THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Kakuru, Egonda-Ntende & Madrama, JJA*]

CRIMINAL APPEAL NO. 102 of 2011

(Arising from High Court Criminal Session Case No. 506 of 2009 at Kampala)

BETWEEN

Kiyimba Ronald==========Appellant

AND

Uganda==========Respondent

REASONS FOR JUDGMENT OF THE COURT

Introduction

[1] The appellant together with two others was indicted and convicted of the offence of robbery contrary to sections 285 and 286 (2) (b) of the Penal Code Act in count 1and 2, defilement contrary to section 129 of the Penal Code Act in count 3 and rape contrary to section 123 of the Penal Code Act in count 4 . The particulars of count 1 were that Kaaga Eriya, the appellant and Lubega Noah during the night of 30th April 2006 at Bamunanika village in Mityana district robbed Nalukwago Harriet of a hair drier, six pairs of shoes, a mattress, five photo albums, a radio cassette, a flat iron, jacket, cell charger, pair of bed sheets, bed-cover, solar panel and other household properties plush UGX 110,000 and at or immediately before or after the said robbery threatened to use a deadly weapon, to wit an SMG rifle on Nalukwago Harriet.

[2] For count 2 the particulars of the offence were that Kaaga, Lubega Noah and the appellant during the night of 30th April 2006 at Bamunanika village in Mityana district robbed Gonzaga Ssebulime of a mobile phone Nokia 2100 and cash amounting to UGX 360,000 and at or immediately before or immediately after the said robbery threatened to use a deadly weapon, to wit an SMG rifle on Ssebulime. The particulars of offence for count 3 were that Kaaga Eriya together with the appellant during the night of 30th April 2006 at Bamunanika village in Mityana district had unlawful sexual intercourse with Namuiga Teopista a girl who was under 18 years. For count 4, the particulars of offence were that the appellant during the night of 30th April 2006 at Bamunanika village in Mityana district had unlawful carnal knowledge of Nangozi Rosemary without her consent.

[3] The learned trial Judge sentenced the appellant to a term of imprisonment of 20 years on each count to run concurrently.

[4] Being dissatisfied with both the conviction and sentence of the trial court, the appellant appealed to this court on the following ground:

> '1. That the learned trial court erred in law and fact when it failed to avail a certified copy of the judgment of the case.'

[5] At the hearing of the appeal we allowed the appeal, quashed the convictions of the appellant on all counts and set aside the sentences imposed upon him. We promised to give our reasons for doing so on notice which we now do.

Analysis

[6] At the hearing, the appellant was represented by Mr. Henry Kunya whereas the respondent was represented by Mr. Peter Mugisha.

[7] The appellants filed a notice of appeal on 24th May 2011 in this court to appeal against the conviction and sentences. On the record there is evidence that this court requested for the judgment of the trial court. In a letter dated 23rd November 2017, the Assistant registrar of this court requested the registrar of the High Court to locate the missing judgment. He referred to a letter dated 21st March 2014 that was to the same effect. In the letter, the registrar alluded to the fact that the appeal was supposed to have come up for hearing on 31st March 2014 but it could not proceed without the judgment of the trial court that was missing on the record. The registrar

again wrote to the High Court requesting for any feedback in the matter on 21st December 2018 but there was no response.

[8] It is clear that efforts were made to recover the missing judgment but to no avail. As an appellate court, we are not in position to determine an appeal no its merits without the judgment of the trial court and the appellant cannot raise a substantive appeal without the same. Failure to avail a copy of the judgement to the appellants is a violation of the appellant's fundamental rights to a fair hearing under articles 28 (1) and (6) and 126 (2) (b) of the Constitution.

[9] This court in Tuuni Stephen & Another v Uganda [2018] UGCA 37, faced with similar facts stated:

> '6. As the record of appeal is incomplete, in the absence of the judgement of the trial court, it is not possible to hear and determine on the merits an appeal in this case. The appellants are so constrained that they cannot simply prepare and present a substantive appeal to this court which is a constitutional right. In those circumstances we are left with no alternative but to quash their conviction and set aside the sentences imposed upon them.
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> 7. We have considered the possibility of ordering a retrial in this matter as proposed by the learned Senior State Attorney. However, we note that the appellants have been in custody since April 2008 to-date, a period of about 10 years. This covers both the period spent in pre-trial custody and serving sentence after conviction. The longest sentence was 17 years' imprisonment which was being served concurrently with the one of 15 years' imprisonment. If one took into account the fact that the appellant may have been entitled to remission in addition to the period on remand they would be about to complete serving the said sentences.
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> 8. Under Rule 32 (1) of the Rules of this court, this court may, 'so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, nor order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

9. Pursuant to both rules 2(2) and 32(1) of the Rules of this court we are of the view that the justice of the case compels us not to order a re-trial but rather a stay of prosecution in relation to the facts of this case as against the appellants. To subject the appellants to fresh criminal proceedings would be a travesty of justice.

10. It has come as rather a rude shock to this court that the courts in this country can find themselves in this situation where a court file has such an essential document, a judgement, missing, in this day and age without any explanation whatsoever. We wish to draw the attention of the Chief Justice to this file with a view to taking corrective action to ensure that such a situation is not encountered again. We direct the Registrar of this court to forward to the Chief Justice a copy of this judgment.'

[10] In the interests of justice, we were constrained to allow this appeal. We declined to order a re-trial in light of article 126 (2) (b) of the Constitution that enjoins courts not to delay justice and that the appellant had been in custody for almost 13 years. It was simply inappropriate to order a retrial in the circumstances of this case.

Signed, dated and delivered at Kampala this 10th day of March 2020.

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Christopher Madrama
Justice of Appeal