THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 16/92

(BUSIA CRIMINAL CASE NO. 90/92)

UGANDA ……………………………………………………..……….APPELLANT

VERSUS

1. YAKOBO MALABA
2. ERIZAFANI OKODIO
3. ERIMA BENJA MALABA…………………………………… RESPONDENTS
4. PAMBA MALABA
5. KANANY MALABA
6. FESTO MALABA

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

This is an appeal by the state against the 6 respondents. The six respondents are Yakobo Malaba, Erizafani Okodio, Erima Benja Malaba, Pamba Malaba, Kanany Malaba, Festo Malaba. The respondents were charged before the Grade 1 magistrate at Busia court with the offence of removing boundary marks c/s 318 of PCA. On 15-12-1992 they were all acquitted under section 125 of MCA as prosecution had not established a prima facie case for any of them to answer. The state decided to appeal against the acquittal. There were no grounds of appeal apart from one which requests the court to have a retrial carried out because the original file was reported to be irretrievably lost and attempts to trace it after the trial were futile.

The appeal is supported by an affidavit of one Sebastiano Mangeni Mooya who was the complainant in the lower court. Arguing the appeal on behalf of the state Mr. Okwanga strongly felt that this court should order a retrial because the state was unable to get the records of the lower court to enable it to formulate a proper memorandum of appeal. On his part Mr. Tuyiringire who appeared for the six respondents argued that there was no need to

order a retrial as such a move would expose or put the respondents to double jeopardy and that the appellant had other remedies available. He relied on the case of: Ahmed Ali D. Sumar v Republic (1964) EA 481 and that of Fatehali Manji v Republic (1966) 343. In both cases for retrial made by the lower court were set by the appellate court as it was not in the interests of justice to have the accused retied.

It was stated in the 2 cases quoted by Mr. Tuyiringire that each case must be considered on its own merits before a retrial could be ordered and that a retrial should only be ordered when original trial was illegal or defective and that a retrial should only be ordered where interest for justice demands for it. In the present case there are a number of interesting factors to be considered. In the first place the appellant does not appear to be telling the truth when he says that the original proceedings were not available to enable him to formulate grounds of appeal because Mr. Okwanga himself in his argument before this court said he saw some proceedings in possession of the respondents counsel and he found a lot of things missing in that record. This statement is supported by the affidavit of Sebastiano Mangeni Mooya who himself said he had seen typed original proceedings which had been obtained from the chambers of the counsel of the respondents and he said that the proceedings were not genuine because they had started they had stated from 12-9-90. In para. 3 of his affidavit in reply Yakobo Malaba one of the 6 respondents stated that he was in possession of the proceedings and judgment which had provide to him by the court on his own request. In para 6 of the same affidavit he also agrees that the proceedings are from 12-9-90 and he stated that the reason for that was because it was on that date that the hearing of that case started and that is when the first prosecution witness started testifying. From these records I feel that the appellant was not correct in saying that he did not have any material from which to formulate grounds of appeal. It is one thing to say that the proceedings are lost and it is another thing to say that the proceedings are defective. As a prudent counsel the learned counsel for the appellant should have formulated his grounds of appeal from the available record he would then have raised the point of defectiveness of the proceedings as one of the grounds of appeal.

In the case of: Haiderali Lakhoo Zayer v REX (1952) 19 EACA 244 a retrial was ordered by the High Court but the factors of that case were rather different from the present case. In the case of: R v Abdi Moge & 2 others (1948) 15 EACA 86 the factors which were almost the same as in the present case with2 pages of the proceedings missing. The court declined to

order a retrial. The reason why the court declined to order a retrial was that the appellants had already served the greater part of the sentence. In the present case it is said that the complainant Sebastiano Mangeni Mooya is dead it would certainly be futile to order a retrial.

The last point I would like to stress on is that the appellants counsel ought to have obtained an affidavit either from the court clerk at Busia or the trial magistrate at that court categorically stating that the file had got lost and the circumstances under which it got lost. The letter from that court dated 14-10-93 stating that the attempts to trace the file were futile was not enough. That letter should have been supported by an affidavit. The position being what it is I am even doubtful whether efforts to trace the file were exhaustively engaged. It was the duty of the appellant who wanted this court to order a retrial to bring out facts in support of his request.

In all these circumstances and in view of the authorities quoted above I feel that the interest of justice will not be served by ordering a retrial. The appeal is accordingly dismissed with costs to the respondents. The successor of the late Sebastiano Mangeni Mooya is at liberty to seek for other remedies available to him in law in respect of the acts complained of.

C.M. KATO

JUDGE

30-11-1995