THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA

CRIMINAL MISC. APPL. No. 4 of 2021
(Arising From High Court Cr Appeal No 32 of 2018)

IN THE MATTER OF AN APLICATION FOR REVIEW

SENFUKA ABUBAKER :::::::::::::::: APPLICANT

Versus

UGANDA :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is brought under Sections 14 and 33 of the Judicature Act and the **The Judicature (Criminal Procedure) (Applications) Rules SI 13 – 8.**

The applicant seeks orders that:

1. The Court reviews the Judgment, Orders and Conviction in Criminal Appeal No. 32 of 2018 on account of errors on the face of the record.
2. A declaration that the determination which was reached in Criminal Appeal No 32 of 2018 by the Court with the appellant neither prosecuting it, nor the respondent being afforded a chance to be heard was irrational and illegal.
3. A declaration that the conviction arising from the purported proceedings leading to, and the judgment arising from the said Criminal Appeal contravened and violated the cardinal principles of fair hearing and natural justice – the same be set aside on grounds of illegality.
4. Costs of incidental to this application be provided for.

The grounds on which this application is based are stated in the Notice of Motion and particularised in the affidavit affirmed by the applicant. He states that in 2013 he was charged in Makindye Chief Magistrates Court with the offences of Forgery and Uttering a False Document vide Case 783 of 2013. That on 5th February, 2018 he was acquitted of both charges. That neither the applicant nor his lawyers were ever served with any Notice of nor Memorandum of Appeal by the respondent. They were therefore not aware that an appeal had been filed. Then on the 27th January 2021 he was served with criminal summons to attend the Hon. Judge Oyuko Anthony Ojok at the High Court Criminal Division on 1st February, 2021 he appeared with Counsel Oola Gabriel, who informed court that they had never been served with any Notice of Appeal or Memorandum of Appeal. That the parties were directed to file written submissions by 8th of February, 2021, and the matter was fixed for judgement on 15th February, 2021. That his lawyer complied with the directive to file submissions. That on the 15th of February 2021 the court, in its judgement, set aside the order of acquittal, convicted the applicant, and sentenced him to Two and Half (2 ½) years in prison. He was also ordered to pay UGX 30,000,000/ = to the complainant.

That he instructed new counsel to study the record of the court and also filed a Notice of Appeal. He requested for a copy of the proceedings and observed that:

- The appeal first came up for hearing on 7th October, 2018 and the record shows he had not been served.
- That the matter was *"adjourned to 7/11/2019 after submissions been filed within two weeks thereof the appellant to effect respondent with the judgement notice for 7/11/2019*". This implied that he was to be served with a judgement notice even before service on him.
- That on 11/12/2019 the record shows that the applicant had not been served. That the matter was given a last adjournment to hear the appeal on 23/3/2020 at 1.00 pm. It states *"Respondent be effected with memorandum of appeal and hearing notice from the appellant both be effected for 23.3.2020"*. It implied that even by this date, the applicant had not been served with the notice of appeal and memorandum of appeal.
- That the record shows that on 3/08/2020 one Nandawala Lilian holding brief for Maxine stated that "although we have a memorandum of appeal, I am not sure if the

respondent is aware of today's date. We need time to trace the Respondent". That this meant that even by this date the applicant had never been served.

- On the 25th of November 2020 the record shows that the matter was for judgement. It reads "*judgment is ready but the accused person not in court, let summons be issued to the accused*." That judgement was ready without before the applicant had been served. That the respondent had at this stage not prosecuted the appeal through the filing of submissions or otherwise.
- That on 11/12/2020 the record shows that the matter was ready for judgement but it was adjourned to 18/12/2020 at 10.00 am.
- When the matter was called on 18/12/2020 for judgment the Court directed that *'let summons be issued and state be informed. Matter adjourned to 29/Jan/ 2021 at 10.00 am'.*

That the proceedings clearly and manifestly show that the Court breached the rules of natural justice and fairness envisaged for a fair trial. That on all the dates the appeal was called, the applicant had not been served and was not aware of the matter. That he was served with criminal summons for the first time on the 27th of January, 2021 at his residence, yet the complainant has always known his residence and the offences with which he had been charged related to a land dispute in their neighbourhood.

That when he received the criminal summons his counsel wrote to the court notifying it that he had never been served with the notice of appeal and memorandum of appeal. That despite filing submissions on time, the judgement states that "both parties did not file submissions".

The applicant states that the proceedings manifest extreme unfairness as he was never given a fair hearing nor accorded a chance to participate in the hearing of the appeal.

That this honourable court is vested with the jurisdiction to review the proceedings / circumstances under which the appeal was heard and to quash and or set aside the judgement, conviction and orders arising from the said proceedings.

Appearance

Mr James Katono appeared for the Applicant

Ms Lillian Nandawula was for the respondent.

Submissions

It was the submission of the applicant that the conviction of the applicant by the appellate Court was irrational, illegal and unfair because although the matter was called several times for hearing, there had been service effected on him. That from the record, the Judgment was ready long before the said service.

Counsel contends that Section 14 and 33 of **the Judicature Act** give this Court unlimited original jurisdiction to grant any remedies that serve the ends of justice. He cited the case of **Bushoborzi Eric vs Uganda HCMC (Fort Portal) 11 of 2015**.

It was argued that Article 126 of the Constitution enjoins the Court to disregard technicalities. That in this case the applicant was not given a fair hearing and as such the matter cannot stand. For this contention **Asibuku Muzamil HCCA (Arua) No 14 of 2016** was relied on.

It was prayed that the Court grant the application and the applicant be retried.

The State opposed this application.

In reply it was the contention of Counsel that it is true that under Section 14 of The Judicature Act, the High Court has unlimited original jurisdiction. That this matter was heard and concluded by the 1st appellate Court. That the law states that where any party is dissatisfied with the decision on appeal they may file a second appeal. The law does not provide for Review of the decision. That the orders sought in this application can only be granted by the 2nd appellate Court.

In rejoinder, Counsel for the applicant reiterated that the applicant seeks a review and not a Revision of the decision.

Determination

Issues

1. Whether this Court has the Jurisdiction to grant the orders sought?
2. What remedies are available?

Issue No. 1

Whether this Court has the Jurisdiction to grant the orders sought?

In this case, the applicant Senfuka Abubaker was charged, tried and acquitted by the Magistrates Court sitting at Makindye. The State appealed to the High Court, challenging that acquittal. The Judgment on the appeal was read on the 15th of February 2021, where it was ordered that the acquittal be set aside and a conviction substituted therefor. The applicant was sentenced to 2 ½ years imprisonment and also ordered to pay compensation of 10,000,000/- for destruction of property.

It was following judgement in that appeal that this application was filed. The applicant is aggrieved by the manner in which the appeal was conducted. It is his contention that the decision was reached before he was given an opportunity to be heard. In sum the applicant seeks orders that this Court review that judgement and set it aside on grounds of illegality. The question now is whether this Court can review the Judgment of Hon Justice Anthony Oyuko and grant the remedies prayed for.

That point is resolved by determining whether this Court has the mandate or jurisdiction to set aside and overturn a conviction and sentence entered by the very same High Court (a court of concurrent jurisdiction) sitting as a first (1st) Appellate Court.

The 5th Edition of **the Oxford Dictionary of Law** defines jurisdiction as 'The power of a court to hear and decide a case or make a certain order'. The 9th Edition of **Black's Law Dictionary** describes Judicial Jurisdiction 'The legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it'.

In this case therefore the contention will be whether this court has the power or authority to set aside the judgment of this Court, entered by this Court sitting as a first appeal. Regarding jurisdiction it was stated in the case of **Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B"; [2008) 1 EA 367 the Court** that,

> The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.

Although the cited decision was arrived at in a civil dispute, it properly sets out the principle on determining jurisdiction, and doing so at the earliest opportunity.

I have scoured the Statutes on Criminal Procedure and the mandate of the High Court. The power to Review, on its merits, a judgment entered on first appeal, has not been given to the Courts in criminal matters. There is no specific provision anywhere that grants the High Courts the jurisdiction to review a judgment or orders of the Court sitting as an appellate Court. Or more particularly, to set aside an order of conviction, sentence or acquittal that the very Court may have made.

But can a court act to invoke inherent powers to stem what may be deemed to be an illegality?

The applicant submitted that this Court may act under Article 126 (2) (e) of **the Constitution** or Section 33 of **the Judicature Act** to grant the Orders sought**.**

Article 126 (2) (e) of **the Constitution** stipulates,

> In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles -
>
> a) …
> b) …
> e) substantive justice shall be administered without undue regard to technicalities

Section 33 of **the Judicature Act** is to the effect that,

> The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

In respect to Article 126 (2) (e) of the Constitution, the provision can only be properly used subject to the law applicable in the circumstances. The Court will rely on this remedial provision where the law permits it to do so. In same vein, Section 33 of the Judicature Act is available only where the Court has jurisdiction to act, and where the matter is properly before that particular Court.

A Court cannot rely on inherent powers outside the provisions of the law or where the law does not give it the mandate to do so. The general rule is that inherent powers are invoked where the law allows the Court to use them. In the Criminal Procedure regime utilised by the High Court, there is no specific provision saving the inherent powers of the High Court, which it may resort to in the handling of Criminal Appeals. Secondly the inherent powers of Court can only be cited where there is no specific remedy available to the parties. Thirdly inherent powers cannot be utilised where the matter is not properly before the Court.

In the instant case the 1st appeal has been heard and determined. In such a situation, there is a remedy enacted and available to reverse a decision reached by the High Court on appeal. The aggrieved party is at liberty to file a 2nd appeal, to the Court of Appeal, as stipulated in Section 45 of **the Criminal Procedure Code Act**. This is the procedure prescribed to regulate the challenge, on the merits, of the findings of the 1st appellate Court.

In view of the above, there is both a specific remedy of a second appeal available, and secondly this Court has no mandate or jurisdiction to Review, and reverse, its own orders made on 1st appeal. Thus inherent powers cannot be invoked.

Once the High Court has reached a decision and signed the judgment on appeal, it becomes *Functus Officio*.

In ***Criminal Procedure and Practice*** by Musa Ssekana (*Law Africa*) pg 377 the term is defined as

> 'having performed his office'. It refers to a legal term used to describe court not retaining any legal authority because its duties and functions have been completed. The general rule is that a final decision of court cannot be reopened.

Here the judgment against the applicant in **High Court Cr Appeal No 32 of 2018** is final, thus giving effect to the principle of finality in criminal appeals. In the absence of finality there would be no end to criminal proceedings by persons reopening proceedings.

Having considered all the above, it is the finding of this Court that it has no jurisdiction to re-hear this appeal, review the decision and set aside the judgement and orders of the Court. The 1st issue is therefore answered in the negative.

In the result, the application is incompetent and fails. It is accordingly dismissed.

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Michael Elubu

Judge

14.4.2021