

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CRIMINAL DIVISION)

CRIMINAL APPEAL NO.033 OF 2021

5 **(ARISING FROM CRIMINAL CASE NO.052 OF 2021, KAJJANSI CHIEF
MAGISTRATES COURT)**

1. ONIDA MOSES

2. OWILLI SAMUEL BAKER:.....APPELLANTS

VERSUS

10 **UGANDA:.....RESPONDENT**

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

This appeal arises from the judgement of Her Worship Phionah Birungi, Magistrate Grade One delivered on the 11th May ,2021 at Kajjansi Chief
15 Magistrates Court whereby the appellants were convicted of the offence of neglect to prevent a felony contrary to section 389 of the Penal Code Act. They were sentenced to six months and ordered to pay a compensation of Ug.sh 11,490,000/= (Eleven Million Four Hundred and Ninety Thousand shillings only) to the school they were guarding.

20 The background of this appeal is that the appellants were private security guards working with M/s Maestro Security Company Limited, that while on duty on the 2nd of February 2021, at Galaxy International School of Uganda at Lubowa Kyeyagalire Zone, Makindye Ssabagabo Municipality in Wakiso District, thieves/
burglars entered into one of the hostels they were guarding and stole a number
25 of items to wit two mobile phones, one iPhone 11, Techno Spark, A Galaxy Tab A,3 laptops and a television set. The appellants were arrested and jointly charged with the offence of neglect to prevent a felony contrary to section 389 of the Penal Code

Aggrieved by the decision of the trial magistrate, the appellants appealed to this
30 court on the following grounds;

1. **That the learned trial magistrate erred in law and fact when she did not afford the appellants a translator to translate court proceedings from English language into Luo language, hence occasioning a miscarriage of justice.**
- 35 2. **That the learned trial magistrate erred in law and fact when she did not give the appellants adequate time to prepare their defense hence occasioning a miscarriage of justice.**
- 40 3. **That the learned trial magistrate erred in law and fact when she convicted the appellants' when the prosecution had not proved its case beyond reasonable doubt hence occasioning a miscarriage of justice**

The appellants prayed to court to allow the appeal, quash the conviction and set aside the sentence of the lower court.

Both parties filed their written submissions.

45 **Appellants submissions**

Counsel for appellants submitted on grounds 1 & 2 concurrently

He submitted that the trial court violated their constitutional right of an entitlement to a translator while they were on trial. He added that throughout the entire proceedings other than that of the bail application, the trial court did
50 not afford a translator to the appellants.

He contended that the appellants who are Luo speakers were illiterate and therefore did not understand the proceedings throughout the trial.

He submitted that the adverse effects of lack of translation were that the appellants were unable to give their evidence in chief, call witnesses, mitigate
55 their sentences and that they did not generally understand the nature of the proceedings which in effect led to them being condemned unheard.

He cited article 28(3) (f) of the Constitution which provides that every person who is charged with a criminal offence shall be afforded without payment by that person, the assistance of an interpreter if that person cannot understand
60 the language used at the trial.

He further submitted that failure to afford the appellants a translator affected their right to a fair hearing and also violated article 44 of the Constitution where the right to a fair hearing is entrenched as one of the non derogable rights. He cited the case of **De Souza Vs. Tanga Town Council Civil Appeal No.89 of**
65 **1960 reported in 1961 EA 377 at page 388** where the court held that if the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be a no decision. He prayed for court to find ground one in
70 the affirmative.

On ground two, counsel for the appellants submitted that appellants were not given enough time to prepare their defence, that the proceedings of 3rd May, 2021 were done hurriedly without giving the accused persons a chance to prepare their defence. It was his submission that when the matter came up for
75 hearing on 3rd May,2021, the court proceeded summarily and had PW1 tendered in his evidence, heard PW3 and PW2, prosecution closed its case, submissions on the prima facie case were made, ruling on prima facie case was made, options of the defence were read out to the appellants' and that both appellants' were supposed to give their evidence in defence and all this was
80 done on the same day.

He argued that the manner in which the lower court conducted the proceedings on that day violated article 28(3)(c) of the Constitution which requires that a person charged with a criminal offence shall be given adequate time and facilities for the preparation of his or her defence. He submitted that the
85 appellants had not been accorded adequate time to put up their defence and prayed for this ground to succeed

On ground three, counsel for the appellants submitted that section 389 of the Penal Code Act with which the appellants were charged provides that;

90 **“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion of the felony, commits a misdemeanor.”**

He contended that the above section requires the prosecution to prove that the accused person had knowledge of the potential crime or felony before it was committed. He submitted that in the instant case it was not proved beyond
95 reasonable doubt that the appellants had prior knowledge of the breaking in of the said hostel

He prayed for the appeal to succeed.

Respondent’s submissions

Counsel for the respondent conceded to ground one of the appeal and indeed
100 admitted that the lack of a translator when the hearing took place occasioned a miscarriage of justice hence rendering the entire hearing void as the appellants did not understand the entire trial proceedings.

She however prayed for this court to refer the matter back to the lower court for retrial. In support of this, she cited the case **of Gwolo Jackson alias Mugaga
105 versus Uganda Criminal Appeal No.015** of 2017 where it was held that where the appellate court forms an opinion that a defect in procedure resulted into a failure of justice, it is empowered to direct a retrial

Consideration

The duty of this court as a first Appellate Court was stated in the case of
110 **Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997** where court held that;

“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its

115 **own mind not disregarding the judgment appealed from but carefully weighing and considering it.”**

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion.

120 The gist of this appeal is whether the failure to afford the appellants an interpreter to interpret court proceedings from English language into Luo language occasioned a miscarriage of justice.

Article 28(3) (f) of the 1995 Constitution of the Republic of Uganda as amended which provides that;

125 **“Every person who is charged with a criminal offence shall be afforded without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial.”**

It is therefore trite law that where an accused person does not understand the official language of the court, an interpreter must be provided for him without any expense. Simultaneously, there should be adequate interpretation to the court anything said by the accused persons.

130 The value and importance of interpretation of proceedings to an accused person are not in doubt. Indeed, interpretation is the only means of ensuring proper understanding by and participation of an accused person in the trial proceedings where the proceedings are being conducted in a language he/she does not understand hence enabling justice

135 This right to an interpreter ensures that the accused person who is not familiar with the official language of court will be able to understand the proceedings and properly defend himself.

140 In the instant case, I have perused the record and relied on the respondents own admission that there was indeed no interpretation for the appellants of the proceedings in the lower court. As a result of this, their right to a fair trial was in jeopardy for the reasons that they were not in position to understand or respond to the questions put to them which affected their ability to defend themselves in

court. I therefore I find that lack of interpretation occasioned a miscarriage of justice to the appellants.

145 Ground one succeeds.

Where a conviction by a lower court is based on a fundamental irregularity in the proceedings which results into a miscarriage of justice, the interest of justice normally demands that a retrial be ordered. An order for a retrial is as a result of the judicious exercise of the court's discretion which should be done with great
150 care and not randomly, but upon principles that have been developed over time by the Courts: **See: Fatehali Manji vs R, [1966] EA 34**

The overriding purpose of a retrial as stated in the case of **Rev. Father Santos Wapokra vs Uganda, CACA No. 204 of 2012**, is to ensure that the cause of justice is served in a case before court. A serious error committed as to the
155 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, it must also ensure that the accused person is not subjected to double jeopardy,
160 by way of expense, delay and inconvenience by reason of the retrial.

The other considerations to be taken into account before ordering a retrial include; where the original trial was illegal or defective, the rule of the law that a man shall not be twice vexed for one and the same cause ,where an accused was convicted of an offence other than the one with which he was either
165 charged or ought to have been charged, 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
170 commission of the offence and the new trial, and whether the evidence will be available at the new trial. **See: Tamano vs R [1969] EA 126.**

In the instant case, taking guidance from the above authorities, I note that the offence of this appeal was committed on the 2nd February, 2021, the appellants were charged on the 10th day of February 2021, the trial commenced on the 31st March 2021, judgement was delivered on the 11th May, 2021 whereby the appellants were convicted. Taking into consideration the lapse of time and the fact that the appellants have already served their custodial sentence, a retrial would be meaningless. It is also my considered view that ordering a re-trial would expose the appellants to double jeopardy.

For the above reasons, I am inclined not to order a retrial, I allow the appeal, quash the conviction and set aside the sentence. I also order for the immediate release of the appellants unless there are being held on some other lawful charges.

I accordingly find no point in considering the other grounds of appeal.

I so order.

Dated this -----day of -----2022

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JUDGE

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