It is important to note that there was no ground to the effect that the trial proceeded without a plea having been taken and caused a miscarriage of justice

The Court in the **Rev. Father Santos Vs Wakopra case (supra)** reviewed the trial Court proceedings and the evidence adduced by the prosecution and defence and how the case was handled by the trial Court when it came to the conclusion that the appellant was convicted on an indictment to which he never pleaded to and was nowhere on record. The Court of Appeal found the trial a nullity, set aside the proceedings of the trial Court, the conviction was quashed and sentence was set aside as being wrong in law. That is why the Court ordered a retrial.

This brings us to the only ground of appeal the appellant raised in the instant appeal. It was that the learned Justices of the Court of Appeal erred in law when they failed and or rejected to order a retrial thereby occasioning a miscarriage of justice.

The question of whether the Court orders a retrial or not is a matter of exercise of judicial discretion which has to be exercised judicially. The discretion is based on principles that have been developed over time by the Court **(Fatehah Manyi Vs R (1966) EA 343, Ahamed Ali Dharamisi Sumar vs R (Supra)** it was stated inter-alia that ... the Court must first investigate whether the irregularity is reason enough to warrant an order of retrial. See **Katilal Shahur (1958) EA 3.**

The question here is, how does the Court investigate whether the irregularity is reason enough to warrant an order of retrial? This

takes us to the duty of the first appellate Court as already reproduced according to settled principles of law in a number of cases decided by this Court.

The investigation inevitably brings in issue the substance of the irregularity/technicality and that is, whether there was substantial miscarriage of justice, for instance that the right of the suspect to fair hearing and speedy trial was infringed upon.

In the instant case, the trial Court recorded evidence by the prosecution and the defence. The respondent defended himself in detail. How could the respondent have defended himself without having taken a plea in view of what we have stated above. Clearly, there was no complaint on record that the appellant was denied the right to be heard or that he was restrained which automatically would have rendered the proceedings a nullity. But this can only be done after reviewing or re-evaluating the evidence on the record of the trial Court.

It is our view therefore that Article 28 & 44 (c) of the Constitution were not breached simply because the plea to the indictment did not appear on record. This means that the irregularity which the Court of Appeal learned Justices said was mandatory and non-compliance with it rendered the trial a nullity could not be sustained.

Section 60 of the TIA has already been reproduced in this judgment. But for clarity, we will reproduce what we consider most vital for determining the following issues,

(1)Whether the trial was a nullity or not

(2)Whether the retrial ought to have been ordered

Section 60 provides

"The accused person to be tried before the High Court shall be placed at the bar, unfettered unless the Court shall cause otherwise to order and the indictment shall be read over to him or her by the Chief Registrar or other officer of the Court and if need be by the officer of the Court and explained if need be by that officer or interpreted by the interpreter of the Court and the accused person shall be required to plead instantly to the indictment ..." (already reproduced at page 7 herein)

From the foregoing there is nowhere, the provision provides specifically that the trial shall be a nullity if the plea is not taken. In any case, the provision has various limbs and from what we have reproduced above, the first limb is the accused to be placed at the bar unfettered the second is "... and the indictment shall be read to him or her."

Our view is that since the provisions did not provide that failure to take plea results into nullity the intention of the drafters or makers of the legislation was not to make it a nullity. The reason for not providing it specifically was clear to us upon consideration of the first limb, ...**shall be placed at the bar unfettered** interpreting it in its literal or natural meaning, unfettered, means "not restrained or inhibited or prevented." It becomes a question of law mixed with fact. As such the unfetteredness/prevention has to be proved by evidence which evidence is not anywhere on record.

The drafters had in their mind the bigger interest of justice to be served in criminal justice system.

In that sense the word "shall" in this provision is directory not mandatory in the strict sense.

We are satisfied that the trial was not a nullity and it was a case where the first appellate Court failed totally in exercising its duty. This appeal squarelly falls in the exception as per the cases of **Kifamunte Henry (Supra)** and **Tito Buhingiro (Supra)** and makes the record.

We are also fortified by Article 126 (2) (e) of the Constitution which provides;

In adjudicating cases of both a civil and criminal nature, the Courts shall subject to the law apply the following principles:-

(e) Substantive justice shall be administered without undue regard to technicalities

Section 60 of the Trial on Indictments Act is a technicality in the circumstances of the instant case as analysed above and therefore the purported non-compliance has a cure in article 126 (2) (e) of the Constitution.

It is our view that an irregularity, *per se* in the circumstance of this case cannot be a reason to order a retrial. Needless to say that it was not the right case to order a retrial. It would have been a nullity despite the evidence adduced, if the trial Court had lacked jurisdiction, or the appellant was deprived of the right to fair hearing and speedy trial. Suffice it to say that Article 28, 44

(c) and 126 (2) (e) have to be read together in order to know the intention of the legislature.

Counsel for the appellant prayed for a declaratory order/judgment that the learned Justices of Appeal erred in law and fact when they declined to order a retrial. Counsel further submitted that there is need to streamline the grounds for ordering a retrial.

To address learned Counsel for the appellant on the finding that the Court of Appeal erred in not ordering a retrial, from what has been discussed above, the circumstances and the facts as shown on record, it would have been wrong for the Court of Appeal to order a re-retrial since their Lordships with due respect failed to exercise their duty as a first appellate Court.

On the issue whether the trial was a nullity we have pronounced ourselves on it but for clarity the trial was not a nullity.

On the issue of streamlining the considerations for retrial, we have discussed in this judgment some of them. But for clarity we have to state that ordering or not ordering a retrial is a judicial discretion and it is not exercised randomly (or in a vacuum). See **Farehah Manyi vs R** (Supra). The exercise of judicial discretion should be exercised judicially. The Court has to investigate whether the irregularity is reason enough to warrant an order of retrial. See **Kaktilal Shahur (Supra**). This depends on the circumstances of each case. For example, in cases where it is an outright case of being null and void, in the instance where Court lacks jurisdiction to hear a case, where the principle of fair

hearing in a substantial manner have been infringed causing a miscarriage of justice.

Principles like substantive justice to be administered without undue regard to technicalities. (Article 126(2) (e) of the Constitution.

Where an accused person was convicted of an offence other than the one where he was either charged or ought to have been charged. (**See Tamano vs R (1967) EA 26**)

The strength of the prosecution case.

The seriousness of the offence.

Whether the original trial was complex and prolonged

The expense of the new trial to the accused, who should not suffer a second trial unless the interests of justice so require.

The length of time between the commission of the offence and the new trial.

Whether the evidence will be available at the trial.

Whether the prosecution or defence case were not flimsy. (Each case depends on its own facts and circumstances.)

All these principles and conditions above stated show that the evidence has to be reviewed before a retrial is ordered or not ordered.

In the result, we find that the ground of appeal cannot be sustained and in order to ensure that justice is duly done we order as follows:

(1) The High Court decision on conviction and sentence are reinstated and orders of quashing the conviction and setting aside the sentence set aside.

(2) The discharge of the respondent is set aside.

(3) Warrant of arrest to issue against the respondent and be remitted to Prison to continue serving the sentence as imposed by the High Court of 36 years imprisonment starting for the date of conviction.

(4) Court of Appeal **Criminal Appeal No 511 of 2016** which was before Egonda-Ntende, Chebrion, Muzamiru Kibedi be remitted to Court of Appeal for hearing the appeal before a different Coram.

Dated at Kampala this 12th day of October 2023

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Mwondha

Justice of the Supreme Court

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Tibatemwa-Ekirikubinza

Justice of the Supreme Court

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Tuhaise

Justice of the Supreme Court

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Chibita

Justice of the Supreme Court

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Musoke

Justice of the Supreme Court

Judgment delivered on 12th October 2023
by me Faith Mwondha
JSC