THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL No.300 of 2010

CORAM: HON. MR. JUSTICE EGONDA-NTENDE JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA JA

SAMUEL KAYE ..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court sitting at Luwero before Benjamin Kabiito J dated 9th November 2010 in High Court Criminal Session Case No. 111 of 2009)

JUDGMENT OF COURT

Background

The Appellant was Topista Nakanyike's nephew with whom he shared a boundary on a Kibanja in Munyolwe Village, Nakaseke District. The Appellant and the deceased had wrangled over the ownership of the Kibanja for some time and had an estranged relationship.

On or about the 1st day of April 2019, the Appellant and his wife went to the village for a visit and spent a night in a house on the disputed Kibanja. Having spoken to Robinah Nadamba, (the deceased's sister) about the possibility of an amicable settlement of the long dispute, she took them to the deceased residence in a bid to settle the dispute. Upon arrival, Robina called out the deceased to come and discuss the land matter. The deceased who was in the garden across her house replied that she was coming.

When the Appellant and the people he was with heard her voice, they followed her to the garden where she responded from. It is alleged that on seeing them the deceased tried to run away from them, but the

appellants restrained her and a fight ensued. It cannot be explained how a meeting which was meant to be conciliatory became a murder scene. A bewildered Robina, on realising that the deceased was getting overpowered ran while raising an alarm and crying out for help.

Upon return, Robina found the deceased lying in a pool of blood in her banana plantation. The deceased was beaten on the chin, and some teeth fell out. Robina reported the incident to the police. A medical doctor who later came to the scene confirmed that Toepista died on the scene.

Kaye was arrested and indicted for Murder. The Trial Judge found the Appellant guilty and sentenced him to 30 years imprisonment. From the court records available, the Judgment upon which the Judge based to convict the Appellant has never been found. As a result, the Appellant appealed against the Judgment on only one ground:

1. **That the Trial Court erred in law and fact when he failed to provide a certified copy of the Judgement to the Appellant hence occasioning a gross miscarriage of Justice.**

When the notice of Appeal was filed in this Court,registrar, Court of Appeal, wrote to the deputy Registrar High Court Criminal Division to request for the missing Judgement on the record. On 19th September 2019, the Deputy Registrar Criminal Division wrote back informing him that the trial Judge had confirmed that he left the Judgment on court file. It was never availed.

In February 2020 the Deputy Registrar of the Court of Appeal wrote a follow-up letter also requesting for the Judgment. The Deputy Registrar criminal division wrote back forwarding the record of proceedings but with the Judgment missing.

Representation

Mr. Henry Kunya appeared for the Appellant while Ms Vicky Nabisenke, Assistant DPP, appeared for the Director of Public Prosecutions, the Respondent.

Submission of the Appellants

Mr. Kunya for the Appellant submitted that the current state of affairs makes it challenging to pursue a proper Appeal based on an incomplete record. He contended that having spent one year and seven months on remand before Judgment and another ten years six months awaiting the hearing of the instant Appeal, totalling 12 years one month under incarceration, the interest of Justice would not be met if an order for retrial is sought and granted. In conclusion, Counsel invited this Court to grant an order of immediate release of the Appellant.

Respondent's Reply

The Respondent opposed the Appeal and averred that the Appellant is a convict, no longer a suspect who enjoys the presumption of innocence. Counsel for the Respondent noted that a competent court had convicted the appellant upon evidence which was still on record. It was the duty of this Court to review the evidence and subject it to fresh scrutiny. Counsel argued that for Court to decide the lack of records in favor of a convict is to give him the benefit of the doubt which he no longer legally enjoys, and this amounts to visiting the wrong/ shortcomings of the Court onto the state and the public/victims of crime whom the office of the DPP represents. She asked the Court to make a decision that meets the ends of Justice for all.

Consideration of the Appeal.

This Appeal, no doubt, raises a serious question of procedure. The fact conceded to by the Registrar Crime, in his letter dated 28th May 2021 was that the written Judgment in this case is irretrievably lost making it

impossible for the Appellant to pursue their Constitutional right to appeal.

We have cautiously considered and pondered over the course of action a court should take when faced with the scenario of loss of vital court documents on or before appeal, including Judgments. On the one hand the incidents of loss of files or absence of Judgments and vital documents should not be visited on the Appellant. On the other hand an appellant should not benefit from his own wrong should there be evidence of collusion of the Appellant in the loss of vital court documents. Given the circumstances surrounding the case this court has either ordered a retrial see **Ephraim Mwesigwa Kamugwa v The Management Committee of Nyamirima Primary School (Court of Appeal Civil Appeal No.101 of 2011)** or quashed the lower court decision. The decision of this Court in the case of **Tuuni Stephen Another v Uganda Court of Appeal Criminal Appeal No.190 of 2011** where the point in issue, as in the instant case related to a missing Judgement.

This Court noted that:

> *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.*
>
> *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.

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 retrial 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.

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.

In the instant case, Learned Counsel for the Respondent invited this court to arrive at its own decision based on the available evidence or to order a fresh trial altogether. **Tuuni** [Supra] was instructive for the proposition that the interest of Justice would not be met if an order for retrial was made in circumstances where an appellant appeared to be suffering the full brunt of the administrative flaws. The Appellant has 12 years in incarceration. A retrial in this case may not advisable given the passage of time which could lead to eroded memory of the witnesses, and the quality of their evidence being compromised and or biased, fostering further injustice. This Court found in **Tuuni Supra**, that the delay caused by loss of vital court records is unjustifiable, and the Appellants indeed deserved better from the justice system.

We find that the Judgment which would have been the basis of appeal in this case is irretrievably lost, and the hearing of the Appellant's Appeal has been inordinately delayed for over ten years. This court concludes that failure to keep records leading to injustice is not the appellant's fault. The conviction and sentence against the Appellant are with set aside.

The Appellant is forth with discharged unless held on other lawful grounds

In the premise, this Appeal succeeds.

Signed this ..... 24th ..... day of ..... August 2021

Hon. Justice Fredrick Egonda-Ntende,

Justice of Appeal

Hon. Justice Catherine Bamugemereire,

Justice of Appeal

Hon. Justice Christopher Madrama,

Justice of Appeal