THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Mwondha; Tibatemwa-Ekirikubinza; Tuhaise; Chibita; Musoke; JJSC

CRIMINAL APPEAL NO. 49 OF 2020

Uganda ..... Appellant

Versus

1. Hajji Eliasa Namunyu (RIP)

2. Hajji Maliki Wanambili (RIP)

3.Tabo Abubaker

4.Wandera Lukeman

5. Musiho Ubaidi (RIP)

6.Nambiro Shaban ..... Respondents

(Appeal arising from the decision of the Court of Appeal sitting at Masaka before Egonda-Ntende, Cheborion and Kibeedi, JJA in Criminal Appeal No. 16 of 2016 delivered on 6th August 2020)

Judgment of the Court

This appeal was filed by the Appellant following the acquittal of the Respondents by the Court of Appeal.

Background

The Respondents were charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that Hajji Eliasa Namunyu, Hajji Maliki Wanabili, Tabo Abubaker, Wandera Lukeman, Musiho Ubaidi, Nambiro Shaban

Wamanghe and others still at large on the 24th day of November 2012 at Hamila Village, Buhabeba Parish, Busolwe Sub-county, Butaleja District, with malice aforethought, caused the death of Sadat Shaban Malingha. The Respondents were charged and tried at the High Court sitting at Mbale on 27th April 2015. All of them were convicted of the murder of Sadat Shaban Malingha.

Tabo Abubaker, Wandera Lukeman, Musiho Ubaidi and Nambiro Shaban were each sentenced to imprisonment for 37 years and 3 months, while Hajji Maliki Wanambili was sentenced to imprisonment for 12 years and 3 months. Hajji Eliasa Namunyu (RIP) was not sentenced since he had died while on remand. Being dissatisfied with the said decision, the Respondents appealed to the Court of Appeal against both the conviction and sentence.

When the case came up for hearing before the Court of Appeal, court was informed that Hajji Maliki Wanambili (RIP) and Musiho Ubaidi (RIP) passed away, leaving only Tabo Abubaker, Wandera Lukeman and Nambiro Shaban to pursue the appeal. The learned Justices of Appeal, upon a finding that the Respondents did not take plea, quashed the proceedings and convictions, and set aside the sentences against them. They also declined to order a re-trial. Instead, they ordered stay of prosecution and directed the Respondents' immediate release.

The Appellant was aggrieved with the acquittal of the Respondents and filed this appeal, seeking a declaratory judgement, on grounds that:-

1. The learned Justices of Appeal erred in law in holding that the conviction and sentence of the Respondents was a nullity whereas not, thereby occasioning a miscarriage of justice.

2. The learned Justices of Appeal erred in law when they allowed the appeal without according the Appellant an opportunity to be heard, thereby occasioning miscarriage of Justice.

Representation

At the initial hearing of this appeal, the Appellant was represented by Ms. Immaculate Angutoko, Chief State Attorney, Directorate of Public Prosecutions while the Respondents were represented by Mr. Mooli Albert, on State Brief, each of whom adopted their respective written submissions on record, with brief oral highlights.

Hearing of the Appeal

The three surviving Respondents (Tabo Abubaker, Wandera Lukeman and Namiro Shaban) were not in Court at the initial hearing of this appeal. Counsel for the Appellant informed this Court that the office of Directorate of Public Prosecutions was in the process of tracing them. This Court proceeded to hear the matter under Rule 23 (1) of The Judicature (Supreme Court) Rules (hereinafter referred to as "Rules of this Court"), and reserved its judgment on notice.

However, before delivery of the judgment, of one of the members of the panel passed on and another became indisposed. Consequently, the panel had to be reconstituted to re-hear the appeal. At the re-hearing of the appeal, learned Counsel Awelo Sarah, holding brief for learned Counsel Mooli, for the Respondents, and Ainebyoona Happiness, Chief State Attorney for the Appellant, each re-adopted their earlier submissions on record.

Appellant's Submissions

On ground 1, learned Counsel for the Appellant contended that the learned Justices of Appeal erred in law in holding that the trial was a

nullity. She submitted that all the Respondents pleaded to the charges for which they were arraigned, though there was an omission to record the same *verbatim*.

In her submissions, the Appellant's Counsel maintained that there was a plethora of indicators that all the six Respondents pleaded to the indictment, and that they clearly understood the nature of the offence with which they were being tried, including the ingredients of the offence.

Counsel submitted that the indicators were, first, that the 4th and 5th Respondents, in their submissions at page 77 of the record of appeal, acknowledge the fact that they pleaded to the charges. According to Counsel, this revealed that charges were read to all the Respondents. Secondly, Counsel referred this Court to page 53 of the record of appeal and submitted that the defense did not contest the ingredients of the offence, save for participation of the Accused (Respondents in this appeal). Thirdly, Counsel referred this Court to page 59 and 60 of the record of appeal and submitted that the learned trial Judge, in her summing up notes to the assessors, explained the offence, ingredients of the offence with which the accused persons were indicted. Fourth, learned Counsel referred this Court to pages 67 and 68 of the record of appeal and submitted that the trial Judge, in her judgment, stated that all the six accused persons raised the defence of *alibi* and denied murdering the deceased.

Counsel submitted that all the highlighted indicators form part of the record of appeal and overwhelmingly indicate that the six Respondents pleaded to the indictment, that they were aware of the nature of offence with which they were being tried, and that they all responded to the allegations. She argued that, moreover, there was no objection from any of them throughout the trial; and that their counsel never raised it as a

ground in the memorandum of appeal. Counsel maintained that the learned Justices of Appeal should have inferred from the highlighted indicators that the Appellants (now Respondents) pleaded to the indictment.

Counsel also submitted that, the omission on the record notwithstanding, the failure to have the Respondents plead to the charges was a human error which did not occasion any miscarriage of justice to the Respondents; that it is curable under Article 126 (2) (e) of the Constitution of the Republic of Uganda; that, similarly, Section 34 (1) of Criminal Procedure Code Act permits this Court to ignore procedural errors and omission if no substantive miscarriage of justice has been caused; and further, that Section 139 (a) and (b) of the Trial on Indictments Act also renders some omissions and errors not fatal. She argued that the omission did not go to the root of the fundamentals of the Respondents' case. She cited the case of **Guster Nsubuga and Another V Uganda, Supreme Court Criminal Appeal No. 92 of 2018** to support her submissions. She concluded that the nullification of the trial proceedings was an error of law since no miscarriage of justice was occasioned to the Respondents.

Counsel further argued that the case of **Rev. Father Santos Wapokra V Uganda CACA No. 204/2012,** which the learned Justices of Appeal relied on to declare the trial a nullity, is distinguishable from the facts of the instant case in that; in the case of **Rev. Father Santos Wapokra**, the Appellants indeed did not plead to the amended charges, whereas in the instant case, there are all indications from which inference can be drawn that the Respondents actually pleaded to the indictment.

Counsel concluded that from the reading of the record of appeal, it is very clear that the Respondents, who were represented at trial, followed the proceedings and gave a fully detailed defence to the

charges, upon which they were subsequently convicted. She invited this Court to declare that the learned Justices of Appeal were wrong to nullify the proceedings.

On ground 2, learned Counsel for the Appellant submitted that natural justice demands that before the Court of Appeal declared the proceedings a nullity, it should have accorded the Appellant and the Respondents an opportunity to be heard; that failure to do so occasioned a miscarriage of justice since the victims were denied justice on an offence of such a grave magnitude simply because of a mere technicality.

Counsel submitted that the right to a fair hearing under Article 28 (1) of the Constitution of the Republic of Uganda applies to all parties involved including accused persons and victims of crime; that, cognizant of the fact that court cannot ignore an illegality, the Court of Appeal in exercising its powers under Section 11 of the Judicature Act is obliged to observe fundamental requirements of the Constitution. She also submitted that the ground on plea taking was not in the memorandum of appeal, but fairness demands that the parties be heard before a decision on nullification is made. She contended that the learned Justices of Appeal's not according the parties an opportunity to be heard on a matter which formed the basis of their decision occasioned a miscarriage of justice.

Counsel invited this Court to allow the appeal and enter a declaratory judgment that: -

i) The nullification of proceedings on grounds of failure to take plea was erroneous.
ii) the Respondents were erroneously acquitted.

iii) failure to accord parties a right to be heard on nullification occasioned a miscarriage of justice.

Counsel accordingly prayed that this Court be pleased to set aside the orders of the Court of Appeal and remit the file to a different panel to handle the appeal on its merits.

Respondents' Submissions

On ground 1, learned Counsel for the Respondents submitted in reply that Section 5 (c) of the Judicature Act, Cap 13, states that where the High Court has convicted an accused person, but the Court of Appeal has reversed the conviction and ordered the acquittal of the accused, the Director of Public Prosecutions (DPP) may appeal as of right to the Supreme Court for a declaratory judgment on a matter of law or mixed fact and law. He accordingly maintained that the legal effect of a declaratory judgment is to determine a point of law; that this type of judgment does not order a party to take any action or award damages as to the violations of the law. He maintained that, in the instant circumstances therefore, the legal effect of the judgment that the Appellant seeks will not have any effect on the acquittal of the Respondents.

On the substance of the appeal, Counsel submitted that the learned Justices of Appeal properly found that the conviction and the sentence of the Respondents was a nullity, and that the finding did not occasion a miscarriage of justice.

Counsel cited rule 32 (1) Judicature (Court of Appeal Rules) Directions SI 13-10, which is to the effect that the Court of Appeal may, so far as its jurisdiction permits, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate. He argued that, accordingly, court cannot sanction an

illegality, and where such an illegality is glaring on the face of the record like it is in the present case, then even Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995 cannot be used to circumvent an already laid down legal principle. He maintained that failure to take a plea is not a mere technicality but a substantial matter that goes to the root of the appeal.

Counsel referred this Court to pages 14 to 16 of the record of proceedings and submitted that, during the preliminary stages of the hearing of the case, there is nowhere on record where it is indicated that the accused persons took plea at all before the trial court. Counsel concluded that the Court of Appeal properly executed the duty that was incumbent upon it by perusing the record of proceedings where they properly discovered that amidst all the hearing, no plea was taken at all.

Counsel submitted that plea taking is a fundamental principle of a fair trial as enshrined in Article 28 (3) (b) of the Constitution of Uganda, and where an accused person does not plead to a charge, then the trial is a nullity. He maintained that therefore, the learned Justices of Appeal properly held that the conviction and the sentence of the Respondents was a nullity, that this did not occasion a miscarriage of justice.

On ground 2, learned Counsel for the Respondents submitted that the Appellant was accorded the right to be heard, and that therefore there was no miscarriage of justice occasioned to the Appellants. Counsel referred this Court to page 2 of the judgment of the Court of Appeal, where it is stated that the Appellant was represented by Mr. Peter Mugisha who filed written submissions. Counsel argued that, however, in reaching its decision, the court took upon itself the duty bestowed upon it as the first appellate court by scrutinizing the file and coming to its own conclusion; that, therefore, the first appellate court could not

ignore a glaring illegality that was on the face of the record, and, as such, came to a right conclusion, thereby acquitting the Respondents.

Counsel submitted, in conclusion, that the Appellants were accorded the right to be heard; that the learned Justices of Appeal properly held that the conviction and the sentence of the Respondents was a nullity; and that, therefore, there was no miscarriage of justice occasioned. He prayed that this Court upholds the findings of the Court of Appeal and dismisses this appeal.

Resolution of the Appeal

This Court's jurisdiction, as a second appellate court, is limited to considering questions of law or mixed law and fact that were before the first appellate court. This Court is not required to re-evaluate the evidence like the first appellate court. See: Rule 30 (1) of the Judicature (Supreme Court Rules) Directions; and **Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No. 10 of 2007.**

Ground 1

The Appellant's argument in ground 1 of the appeal is that all six Respondents took plea as evidenced by the indicators on the record; that, however, their plea taking was not recorded *verbatim* on record; further that much as the plea taking was not recorded *verbatim*, no injustice was caused to them since the record shows that they ably defended themselves and understood the proceedings in Court.

On the other hand, the Respondents argue that the learned Justices of Appeal properly found that the conviction and sentence were a nullity, and that the finding of the Court of Appeal did not occasion a miscarriage of justice. They maintained that the Court of Appeal derived its mandate from rule 32 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 to make the orders it made. They also

maintained that the trial Judge's failure to take the plea of the respondents at trial was an illegality which cannot be circumvented by Article 126 (2) (e) of the Constitution of the Republic of Uganda, since such omission or failure to take a plea is not a mere technicality but a substantial omission that goes to the root of the matter.

It is discernible from the record that the Respondents (then accused persons) were indicted with murder, which is triable by the High Court only. Section 60 of the Trial on Indictments Act Cap 23, provides for pleading to indictment. It states that:-

> *"The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy."* (underlined for emphasis).

The foregoing section gives guidance on how a plea should be taken. It does not, however, state that recording of such plea has to be done by a judicial officer. The requirement to record a plea taken by an accused is reflected in the case of **Adan V Republic (1973) EA, 443** where the procedure *of* taking a plea was summarized as follows: -

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those*

essential elements, the magistrate should record what the accused has said, as nearly as possible in his own word, and then formally enter a plea of guilt. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statements of facts or asserts additional facts which, if true might raise a question as to his guilt, the magistrate should record a change of plea to not guilty and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded." (underlined for emphasis).

Thus, the provisions of section 60 of the Trial on Indictment Act, Cap 23, read with the decision in **Adan V Republic** (supra), are clear on how taking of plea should be done. The process involves reading and explaining the indictment to the accused person, and recording the response given by such accused person. If the accused person pleads not guilty, as provided for in sections 66, 67, 71, 72 and 73 of the Trial on Indictments Act, assessors are chosen, followed by a preliminary hearing, swearing of assessors, and calling of witnesses.

This would mean that where taking plea was clearly conducted, what is read and explained to the accused person is not only the indictment or charge and its particulars, but also the ingredients of the offence the accused person is charged with. In the same circumstances, this also presupposes that hearing of oral testimonies cannot commence unless the accused person pleaded not guilty to the charges against him/her.

In the instant case, in their judgment at page 70 of the record of appeal the learned Justices of Appeal found that:-

> *"From the record of proceedings, on 27.04.2015 when the trial of the case started, it is indicated that the proceedings started by both counsel for the prosecution and the accused tendering into court documents by agreement. Thereafter court started hearing the oral testimonies of the prosecution witnesses."* (underlined for emphasis).

In her submissions, learned Counsel for the Appellant maintained that the Court of Appeal, in declaring the High Court trial to be a nullity on basis of the Respondents' failure to take plea, was an error in law because that court did not properly scrutinize the record. Counsel referred this Court to four indicators from the record, which she advanced to support her argument that the Respondents understood what transpired during their trial.

We have carefully scrutinized the record, taken into account the four indicators raised by the Appellant as well as the Respondents' responses to the same, together with the applicable laws, with a view to determining whether the first appellate court correctly adhered to their mandate and or properly scrutinized the record to arrive at the decision that the trial at the High Court was a nullity.

The first indicator highlighted by the Appellant's Counsel is that the 4th and 5th Respondents, in their submissions, acknowledge the fact that the Respondents pleaded to the charges. This is reflected at page 77 of the record of appeal, which shows that the 4th and 5th Respondents (then 4th and 5th appellants), in their written submissions at the Court of Appeal, stated as follows:-

> *"Our clients A4 Wandera Lukeman and A6 Nambiro Sharon the appellants and others were indicted with the offence of murder contrary to Section 188 and 189 of the Penal Code Act. They pleaded not guilty to the charge of murder and a full trial was conducted, however at the end they were convicted."* (underlined for emphasis).

The Respondents' submissions were neither disowned nor reviewed by the said 4th and 5th Respondents at any stage of hearing of the appeal before the Court of Appeal, and they are still part of the record of appeal. The above extracted part of the Respondents' Counsel's submissions is clearly at variance with the decision or conclusion by the learned Justices of Appeal that the trial before the High Court was a nullity due to the Respondents' not taking plea to the charges preferred against them. This would make us doubt that the learned Justices of Appeal properly scrutinized the record before they declared the trial of the Respondents a nullity due to failure to take plea.

The second indicator highlighted by the Appellant's Counsel is that the defence did not contest three of the ingredients of the offence, but only contested the ingredient of the accused person's participation in the crime. This is reflected at page 53 of the record of appeal, where Counsel Kasajja Robert, who represented all the accused persons then, is on record as stating in his submissions that; *"I do not contest ingredient 1, 2, and 3."* This was in response to the submission by the prosecution that it *"has proved each of the ingredients of the offence of murder beyond reasonable doubt..."* at the same page 53 of the record of appeal.

The foregoing submissions were not disowned or reviewed by the Respondents, and they are part of the record of appeal. As discussed above, the particulars and the ingredients of the offence are required to be explained to the accused persons at the time of taking plea. It follows that the submissions by Counsel Kassajja Robert as quoted above, could not have been made out of speculation, but rather, in respect of ingredients 1, 2 and 3 as explained to the accused persons during the process of taking plea.

The third indicator highlighted by the Appellant's Counsel is that the learned trial Judge, in her summing up notes to the assessors, explained

the offence and the ingredients of the offence with which the accused persons were indicted. This is reflected at pages 59 to 60 of the record of appeal, in the learned trial Judge's Summing Up Notes to the Assessors.

We note, however, that since the process of summing up to the Assessors by a trial Judge takes place after the accused person has put in his/her defence, it cannot assist an accused person to know the nature of the offence he/she is charged with for purposes of preparing his/her defence. In that respect, we would not rely on it to decide that it was part of plea taking, or that it enabled the accused persons to prepare their defence.

The foregoing notwithstanding, however, the record shows at page 60 that the learned trial Judge indicated in her summing up notes to assessors, that:-

> *"All the accused persons gave evidence not on oath and set up alibis. They totally deny having killed the deceased."*

This suggests that the accused persons took plea, otherwise what were they denying or setting up *alibi* for?

The fourth indicator highlighted by the Appellant's Counsel is that the learned trial Judge, in her judgment, stated that all the six accused persons raised the defence of *alibi* and denied murdering the deceased, and that they all gave unsworn evidence in court. This is reflected at page 68 of the record, which shows that the learned trial Judge, in her judgment, stated that; *"All the six accused persons raised defence of alibi and denied murdering the deceased."* It is also the same statement reflected in the trial Judge's Summing Up Notes to the Assessors as extracted above. This, when considered with the acknowledgement in the submissions for the Respondents that they pleaded not guilty, would

be a strong indication that the accused persons pleaded not guilty to the charges before a full trial commenced against them.

The foregoing is reinforced by the fact that, as deduced from the record, all the Respondents, who had legal representation, never at any one time raised any objection at the trial that they had not pleaded to the indictment against them, neither did they raise it as a ground of appeal before the Court of Appeal. Instead they participated in the trial at all material stages including cross examining the prosecution witnesses and giving their own unsworn evidence through which they all raised the defence of *alibi*. As already stated above, in their submissions to the Court of Appeal, they acknowledged in their submissions that they pleaded not guilty to the indictment of murder at trial.

Further, we have carefully addressed the finding of the learned Justices of Appeal, as reflected in the extract of their judgment above, that the proceedings started by counsel for each side tendering into court documents by agreement; that thereafter, court started hearing the oral testimonies of the prosecution witnesses.

In that connection, we carefully looked at the record of proceedings especially, page 14 of the record of proceedings where it was recorded by the learned trial Judge that the prosecution had agreed on a number of documents to be tendered in court.

With respect, contrary to what the learned Justices of Appeal stated, there is nothing on the face of the record to suggest that the proceedings of 24/04/2015 were the commencement of the proceedings. We are alive to the procedure during the initial stages of a criminal trial which involve plea taking, reading and explaining the indictment to the accused person, and recording the response given by such accused person. If the accused person plead not guilty, assessors are chosen,

followed by a preliminary hearing, swearing of assessors, and calling of witnesses. In the matter before us, the record does not reflect the court attendance and representation, or the selection of assessors (who are, at later stages of the proceedings, recorded as present).

In light of the foregoing, in our considered opinion, there is a likelihood that part of the proceedings may not have been typed, or that the particular record went missing. However, whether this part of the original record is retrieved or not, or whether it exists or not, the deductions from the record of appeal that is before us indicates that the accused persons pleaded not guilty to the charges of murder that were preferred against them. This is regardless of whether or not the learned trial Judge actually recorded the plea or not. In that connection, the argument by the Respondents that they never took plea to the charges against them is not supported by what is reflected on the record including their own submissions.

Thus, based on the record before us, and for reasons given, we agree with the Appellant that there are indicators on record that the Respondents pleaded not guilty to the charges against them at trial. The Respondents themselves acknowledged that position as a fact in their submissions. They also did not contest ingredients 1, 2 and 3 of the offence of murder, but each of them put up a strong defence of *alibi* regarding ingredient number 4 which related to their participation in the offence of murder which they had been charged with. It is also confirmed in the judgment and the summing up notes to assessors of the learned trial judge which state that the said Respondents (then accused persons) denied the charges of murder.

We are also alive to the provisions of Article 126 (2) (e) of the Constitution which enjoins this Court to administer substantive justice without undue regard to technicalities. Similarly, section 34 (1) of the

Criminal Procedure Code Act Cap 116 permits an appellate court on appeal against conviction to ignore procedural errors and omissions if no substantive miscarriage of justice has been caused. Section 139 of the Trial on Indictments Act also provides that no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission or irregularity, among other things, unless the error, omission, or irregularity has in fact occasioned a failure of justice. Section 139 (1) of the same Act provides that in determining whether any error, omission, irregularity or misdirection has occasioned failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

We further note that this Court adopted the foregoing principles in the case of **Guster Nsubuga and Another Vs Uganda, SCCA No. 92 of 2018**, when it held that substantive justice requires that the anomaly pointed out in the process of plea taking be overlooked in favour of the wider cause of substantive justice; that it would be expecting too much to demand that all trials must run like clockwork, short of which they would result in nullification of the entire trial.

We however maintain that plea taking is essential in a criminal trial because it forms the basis upon which the accused person gets to know the details of the case against him or her to enable such accused person to prepare his or her defense. In this appeal, substantive justice was clearly administered, as deduced from the face of the record which shows that the Respondents pleaded not guilty to a charge of murder; that they all raised the defense of *alibi*, in effect challenging their participation in the murder; that they proceeded to cross examine the prosecution witnesses through their Counsel; and that they went ahead and gave evidence as defense witnesses without at any stage objecting

to the conduct of the trial. In their submissions they acknowledged having taken a plea of not guilty. If there were any errors during plea taking process, such errors would be covered by the legal provisions and principles cited above, but that would not in any way mean that the Respondents did not take plea.

Thus, even though the record does not reflect a recording of the Respondents' plea taking at trial, it is discernible from the same record that all the Respondents pleaded to the indictment which they denied and presented a defense during a full trial.

In that light, based on the principles highlighted above, and on our findings regarding what is reflected on the record, we find that the learned Justices of Appeal erred in law in holding that the conviction and sentence of the Respondents was a nullity, and this occasioned a miscarriage of justice.

We therefore find merit in ground 1 of this appeal.

Ground 2

In ground 2, the Appellant faulted the learned Justices of Appeal for not giving the Appellant the opportunity to be heard prior to making their decision by which they acquitted the Respondents who had been convicted of murder. The Respondent maintained, on the other hand, that, at the hearing of the appeal, the Appellant was duly represented by Counsel who even filed written submissions.

The Appellant's Counsel, in their submissions, appear to suggest that, prior to delivering its judgment, the parties should have been summoned by the Court of Appeal to make submissions on the court's decision to acquit the Respondents.

The question to decide therefore, is whether the Court of Appeal, when entertaining an appeal, can, on its own motion, make a decision on a matter without according the parties the opportunity to be heard.

The duty of the Court of Appeal as a first appellate court is provided for under rule 30 of the Judicature (Court of Appeal Rules) Directions. Rule 30 (1) (a) of the said Rules empowers the Court of Appeal to reappraise the evidence from the High Court and draw inferences of fact. In the case of **Kifamunte Henry Vs Uganda** (supra), it was reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court, and make up its own mind.

Rule 102 (c) of the same Rules provides that the court shall not allow an appeal or cross appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross appeal, without affording the respondent or the appellant, as the case may be, an opportunity of being heard on that ground.

In **M/S Fangmin Vs Belex Tours & Travels Ltd, Civil Appeal No. 06 of 2013, consolidated with Crane Bank Ltd Vs Belex Tours & Travel Ltd, Civil Appeal No. 1 of 2014, at page 32,** this Court observed as follows:-

> *"The correct position of the law is that an issue on ground of illegality or fraud not raised in the lower court may be raised on appeal, the parties must be given an opportunity to address court on it before the court makes a decision. Even where a Judge wishes to consider an issue after the hearing has been concluded, the Judge must give the parties opportunity to address the court on the issue."* (underlined for emphasis).

The same principle was invoked by this Court **Kwamusi Jacob Vs Uganda, Supreme Court Criminal Appeal No. 22 of 2014,** and in **Kato Kajubi Godfrey Vs Uganda, Supreme Court Criminal Appeal No. 20 of 2014** where this Court, in the interests of fairness, emphasized the right to a fair hearing regarding the rights of the accused person, the victim of the crime, as well as the public interest especially during the sentencing stage.

Thus, based on the foregoing authorities, we are inclined to agree with the Appellant's submissions that, the right to a fair hearing as enshrined in Article 28 of the Constitution applies to all parties equally and courts should respect it. The right to a fair hearing is non-derogable, as provided for under Article 44 (c) of the Constitution.

Thus, while the Court of Appeal, within its mandate of reappraising evidence as a first appellate court, may have discovered what it perceived to be an illegality on the face of the record, accordingly making its own conclusions that the Respondents had not taken plea, natural justice and fairness demands the said court should have accorded the Appellant and the Respondents an opportunity to be heard before proceeding to declare the proceedings a nullity. As this Court held in **M/S Fangmin Vs Belex Tours & Travels Ltd, consolidated with Crane Bank Ltd Vs Belex Tours & Travel Ltd, (supra),** parties must be given an opportunity to address court on an issue, even where a Judge wishes to consider such issue after the hearing has been concluded.

Thus, the failure of the Court of Appeal to accord the parties the right to address court on an issue not raised in the memorandum of appeal, which issue the same court relied on to declare the proceedings a nullity, was definitely a misdirection, and was erroneous, in law. It not only violated the parties' right to a fair hearing, but also occasioned a

miscarriage of justice, let alone leading that court to base its decisions on wrong findings of fact. The record before us indeed shows that a satisfactory explanation or justification could have been offered by the Appellant if the Court of Appeal had accorded them an opportunity to address it on the issue of whether the Respondents took plea at trial.

We therefore find merit in this ground of appeal.

All in all, this appeal succeeds on both grounds 1 and 2, and it is accordingly allowed.

As we proceed to make orders based on our findings, decisions and conclusions, we are alive to the provisions of Section 5 (1) (c) of the Judicature Act under which this appeal was brought, to the effect that the DPP may appeal as of right to the Supreme Court for a declaratory judgment on a matter of law or mixed fact and law. We have also considered the Respondents' contention that this Court's judgment can only be declaratory, to determine a point of law, but not to order a party to take any action or award damages as to the violations of the law, and that, the legal effect of the judgment the Appellant seeks will not have any effect on the acquittal of the Respondents.

It is our finding above that when the Court of Appeal moved itself to make its decision and orders to quash the proceedings of the High Court and declare them a nullity, consequently acquitting the accused persons (now Respondents), it never accorded the parties the opportunity to be heard on a matter which was not among the grounds of appeal before it. The right to a fair hearing is guaranteed under Article 28 of the Constitution, and it is non-derogable under Article 44 (c) of the Constitution.

In our well-considered opinion, the provisions of Section 5 (1) (c) of the Judicature Act could not have been put in place to protect or to validate

unfair trials, like the type that we have found to have occurred in the circumstances of the appeal before us, where the Court of Appeal did not conduct a fair hearing, in that it did not accord the parties an opportunity to be heard on a matter that formed the basis of that Court's decisions, which consequently occasioned a miscarriage of justice. The said provisions of the Judicature Act can, in the interests of justice, only apply where a court decision is made judiciously through a fair hearing as guaranteed in the Constitution.

In such situations, for the provisions of Section 5 (2) of the Judicature Act to apply, it would not matter that the eventual finding of this Court is that the Court of Appeal made erroneous or misdirected decisions, as long as it conducted a fair trial.

Thus, to apply the provisions of Section 5 (2) of the Judicature Act to the circumstances of this appeal where the hearing on which the Court of Appeal decisions were made was not fair, would tantamount to putting such mistrials or unfair hearings on the same pedestal as decisions based on fair hearings, which would erode the very foundation of the administration of justice on which our court systems are based.

This Court, being the last court of resort, cannot turn a blind eye to such glaring prejudices and injustices, or leave them unaddressed, in the course of making its orders.

The Rules of this Court have catered for such situations or eventualities by empowering this Court to invoke its inherent powers to redress or remedy such situations to ensure that justice is administered. Rule 2 (2) of the Rules of this Court empowers this Court, in exercise of its inherent powers, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of court process of this

Court or of the Court of Appeal, and that the 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 process of any court caused by delay. Rule 31 of the Rules of this Court provides that on any appeal this Court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the Court of Appeal with such directions as may be appropriate, or order the rehearing of the appeal before the Court of Appeal, among other such orders regarding other courts, and may make any necessary, incidental or consequential orders.

Thus, in the interests of justice, having found that the hearing at the Court of Appeal was not fair, in that the said court did not accord the parties in the appeal an opportunity to be heard on the matter upon which the court based its decisions, this Court, under Rules 2 (2) and 31 of the Rules of this Court, nullifies the decisions and orders issued by the Court of Appeal, and orders a re-hearing of the appeal before a different panel of that court, so that justice is done and the appeal is determined on the merits.

This file is accordingly remitted back to the Court of Appeal to re-hear the appeal on the merits before a different panel.

We so order.

Dated at Kampala this ....17th..... **day of**...January..... **2024**

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Faith Mwondha
Justice of the Supreme Court

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Prof. Lillian Tibatemwa-Ekirikubinza
Justice of the Supreme Court

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Percy Night Tuhaise
Justice of the Supreme Court

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Mike Chibita
Justice of the Supreme Court

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Elizabeth Musoke
Justice of the Supreme Court

Delivered on 17th January 2024
by the Registrar