THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISCELLENEOUS APPLICATION NO.4 OF 2019

(ARISING OUT OF COURT OF APPEAL CRIMINAL APPEAL NO. 55, 62 & 67 OF 2016)

(From Lira High Court Criminal Session case No. 0110 of 2014)

UGANDA ..... APPLICANT

VERSUS

1. **OGWANG PATRICK Alias OSINDE**
2. **OGWANGA ANDREW SALEH**
3. **OGWAL RAMADHAN ..... RESPONDENTS**

RULING OF JUSTICE RUBBY OPIO-AWERI, JSC.

This is an application by the state (herein after referred to as the applicant) for leave to file a Notice of Appeal out of time. The application was brought under Rules 2(2), 5, 41(2),42(1),(2) and 51(1) of the Judicature (Supreme Court Rules)Directions SI 13-11 and it sought for orders that;

1. **The applicant be granted leave to file a Notice of Appeal arising out of the judgment of the Court of Appeal delivered on 2nd May 2019 in Criminal Appeal N. 55, 62 & 67 of 2016 out of time.**

2. **The High Court be directed to halt proceedings till disposal of the appeal.**

The grounds of the application as set out in the application are that;

1. **That the respondents were indicted with three counts before the Lira High Court ; namely count 1 Murder contrary to sections 188 and 189 of the Penal Coded Act, count 2 Aggravated robbery contrary to sections 285 an d286(2) of the Penal Code Act and count 3 Attempted Murder contrary to section 204 of the Penal Code Act.**
2. **That the respondents were convicted on all the three counts by the learned trial judge on the 8th of April 2016. She sentenced the 1st respondent who had pleaded guilty to 25 years imprisonment, the 2nd , 3rd , 4th , 5th were each sentenced to 65 years imprisonment on count 1, 50 years imprisonment on count 2 and 35 years imprisonment and on count 3 respectively. All sentences were to run concurrently.**
3. **That the respondents appealed to the court of Appeal against both convictions and sentences of the High Court through Criminal Appeal No. 55 , 62 and 67 of 2016, whereupon the conviction of the 2nd ,3rd 4th, and 5th respondents were quashed and the sentence quashed and the sentence set aside and an order of a re trial made. The respondent's conviction was upheld and the omnibus trial made, the 1st Respondent's conviction was**

upheld and the omnibus sentence of 25 years imprisonment for count 1, 2 and 3 respectively. All sentences to run concurrently.

4. That judgment of the Court of Appeal was delivered on the 2nd of May 2019 when our action officer Odit Andrew Senior Assistant director of Public Prosecutions who was in personal conduct of the matter had been appointed on contract as legal advisor of the Bamugemereire Commission and was unable to lodge a notice of appeal in time .
5. That the office of the Director of Prosecutions got to know that the notice within which to lodge a notice of Appeal had lapsed when the Respondents were transferred from Luzira upper Prison to Lira for a re trial as per the orders of the court of Appeal judgment delivered in May 2019.
6. That upon going through the judgment of the Court of Appeal, I note that the Applicant's intended appeal raises substantial questions of law which this Honorable court has to determine as to whether the lower court was right to order for a retrial in a complex and protracted trial of this nature on the basis of the fact that one of the assessors had come late during partial testimony of DW12.
7. That the time within which to file a Notice of Appeal has since lapsed, and this application seeks leave to file a notice of appeal out of time.

The application was supported by the affidavit of **Asiku Nelly, Senior State Attorney** who reiterated the grounds therein as already set forth in the application.

The respondents opposed the application vide an affidavit in reply sworn by **Ogwanga Patrick** where he interalia stated as follows;

1. **That this application is barred by law since the judgment was delivered on the 2nd may, 2019 and this application was filed on 9th August 2019 way beyond the required limitations to file a Notice of Appeal in Court of Appeal.**
2. **That the Director of Public Prosecutions who was in personal conduct of the matter was notified of the judgment date of the court of Appeal by a hearing notice, cause list and production warrants to the officer in charge of the prisons.**
3. **That the respondents shall raise an objection on a Point of Law that the application be struck out on the basis of it being not properly before this court. That the application should rather be before the court of Appeal which court has records from which the Notice of Appeal has to be filed and signed with a seal of the registrar, Court of Appeal.**
4. **That the period between the delivery of the judgment and the filing of this application is grossly excessive and that there is no sufficient reason for the inordinate delay.**

Back ground to the Application.

On the 6th day of January, 2014, at Ireda Lumumba, central Division in Lira district, the respondents robbed Ug Shs 65 Million from Akidi Suzan Eryau and immediately before or after shot her dead and also injured Enamu Jonatham, the deceased's son.

The respondents were indicted in the High Court on three counts. The first count was murder contrary to Sections 188 and189 of the Penal Code Act, second count was Aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act and the third count was attempted murder contrary to section 204 of the Penal Code Act. The learned trial judge convicted all the respondents on all three counts. They were sentenced each to 65 years on count one, 50 years on count 2 and 35 years on count 3. The sentences were to run concurrently. Being dissatisfied with the decision, the respondents appealed to the Court of Appeal which court quashed the convictions and sentences. Court ordered that the cases be remitted back to High Court for a retrial.

Representation;

At the hearing of this application, the applicant was represented by **Peter Mugisha** while the respondents were represented by **Mr. Rukundo Keith.**

Counsel represented only 3 respondents who were present in court. He informed court that the fourth respondent died in prison and the first respondent pleaded guilty.

Submissions;

Both counsel submitted orally.

Applicant's case;

Counsel contended that at the time of delivery of the judgment, senior state attorney Mr. Odiiti who was the action officer in the matter had been appointed as legal advisor in the Bamugemereire Land Commission. He further argued that the Office of the Director of Public Prosecutions was not aware of the delivery of the judgment and only got to know way after the time within which to file an appeal had passed and the respondents were being transferred to Lira for a retrial.

Counsel stated that as soon as the judgment got into their hands, they realized that much as the time had lapsed, the case embodied substantial questions of the law which required to be addressed by this court on appeal.

Counsel further argued that it is in the interest of justice that the application be granted. He relied on the case of **Tushabe vs Cooperative Bank Ltd (In receiver ship/ Statutory liquidation) Supreme Court Civil application No. 08 of 2018** and argued that in that case, leave was granted to file a notice of appeal when 2 months had lapsed after the judgment had been delivered. Counsel stated that

that i n the instant case, 3 months had elapsed because they did not know that the judgment had been delivered.

Counsel prayed court to find a sufficient cause to allow this application as being among the rarest of the rare cases and that it must be re-opened.

Respondents' case;

Counsel opposed the application and stated that it was unsustainable since it was brought 3 months and 7 days after the delivery of the decision. He further argued that the notice of motion is supposed to be filed in the Court of Appeal first.

Counsel also argued that it is not true that Mr. Odit was appointed on the Bamugemereire commission given that there was no evidence to the same effect neither does such a commission exist. He stated that this makes the affidavit defective hence having an unsupported application. He further argued that the affidavit does not disclose the source of information and should be struck off as was the case in the case of **Uganda Journalist Safety Commission vs A.G Constitutional Petition No.07 of 1997.**

Counsel contended that the Directorate was informed of the judgment date and therefore cannot justify why he was not around.

Counsel prayed court to dismiss the application and allow the High Court to proceed with the retrial process.

COSINDERATION:

This application is seeking for leave to extend time within which to file a file a Notice of Appeal.

Before dealing with the gist of the application, I shall first deal with the issue of amendment that was dealt with instantly at the hearing. Counsel for the applicant moved court under Rule 44(2) of the Rules of this court seeking for leave to amend the application in respect of removing off the names of the Okao Jimmy alias Baby since he pleaded guilty and is therefore not part of the issue embodied in the application. He also sought that Owoo George be removed from the application since he died from prison. Counsel also sought that the application be amended as to have been brought under Rule 2(2) of the rules of this court in addition to the other laws stated in the application.

The application was opposed by counsel for the respondents on grounds that the applicant should instead seek leave to withdraw the names of the respondent. He also stated that Rule 2(2) deals with inherent powers of the court and not amendment.

The application for amendment was granted by court and the reasons are as follows;

According to **Odgers on pleadings and practice 20th edition** at page 170, it was stated that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms

even at a late stage. However if the application is be made mala fide, or if the proposed amendment will cause undue delay or will in any way unfairly prejudice the other party, or is relevant or useless, or would raise merely a technical point, leave to amend will be refused.

In the case of **Gaso Transport Services (Bus) Ltd vs Martin Adala Obene SCCA No. 4 of 1994, Justice Tsekooko JSC** laid down conditions upon which court grants an application for amendment. He observed as follows;

- **The amendment should not occasion injustice to the opposite party. An injury which can be compensated by the award of costs is not an injustice.**
- **The amendment should be granted if it is in the interest of justice and to avoid multiplicity of suits.**
- **The application for amendment should be in good faith.**
- **No amendment should be allowed where it is expressly or impliedly prohibited by any law (ie Limitation of actions).**

In the instant case, all the amendments sought were not in bad faith and would not occasion any injustice on the part of the respondents.

I shall now proceed to the gist of the application. I shall first lay down the law that governs the filing of a Notice of Appeal.

Section 28(1) and (6) of the Criminal Procedure Code Act provides that;

"Notice of Appeal

1. **Every appeal shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the registrar within fourteen days of the date of judgment or order from which the appeal is preferred.**
2. **.....**
3. **.....**
4. **.....**
5. **.....**
6. **The appellate court may, for good cause shown , extend the periods mentioned in subsection (1) or (3)"**

Rule 58 of the Supreme Court Rules provides as follows;

1. **Where the Court of Appeal acquits or confirms the acquittal of an accused person, the Director of Public prosecutions, as empowered by the Act, may give notice of appeal as provided in rule 57(1) and (2) of these Rules.**
2. **Where the Director of Public Prosecutions gives notice of appeal as provided in sub rule (1) of this rule, notice may be given informally at the time that the decision is given, upon which the accused person shall give his or her address for service of the notice of hearing of the appeal; or if the Director of Public Prosecutions gives notice in writing within fourteen days after the**

decision, the director shall notify the court of the address of the accused person for service by the registrar the notice of Appeal upon the accused person, and notice of the date of hearing , which notices shall be substantially in the forms prescribed in respect of appeals against conviction."

Rule 5 of the Supreme Court Rules provides as follows;

Extension of time;

The court may for <u>sufficient reason</u> extend the time prescribed by these rules or by any decision of the court or of the Court of Appeal for the doing of any act authorized or required by these rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as reference to the time as so extended."

I shall now proceed to consider the grounds of the application and the submissions of both counsel. The question to be answered by this court is *whether the applicant has satisfied the conditions for the grant of the order sought.*

Let me first deal with the competency of this application. Counsel for the respondent argued that the affidavit in support of the application contained matters which the deponet had no direct knowledge of. He stated that the fact that the deponet swore that Mr. Andrew Odit was appointed as the legal advisor to the Bamugemereire

Commission, a matter which was not in his direct knowledge would render the affidavit defective and should therefore be struck off the record. He also contended that the application would be unsupported and therefore should be struck off the record.

The law on affidavits is provided for under the Civil Procedure Rules.

Order 19 r 3 (1) of the Civil Procedure Rules provides that;

(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."

The respondent relied on the case of **Uganda Journalist Safety Committee & Ors vs Attorney General, Constitutional Petition No. 7 of 1997** which is to the effect that failure to disclose the source of information will normally render the affidavit null and void.

I agree that the deponet should have disclosed the source of information regarding the appointment of Mr. Odit as legal advisor. Be that as it may, this court shall adopt court's approach in the case of **Col. (Rtd) Dr. Kizza Besigye v. Yoweri Museveni Kaguta & Electoral Commission, Supreme Court Presidential Election Petition No.0001 of 2006**, and severe off these parts of the Affidavit in support which are hearsay and offend provisions of O.19 r 3 without rendering the remaining parts of the affidavit a nullity.

The conditions to be fulfilled for court to grant leave to file a notice of motion out of time were well discussed by **Justice Mulenga JSC** in the case of **Boney Katatumba vs Waheed Karim Civil Application No.27 of 2007,** as follows;

"....under Rule 5 of the Supreme Court Rules, the court may, for sufficient reason, extend the time prescribed by the rules. What constitutes sufficient reason is left to the court's unfettered discretion. In this context, court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example an application that is brought promptly will be considered more sympathetically than one that is brought after unexplained inordinate delay. <u>But even where the application is unduly delayed, the court may grant the extension if shutting out the appeal may appear to cause injustice."</u> (Underlining for emphasis)

It is apparent from the law and the above definition that what amounts to sufficient reason is entirely discretionary and that there are no hard and fast rules since cases usually present different set of facts. This notion was enunciated more in the case of **Tushabe vs Cooperative Bank ltd (in receivership/ statutory liquidation) Supreme Court Civil Application No. 08 of 2018** as follows;

"The law created gates of justice through which people seeking justice pass to reach courts to be redressed. The Gates open and close at given intervals in accordance with rules of procedure. In rare

circumstances gates which are closed may be opened to allow in a late entrant. <u>The discretion to open or not to open is vested in the court."</u> (Underlining for emphasis)

The criterion for determining such an application was laid down in the case of **Molly Kyalukinda Turinawe & 4 Ors vs Turinawe Ephraim & Anor, Supreme Court Civil Application No.27 of 2010**, where court stated that **it is important to consider the following three questions before I can dispose of this application;**

i. **Whether the applicants have established sufficient reasons for this court to extend the time in which they may lodge their appeal.**
ii. **Whether the applicants are guilty of dilatory conduct?**
iii. **Whether any injustice would be caused if this application is not granted.**

I shall follow the above criteria in determining this appeal.

Various cases have held that sufficient reason **must relate** with the ability or failure to take the particular step in the prescribed time. *See Gulliano Gariggo vs Claudio Cassadio, Supreme Court Civil Application No. 01 of 2013, Mulindwa vs Kisubika Supreme Court Civil Appeal No. 12 of 2014[2018]*

The applicant argued that it did not know about the judgment delivery and only got to know when the respondents were being transferred from Luzira prison to Gulu prison for retrial in the High Court.

The respondents argued that the office of the Directorate was duly served with the hearing notices and production warrants but they did not attend court for judgment delivery.

The respondent's argument that the date of the judgment was communicated to the office of the Directorate was not backed with proof. This leaves speculation as to whether the office was indeed served or not.

In the case of **Uganda vs Ntambi Supreme Court Civil Application No. 08 of 2019,** the application for leave to appeal was denied and court observed as follows;

"In the first place, the reason for delay advanced in ground five of the application is a demonstration of sheer negligence on the part of the Director of Public Prosecution and it cannot be sustained by this court. I do not understand as to how a judgment delivered in the presence of an officer of the directorate takes this long before the Directorate realizes that there is an error of law."

The above case is distinguishable from the instant one in a sense that in the above case, there was an officer of the directorate who was present in court for judgment delivery and therefore not filing the notice of appeal in time was indeed sheer negligence. In the instant case, there is no proof on record that the Directorate was served with a notice for judgment delivery or that anyone from the Directorate was present on the day of judgment. Therefore it is very possible that

the office was indeed not in the know that the judgment was even delivered.

Further, I do not find the applicant guilty of dilatory conduct since they only got to know of the judgment way after the time within which to appeal had lapsed.

On the issue of injustice, it was the applicant's contention that this case contains substantial questions of the law which this court has to determine on appeal. The background of the case as stated in the ruling above was that the respondents some time in 2014 robbed the deceased of 65 Million shillings and immediately before or after the act shot her dead. They also injured the child of the deceased. They were indicted on 3 counts of murder, aggravated robbery and attempted murder. The High court after consideration of the evidence found the respondents guilty of the crimes and sentenced them to 65 years on count one,50 years on count 2 and 35 years on count 3. The respondents appealed to the Court of Appeal on both conviction and sentence. The case was heard by the Court of Appeal and for clarity, I shall reproduce some of the observations of the Court. The Court held interalia that;

".....Ms Kabagenyi pointed out an irregularity in the proceedings before the trial court which we think is a substantive issue. She argued that the learned trial judge permitted an assessor who had absented himself from part of the trial and did not hear the evidence of one of

the defence witnesses to proceed with the trial. Counsel contended that such an irregularity was fatal to the whole trial.

The law governing swearing in of assessors is section 67 of the Trial on Indictment Act. It provides as follows;

"*At the commencement of the trial and, where the provisos of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court.*"

We note at page 41 of the record of appeal that, the assessor clearly took their oath. It reads as follows:

"Court:

The two Assessors take oath

1. Ojungu Edward, Protestant, 40 years old.
2. Akwat Thomas Patrick, Male Adult 58 years, protestant.

From the above we find that the assessors were duly sworn in.

The appellant also contended that one of the assessors was absent during part of the hearing. From the outset, we wish to point out that the absence of an assessor in a trial before the High Court is provided by Section 67 (1) of the TIA. It stipulates as follows;

"*(1) if , in the course of a trial before the High Court at any time before the verdict an assessor is for sufficient cause prevented from attending*

throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.

(2) If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and new trial shall be held with the aid of different assessors."

In the instant case, hearing started on 19th March 2015 with assessors, Ojungu Edward and Akwat Thomas Patrick who were duly sworn in as indicated above. On 3rd December 2015 one of the assessors was absent during part of the hearing. He missed part of the evidence of DW12 Ocepa Geoffrey and resumed later. The trial court proceeded with both assessors, summing up was made to both assessors on 1st February 2016 and their joint opinion was delivered in Court on 8th February 2016. The record indicates as follows;

"We are ready with our opinion and we are presenting a joint opinion."

In their joint opinion, the assessors advised Court to convict the appellants on all three counts. We are of the view that the second assessor, having absented himself from part of the trial and did not hear the evidence even of only one witness should not have been permitted to resume participation and give opinion in the case. See; Abdu Komakech vs Uganda [1992-93]HCB 21 and Mukiibi Emmanuel vs Uganda ,Court of Appeal criminal Appeal No. 43 of 1996 (unreported)

Allowing the assessor to resume participation in the trial was a fundamental irregularity which occasioned a miscarriage of justice. the assessor 's opinion was based on incomplete evidence and it could have influenced the decision of the judge.

Section 34(1) of the Criminal Procedure Act provides as follows;

"the appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard or that it should be set aside on the ground of wrong decision on any question of the law if the decision has caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a ,miscarriage of justice , and in any other case shall dismiss the appeal; except that the court shall, no withstanding that it is of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

Taking into account the provisions of the law, we hereby allow the appeal, quash the conviction and set aside the sentences imposed upon the 2nd, 3rd, 4th and 5th appellants.

We find no point of considering the rest of the grounds in respect of the above appellants. We accordingly order a retrial before a different judge ....."

It is clear from the above observations that the Court of Appeal primarily premised its decision of quashing the convictions and sentences against the respondents on the conduct of the assessors. This indeed raises substantial questions of the law as to what the role of the assessors is in a trial and whether an irregularity regarding assessors can render the whole trial a nullity. In my opinion these questions of law cannot be overlooked by blocking this appeal from proceeding to this court.

I believe that denial of this application would cause an injustice to the people of Uganda and it would be against public policy.

I think it would be fair for both parties that this appeal be heard in order to settle the questions of law and also to reevaluate the evidence.

I therefore hold that the questions of law embedded in this appeal is sufficient reason for this court to overlook the undue delay on the part of the applicant. I hereby allow the application. The notice of Appeal should be filed with in 3 days and served on to the opposite party within 7 days of this ruling.

Dated at Kololo this.....11th.....day of.....November.....2019

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OPIO-AWERI.

JUSTICE OF THE SUPREME COURT