THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL APPEAL No. 0014 OF 2016

(Arising from the Chief Magistrate's Court at Arua in Crim. Case No. 621 of 2011)

ASIBUKU MUZAMIL ……………………………………………………… APPELLANT

VERSUS

UGANDA ……………………………………………………………… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant, who was A7, was together with eleven others charged with; - (a) three counts of Arson c/s 237 (a) of *The Penal Code Act*. It was alleged that the twelve accused and others still at large on the 16th June 2011 at Eleke village in Yumbe District, they willingly and unlawfully set fire; to the four grass-thatched houses the property of Beledina Ombia in count 1, two grass-thatched houses the property of Candiru Betty in count 2, and two grass-thatched houses the property of Abubakar Muzamil, in count 3.

(b) three counts of Malicious Damage to property c/s 335 (1) of *The Penal Code Act*. It was alleged that the twelve accused and others still at large on the 16th June 2011 at Eleke village in Yumbe District, they wilfully and unlawfully damaged; houses the property of Beledina Ombia in count 4, houses the property of Candiru Betty in count 5, houses the property of Abubakar Muzamil, in count 6. There were two other counts of assault and one of theft, none of which implicated the appellant. They were against two of his co-accused.

Hearing of the case began on 11th June 2012 with the testimony of P.W.1 Driciru Peace who testified that he woke up on the morning of 16th June 2011 in preparation to weed her mother's garden of beans when one of the appellant's co-accused uprooted some of the crops in the garden including sorghum, and went away with them on a bicycle claiming that the land belonged to him. She called her brother who in turn brought the village Secretary of Defence to the scene. The appellants' co-accused began hurling insults at her. Soon the quarrel drew in more people

and eventually erupted into a fist fight between the Secretary for defence and the appellant's co-accused. When the fight was broken up, the appellant's co-accused retreated and went to re-group. The group then attacked her home and she went ahead to narrate the manner of participation of each of the accused in the ensuing melee. It all culminated in several houses being set on fire, some damaged and property destroyed. The police later came, intervened and arrested the accused. The trial continued with seven other prosecution witnesses;- P.W.2 Adeku Demiteo the L.C.1 Secretary for Defence / Security; P.W.3 Baguma Stephen the area L.C.1 Chairman; P.W.4 Belendina Ombia; P.W.5 Betty Candiru; P.W.6 Cadribo Peter; P.W.7 No. 23595 D/Sgt Amabua Philliam; P.W.8 Ojako Patrick and the prosecution closed its case on 14th September 2015.

On 2nd December 2015, the trial magistrate ruled that each of the twelve accused had a case to answer. The options available to them in making their defences were explained to the accused and each of them indicated the preferred options and whether or not they would be calling witnesses. On that day, the record indicates that only the following accused were in court; A1, A2, A3, A5, A8, A9, A11 and A12. Hearing of the defence case opened on 16th December 2015 with the testimony of the first accused, A1. It continued thereafter with the respective defences of A2, A3, A4, A5, A8, A9, A11 and A12. the next defence witness to testify was D.W.10 and the defence closed on 17th December 2015 and judgment was fixed for 7th January 2016.

It is not clear from the trial record when exactly the judgment was delivered because it is neither dated nor did the trial magistrate record the day it was delivered. What is clear though from the judgment, is that all the accused, including the appellant, were convicted. The appellant was present in court on that day and he prayed for lenience on account of being a first offender. He together with the rest of his co-accused, were sentenced to three years' imprisonment. Being dissatisfied with the outcome, the appellant sought leave to appeal out of time which was granted on 8th November 2016 vide Arua High Court Miscellaneous Criminal Application No. 24 of 2016. He indicated in that application that although he was present in court on 7th January 2016, the day the judgement was delivered, during the trial he had been in and out of hospital for cancer treatment and as a result he was never given the opportunity to defend himself. That is the ground he intended to raise on appeal. He sought and was later granted bail pending appeal on 1st

November 2016 to enable him prepare his appeal as an unrepresented appellant and to obtain the much needed cancer treatment, for his condition.

As one of the considerations for granting him bail, hearing of the appeal was fixed for hearing on 9th March 2017 on the understanding that by that time he would have caused the preparation of a certified copy of the record of proceedings and filed a memorandum of Appeal. That day having come and passed without any indication of the appellant having taken any further step in the prosecution of his appeal, the court at its own initiative fixed the appeal for 31st July 2017, called for the original trial record and summoned the appellant to court.

On that day, the appellant appeared in court with his surety who informed court that the appellant was yet to obtain the needed cancer treatment because it was prohibitively expensive and as a result his mental health had deteriorated. Although the lower court record is still in the handwriting of the trial magistrate, the court having observed that it was legible even in that state and since the learned Senior Resident State Attorney too found it legible, in order not to delay the appeal any further, it was decided that the court will in exercise of its duty as a first appellate court, dispense with the submissions of the appellant, receive written submissions of the learned Senior Resident State Attorney, and proceed to deliver judgment on 10th August 2017, hence this judgment.

Although the appellant, due apparently to his ill-health and being an un-represented appellant, did not file a memorandum of appeal, he did file a notice of appeal on 14th November 2016, six days after being granted leave to appeal out of time. Since according to section 28 of *The Criminal Procedure Code Act* a Criminal Appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, there is pending before this court for determination, a valid appeal filed by the appellant. Although the appellant did not file a memorandum of appeal, section 44 (2) of *The Criminal Procedure Code Act* empowers this court to consider and determine an appeal in the absence of the appellant and to make such other order as it thinks fit. I construe this provisions as authorising this court as well to dispense with the submissions of the appellant and proceed to decide an appeal which has neither been dismissed summarily, withdrawn, abated nor abandoned rather than dismiss it for want of prosecution. This

in my view is a power vested in this court by section 17 (2) of *The Judicature Act*, authorising this court, with regard to its own procedures to exercise its inherent powers to prevent abuse of the process of the court by curtailing delays.

In any event, in Arua High Court Miscellaneous Criminal Application No. 24 of 2016, the appellant disclosed the ground of his dissatisfaction with the decision of the court below. He contended that he was denied an opportunity to defend himself during the trial and therefore did not obtain a fair trial. Unfortunately, the learned Senior Resident State Attorney did not file her submissions in response to that argument as she had undertaken to.

This being a first appeal, the court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”.

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

I have perused the record of trail and found that indeed when the court on 2nd December 2015 the trial magistrate ruled that each of the twelve accused had a case to answer and explained the

options available to them in making their defences, the appellant was not in court. In all subsequent proceedings thereafter as the rest of the accused presented their defences on 16th and 17th December 2015, still the appellant was not in court. He was next in court on 7th January 2016 only to be convicted and sentenced. In effect, he was never afforded an opportunity to defend himself.

The right to a fair trial guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995* entails the right to defend oneself in person or by counsel. It entails being afforded adequate opportunity by court to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence. A trial during which this basic right is denied cannot be a fair trial. Denial of the opportunity to defend oneself against a criminal is a defect that cuts to the root of the fairness of the trial. A conviction cannot stand if the defect cuts at the root of the trial. Where due to some inherent defect the trial has been irregular and the irregularity is not curable, the resultant conviction is *ab initio* void and cannot be sustained on appeal. When it appears that in the proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the appellate court has no option but to quash the conviction.

This court is empowered under section 34 (1) of *The Criminal Procedure Code Act* to allow the appeal if it thinks that the judgment should be set aside on the ground that the decision has in fact caused a miscarriage of justice. I find that the defect complained of by the appellant in this appeal, is a defect that cuts to the root of the fairness of the trial. It is incurable, it is an error material to the merits of the case that involves a miscarriage of justice. For that reason, the conviction of the appellant is quashed and the sentence set aside.

Where a conviction is quashed and sentence set aside on account of s defective trial, the appellate court has the option of directing a re-trial. In *Rev. Father Santos Waokra v. Uganda, C. A. Criminal Appeal No. 204 of 2012*, the Court of appeal outlined the consideration for making such an order which include; consideration of the principle that a man shall not twice be vexed for one and the same cause, it should not be used by the prosecution as an opportunity to lead evidence that it had not led at the original trial; the prosecution must not use it as an opportunity

to fill gaps it its evidence that it originally produced at the first trial; where it will result in depriving an accused of the chance of an acquittal; 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 and the fact that any criminal trial is an ordeal for the accused who should not suffer a second trial; and whether evidence will be available at the new trial. Above all, each case must be decided on its peculiar facts and circumstances.

In the instant case, the trial in the court below spanned a period of nearly four years having begun on 11th June 2012 and ended on 7th January 2016. It must have been quite an ordeal to the appellant who struggled through it, to the extent that he was not available to make his defence due to ill-health at the time the rest of his co-accused did. His health has since become worse. The case related to events which occurred on 16th June 2011, more than six years ago, whose recollection now will be a strain on the memory of all those involved as witnesses. Although felonies, the offences with which he was charged cannot be classified as of a very serious nature, of such a nature as public policy would demand for prosecution six years after. Directing a re-trial now will not only expose the appellant to the ordeal of a second trial, but will also be an unnecessary strain on his health and financial resources, in circumstances where it is now obvious that he needs to save every penny for an expensive cancer treatment that is threatening his life. Having judiciously taken all those factors into account, I find that it is not in the best interest of justice to order a re-trial. The appellant is accordingly discharged.

Dated at Arua this 10th day of July 2017

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Stephen Mubiru
Judge
10th August 2017.