THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura & Musota, JJA]

Criminal Appeal No.190 of 2011

(Arising from High Court Criminal Session Case No. MSK-CO-CR-170 of 2008 at Masaka)

Between

Tuuni Stephen==========Appellant No. 1
Kamanyi David==========Appellant No.2

And

Uganda==========Respondent

(On Appeal from a Judgment of the High Court of Uganda [F.B. Jane Kiggundu, J.,] sitting at Masaka and delivered on the 25th August 2011)

JUDGMENT OF COURT

1. The appellants were convicted of two counts of robbery contrary to sections 285 and 286 (2) of the Penal Code. The particulars of the first offence were that the appellants on 13th day of April 2008 at Omukabare Ranch No.10 in Lyatonde District robbed Tumwine Benon of shs.40,000.00 and at or immediately before or immediately after used a deadly weapon to wit a knife on Tumwine Benon. The particulars of the second offence were that on the same day and same place as in the first offence the appellants robbed Kyakori Faibi of a Nokia mobile phone, medicine for cows, a hand bag with clothes, Shs.100,000.00; all valued at Shs.500,000.00 and at or immediately after used a deadly weapon, to wit a knife, on Kyakori Faibi. The appellants were sentenced to 15 years and 17 years imprisonment respectively on each count and both sentences were to run concurrently. Dissatisfied with that decision, the appellants appealed to this court against both conviction and sentence.

2. The sole ground of appeal stated,

'That the trial court erred in law and fact when it failed to avail a certified copy of the Judgment of the case.'

3. The background to this appeal is that the appellants filed a notice of appeal on the 12 September 2011 against both conviction and sentence. The High Court did not avail the record of appeal including the judgment of the trial court immediately to the appellants or to this court. After extensive demands by the Court of Appeal the High Court finally forwarded to the Court of Appeal the record of appeal of the High Court but the judgment of the learned trial judge was missing. Efforts to locate the same did not yield fruit.

4. This matter was finally set for hearing and came up on the 12 June 2018. The Appellants' counsel, Mr Henry Kenya submitted that without a judgment the appellants are unable to challenge the decision of the trial court on its merits. In those circumstances, he submitted that this court ought to quash the conviction of the appellants as it is not supported by a judgment of the trial court. He prayed that considering that the appellants have been in lawful custody for about 10 years including both the pre-trial detention and the period that they have been serving the sentences imposed upon them it was not in the interests of justice to order a retrial. He prayed that the appellants should be released unconditionally.

5. Ms Ann Kabajungu, a Senior State Attorney in the Department of Public Prosecutions, for the respondent, agreed that this appeal should be allowed in light of the absence of the judgment of the trial court in the record of the trial. However, she prayed that as the appellants had been charged with serious offences this court should order a re-trial.

6. As the record of appeal is incomplete, in the absence of the judgment of the trial court, it is not possible to hear and determine on the merits an appeal in this case. The appellants are so constrained that they cannot simply prepare and present a substantive appeal to this court which is a constitutional right. In those circumstances, we are left with no alternative but to quash their conviction and set aside the sentences imposed upon them.

7. We have considered the possibility of ordering a retrial in this matter as proposed by the learned Senior State Attorney. However, we note that the appellants have been in custody since April 2008 to-date, a period of about 10 years. This covers both the period spent in pre-trial custody and serving sentence after conviction. The longest sentence was 17 years' imprisonment which was being served concurrently with the one of 15 years'

imprisonment. If one took into account the fact the appellants may have been entitled to remission in addition to the period spent on remand they would be about to complete serving the said sentences.

8. Under Rule 32 (1) of the Rules of this court, this court may,

> 'so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

9. Pursuant to both rules 2 (2) and 32 (1) of the Rules of this court we are of the view that the justice of the case compels us not to order a re-trial but rather a stay of prosecution in relation to the facts of this case as against the appellants. To subject the appellants to fresh criminal proceedings would be a travesty of justice.

10. It has come as rather a rude shock to this court that the courts in this country can find themselves in this situation where a court file has such an essential document, a judgment, missing, in this day and age without any explanation whatsoever. We wish to draw the attention of the Chief Justice to this file with a view to taking corrective action to ensure that such a situation is not encountered again. We direct the Registrar of this court to forward to the Chief Justice a copy of this judgment.

11. The appeal in this case has been pending for 7 years. This inordinate delay is simply not justifiable. The people of this country and the appellants deserve better. The delay is egregious.

Dated, signed and delivered at Masaka this 13th day of June 2018

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal