THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT ARUA

[Coram: Barishaki, Mugenyi & Gashirabake, JJA]

CRIMINAL APPEAL NO. 004 OF 2019

(Arising from Criminal Case No. 139 of 2018)

BETWEEN

BAKO BEATRICE..... APPELLANT

AND

UGANDA ..... RESPONDENT.

[Arising from the decision of OYUKO ANTHONY OJOK, J of the High Court of Uganda sitting at Arua in Criminal Session Case No.0132 of 2012 dated 10th December 2018]

JUDGMENT OF COURT.

Introduction.

The Appellant Bako Beatrice and one called ANGUYO KIZITO alias NGU were indicted on two counts. The first court is of Murder Contrary to Section 188 and 189 of the Penal Code Act Cap 120 laws of Uganda. In the particulars it is alleged that Anguyo Kizito alias Ngu and Bako Beatrice on the night between 26th and 27th day of December 2014 at Abinyu village Lumila parish in Maracha District with malice aforethought caused the death of EDODO BAKER.

The second count is Conspiracy to commit a felony contrary to Section 390 of the Penal Code Act, Cap 120 Laws of Uganda. In the particular it is alleged that Anguyo Kizito alias Ngu and Bako Beatrice on the night between 26th and 27th day of December 2014 at Abinyu Village, Lumila Parish in Maracha District conspired together unlawfully kill EDODI BAKER.

Background

It is alleged that on the 27th day of December at around 6:30 pm the deceased went to Okookoro Trading Centre in Maracha District for leisure and remained there with his brothers and other people, including A2 until 9:00pm when he reportedly left to meet a friend with whom he had an appointment at around 10:00pm.

After the deceased had left it was realised that the slippers for A2 were missing and the deceased was suspected to have gone with them which reportedly did not please A1 who is a brother to A2 who was also present at the trading centre. A1 offered his phone to be used by the brother of the deceased one Asindu Milton PW4 to confirm from the deceased if indeed he went with the slippers. That the deceased confirmed on phone to PW4 that he indeed when with the slippers. A1 reportedly got more annoyed and demanded that A2 escorts him to go and receive the slippers from the deceased and that they immediately left.

The following morning the deceased was found lying dead by the road side at Lumila near the church. The Police was immediately informed and the news reached the surrounding community who identified the body. When the brothers of the deceased who were with him at the Trading centre the previous evening confirmed that it was their brother who was dead, they immediately linked A1 and A2 to the Murder because the accused persons were the only last known people who followed him with anger because of the issue of the slippers and A1 vowed that if the slippers were not found someone would die.

The accused persons who were related to the deceased both immediately disappeared from the village the day following his death for over a period of a month and strangely never attended his burial and they resurfaced almost at around the same time both were arrested and charged accordingly. The post mortem carried on the body of the deceased found that the deceased died due to fracture of the cervical vertebrate.

The accused persons were indicted on two counts, they denied the offences and pleaded not guilty, raised the defence of Alibi that they never followed the deceased and immediately after leaving the Trading centre they went to their various homes.

A1 escaped from prison and the trial proceeded against A2 alone. She was found guilty under the doctrine of having common intention with A1 convicted and sentenced to 40 years' imprisonment.

The Appellant being dissatisfied and aggrieved with the decision and judgment of the Trial Judge Hon. Justice Oyuko Anthony Ojok Resident Judge of the High Court of Uganda at Arua delivered on the 10th Day of December, 2018 now appeals to this honourable Court against conviction and sentence on the following Grounds that:

1. The trial had major procedural irregularities which rendered it a nullity or mis- trial to prejudice of the Appellant.
2. The learned trail judge erred in law and fact to rely on insufficient circumstantial evidence thereby making an erroneous decision to convict the Appellant.
3. The learned trial judge misdirected himself in applying the doctrine of common intention to convict the Appellant thereby occasioning miscarriage of justice.
4. The trial judge erred in law and fact to pass a manifestly harsh and excessive.

Representation

The Appellant was represented by Mr. Madira Jimmy. The Respondent was represented by Partick Omia and Anne Kasajingu.

Submissions of Counsel for the Appellant.

Ground 1.

Counsel for the Appellant submitted that there was no judgment on record. The law that governs trial of criminal cases on Indictment before the High Court is the Trial

on Indictment Act Cap 23 laws of Uganda Section 86(1) of the Trial on indictments Act provides for contents of Judgment to wit:

> "every judgment delivered under Section 85 shall be written b or reduced to writing under the personal direction and superintendence of the judge in the language of court, and shall contain the point or points for the determination, the decision on it and the reasons for the decision and shall be dated and signed by such presiding judge as on the date on which it is pronounce in open court."

Counsel submitted that the record of proceedings defies logic to be called a judgment. It is not signed and nor dated by the Trial judge nor does it contain a decision of court and or reasons for the decision. There are no points of law, facts argued and or issues framed for determination and no final decision. It appears to be a continuation of the submissions of the learned Defence Counsel.

Counsel submitted that there is no conviction as required under **Section 86 (3)** of the **Trial on Indictments Act, Cap 23** which provides that in the case of a conviction, the judgment shall specify the offence of which and the section of the written law under which the accused person is convicted. This requirement is coached in mandatory terms.

Counsel submitted that the trial judge should have entered and recorded a conviction clearly, specifying the offence and section of the law under which the Appellant is convicted.

Counsel also submitted that the learned State Attorney attempted to drop count two in his submissions but this was irregular because he did it without leave of court as the law under Article 120 (3) (d) of the 1995 Constitution of Uganda only vests the power to do so in the Director of Public Prosecutions. The court rightly ignored the submissions to drop count two and the Trial judge never recorded the finding on record as to whether court accepted it or not and it is our considered view that Count two was not dropped and it still forms part of the indictment and we submit so.

Counsel cited **Karim Bagenda and 3 others vs. Uganda, SCCA No. of 1994,** where the Supreme Court held that failure to enter a conviction was a serious irregularity which cannot be cured by giving reasons later.

Submissions of counsel for the Respondent.

Counsel conceded with the submissions of counsel for the Appellant that there is no judgment on record of Appeal. Counsel submitted that it is not certain whether a judgement was delivered as none of these provisions were complied with and what offence the Appellant was convicted of that led to being sentenced and committed in prison.

Additionally, Counsel submitted that there are no notes by the Trial judge on summing up to the Assessors. In addition to this no judgment. This indicates that the law and evidence were not summed up for the Assessors which is a non-compliance of the mandatory provisions of section 82(1) of the Trial on indictments Act. Counsel cited **Adiga Johnson David vs. Uganda, Court of Appeal Criminal Appeal No. 0157 of 2010 (2021)**, where it was held that the provision that is section 82(1) is coached in mandatory terms and that the failure of the learned trial judge to adhere to it rendered the trial a nullity and thus occasioned a miscarriage of justice.

Counsel submitted that in light of the circumstances, it follows that the trial being a nullity and there being no judgment on the record there is no basis on which grounds 2,3 and 4 can be argued. Counsel prayed that this honourable court shall be pleased to order a retrial under Rule (1) of the Judicature (Court of Appeal Rules) Directions. Counsel submitted that with regard to the prayer of a retrial, we submit that this will ensure that the cause of justice is served, counsel cited **Rev. father Santos Wapokra vs. Uganda, CACA No. 204 of 2012**. Counsel further submitted that ordering a retrial will not cause a miscarriage to the Appellant.

Submissions in rejoinder

Counsel for the Appellant objected to the proposal of a retrial and submitted that before court orders for a retrial, the court handling the case must address itself to the rule of law that a man shall not be tried twice vexed for one and the same cause.

Counsel cited **Rev. Father Santos Wapokra vs. Uganda CACA No. 204 of 2012,** where the justices cited **Fatehali Manji v. R (1966) EA 343**, where court held that a retrial is a s a result of the judicious exercise of court's discretion, thus this discretion must be exercised with great care and not randomly but upon principles that have been developed overtime by the courts.

Counsel further submitted that the prosecution case against the Appellant is very weak and based on circumstantial evidence and there is high likely hood of a delay in the event that a retrial is ordered.

Consideration of Court

We have carefully considered the record of appeal, the submissions of Counsel and law relating to the matter before us. We appreciate the fact that both counsel have not wasted courts time by conceding that it is not necessary to consider the other grounds of appeal since they are all affected by the outcome of the first ground.

In resolving the issues raised in this appeal, this court is mindful of its duty as the first appellate court to re-evaluate the evidence presented before the trial court to reach its own conclusion. See **Pandya vs. R (1957) E.A and Kifamunte Henry vs. Uganda SCCA No.10 (1997)**

It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court. This obligation to reappraise the evidence is founded in common law rather than rules of procedure. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. Although in case of conflicting evidence, the appeal court has to make

due allowance for the fact that it has neither seen nor heard the witnesses. See **Fr. Narsensio Begumisa and 3 other vs. Eric Kibebaga, SCCA No.17 of 2002.**

The Appellant raised four grounds of appeal, however in the submissions counsel for the Appellant conceded to the submissions of the Respondent that there was no basis for court to resolve the other grounds. This therefore leaves this court with one ground to consider that has been simplified by the submissions of both counsel.

It is the provision of the law under **Section 86 (1) of the Trial on indictment Act Cap 23** of Uganda that:

> "Every judgment delivered under section 85 shall be written by, or reduced to writing under the personal direction and superintendence of, the judge in the language of the court, and shall contain the point or points for determination, the decision on it and the reason for the decision and shall be dated and signed by such presiding judge as on the date on which it is pronounced in open court"

It is the requirement under the above section of the law that the judgment must be:

1. Reduced into writing under the personal direction and superintendence of the judge;
2. It has to be in the language of court;
3. Shall contain the points of determination
4. The decision on it and the reasons for the decision.
5. Dated and signed

According to the record of Appeal there was no judgment as required by the above provision of the Trial on indictment Act Cap 23. What appears on the record of appeal page 29 is as follows:

"conceded the 1st 3 ingredient

Participation

- 1st people who saw Edodi was A1 and A2

- Followed and you got your slippers
- A2 is related to deceased
- Never attended the burial
- Not at home
- Common intention with a1

Convict

5 witnesses

Guilty as indicted

State: Record of previous

- Convictions
- Died at the age 23 years
- Unlawful
- Family man
- Death

Mitigation:

- Single mother
- Leniency
- Remand 3 years and 2 months
- 1st offender"

When a matter is brought before court, the purpose is for court is to adjudicate over the matter and then determine the rights of the parties by writing down the judgement. A Judgment may be defined as a reasoned pronouncement by a judge on a disputed legal question which has been argued before him.

Black's Law Dictionary, 9th Ed. West Publishing Company. 2009, defines a judgment as;

> "A court's final determination of the rights and obligations of the parties in a case. The term judgment includes an equitable decree and any order from which an appeal lies."

There are very many reasons why it is important for a judge to write down their judgment. Written decisions assure the public that justice is being served and the judges' decision is not just out of emotions or ill will. Further still, it through written judgments that provide findings of fact and legal reasoning that a higher court might consider on appeal.

The process of reasoning by which the court comes to the ultimate conclusion and decrees the suit should be reflected clearly in the judgment.

Judgment is the most important document for the parties as well as the Judge and more important for the Judge are the reasons in support of his/ her judgment. Judges write decisions for many reasons. The primary purpose of judgment writing is to tell the litigants why the case was decided the way it was. A judgment should show why the judge considered some facts more important than others and how the judge's applied law to fact. A judgment should also show the litigants that the judge considered their positions and that justice was rendered.

A clearly expressed judgment demonstrates the interest of the subject and the exposition of legal reasoning. Reasons given by a judge in a judgment indicate the working of his/ her mind, approach his/ her grasp of the question of fact and law involved in the case and the depth of his knowledge of law. The supreme requirement of a good judgment is reason. The weight of a judgment, its binding character or its persuasive character depends on the presentation and articulation of reasons. Reason, therefore, is the soul and spirit of a good judgment. We are persuaded by the decision of the Indian Supreme Court in **K.V. Rami Reddy v. Prema (2009) 17 SCC 308,**

> "The declaration by a Judge of his intentions of what his judgment is going to be, or a declaration of his intention of what the final result it is going to embody, is not a judgment until he had crystallized his intentions into a formal shape and pronounced it in open court as the

> final expression of his mind. (Para 12) The CPC does not envisage the writing of a judgment after deciding the case by an oral judgment and it must not be resorted to and it would be against public policy to ascertain by evidence alone what the „judgment" of the Court was, where the final result was announced orally but the judgment as defined in the CPC embodying a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, was finalized later on."

It is therefore our finding for the trial court not to write a judgement he failed in rendering justice. A judge renders justice through his decisions. The decision-making culminating in the judgment is the heart and soul of the judicial process. Failure to adhere to this whole process rendered the whole process a nullity that leads to a retrial.

A retrial is ordered in very rear circumstances, foristance where there the original trial was null and defective, and where the other party would not suffer an injustice.

In Luwaga **Suleman Alia Katongole vs. Uganda Court of Appeal Criminal Appeal No. 858 of 2014,** Court of Appeal held that:

> ""In general a retrial will be ordered only when the original trial was illegal or defective; it will not he ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it. Sec Fatehali Manji v The Republic [1966] 1 EA 343.
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> In Rev. Father Santos Wapokra V Uganda, Court of Appeal Criminal Appeal No.204 of 2012, this Court stated as follows;

"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 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 inconvenience by reason of the retrial. Other considerations are; where the original trial was illegal or defective, the rule of 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 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. "

In the instant case, and having found that the Plea Bargain Agreement was defective, we find that the interest of justice will best be served by ordering a retrial in the following terms."

Guided by the above authority, a retrial is necessary for the cause of justice to be done in this matter. It is grossly irregular that the judge did not make a pronouncement on the matters before him. The Appellant objected to a retrial arguing that it would be against the principle of double jeopardy, however we disagree with that argument because before a judgment is pronounced it cannot be double jeopardy. In this matter what appeared to be a judgment does not make mention of the offence convicted, what reason for the conviction, facts of the case

etc. the whole process was irregular. It is therefore our considered opinion that there is a retrial of this matter in the nearest session possible.

The Registrar of this Court is directed to bring this matter to the immediate attention of the Resident Judge at Arua so that a retrial is conducted in the next convenient criminal session taking into consideration the fact that justice delayed is justice denied.

We therefore order that:

1. Conviction and sentence be set aside
2. Retrial in the nearest session possible in the interest of justice.

We so hold.

Dated at Arua this 28th **of** April **2023**

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BARISHAKI CHEBORION

JUSTICE OF APPEAL

.....

MONICA MUGENYI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL