

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 309 OF 2010**

**(Coram: Kiryabwire, Bamugemereire, JJA and Kasule,
Ag, JA)**

**(ARISING FROM HIGH COURT AT KAMPALA
CRIMINAL SESSION CASE NO. 43/2008)**

MUGISHA WILSON:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

JUDGMENT OF THE COURT

The Appellant lodged this appeal premised on only one ground namely;

“That the trial Court erred in law and fact when it failed to avail a certified copy of the trial court record of proceedings and judgment hence occasioning a miscarriage of justice upon the appellant”

BACKGROUND

The Appellant was indicted with the offence of murder c/s 188 and 189 of the Penal Code Act in a High Court criminal session case No. 43 of 2008 held at Kampala, was convicted and subsequently sentenced to 50 years' imprisonment by High Court Judge **(Byabakama. J) (as he then was)**, on the 2nd day of November 2010.

As far as the merits or demerits of this appeal are concerned, not much has been brought to this Court's attention. The record of proceedings of the trial Court disappeared without trace after Judgment had been delivered by the trial Court in this case. The Appellant subsequently lodged a Notice of Appeal against the High Court's decision of conviction and sentence.

The Appellant was however unable to secure the record of proceedings and the judgment against him from the High Court. He, through a litany of correspondences which this Court has been able to examine, requested for the Court proceedings to enable him pursue this appeal in accordance with the Court's Rules but was unable to secure them. The High Court in fact confirmed the total loss of the trial Court record of proceedings, after which confirmation, the Appellant then lodged a Memorandum of Appeal whose sole ground was the trial Court's failure to provide him with the trial record of proceedings to enable him pursue his appeal.

LEGAL REPRESENTATION

At the hearing, the appellant was represented by learned counsel Brian Mwogi on State brief, while the learned State Attorney Sherifa Nalwanga was for the respondent.

APPELLANT'S SUBMISSIONS

The Appellant's Counsel submitted that a trial court is obliged to keep a proper record of trial proceedings. It is the duty of the trial Court to serve a copy of the record of proceedings on the appellant and also to transmit the same to the appellate court. He contended that the right to a fair hearing also includes the right to appeal and therefore this right should not be frustrated by the State's failure to avail to him and the appellate Court with the trial Court record of proceedings.

The appellant's Counsel referred to this Court's decision in **Tuuni Stephen & Another Vs. Uganda, Court of Appeal Criminal Appeal No. 190 of 2011**. Therein, an appellant had been convicted on two counts of aggravated robbery and sentenced to 15 years and 17 years imprisonment respectively on each count by the High Court. Upon lodging an appeal, the High Court did not provide the record of proceedings. This Court discharged and set the appellant free. Learned Appellant's Counsel implored us to follow this decision and set the appellant free.

Appellant's Counsel also relied upon the persuasive decision of the Supreme Court of Ghana; **John Bonuah Vs. R; Criminal Appeal No. J3/1/2015** and another by

the Court of Appeal of Kenya; **John Karanja Wainaina Vs. R; Criminal Appeal No. 61/1993 (unreported)**. In both these decisions, a retrial was ordered by Court. The Appellant prayed that this Court distinguishes these cases from this particular one of his case and set him free as this Court had previously done in **Tuuni Stephen & Another Vs. Uganda (Supra)**

RESPONDENT'S SUBMISSIONS.

Preliminary Point of Law

The Respondent's learned Counsel raised a preliminary point of law that there is no substantive appeal before this Court. An appeal can only be properly brought before Court when the same is filed in time or, if the time had elapsed, then upon this Court granting leave for extension of time. **Section 28(1) of the Criminal Procedure Code Act Cap 116** required the Appellant to lodge his notice of appeal within 14 days from the date of judgment. The appellant had been convicted and sentenced in a Judgment dated 2nd November 2010. He lodged his notice of Appeal on the 14th of December 2010, 28 days after the conviction and sentencing. The appellant never applied for extension of time within which to appeal. The appellant therefore had no valid appeal in this Court, having lodged

his Notice of Appeal outside the mandatory period of 14 days.

Appellant's Counsel by way of response, argued that this preliminary objection was merely academic and for moot purposes. The application for extension of time can only be made and granted upon the Applicant satisfying Court that there are sufficient grounds for the grant of the application. In the case of the appellant, there is no way such an application could be made without a proper record of Court proceedings from the trial Court. Even if such an application had been granted, it would only be a wastage of Court's time since there was no record of Court proceedings from the trial Court and therefore an appeal would still not have been lodged. Appellant's Counsel prayed for substantive justice to be done under **Article 126(2)(e) of the Constitution**, by this Court allowing the appeal.

RESPONDENT'S SUBMISSIONS ON THE MERITS OF THE APPEAL

Counsel for the Respondent conceded to the loss of the record of Court proceedings of the trial Court and the fact that the appellant prayed to be supplied with the same but without success.

Learned Counsel for the respondent however maintained that the loss of the trial Court record does not take away the fact that the Appellant currently is not presumed innocent. A criminal trial was conducted and the Appellant had been proved beyond reasonable doubt to be guilty and had been duly sentenced. Therefore, in the respondent's view, the appellant having been found by a Court of law to be guilty, should not get off the hook just because the trial Court record went missing.

Respondent's learned Counsel however conceded that indeed in no circumstances should a record of Court proceedings at trial go missing especially when there is an intention to appeal against the trial Court decision. Learned Counsel however, was of the view that setting a convict sentenced to 50 years free after serving just only 10 of those 50 years on the basis of the missing Court record of the trial Court proceedings would be rather too generous of this Court. The State prayed this Court to order a retrial instead.

Learned Counsel for the respondent invited this Court to balance both the rights of the Appellant and those of the State and the victims of the crime committed by the appellant. Counsel implored this Court not to set a precedent that may be used to abuse the Court process of

letting free those convicted of grave crimes, like the appellant is, on the mere ground that the Court record of the Trial proceedings went missing. The Respondent's Counsel referred to a number of decisions in which a retrial was ordered on the ground that the Court record of trial proceedings had gone missing. These included; **Rev. Father Santos Wapoka Vs. Uganda, Court of Appeal Criminal Appeal No. 204 of 2012; Mugaya Isabirye James Vs. Uganda, Court of Appeal Criminal Appeal No. 872 of 2014; and Bongomin Kennedy Vs. Uganda, Court of Appeal Criminal Appeal No. 533 of 2014.**

CONSIDERATION OF THIS APPEAL

In resolving this appeal, we shall first resolve the preliminary point of law raised by Counsel for the respondent. Respondent's Counsel sought this Appeal to be dismissed or struck out because the notice of appeal had been filed out of time without leave of this Court. It is a fact that is not disputed that the Appellant was convicted and sentenced on the 2nd of November, 2010 and he filed in Court the Notice of Appeal on the 14th day of December 2010, almost 28 days out of time. **Section 28(1) of the Criminal Procedure Code Act, Cap 116** required the Appellant to lodge his Notice of Appeal within 14 days of

the date of judgment or order from which the appeal was preferred. This section provides that: -

“28Notice of appeal.

1. ***Every appeal shall be commenced by a notice in writing which shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the registrar within fourteen days of the date of judgment or order from which the appeal is preferred.”***

Appellant’s Counsel in his submission in reply to the preliminary point of law referred to the same as a mere moot with no practical relevance to the matter. He argued that an application for extension of time to file a notice of appeal would have been of no legal consequence with the entire Court record of proceedings as well as the judgment therein missing. Learned Counsel further submitted that even if the application was made and an order granting leave to file the Notice of Appeal out of time had been issued by Court, no appeal would have been filed due to the lack of the record of Court proceedings.

This Court does not agree with the Appellant that he could not file a notice of appeal within the required time because of the missing Court record of Court proceedings from the

trial High Court. Filing a notice of appeal does not require one to attach such a record of proceedings.

The above notwithstanding, this Court is inclined to believe the Appellant that the loss of the Court record could have impeded him from applying for leave to file a notice of appeal out of time. An application for leave to file a notice of appeal out of time requires an applicant to be in a position of lodging a memorandum of appeal. In fact, the application for leave might in practice be made concurrently with the lodging of the appeal itself, which appeal would require a record of proceedings from the lower Court.

The Appellant's case is one that requires the invocation of **Article 126(2) (e) of the Constitution** that substantive justice shall be administered without undue regard to technicalities. Where neither the Appellant nor the Respondent can be blamed for the failure to adhere to procedural technicalities, this Court should not use the irregularity to the detriment of the other party. This Court hereby extends the period of time within which the Notice of Appeal was lodged so that the said Notice of Appeal is legitimate for the purpose of this Appeal. The Respondent's preliminary objection is thus hereby

overruled. This Court will go ahead and determine the appeal on its own merits.

The Appellant prayed of this court to set him free because he could not enjoy his right to appeal against the conviction and sentence of the High Court with the record of the trial High Court proceedings missing. It was contended for the Appellant that the right to a fair hearing included the right to appeal against a conviction and that this right should not be denied to him. The Respondent, on the other hand, prayed this Court to balance the rights of the Appellant with the fact that the State had successfully proved beyond reasonable doubt the Appellant's guilt when he was tried and convicted.

Rule 32(1) of the Rules of this Court empowers this Court to;

“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.”

This is not the first occasion this Court is encountering a case of this nature. In **Tuuni Stephen & another Vs. Uganda (Supra)**, the Appellant in that appeal successfully

convinced this Court to set him free. He had been convicted on two counts of aggravated robbery and sentenced to 15 and 17 years imprisonment respectively on each count by the High Court. It should be noted that **Tuuni Steven** case (supra) is distinguishable from the facts presented before us in this appeal that therein the Appellant had served almost three quarters of the sentence when his appeal came up for hearing and it transpired that the trial Court record of proceedings had gone missing. In this appeal however, the Appellant has only served approximately 10 out of the 50 years sentence that was passed against him. That is merely just less than a quarter of the sentence.

The appeal Court observed in **Tuuni Stephen & Another Vs. Uganda (Supra)** that: -

“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.”

Considering that the Appellant in this appeal has served only approximately 10 out of 50 years of the sentence, we agree with Counsel for the respondent that this is a matter that requires a re-trial as opposed to setting the appellant free.

We accordingly, set aside the conviction and sentence of 50 years imprisonment of the appellant for the offence of murder c/s 188 and 189 on the ground that the trial Court record of High Court at Kampala Criminal case No. 43 of 2008 went missing. We order for a retrial of the appellant before the High Court for the same offence of murder c/s 188 and 189 of the Penal Code Act.

The appellant shall remain in Prison custody pending the re-institution of the re-trial proceedings and it shall be the Court conducting the re-trial to entertain any application for bail by the accused, now appellant.

Before we take leave of this appeal, we express our great disappointment to the fact that all the Court proceedings of the trial in this case went missing without a trace. There must be an evil hand of corruption behind this.

We accordingly direct that a copy of this Judgment be passed over to His Lordship, The Principal Judge as head of the High Court for a thorough investigation and disciplinary action taken against whoever is found to have been responsible for the disappearance of the Court record. This Judgment should also be copied to all Registrars throughout this country.

It is also directed that a copy of this Judgment be passed on to the DPP to take steps to ensure the re-trial of the appellant takes place as quickly as possible.

The High Court Registrar is hereby directed to fix this matter for re-trial as soon as it is possible after due consultations with the Director of Public Prosecutions.

We so order.

Dated at Kampala this..... day of2021.



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Geoffrey Kiryabwire

Justice of Appeal



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Bamugemereire Catherine

Justice of Appeal



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Remmy Kasule

Ag. Justice of Appeal

20/07/2021