THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0470 OF 2015

(Coram: Obura, Bamugemereire & Madrama, JJA)

OBIRAI ANDREW FRANCIS} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti in Criminal Session Case No. 0039 of 2014 before Batema, J delivered on 9th day of March 2018)

JUDGMENT OF THE COURT

The appellant was charged with the offence of murder contrary to section 188 and 189 of the Penal Code Act. The particulars were that the appellant on the 8th day of September 2013 at Soroti Senior Quarters Soroti district with malice aforethought caused the death of Atim Dorothy.

The appellant was tried and convicted as charged whereupon he was sentenced to 35 years' imprisonment on 9th March 2018. The appellant was aggrieved by both the conviction and sentence and appealed to this court initially on 5 grounds and later with leave of court on 12 grounds of appeal against his conviction and sentence, namely:

1. That the learned trial judge erred in law in denying the appellant a fair trial in violation of the constitution of the Republic of Uganda 1995(as amended) thus occasioning a miscarriage of justice to the appellant.

2. The learned trail judge conducted the trial of the appellant that was riddled by grave procedural errors and irregularities thereby causing failure of justice to the appellant.

3. The learned trial judge erred in law and fact when he relied on the uncorroborated dying declaration which fell below the required

standard of proof to convict the appellant occasioning a miscarriage of justice.

4. The learned trial judge erred in law and fact when he failed to properly evaluate the circumstantial evidence on court record and as a result came to a wrong conclusion that the appellant was placed at the scene of the crime whereas not.

5. The learned trial judge erred in law and fact when he convicted the appellant without following the law governing the assessor's' participation in the trial proceedings thereby causing a miscarriage of justice.

6. The appellant did not receive effective assistance of defence counsel that caused a miscarriage of justice.

7. The learned trial judge erred in law to hold that the appellant was guilty whereas he found out that the prosecution of the appellant was mounted and conducted in the breach of the law.

8. The learned trial judge erred in law and fact when he failed to draw an adverse inference in the prosecution's failure to call three material witnesses.

9. The learned trial judge erred in law and fact when he did not give an order of release of the appellants' motor vehicle Toyota RAV4 Registration No. UAR 809W.

10. The learned trial judge erred in law and fact when he convicted the appellant on the offence of murder when the post-mortem report was vague as to the cause of death of the victim leading to a failure of justice.

11. The learned trial judge erred in law and fact in sentencing the appellant to an illegal, harsh and excessive sentence in the obtaining circumstances of the case.

12. In the alternative, that the trial court erred in law and fact to deny the appellant a fair appeal hearing when it failed to forward a complete accurate court record of the case.

The appellant prayed that the appeal be allowed and the conviction be quashed and sentence set aside. In the alternative, that a lenient sentence between 10 -15 years be substituted.

Representation

At the hearing of the Appeal, learned counsel Mr. Napa Geoffrey appearing on state brief for the appellant informed court that the appellant had exercised his constitutional right to self-represent himself and the same was confirmed by court. The appellant was present in court and represented himself. The respondent was represented by the learned Assistant DPP Mr. Ssemalemba Simon Peter. The court was addressed in written submissions by the appellant and counsel for the respondent and the appeal was adjourned for judgment on notice.

The appellant submitted on all the grounds of appeal and in ground 5 raised the issue of nullity of the proceedings which we shall consider first as it goes to jurisdiction as to whether the judgment leading to the other grounds is valid.

Submissions of the appellant on ground 5;

The appellant submitted that the two assessors who participated were never sworn in as required by the law under section 67 of the Trial on Indictment Act. Secondly, that the trial judge did not record the particulars of the assessors to confirm that they were eligible as provided by Sec. 3 of Trial on Indictment Act. Further, the appellant and his counsel were not asked if they had any objections to the assessors as required by section 68

Trial on Indictment Act and that this irregularity goes to the jurisdiction of the trial.

The appellant further submitted that on the 20/4/2017 assessors were parachuted into the trial by the judge to take part in a trial that started in their absence. However, the assessors kept absenting themselves during trial and would appear as they would deem fit contrary to Section 68 of Trial on Indictment Act and were allowed by the judge to continue taking part in the trial.

The appellant further submitted that the assessors did not give their opinion contrary to Section 67 of Trial on Indictment Act and that this affected the legality of the appellant's trial. The appellant submitted that the irregularities rendered the trial a nullity and relied on **Okao Jimmy Alias Baby & 4 ors vs. Uganda; CACA No. 55** and **Alenyo Marks vs. Uganda; SCCA No. 08 of 2007** to the effect of a trial without participation of assessors.

The appellant concluded that it was illegal for the trial to proceed without trial assessors.

Reply of the respondent's counsel to ground 5.

In reply to ground 5 of the appeal, the respondents counsel submitted that although the typed record of proceedings does not show that the assessors gave their opinions it is clear from the handwritten record (pages 281-286) that the learned trial Judge duly summed up the law and evidence to the assessors and they gave their opinions.

The respondent's counsel conceded in his submissions that the record of proceedings does not show that the assessors were sworn in at the beginning of the trial. They submitted that this irregularity was not fatal to the proceedings and did not occasion a miscarriage of justice to the appellant.

The respondent's Counsel relied on section 139 of the Trial on Indictments Act for the proposition that the sentence shall not be reversed on appeal on

account of any error, omission, irregularity or misdirection unless it caused a miscarriage of justice. Section 139 of the TIA provides that:

> 139. Reversibility or alteration of finding, sentence or order by reason of error, etc.
>
> (1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.
>
> (2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

The respondent's counsel also relied on Article 126(2) (e) of the Constitution 1995 as amended which provides that; "substantive justice shall be administered without undue to regard to technicalities".

In the premises, the respondent's counsel submitted that failure of the assessors to be sworn in was an omission which did not cause a miscarriage of justice to the appellant. Be that as it may, they submitted that it is evident from the proceedings that the appellant was represented by counsel from the beginning of the trial and neither his counsel nor the appellant objected to the said irregularity and omission.

In the premises, the respondents counsel prayed that this Honorable Court dismisses the appellants' appeal in totality and upholds the sentence of 35 years' imprisonment imposed by the High Court.

Resolution of ground 5 of appeal

We have carefully considered ground 5 of the memorandum of appeal which discloses a point of law, the submissions of the appellant who represented himself, as well as the submissions in reply of the respondent's counsel. We have taken into account the authorities cited and have considered other

precedents on irregularities in trial with assessors. To establish what happened we have studied the record.

As a first appeal from the decision of the High Court in the exercise of its original jurisdiction our duty as set out in Rule 30 of the Rules of this court is to retry the case by subjecting the typed record of the evidence to fresh scrutiny and to reach our own conclusions on matters of fact (see rule 30 of the Rules of this court). The duty of this court is set out in several authorities where it is stated that we should subject the evidence to fresh scrutiny and be cognisant of the fact that we neither saw nor heard the witnesses testify and should make due allowance for that (See **Pandya v R [1957] EA 336, Selle and Another Vs Associated Motor Boat Company [1968] EA 123** and **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**).

The typed record of proceedings shows that the trial commenced on 10th March 2017. The appellant was required to take a plea to the charges. A plea of not guilty was entered the same day and hearing of the prosecution case set to commence on the 27th of March 2017. Thereafter the record shows that on 27th March 2017, the trial judge was indisposed and that the hearing was adjourned to the 30th of March 2017. On the 30th of March 2017, there is no evidence of any assessors being present. The record shows as follows:

> Accused present.
>
> Aryong for state.
>
> Levi Etum on private brief.
>
> Ecitu Court clerk.
>
> Omongole Richard on watching brief.

Thereafter, the state informed the court that they had witnesses in court and some basic facts were agreed upon by the parties. Further some exhibits were agreed upon by the parties and marked by court. Thereafter PW1 took oath and testified. The hearing was then adjourned to 10th April 2017. On 10th April 2017, the court did not proceed and by consent hearing was further adjourned to 18th April 2017.

On the 18th of April 2017, there is no evidence of any assessors when the matter proceeded and evidence was taken from D/AIP Okello Moses. Presumably this was PW2. Thereafter PW 3 also testified and was cross examined. Thereafter the matter was adjourned to 20th April 2017. The record shows that the appellant was represented and on the record there is recorded the presence of two assessors whose particulars are, however, not given and a court clerk. The cross-examination of PW3 continued and thereafter hearing was adjourned to the 24th of April 2017. On 24th April 2017, the parties were represented and the record shows that there were two assessors in attendance. However, the particulars of the assessors are not disclosed. On that day, PW4 testified and was cross examined and later PW5 also testified and was cross examined. Hearing was adjourned to 25th April 2017.

On 25th of April 2017, the record shows that the parties were represented while two assessors were in attendance but their particulars are not given. PW 6 testified and was cross examined. Further PW 7 also testified and was cross examined and the matter was adjourned to 27th April 2017.

Surprisingly on 27th April 2017, the appellant appeared but there were no assessors. PW 8 testified and was cross examined by the appellant since his counsel was indisposed and was not present in court. The matter was adjourned to the next morning. On 28th April 2017, the accused informed the court that his lawyer was sick and hearing was further adjourned to the 4th of May 2017. On the 4th of May 2017, the parties were represented and the record does not have assessors being present. In these proceedings PW 9 testified and was cross examined by the appellant's counsel and hearing was further adjourned to the 8th of May 2017.

On 8th May 2017, the parties were represented and it is recorded that two assessors were also present. The particulars of the assessors are not given. PW2 testified and was cross-examined. Further on 16th May 2017, the parties were present and the assessors were in court but their particulars are not given. Submissions were received by the court from the parties, on

whether a prima facie case had been established. Trial was adjourned to 7th June 2017 and on 7th June 2017 for the accused to present his defence.

On 8th July 2017 the parties were represented and the case was adjourned for defence of 19th June 2017.

On 20th June 2017, no assessors were present and the appellant's counsel was absent. The matter was adjourned for summing up and judgment was fixed for the 31st of July 2017. On 11th July 2017 the matter came up for the summing up to assessors but it was not done and was rescheduled for 28th September 2017 for reason that the learned trial judge was indisposed. On 28th September 2017, the trial judge was still indisposed. The matter was further adjourned to 16th October 2017 and yet again on the date, it is indicated that the trial judge was indisposed and the hearing was rescheduled for 31st of October 2017. On 31st October 2017 the matter did not take off. It was adjourned yet another time until 13th February 2018. On 13th February 2018, the record shows that the appellant was in the dock and his counsel was present. Two assessors were present and summing up was made to the assessors who adjourned their opinion for 15th February 2018. While the record shows that summing up was done, no particulars of the summing up was given and there is no record of what the learned trial judge told them.

Thereafter they are no further proceedings showing that the assessors ever gave their opinion and if so when. The record only shows that judgment was delivered on 9th March 2018 and the appellant was sentenced.

We have carefully considered the judgment and in the judgment, there is no mention of the assessors or their opinion. Even if there was any opinion, it is not on the record and the learned trial judge never referred to it.

From the proceedings, there is no evidence that assessors were sworn in at the commencement of the trial and they were not present at the commencement of the trial when several witnesses were called. Further there is no evidence that the assessors attended some hearing dates when witnesses were led in chief and cross examined.

The above is the state of the record. In **Okao Jimmy Alias Baby, Ogwanga Patrick alias Osinde, and 3 Others v Uganda; Court of Appeal Criminal Appeal Nos 55, 62, & 67 of 2017**, this court considered the absence of assessors at pages 13 and 15 of the Judgment in the circumstances where one of the assessors was absent during part of the hearing. The court held that the absence of assessors from hearing witnesses is not a mere irregularity. After considering section 69 (1) of the Trial on Indictment Act, they held that the trial court proceeded with both assessors, summing up was made to both assessors after one of the assessors had been absent on one of the hearing dates and they held that:

> "we are of the view that the second assessor, having absented himself from part of the trial and did not hear the evidence even of only one witness and should not have been permitted to resume participation and give opinion in the case....
>
> Allowing the assessor to resume participation in the trial was a fundamental irregularity which occasioned a miscarriage of justice. The assessor's opinion was based on incomplete evidence and it could have influenced the decision of the judge."

After considering section 34 (1) of the Criminal Procedure Code Act, to establish whether a substantial miscarriage of justice has actually occurred despite the irregularity, the court found that the trial was fatally defective and quashed the conviction of the appellant and set aside the sentence.

We note that in this particular appeal, there is no evidence that assessors were sworn at the beginning and their particulars are missing from the record. The respondent in his submission alluded to the hand written record of proceedings at the high court that show that the assessors gave their opinion, but the same was not availed to court and therefore court cannot conclude that the assessors gave their opinion. The court relies on the record to establish what happened in the proceedings and does not have the luxury of establishing from other unverifiable independent sources what actually happened. The record of proceedings is forwarded by the trial court and is the material upon which this court can base its decision.

In **Alenyo Marks vs Uganda; Supreme Court Criminal Appeal No 08 of 2007**, The Supreme Court held that:

> "section 3 of the Trial on Indictments Act underscores the importance of assessors by providing for a mandatory requirement that all criminal trials in the High Court be conducted with at least two assessors. It therefore follows that assessors' participation and role in a criminal trial is vital. Their role goes to the legality of a trial....
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> We have reviewed the record and have not seen any indication of the assessors having taken oath. Indeed, the respondent conceded to the fact that the assessors were not sworn in.
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> According to section 67 of the Trial on Indictments Act, the taking of oath is a mandatory prerequisite in the trial process. The section provides as follows:
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> > **At the commencement of the trial and... After the preliminary hearing has been concluded, each assessor shall take an oath impatiently to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court.**
> >
> > (Emphasis of court)
>
> It is our finding that a trial which proceeds without the assessors taking oath is a nullity."

The decision of the Supreme Court was delivered on 7th of November 2019. Further, the Supreme Court judgment is binding on this court. The judgment holds that the failure to take oath of assessors (whose particulars are even unknown) is a fatality to the proceedings and therefore the proceedings in the lower court are a nullity.

For emphasis, section 67 of the TIA provides that:

> 67. Oath of assessor.
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> At the commencement of the trial and, where the provisions of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court.

We have reviewed the record and have not seen any evidence of the assessors having taken oath. Indeed, there are even no particulars of the assessors anywhere.

We have further considered the issue of the records. In **Lukwago Hussein and Others Vs Uganda; Criminal Appeal Nos 01, 06, 07 and 08 of 2015**, this court considered the problem of the vital parts of the record of the trial court are missing and held that:

> "In **Ephraim Mwesigwa Kamugwa Vs the Management Committee of Nyamirima Primary School (Civil Appeal 2011/101) [19] UGCA** Fredrick Egonda Ntende JA in this judgment analysed the law on incomplete record on appeal.
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> > "What is the law with regard to an incomplete record of appeal? The law on missing record of proceedings has long been established. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances, the appellate court has the power to either order a retrial or reconstruction of the record by the trial court..."

The participation of assessors in this case after their initial absence when several witnesses testified and then their presence at some point of the proceedings and further absence and resumption renders their omission to participate in the trial a fatal irregularity. Moreover, assessors are required to give their opinion but should not take further proceedings in the trial if they had absented themselves when evidence was adduced. In this case as we have summarised above, the record shows that the assessors were present at one point then they were absent at some material points and later resumed as we have set out at the beginning of this judgment. A similar situation was considered by the Court of Appeal of Tanzania in **Boniface Marcel Tariro and Sijali vs Republic; Criminal Appeal No. 289 of 2017** in a Judgment delivered on 29th of September 2021 where the Court considered the irregularity where one assessor left and later resumed hearing and gave his opinion. The court stated as follows:

> "In this case, the record of appeal bears out at page 55 that on 11/5/2017 when the matter came up for continuation of hearing the trial court informed the parties on the absence of assessor Mr. Laizer Mollel for being bereaved and the court

ordered the case to proceed as scheduled. Then the matter proceeded with the hearing of the evidence of F. 1900 D/Cpl Lameck (PW5) whose evidence was very long until on 12/5/2017 as shown at page 81 of the record of appeal. On the same date the court also heard the evidence of Sesilia Ignas Kavishe (PW6) whose evidence is at pages 81 to 86 of the record of appeal. Then Mr Laizer Mollel resumed on 15/5/2017 when PW7 testified to the end of the trial. Surprisingly enough, Mr. Laizer Mollel gave his opinion (page 184 – 185 of the record of appeal) which also involved PW5 whose evidence he did not hear. And, the trial court considered the assessor's opinion when it said:

> *"considering all the evidence presented to court including the exhibits, final submissions made and assessors' opinions, I am convinced that..."*

We think, based on the case of **Assa Singh** (supra) it was not proper for Mr Laizer Mollel to resume and participate with hearing after having been absent for two days of hearing of the case. As such, resuming with hearing of the case and giving opinion on evidence of the witness he did not hear and the same being considered by the Court, was a fatal omission which renders the entire trial and the judgment thereof a nullity.

In the end, considering all omissions we have endeavoured to explain above, we are of the settled view that, they are fatal and render the trial a nullity. Consequently, we nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentence meted out against the appellant."

Further, we have considered the issue that the learned trial judge never referred to any assessor's opinion in terms of the law. In in **Alenyo Marks vs Uganda;** (supra) the Supreme Court held *inter alia* that the participation of assessors under section 3 of the TIA goes to the legality of the trial.

Section 3 of the TIA provides that:

> 3. Assessors.
>
> (1) Except as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit.

In our judgment, the failure of assessors to participate at the hearing and to give their opinion goes to the jurisdiction of the court to pass judgment as the court was not be duly constituted to determine the case.

The requirement for assessors to give their opinion is a mandatory requirement though the judge does not have to conform to their opinion. Section 82 of the Trial on Indictment Act provides that:

> 82. Verdict and sentence.
>
> (1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.
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> (2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.
>
> (3) Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment.

The law is clear that the judge shall require each of the assessors to give their opinion. There is no evidence whatsoever on the record that the assessors gave their opinion at all. In fact, the learned trial judge refers to no opinion of any assessor to support his finding or to depart from. In **Bakubye and Anor v Uganda (Criminal Appeal-2015/) [2018] UGSC 5 (17 January 2018)** The Supreme Court held that section 82 (1) of the **Trial On Indictments Act** is couched in mandatory language and the presiding judge is duty bound to do the summing up and that duty cannot be delegated.

We note that the section also directs the judge to ask the assessors to give their opinion. The fact that the trial judge may agree or disagree with the opinion is not material as it is provided for under section 82 (2) of the TIA. What is material being that the assessors shall give their opinion after they are asked by the trial judge to do so.

Be that as it may, the opinion would have been of no value since it would have been given by the assessors who missed hearing the testimonies of several witnesses of the prosecution and the proceedings of court and did not see or hear the witnesses testify.

In the premises, the trial was conducted without assessors for the reasons that they were not sworn, they both absconded when several witnesses

testified and only heard some witnesses. The particulars of the assessors are not known and in any case their opinion could not be sought by court for reason of non-participation. The only remedy that was left for the trial judge was to find that there was a mistrial and start the trial de novo after selection of new assessors.

In the premises, we find that the trial was a nullity for the reasons we have set out and we allow ground 5 of the appeal, quash the conviction of the appellant and set aside the sentence.

Having set aside the conviction and sentence, we note that the appellant had been on remand for 5 years prior to his sentence on 5th March 2018. His appeal was heard in November 2022 that means that he has been on remand for 9 years and some months. The issue remaining is whether a retrial should be ordered in the circumstances.

The principles for ordering a retrial were considered by this court in **Rev. Father Santos Wapokra Vs Uganda; Court of Appeal Criminal Appeal No. 204 of 2012** where the court cited several precedents for the principles for determining whether a retrial should be ordered. The Court of Appeal held that:

> The overriding purpose of the retrial is to ensure that the cause of justice is done in the case before Court. A serious error committed as to the conduct of the 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 trial.
>
> An order for a retrial is as a result of the judicious exercise of the Courts discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the Courts: See: **Fatehali Manji v R [1966] EA 343**.

Among the principles referred to is the consideration of whether the irregularity is reason enough to warrant an order of retrial. In the

circumstances, the irregularity was a serious irregularity that went to the jurisdiction of the court and therefore there was no valid trial at all. We have considered the circumstances in which the appellant spent about nine years on remand but had been charged with the serious offence of murder which carries a maximum penalty of death. The cause of justice is that such a trial should be conducted and succeed or fail on the merits. The reason the trial was rendered a nullity is the absence of assessors in the manner provided for under the Trial on Indictment Act, as we have set out above.

In the premises, because no valid trial took place, and the cause of justice requires such offences of murder to be tried, we hereby order a retrial of the appellant. The appellant is accordingly remanded for trial in the High Court where he may apply for bail pending retrial if he so desires.

Dated at Mbale the 7th day of January 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal