THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA,

HOLDEN AT MUKONO

HCT -14-CRIMINAL APPEAL NUMBER 3/2017

ARISING FROM CRIMINAL APPEAL NUMBER 512/2009

UGANDA :::APPELLANT

VERSUS

1. **NGASWIREKI PAUL**
2. **KIVUMBI AWALI:::RESPONDENTS**

BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT

JUDGEMENT

1. This is an appeal arising from the Judgment of the Chief Magistrate of Mukono as she then was Her Worship Ikit Mary. The appeal is against the acquittal of the two Respondents.

2. The two grounds of appeal are that:

   (a) The learned Chief Magistrate erred in law and in fact when

   she failed to conduct a viore dire thereby occasioning a miscarriage of justice.

   (b) The learned Chief Magistrate erred in law and in fact when
   she held that the victim's evidence was not corroborated and
   hence wrongly acquitted the Respondents

   (c) The learned Chief Magistrate erred in fact and in law when she held that the respondents were not properly identified by the victim and hence came to a wrong conclusion.

3. ***The brief facts of the case***

The brief facts of the case are that Kivumbi Awali and Ngabwireki Paul herein after called the respondents were charged with attempted murder contrary to section 204 of the Penal code Act, laws of Uganda. It was alleged that the two attempted to murder Allan Sembatya a child who was about 6 to 7 years old stated to be a neighbor. They were tried and court compelled the state to close its case after only two witnesses. They were acquitted on 20TH February 2012.

The state did not prefer an appeal immediately for reasons best known to it. It later filed a notice of Motion for leave to appeal out of time, which was allowed after both the prosecution and defence consented to it and hence this appeal.

This appeal has had a checkered history where the original file disappeared and reappeared, and eventually disappeared completely. Court therefore relied on certified typed proceedings.

The trial also had three trial magistrates. Two Chief Magistrates, His worship Tom Chemutai, and Her Worship Ikit Mary and His Worship Kaliman Jamson Kalemera who was a grade one magistrate then who had no jurisdiction to try a case of attempted murder.

He presided over the evidence of Margaret Ssembatya.

The case was adjourned for cross examination after counsel for the accused/respondents requested for an adjournment to peruse the police file. She was never cross examined and her evidence was never challenged at all. The two respondents were acquitted on the grounds that the evidence of the victim was not corroborated. The state is faulting the trial court for not conducting a voir dire and conclusion that the evidence of the child was not corroborated.

4. Written submissions.

The learned state Attorney for the Appellant and both counsel for the Respondents filed written submission in support of their cases which are on record. Court has put them into consideration while writing this judgment.

5. ***The law applicable AND legal principles.***

The Magistrate Courts Act, The evidence Act, The Oaths Act, The Judicature Act, The Trial on Indictment Act, and The Constitution of the Republic of Uganda, International treaties, and case law.

As an appellate court, unlike the trial court that had the opportunity to listen to the witnesses, consider their demeanor in court, it has to just to rely on what is on the record to come up with its own findings and make its own conclusions.

The appellate court has the duty to re-evaluate the evidence, look at the manner in which the plea and evidence was taken and the procedure used, look at the preferred charges and ingredients thereof, and finally consider whether the trial magistrate applied the law to the facts properly before arriving at the decision.

In other words, the appellate court is more concerned with the propriety, legality and regularity of the legal process during the trial.

I am bound by the legal principles laid down in the cases ***of R V Pandya 1957 EA 336 AND KIFAMUNTE HENRY VERSUS UGANDA SSCA NO 10 OF 1997 AND OKENA VERSUS REPUBLIC 1972 EA*** *32 as cited by counsel for the Appellant on the role of Appellate court.*

The judicial appellate system is indeed akin to the post mortem process where the pathologists combs the entire body looking for the cause of death. In the judicial process, the appellate court combs the lower court record looking for the alleged legal errors and omission that are stated to have caused a miscarriage of justice to the appellant.

The appellate court may, depending on its findings, quash, or uphold the decision of the lower court, come up with its own decision, address legal issues of unfairness or irregularity that are not contained in the memorandum but are glaring on the record which resulted into a miscarriage of justice and or order for a retrial in the interest of justice, bearing in mind that litigation whether civil or criminal must come to an end.

It is also trite that even where court has erred, the Appellate court interferes with the decision of the lower court only where there has been a miscarriage of justice to any of the parties in the proceedings. The presumption of innocence of an accused person (see article 28(1) (a) of

the 1995 Uganda Constitution),the burden of proof resting on the prosecution and standard of proof in criminal cases being beyond reasonable doubt.(see the landmark case of ***Woolmington Versus The DDP 1936 AC 462*** are all universal principles applied in criminal justice system.

The main contention of this appeal is based on the evidence of a child and as such the right to equal treatment before the law regardless of whether one is a child or adult cannot be over emphasized. It is a universal non derogatory right which must be protected by the presiding judge or magistrate who sits at the gate of justice to ensure that all those who enter and come out of court whether as suspects or victims of crime, or parties in any other civil dispute are treated equally before the law.

This equal treatment must be accorded to the child during the trial whether the child is the victim and sole identifying witness like in the instant case or was just a witness to the crime.

6 Resolution of grounds

I will resolve the grounds in their chronological order.

Ground 1: whether the learned trial Chief Magistrate erred in law and in fact when she failed to conduct a voir dire thereby occasioning a miscarriage of justice.

Counsel from both sides submitted ably about the legal provisions pertaining to conducting a voir dire before taking the evidence of a child of tender age under the current regime of the law

It is trite law that before taking the evidence of a child of tender age which is stated to be 14 years and below according to case law (refer to the cases of **Kibageny ArapKolil v R [1959] EA 92-93** AND ***Tomasi Umukono versus Uganda [1978] 171.***

The court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it

implicating the accused ***(refer to section 103(4) of the MCA and section 10 of the Oaths Act).***

But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

Let me reproduce some sections of the law for emphasis since the main contention of this appeal is about failure by the trial court to conduct a viore dire before taking the evidence of the victim and alleged absence of corroboration of the victim's evidence.

In other words, the appeal is all about the law and procedure of taking evidence of the child and the effect of flauting that procedure.

Section 101 (1) of the MCA Cap 16 provides that : ***"Every witness in a criminal cause or matter in a magistrates court shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oath"***

101(2) of the MCA supra provides: "Any witness upon objecting to being sworn and stating as the grounds for that objection either that he or she has no religious belief or that taking of an oath is contrary to his or her religious belief, shall be permitted to make a solemn affirmation instead of taking an oath which affirmation shall be of the same effect as if he or she had taken the oath"

Section 101(3) of the Magistrates Court Act provides:

"Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court understand the nature of an oath, the child's evidence may be received though not given on oath, if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

Section 10 of the oath's Act cap 19 provides: ***"No person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation".***

Section 40(3) of the Trial on Indictment Act provides more or less in similar terms on the same subject.

It reads ***"Where in any proceedings any child of tender years does not in the opinion of the court understand the nature of an oath, his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.***

Provided that where the evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support thereof implicating him".

The import of section 101(3) of the MCA and section 40(3) of the TIA is to ensure that the courts takes evidence of the child of tender age only upon satisfaction that the child is intelligent enough to testify on the matter before court and understands the duty of speaking the truth.

In view of the statutory responsibility to assess the intelligence of the child and establish whether she/ he understands the duty of speaking the truth, the trial court conducts a voir dire before taking the evidence of any child of tender age.

A Voir Dire (to speak the truth) is an Anglo-French legal phrase which in the context of common law criminal procedure, refers to a preliminary examination by a trial judge or magistrate to determine the competency of a witness of tender age as to whether he or she is possessed of sufficient intelligence to testify in the matter before court and understands the duty of speaking the truth.

In my humble opinion as a pro justice for children Judge, the proviso to section 40(3) of the TIA, Section 10 of the Oaths Act chapter 19, and section 101(4) of the MCA are inconsistent with the provisions of Article 44(c) of the 1995 Constitution of the Republic of Uganda.

Whereas adults can chose either to take evidence on oath or not as provided under section 101(2) of the MCA SUPRA, and their evidence is of the same effect as if he or she had taken the oath, the reverse is the same for the children because their evidence has to be corroborated yet they are never given the option to decide on whether they take the oath or not.

Whereas section 101(1) of the MCA is mandatory for every witness in a criminal cause to give evidence on oath, when the evidence of a child of tender age who is possessed of sufficient intelligence to testify fails to pass the test in a viore dire that is not guided by any rules of procedure, but determined by the good sense of a trial court, this section automatically ceases to apply to his /her evidence rendering such evidence useless and of no legal effect.

This leaves children who are victims of crime very vulnerable in view of the increased trend of violence against children.

Needless to say, it is very absurd that in spite of the established practice of conducting Voir Dire during court proceedings, there is no statutory procedure or established uniform format that is followed by judicial officers to help them decide on whether the child should testify on oath or not or not at all since determining the intelligence of the child is left to the good sense of the trial judge or magistrate alone, not even the attorney who has examined the child before in a more friendly environment, created a better bond with the child before and in their assessment are satisfied with the ability of the child to testify.

With the current legal regime, a complete stranger takes the lead in introducing the child in new environment which causes nervousness even among some adults which may affect the demeanor of a child who is a key witness and indeed has useful information to pass on to court.

Due to lack of set standards or rules, each judge or judicial officer adopts their own procedure, questions which may even vary from case to case in a bid to determine the intelligence of a child.

Intelligence has been defined in dictionaries by Merriam Webster, Cambridge English Dictionary, and Oxford Dictionaries but all in all it refers to the ability to retain knowledge, use reasoning to solve problems, or have an average brain power which really refers to someone's ability to understand things.

Courts of law must take judicial notice of increased violence against children in areas of sexual violence, child sacrifice, domestic violence where children are victims of crime as well as witnesses to crime.

In view of the changing trend where children are increasingly involved in the justice system either as victims of crime or witnesses it would be fair for the criminal justice system to come up with reforms concerning taking and admission of their evidence

Whereas it is important for the trial court to always warn and caution itself and (assessors in cases triable by the High Court) of the dangers of relying on evidence of a child of tender age like it does with evidence of a single identifying adult witness see case of ***Nabulele,*** each case involving children should be considered based on its peculiar circumstances to avoid mistakes that can cause and occasion a miscarriage of justice and injustice to children who are victims of crime.

It is common knowledge that children develop in stages and according to those who have specialized in this area as read from Google post on 1/10/2018 on child development stages, after their third birthday, children become increasingly independent, as they try to make sense of the world around them. They develop a sense of right and wrong, and will be desperate for praise and approval. Their memory starts improving as they may be able to remember favourite songs and nursery rhymes if they attend kindergarten and church.

At the age of four, children can show a range of emotions, and can have an idea of how others feel about them. They may be withdrawn and feel free with adults around them.

At the age of five, children become much more confident in their abilities. Often, this is most obvious in terms of their speech and language development as an average five year is very talkative. According to Dr. Pat Spungin of parenting website raisingkids.co.uk the age of 5 is a period of great intellectual growth as a child begins to grasp more abstract ideas, like numbers, time, and distance.

It is also important to note that children develop at different speeds both physically and mentally. But ideally at the age of 5 and above, children are able to hold a conversation, and may be able to describe events and repeat stories that have captivated their mind. They may know characters in cartoons, they know names of their family members and neighbours as they are called or referred to like mama X taata Y, names of their friends, teachers and what people do around them. For example they can describe persons by the work they do such as the man that sells milk, or makes chapatis etc.

It is therefore important to test the intelligence of a child based on his or her development stage and appreciate the fact that much as they are children they have a sense of understanding and indeed they can identify those who have hurt them or who committed crime in their presence depending on the circumstances of each case.

Ask questions that would require the child to give their names, names of their parents or guardians, name of the school if any, if they know why they are in court, and if they have any information they want tell court about the case before court, whether they are going to tell court what they saw by themselves or heard, and whether they will tell court the truth.

If they are found to be possessed with sufficient intelligence to give evidence, there is no cogent reason why they should not be allowed to take oath. They only need to be treated with dignity and courtesy as children bearing in mind their level of development.

Section 10 of the Oaths Act (supra) presupposes that a witness made an informed choice to give unsworn evidence. Unlike Adults who are given a choice and very often opt to give unsworn evidence to avoid cross examination because they don't want their evidence tested, the child's fate is based on the presumed good sense of judgment of the Trial Judge or Magistrate, yet failure to take oath renders the child's evidence useless without corroboration.

It is trite law that court can convict on the evidence of a single witness if he or she satisfies court. With the current law on evidence of children of tender age, this is not possible making the law discriminatory against children.

Given the fact that there is no uniform method, or set of questions that are used, a child who may tell court the truth that they often lie, may not be allowed to take oath just because they have said they tell lies. Already this child is being very honest but that true revelation is taken against him or her.

Some judicial officers may use religious questions based on their own belief without appreciating the fact that children's decision to go for fellowship in places of worship depends on the parent's programme. Failure to attend places of worship regularly or not at all does not mean that the child does not understand the duty to tell the truth.

Courts are often tempted to ask whether children know God, whether they know what happens in hell and heaven, whether they know what happens to them when they tell lies and so many funny questions which attracts imaginary answers from children since nobody has visited those places before in reality.

It is time to reform the unfair laws affecting children who cannot speak for themselves and not leave it to the good sense of the trial court. The trial court applies the law and facts of the case while making decisions. In the case of viore dire, it's the good sense of the judge and magistrate, not any law.

Allowing children of tender age to testify while prima facie the court is not believing them even as victims of crime since the law is that no conviction should follow without corroboration in my opinion is a mockery and miscarriage of justice making our criminal justice system very unfair and discriminatory against children. It brands all children liars even when they are very honest.

I find this law that requires corroboration repulsive and discriminatory against children. It is a bad law which should be amended. I believe judicial officers have sufficient intelligence to discern from lies and truth just like it is done with adults and can ably exercise the pre requisite caution when dealing with children of tender age. Once a child is allowed to testify, let the evidence be subjected to the normal scrutiny like that of adults and not rendered useless because they were not given a chance to test their credibility.

The UN guidelines on justice in matters involving child victims and witnesses of crime recognize that children are vulnerable and require special protection according to their age, level of maturity, and individual special needs.

Specifically the guidelines provide for the right to participate in court proceedings in the following words:

" Every child has ,subject to national procedural law, the right to express his or her views ,opinions, and beliefs freely, in his or her own words and to contribute especially to the decision affecting his or her life, including those taken in any judicial process, and to

have those views taken into consideration according to his or her abilities, age, intellectual maturity, and evolving capacity. The best interest of the child shall be primary consideration in all matters involving or affecting them,"

The guidelines further provide that***: "Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone, as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance" (United Nations Economic and Social Council Resolution 20 of 2005, paragraph 18).***

The above guide line is actually entrenched in our 1995 Constitution under Article 44(c). A right to a fair hearing includes a right to hear the victim's case.

Where a child is a victim of crime, he or she has that non derogatory right to be heard and should be treated as a capable witness of course subject to examination and her or his testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age, allow the giving of intelligible and credible testimony with or without communication aids and other assistance.

The right to a fair hearing cannot be removed and should not be removed by the legal process of conducting a viore dire which allows the judge or magistrate to exercise their discretion as to whether the child should take oath or not. Once a child is found to be intelligent enough to testify, he or she should be allowed to have her testimony tested by cross examination to avoid the requirement of corroboration of the particular fact especially where the child is the sole identifying witness.

The principles set out in the land mark case of ***Abdala Nabulere*** &

Another Versus Uganda Criminal Appeal No 6 of 1978 should apply even to children who are intelligent enough to testify as regards identification if they are the sole witnesses on identification since section 133 of the Evidence Act Cap 6 states that:

***"subject to the provisions of any other law in force , no particular number of witnesses shall in any case be required for the proof of any fact*" .This law suggests that it is lawful to consider some other law and in this case , it's the law affecting evidence of children of tender age whose evidence requires corroboration.

In my humble opinion, Invalidating the child's evidence based on the provisions of the Oaths Act, The Magistrates Act and Trial on Indictments Act cited above contravenes Article 44(c) of the Constitution of 1995 as these particular sections are inconsistent with the Constitution which is the Supreme Law of the land. The law is very clear that where any other law or custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail and that other law or custom shall be ,to the extent of the inconsistency be void. (Article 2(2)) of the 1995 Constitution supra.

Having gone through the law and legal principles above, let me revert to the issues at hand.

The 2nd Respondents counsel submitted that the mode of carrying out the Voir Dire examination is not specifically provided for in any written law in Uganda. Whether or not a voir dire examination was carried out is a question of fact to be decided by this honorable court according to the circumstances of a particular case. I entirely agree with him on this. He went on to cite the case *of* ***Sula versus Uganda [2001] 2 EA 556,*** where the Supreme court of Uganda approved two formats of carrying out a voir dire examination namely:

1. ***The court may write down the questions put to the witness and the answers of the witness in the first person and in the actual words of the witness in a dialogue or***
2. ***The court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make its conclusion thereafter.***

In view of the fact that there is no statutory provision about the process of conducting the voir dire, the above is the current case law that is applicable. Whichever format is applied, the record should ideally indicate that questions were asked and answers recorded.

In the case under review, page 4 of the certified proceedings that took place on 8/1/2010, the recording about voir dire is as follows:

PW1 ***:"(the victim) appears young in a voir dire is conduct in the witness is found unable to understand the purpose of taking an oath."*** Everything appears wrong including the sentence construction, but that is what is certified as the true record.

I construe that statement to refer to the opinion of the learned chief magistrate before taking the evidence of the victim.

The Chief Magistrate then took his evidence. The record even indicates that ***Alan Sembatya male adult of 7 years***….

The record of proceedings is evidence of what transpires in court. The Appellate court relies on the record to determine the propriety, irregularity and illegality of proceedings. Conducting a voir dire is a question of fact and where the process does not fall within the ambit of the precedent set in the case of Sula cited above, it cannot be said that it was conducted.

Since the process of determining whether the child is possessed with sufficient intelligence to testify and whether he or she understands the duty of speaking the truth has a fundamental effect on the evidence, more so if the child will not be believed as his evidence has to be corroborated, flouting the established procedure is irregular and indeed may occasion a miscarriage of justice.

The situation is made worse where the child is a key witness like in the instant case.

I do not agree with the submission of counsel Sseryanzi for the 1st Respondent that a voir dire was conducted.

The basis of the learned Chief Magistrates opinion is not known since he did not record any questions or answers to any question. There is no evidence of dialogue completely.

In the result, it is my finding that the learned trial Magistrate erred in law and in fact by not conducting a voir dire in accordance with the current established procedure thereby occasioning a miscarriage of justice.

The second ground is ***whether the trial Magistrate erred in fact and law when she held that the victim's evidence was not corroborated and hence wrongly acquitted the respondents***.

The law governing corroboration was stated in the land mark case of ***R V Baskerville (1916)2 KB 658*** where Lord Reading CJ Stated that: ***"we hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is which confirms in some material particular not only the evidence that the crime has been committed, but also the prisoner committed it"***

It is trite that where a child of tender years gives unsworn evidence, that evidence must be corroborated with independent material evidence before a conviction can be based on it.

I have commented on this criminal procedure and its unfairness when it comes to the evidence of a child who is the sole identifying witness. Whereas the underlying spirit behind it is to ensure the prosecution proves its case beyond reasonable doubt, fairness in all court proceedings must apply to all parties.

The law on corroboration of evidence of a child presupposes that children are unreliable, untrustworthy which is a general presumption without taking into account the circumstances of each case. A child of seven years, like in the case before court, who goes to school, knew the suspects before, in my view is old enough to give evidence which should be subjected to the evaluation of court but not just discarded because of the archaic laws of legal procedures that never trusted children prima facie.

Section 155 of the Evidence Act defines what is sufficient to corroborate evidence as follows***:***

"In order to corroborate the testimony of a witness, any former statement by such witness relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved".

The investigating officer's statement, recording officers evidence and that of the very first person who received the first information from the child whether as victim or witness to a criminal act is very important as it can corroborate the evidence of a child.

I found only two witness statements on record. The victim's unsworn statement which requires corroboration as per the current law and the grandmother's evidence Margaret Ssembatya PW2.

The grandmother's evidence according to the certified proceedings was taken on 8/1/2010 before his worship Kiliman Jamson Kalemera who was a grade one magistrate then.

He did not have the jurisdiction to preside over a case of attempted murder which is triable by a Chief Magistrate.

Justice Musoke Kibuka in the case of ***Kasibante Moses Versus Katongole Singh Marwana and Another Election Petition no 23/2011*** stated on jurisdiction as follows:

"***The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. It confers upon court the power to decide any matter in controversy. It pre-supposes the existence of a duly, constituted court with full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under inquiry".***

He went on to state that ***'It is trite law that no court can confer jurisdiction upon itself. It is equally trite that no court can assign or delegate jurisdiction vested in it".***

Section 161(2) of the Magistrates courts Act provides that ***"a Magistrate Grade 1 may try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life". Attempted murder has the maximum penalty of imprisonment for life.***

The circumstances under which a grade one magistrate took part of the evidence in this case is not known. Whether he conferred jurisdiction upon himself or it was delegated, it rendered the particular proceedings of that day a nullity.

As the first appellate court, my duty is to re-evaluate the evidence and the entire judicial process.

The Grade One Magistrate presided over a case in which he had no jurisdiction at a critical time of hearing evidence. I find the act of having two different magistrates of different jurisdiction taking evidence and the third concluding the case by forcing the state to close its case before calling all the witness, irregular which occasioned a miscarriage of justice.

The evidence that would have corroborated the testimony of the victim was not properly taken by a competent trial magistrate and others were forcefully left out because the court compelled the state to close.

The Trial Chief Magistrate who heard the defence never presided over the prosecution case and was therefore not even conversant with the facts of the case. She never saw the child testify. She did not see the demeanor of the child victim.

The Trial Chief Magistrate did not even realize that the case had been adjourned for cross examination of Margaret Ssembatya. Had she noticed that, she could have realized that the grade one Magistrate had no jurisdiction to take her evidence which would have necessitated hearing of the case denovo.

This being a court of justice, it cannot allow the illegality to prevail.

I do agree that there was no corroboration because the evidence of PW2 was taken without jurisdiction, the Trial Chief Magistrate compelled the state to close its case, pre maturely and unfairly, after taking the evidence of the victim with material irregularity causing a miscarriage of justice.

Lastly is ***whether the Trial Magistrate erred in law and fact when she held that the respondent were not properly identified by the victim and hence came to a wrong conclusion.***

I have considered the arguments on both sides in their respective submissions and the evidence on record. Since I found the process of taking the evidence of both witnesses flawed, I am not persuaded to re-evaluate evidence that was erroneously taken. Taking part of the prosecution evidence by a grade one magistrate was a nullity which can only be cured through a re trial.

I am very convinced that the flaw in taking evidence and forceful closure of the prosecution case occasioned a miscarriage of justice.

In view of the above finding I allow the appeal, set aside the acquittal and order a retrial before the current chief magistrate of Mukono Chief Magistrate’s court.

In view of the fact that the case was first reported in 2009, the Chief Magistrate should hear and complete it within three months from the date of judgment.

Since the Respondents are absent the justice of this case demands that a warrant of Arrest be issued to enable them appear for the retrial.

Respondents be remanded and the normal process of conducting criminal proceedings from plea taking should follow.

They are free to appeal against the judgment if they are not satisfied within 14 days from to date.

Dated this **9**th day of **November 2018.**

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Margaret Mutonyi

RESIDENT JUDGE

MUKONO HIGH COURT CIRCUIT