THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: [MWANGUSYA; OPIO-AWERI; MUGAMBA; BUTEERA; JJ.S.C; NSHIMYE; Ag. J.S.C]

MISCELLENOUS CRIMINAL APPLICATION NO. 01 OF 2016

MPAGI GODFREY==========APPLLICANT

VERSUS

UGANDA==========RESPONDENT

[An application arising from SCCA No.63 of 2015, dated 15/09/2017 before Katureebe CJ; Tumwesigye; Kisakye; Mwangusya; Opio-Aweri; JJ.S.C]

THE RULING OF COURT

The applicant was tried and convicted by the High Court of the offence of Murder. He was sentenced to thirty four years imprisonment.

His appeal to the Court of Appeal was dismissed. He appealed to this Court which upheld both the conviction and the sentence of imprisonment for 34 years.

The applicant brought this application by Notice of Motion under **Article 126 (2) (e) of the Constitution**, as well as **Rules 2 (2), 42 (1) and 66 (3)** of the Rules of this Court seeking the leave of Court for the following orders:

1. That the applicant's appeal No. 63 of 2015 be restored to give a chance to hear sentence appeal only which was never argued at the Supreme Court.
2. That leave be granted for the applicant to file his memorandum of appeal and / or expeditiously be heard on an appeal on sentence only.
3. Any other relief be issued.

The applicant, Mpagi Godfrey, swore an affidavit in support of this application. It is attached to the notice of motion. The grounds upon which the application is based, according to the notice of motion, are the following:

a) **"That the intended application only raises matter of law as the previous decision of this Court to uphold the 34 years sentence which was not subject of the appeal was made in error and this would be in the interest of justice to the applicant.**
b) **That initially the applicant filed a notice of appeal to this Court indicating intention to appeal on conviction and sentence, and under normal circumstances that sentence appeal would be withdrawn upon seeking leave of Court, which was not the case in the applicant's case.**
c) **That the error of counsel at the 2nd appeal who did not include a ground on sentence in the memorandum of appeal or failed to argue sentence appeal should not be visited on the appellant.**
d) **That the applicant was the appellant in the referenced criminal appeal above giving rise to this miscellaneous application arising therefrom.**
e) **That substantive justice should be delivered without undue regard to any technicalities.**
f) **That though the applicant has exhausted the Supreme Court Appeal, it is clear on the judgment of Court that there was no appeal on sentence and no reason given for its absence.**
g) **That this Honourable Court has the inherent obligation to entertain the applicant on sentence appeal only as the decision to exclude sentence appeal was done without his permission.**

h) **That the applicant has offered such safeguards sufficient to overcome any concerns which this honourable Court may have about granting leave.**

i) **That it would be fair in the interest of justice if this honourable apex Court grants this application."**

Representation

At the hearing the applicant was represented by learned counsel Ms. Wakabala Suzan Sylvia. The respondent was represented by Ms. Angutoko Immaculate, a Senior State Attorney. Both parties filed written submissions which they adopted at the hearing.

Submissions for the applicant

Counsel for the applicant submitted that, the applicant filed a notice of appeal to the Supreme Court indicating his intention to appeal against both conviction and sentence. According to Counsel, it was not clear why the appeal against sentence was not included in the memorandum of appeal or why it was not argued at the hearing before the Supreme Court. Counsel submitted that the appeal against sentence was dropped by Counsel for the appellant by mistake without the leave of Court and without approval by the applicant. Counsel prayed this Court that the mistake of Counsel should not be visited on the applicant. He added that the applicant should be given opportunity to be heard on merit.

Submissions by counsel for the respondent

The Senior State Attorney appearing for the respondent opposed the application and contended that it had no legal foundation. She submitted that for **Rule 2 (2)** of the Rules of this Court to apply, there must be evidence of miscarriage of justice or abuse of Court process by the party or there must be a judgment that is null and void which is not the case here. According to counsel, the applicant had not adduced any evidence on any of the grounds to justify this Court to exercise its inherent powers under **Rule 2 (2)** of the Rules of this Court. She said that the record of proceedings does not disclose such grounds either.

It was further submitted for the respondent that while the applicant sought to rely on **Rule 66 (3)** of the Rules of this Court the provision was not applicable to the facts of this application since the appeal on sentence was never withdrawn. In the instant case the applicant, through his lawyer duly filed a memorandum of appeal upon which he based his arguments at the hearing. Counsel added that the applicant never withdrew any appeal on sentence.

Counsel contended that restoration of an appeal can only be based on proof of fraud, mistake or that the interest of justice requires that the appeal should be heard. According to counsel, the applicant in this application had not proved any of those grounds and therefore the application had no foundation in law and it should be dismissed.

The Court's decision.

The respondent raised an objection that this application which was brought to Court under both **Rule 2 (2)** and **Rule 66 (3)** of the Rules of this Court was inappropriately before the Court as both Court Rules that the applicant sought to rely upon were not applicable.

This being a legal challenge to the application, we shall resolve it before we proceed to resolve any other issues that were raised.

In the determination of this application we have to keep in mind the fact that the application arises from a criminal appeal that was heard and determined by this Court. This being a final court of appeal in this country, it has to avoid a situation where it may be asked to sit on appeal against its own judgment and to do so in the very case in which it has already given judgment.

Faced with a similar situation, Sir Charles Newbold P., of the defunct East African Court of Appeal in ***Lakhamshi Brothers Ltd vs. R. Raja and Sons, [1966] EA 313*** held:

> ***"There is a principle which is of very greater importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation. This Court is now the final Court of Appeal and when it delivers its judgment, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as i have said, to the limited application of the slip Rule."***

Considering the same issue, this Court in ***Misc. Application No.17 of 2007 Orient Bank vs. Fredrick Zabwe & Another*** held:

> ***"It is trite law that the decision of this Court on any issue of fact or law is final, so that the unsuccessful party cannot apply for its reversal. The only circumstances under which this Court may be asked to re-visit its decision are set out in Rules 2 (2) and 35 (1) of the Rules of this Court. On the one hand, Rule 2 (2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders for inter alia-***

"...setting aside judgments which have been proved null and void after they have been passed, ..." (emphasis is added)"

We shall examine whether Rule 2 (2) of the rules of this Court is applicable to the instant case.

Rule 2 (2) of The Judicature (Supreme Court) Rules provides:

> **"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."**

Counsel for the respondent argued that in order for Rule 2 (2) of this Court to be applicable to this application, the applicant had to prove that there was a miscarriage of justice or abuse of Court process by a party or proof that the judgment in Criminal Appeal No. 63 of 2015 is null and void.

When considering this Rule in ***Orient Bank vs. Fredrick Zabwe & Another SCCA No.17 of 200,*** this Court held:

> ***"It is clear that, both under the inherent powers and under the slip rule, the Court's jurisdiction is circumscribed and must not be invoked to circumvent the principle of finality of the Court's decisions. We should therefore point out and stress that in this ruling we shall only consider two issues; namely whether the judgment in question is null and void and/or whether, as a result of any error arising from accidental slip or omission it is necessary to correct the judgment in order to give effect to the Court's intention."***

Applying the legal principles above quoted, in order to succeed in this application and for the judgment of this Court to be set aside under Rule 2 (2), the applicant had to prove that the judgment was null and void or that there was abuse of Court process.

In his affidavit of 24th May 2013, the applicant Mr. Mpagi Godfrey does not allege that the judgment in Criminal Appeal No. 63 of 2015 was null and void. He does not allege either that there was need to recall the judgment for purposes of preventing abuse of the process of Court or that there was abuse of the process caused by delay.

What the applicant contended was that there was a miscarriage of justice when counsel for the appellant in Criminal Appeal No. 63 of 2015 mistakenly excluded the appellants appeal on sentence at the hearing. According to the applicant, his notice of appeal indicated that he intended to appeal against conviction and sentence. The appellant alleged that the memorandum of appeal contained grounds in respect to conviction only which occasioned a miscarriage of justice to the applicant as he was not heard on sentence. He prayed this Court that the mistakes of counsel should not be visited on the applicant and that he should be given opportunity for his appeal on sentence to be heard on merit.

The applicant seems to suggest that his notice of appeal included sentence as a ground of appeal. This is not true. A notice of appeal simply indicates to the appellate Court and other parties to the case that the appellant has an intention to appeal on the matter.

The **Blacks law dictionary 9th Edition at page 1166** defines a Notice of appeal as:

> **"A document filed with a court and served on the other parties, stating an intention to appeal a trial court's judgment or order."** (Underlining is for emphasis)

It is trite law that all grounds of appeal that an appellant wishes to fault the lower Court Justices on should be clearly laid out in the memorandum of appeal.

Rule 62 of **The Judicature (Supreme Court) Rules** provides:

> **"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a constitutional appeal, the points of fact or law or mixed law and fact which are alleged to have been wrongly decided, and in third appeals the matters of law of great public or general importance wrongly decided."** (Emphasis is added)

The memorandum of appeal in Criminal Appeal No. 63 of 2015 did not include a ground of appeal on sentence. It was argued for the applicant that that was by mistake of counsel. It was submitted on the applicant's behalf that he should not be punished for the mistake of his counsel.

This Court has held in various decisions that counsel's omission or mistake should not be visited on his client. ***(See: Godfrey Magezi and another vs. Sudhir Rupaleria, Civil Application No. 10 of 2002, Molly Kyalikunda Turinawe and 4 others vs. Eng. Ephraim Turinawe and another, SC Civil ApplicationNo.27 of 2010)***

This Court has, however, made it clear that the general principle of law that mistake or omission of counsel should not be visited on his client is subject to exceptions.

For instance in ***Capt. Philip Ongom vs. Catherine Nyero Owota, SC Civil Appeal No. 14 of 2001,*** Mulenga, JSC held as follows:

> ***"A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the advocate due instructions."***

Similarly, in ***Sepiriya Kyamulesire vs. Justine Bikanchurika Bagambe, SC Civil Appeal No. 20 of 1995*** (unreported) Karokora, JSC also held as follows:

> ***"In my considered opinion, considering the decided cases of this Court and other Courts on this point, it is now settled that errors of omission by counsel (are) no longer considered to be fatal to an application under Rule 4 of the Rules of this Court unless there is evidence that the applicant was guilty of dilatory conduct in the instruction of his lawyer."***

In the instant application, the applicant was present in Court when his appeal was heard. At the hearing of this application, he communicated in English and stated clearly that he understands the English language which is the language of Court.

The applicant could have raised the issue before the Court then at the hearing of his appeal that the ground of appeal on sentence should have been included as a ground of appeal in the memorandum of appeal of Criminal Appeal No. 63 of 2015. He never raised the issue then.

The Court proceeded to hear and dispose of the appeal only on the ground relating to conviction as presented and gave judgment on that basis. The applicant now seeks to be allowed to be heard on the ground of sentence. He faults his counsel for excluding the ground of sentence from his appeal.

We have perused the record and have found no evidence of vigilance on the part of the applicant in Criminal Appeal No. 63 of 2015 to have the ground of appeal on sentence included in his memorandum of appeal so that it can be said that he

was let down by his counsel. His affidavit in support of this application does not bring out any evidence of vigilance on his part either that he gave instructions to his counsel in order that the ground of sentence may be raised in his appeal.

We find that there was no miscarriage of justice, abuse of court process nor was the judgment in Criminal Appeal No. 63 of 2015 null and void.

Therefore, **Rule 2(2)** of the Rules of this Court is not applicable in the instant case.

Rule 66 (3)

The applicant sought to rely on **Rule 66 (3)** of the Rules of this Court for Criminal Appeal No. 63 of 2015 to be restored and for the applicant be heard on the ground of sentence only.

The respondent contended that Rule 66 (3) was not applicable to the facts of this application since the appeal on sentence was never withdrawn.

Rule 66 (3) of **The Judicature (Supreme Court) Rules** provides:

> **"An appeal which has been withdrawn may be restored by leave of the court on the application of the appellant if the court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard."**

For Rule 66 (3) to be applicable, the applicant had a duty first to show that Criminal Appeal No. 63 of 2015 was filed and withdrawn.

The Court record shows that the appellant filed a memorandum of appeal which contained only one ground. That ground related to conviction. The criminal appeal was heard and determined by this Court on the 15th of September 2017 when it was dismissed.

Suffice to say the appeal was never withdrawn for it to qualify to be restored under **Rule 66 (3)** of the Rules of this Court.

The second duty was to show that the withdrawal was by fraud or mistake. We have already ruled that there was no withdrawal.

We accordingly find that **Rule 66 (3)** of this Courts Rules is not applicable to this application.

In conclusion, for the reasons above stated, we find that the applicant has not convinced this Court that there is sufficient reason for the Court to grant the leave applied for and for this Court to allow him to file an appeal on sentence after the Court had given its Judgment in Criminal Appeal No. 63 of 2015.

The application is accordingly dismissed.

The applicant shall continue to serve the sentence confirmed by this Court on 15th September 2017.

Dated at this day.....20th.....of.....September.....2018

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Hon. Justice Eldad Mwangusya

JUSTICE OF THE SUPREME COURT

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Hon. Justice Ruby Opio-Aweri

JUSTICE OF THE SUPREME COURT

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Hon. Justice Paul Mugamba

JUSTICE OF THE SUPREME COURT

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Hon. Justice Richard Buteera

JUSTICE OF THE SUPREME COURT

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Hon. Justice Augustine Nshimye

AG. JUSTICE OF THE SUPREME COURT