

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL REVISION No. 0022 OF 2016
(Arising from Arua Chief Magistrates Court Criminal Case No. 0125 OF 2014)

ODONGO REMUS **APPLICANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under article 139 (1) and (2) of *The Constitution of the Republic of Uganda, 1995*, section 50 of *The Criminal Procedure Code Act* and sections 14, 17 and 33 of *The Judicature Act* seeking a revision of the proceedings, conviction and sentence made by the Chief Magistrate’s Court at Arua in criminal case No. 125 of 2016.

The background to the application is that the applicant was on 30th January 2014 charged with one count of malicious damage to property c/s 335 (1) of *The Penal Code Act*, before the Grade One Magistrate’s Court at Arua. It was alleged that on the 1st day of January 2014 at Ezoova village in Arua District, he willfully and unlawfully damaged or destroyed 3000 bricks, the property of Auma Gertrude. He was released on bail and his trial commenced on 28th August 2014. The prosecution called three witnesses in all and closed its case on 23rd September 2014. The court found the applicant had a case to answer and put him to his defence on the same day. He testified, called two other witnesses and closed his case on 4th May 2015. On 16th June the court delivered its judgment by which the applicant was convicted as charged and sentenced to him to eight months’ imprisonment.

Being dissatisfied with the decision, the applicant filed Criminal Appeal No. 6 of 2015 on 25th June 2015. He applied for and was granted bail pending appeal during September 2015. He filed his memorandum of appeal on 17th August 2015. When the appeal came up for hearing on 28th

September 2016, the court observed that the first ground of appeal assailed the decision of the trial court by advancing the reason that the applicant had been convicted and sentenced “without [the trial magistrate] writing an delivering a judgment as required by the law and without stating the reasons for the conviction and sentence.” Considering that an appeal presupposes a judgment, counsel for the appellant was required instead to apply for revision, hence this application.

In his affidavit supporting the application, the applicant averred that on the day he was convicted, the trial magistrate did not read to him the judgment and neither did she explain to him the reasons for his conviction and sentence. When subsequently his advocates asked for a certified copy of the record of proceedings, it was availed without the judgment. Without a judgment, it became impossible for him and his advocates to argue the appeal, hence this application.

In her affidavit in reply, the Senior Resident State Attorney deposed that the applicant was convicted after the judgment was pronounced in court. When she requested the trial magistrate for a copy of the judgment, the trial magistrate printed it off her computer and provided her with a copy, which she attached to the affidavit in reply.

In his submissions, counsel for the applicant, Mr. Paul Manzi argued that section 136 of *The Magistrates Courts Act* requires a trial magistrate at the end of the trial to write a judgment which should contain the reasons for the decision, should be dated and signed on the day it is pronounced. The certified record of proceedings does not demonstrate that this was done and the omission cannot be cured by an affidavit such as the one filed in reply. The copy of the judgment attached to the affidavit still does not satisfy the requirements of the law. He prayed that the conviction be quashed and the sentence set aside.

In reply, the learned State Attorney, Mr. Emmanuel Pirimba, representing the respondent opposed the application. He argued that the deponent to the affidavit in reply had disclosed that she received a copy of the judgment from the trial magistrate and this should be sufficient proof that the judgment was indeed read to the applicant when he was convicted and sentenced. In the alternative, in the event that the court allows the application, he prayed that the court should order a retrial in accordance with section 48 of *The Criminal Procedure Code Act*. In response, counsel for the applicant argued a re-trial would amount to double jeopardy for the applicant.

Under section 50 (1) of *The Criminal Procedure Code Act*, the High Court may exercise its power of revision with regard to any proceedings in a magistrate's court, when it appears that in those proceedings an error material to the merits of the case or involving a miscarriage of justice has occurred. The court is also enjoined by section 17 (2) of *The Judicature Act*, with regard to procedures of the magistrates courts, to exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.

Guided by these principles, I have perused the certified record of proceedings of the trial court. I have established it as a fact that the record does not contain a copy of the judgment. On the day the applicant was convicted and sentenced, the record reads as follows;

10/06/2015
Jackie, Court Clerk
Rebecca for state
Accused in Court
Matter for judgment: accused convicted

Following that part of the record is a submission by the State Attorney who prosecuted the case submitting in aggravation of sentence. Thereafter, the accused was remanded until 15th June 2015. On 16th June 2015, the court received his *allocutus* and heard the complainant's submission on sentence. Thereafter the court pronounced the sentence.

Section 135 (1) of *The Magistrates Courts Act* requires the judgment in every criminal trial in a magistrate's court in the exercise of its original jurisdiction to be pronounced, or the substance of the judgment to be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice must be given to the parties and their advocates, if any. Section 136 (1) of *The Magistrates Courts Act* requires the judgment to be written by, or reduced to writing under the personal direction and superintendence of the magistrate in the language of the court, and to contain the point or points for determination, the decision thereon and the reason for the decision and it should be dated and signed by the magistrate as on the date on which it is pronounced in open court.

The record of proceedings of the trial court before me does not demonstrate that these requirements were complied with. Not only does the record of proceedings not contain a copy of the judgment by also nowhere is it recorded that a judgment was read out to the applicant in open court. The burden lies on the party who makes a positive averment of an issue to prove it. In this application the burden lay on the respondent to prove that the judgment was indeed read out. This required, at the minimum, averments on oath of the State Attorney who attended court on the day the applicant was convicted. The affidavit of the learned Senior Resident State Attorney is based on hearsay and its contents on this aspect is insufficient to refute the applicant's contention that none was read, most particularly since his version is supported by the record. The judgment attached to the affidavit in reply is not signed, it is not dated and is uncertified. It does not meet the requirements of Section 136 (1) of *The Magistrates Courts Act* and is therefore incapable of supplementing the record of proceedings. I therefore find that the applicant has proved to the satisfaction of court that his conviction was not preceded by the pronouncement of a judgment as required by law. For that reason his conviction is quashed and sentence set aside.

Where a conviction by a magistrate's court is quashed on basis of a material irregularity in the proceedings which occasioned a mistrial, or where by reason of an error material to the merits of the case a miscarriage of justice has occurred, the High Court may consider directing a re-trial. The considerations for making such an order were considered by The Court of Appeal in *Rev. Father Santos Wapokra v. Uganda, C.A. Criminal Appeal No. 204 of 2012* where 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 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.

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 have been developed over time by the Courts: See: *Fatehali Manji v. R [1966] EA 343*.

One of the considerations for ordering a retrial is when the original trial was illegal or defective; See: *Ahmed Ali Dharamsi Sumar v R* [1964] EA 481. The Court must however first investigate whether the irregularity is reason enough to warrant an order of a retrial: *Ratilal Shahur* [1958] EA 3. However, before ordering a retrial, the Court handling the case must address itself to 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*”.

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 v. R* [1969] EA 433. A retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice, that is where it will deprive the accused / appellant of the chance of an acquittal: See: *M’kanake v. R* [1973] EA 67. Where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, a retrial will be ordered: *Tamano v R* [1969] EA 126.

Other considerations are; the 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. Accordingly each case depends on its particular facts and circumstances.

In the final result, the applicant’s conviction is hereby quashed and the sentence set aside. For the allegation of willfully and unlawfully damaging or destroying 3000 bricks, he underwent a criminal prosecution that lasted one and a half years. At the end of that prosecution, he suffered the added inconvenience of being incarcerated for four months. Considering the circumstances of this case, ordering a retrial of the applicant will tantamount to subjecting him to double jeopardy, by way of expense, delay and inconvenience. I therefore decline to order a re-trial.

Dated at Arua this 10th day of January 2017.

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Stephen Mubiru,
Judge