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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 361 OF 2014

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA and Stephen Musota, JA)

NSIMBE GODFREY:.....APPELLANT

10

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of Hon. Justice Mike J. Chibita holden at Masaka High Court in Criminal Session Case No. 95 of 2009 delivered on 28/04/2009)

REASONS FOR THE JUDGMENT

15 The appellant was indicted, tried and convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act by the High Court at Masaka (Chibita, J as he then was) and he was sentenced to life imprisonment. Being dissatisfied with this decision, he appealed to this Court. On 14/6/2018 when the appeal was called for hearing, we found that there were missing parts of the record and as such the appeal
20 could not be ably argued by both counsel and neither would this Court be able to judicially re-evaluate the evidence and arrive at an appropriate decision.

As a result, we quashed the conviction, set aside the sentence and ordered for a re-trial because of the nature of the offence the appellant was indicted and convicted of and the manner in which it was executed. We reserved our reasons for the decision which we now
25 give below.

The facts as found by the trial Judge were that on 5/5/2009, the deceased Nakyanzi Maxensia was found lying dead in a pool of blood in her house in Misojo-Mateete, Sembabule District with her neck cut. The appellant who was her lover was arrested and he admitted in his charge and caution statement that he killed the deceased though during
30 the trial he retracted his statement. The prosecution set out to prove to court that indeed

5 it was the appellant who murdered the deceased on that fateful day by calling 8 witnesses.

The appellant gave an unsworn statement claiming that what he confessed to the Police Officer was not true as he only confessed to it due to the beatings he was subjected to for three days.

In light of the evidence on record, the learned trial Judge convicted the appellant and
10 sentenced him to life imprisonment. He then appealed to this Court on 4 grounds namely;

1. *The learned trial Judge erred in both law and fact to convict and sentence the appellant basing on a non-satisfactory evidence of blood stained clothes and which clothes were not tendered in as exhibits.*
2. *The learned trial Judge erred in both law and fact to convict and sentence the
15 appellant basing on the evidence of a foot mark which occasioned a miscarriage of justice.*
3. *The learned trial Judge erred in both law and fact to convict and sentence the appellant basing on the non-explained existence of two plates of food on table half eaten which occasioned a miscarriage of justice.*
- 20 4. *The learned trial Judge erred in both law and fact to convict and sentence the appellant basing only on prosecution evidence and ignoring defence evidence which occasioned a miscarriage of justice.*

At the hearing of this appeal, the appellant was represented by Ms. Kentaro Specioza on state brief while Ms. Akasa Amina, a State Attorney from the Office of the Director Public
25 Prosecutions represented the respondent.

Ms. Kentaro pointed out to this Court that there was a lot missing on the record of the lower court including the close of the prosecution case, the defence evidence, trial Judge's summing up to the assessors, the assessor's opinion and the allocutus.

Ms. Akasa conceded that vital parts of the record were missing and all efforts were made
30 to recover them but to no avail. She prayed to this Court to exercise its powers under Rule

5 32 of the Rules of this Court to order for a retrial taking into consideration the brutal manner in which the victim was murdered and the fact that the trial Judge sentenced the appellant to life imprisonment.

In rejoinder, Ms. Kentaro submitted that considering that some good time has passed, it may not be easy or yield any fruit in ordering a retrial because of the processes involved
10 of re-gathering evidence and witnesses which might take long. She prayed that the appellant be released since he was fully tried and the missing record is not his fault.

We listened to the submissions of both counsel and carefully reviewed the trial court proceedings and came to the conclusion that indeed there are vital missing parts of the record which could not enable counsel to ably argue this appeal and neither would this
15 Court be able to judicially re-evaluate the evidence and arrive at an appropriate decision. We accordingly quashed the appellant's conviction, set aside his sentence and ordered for a retrial.

An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon principles that
20 have been developed over time by the Courts: **See: Fatehali Manji vs R, [1966] EA 34**

In **Rev. Father Santos Wapokra vs Uganda, CACA No. 204 of 2012**, this Court stated a number of considerations to be taken before ordering a retrial. It stated thus;

*"The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the
25 discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and
30 inconvenience by reason of the retrial.*

5 *Other considerations are; where the original trial was illegal or defective, the rule
of the law that a man shall not be twice vexed for one and the same cause (Nemo
bis vexari debet pro eadem causa), where an accused was convicted of an offence
other than the one with which he was either charged or ought to have been
charged, strength of the prosecution case, the seriousness or otherwise of the
10 offence, whether the original trial was complex and prolonged, the expense of the
new trial to the accused, the fact that any criminal trial is an ordeal for the accused,
who should not suffer a second trial, unless the interests 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. See: ”*

15 However, a re-trial must not be used by the prosecution as an opportunity to lead evidence
that it had not led at the original trial and to take a stand different from that it took at the
original trial. The prosecution must not fill up gaps in its evidence that it originally produced
at the first trial: **(See: *Muyimbo vs R 1969 EA 433.*)** Similarly, a retrial is not to be ordered
merely because of insufficiency of evidence or where it will obviously result into an injustice
20 that is where it will deprive the accused/appellant of the chance of an acquittal: **(See:
M'kanake vs R [1973] EA 67.)**

In the instant case, counsel for the appellant contended that since some good time has
passed, ordering a retrial may not yield any fruit because of the processes involved of re-
gathering evidence and witnesses which might take long.

25 In ***Christopher Kasolo vs Uganda, SCCA No. 15/78*** the appellant and his co-accused
(William Semanda) were sentenced to death on 15th September 1978, having been
convicted of the offence of robbery. He appealed to the Supreme Court which heard the
appeal and its judgment on 8/1/1990. The court noted that the entire record of the High
Court was missing and appeared to be irretrievably lost. It also gave the general position
30 that a re-trial should be ordered where the Court of Appeal cannot re-evaluate the
evidence merely from the judgment. Therefore, the court quashed the appellant's

5 conviction, set aside his sentence and ordered for a retrial having taken into consideration the fact that the appellant had been convicted in 1978 and it was not known whether the witnesses were still available. The court also took into consideration the fact that the driver of the stolen vehicle had died from an outrageous assault upon him.

10 Guided by the above Supreme Court authority and the other authorities we have cited herein above, we find that though the factor of the length of time between the commission of the offence and the new trial should be considered, it does not limit a court of competent jurisdiction from exercising its discretion to order for a retrial.

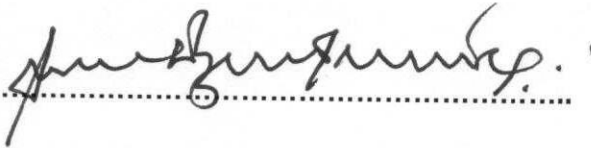
15 In the instant case, the offence of which the appellant was convicted is a grave one and it was executed in a brutal manner. In addition we take note of the age of the victim which was alleged to be 50 years and that of the appellant being about 31 years at the time the offence was committed and also the alleged relationship between the victim and appellant which from the court record was a love affair.

20 Having carefully considered the factors for and those against ordering a retrial as laid out in **Rev. Father Santos Wapokra vs Uganda(supra)** we find that the interest of justice will best be served by ordering a retrial of this case. Accordingly this appeal is allowed and we order as follows:

1. That the conviction be quashed and the sentence of life imprisonment be and is hereby set aside.
2. A retrial of the said case is hereby ordered.
- 25 3. We direct that the Assistant Registrar of this Court in charge of the Criminal Registry brings this matter to the immediate attention of the Resident Judge at Masaka so that the retrial is conducted in the next convenient criminal session.
- 30 4. The appellant shall continue to be kept in custody, subject to his right to apply for bail from the High Court at Masaka, and the said court in the exercise of its discretion may or may not release him on bail.

5 We so order.

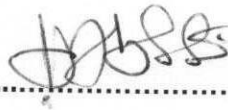
Dated at **Masaka** this 30th day of July.....2018



Hon. Justice F.M.S Egonda-Ntende

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JUSTICE OF APPEAL



Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL

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