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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[Coram: Arach-Amoko; Mwangusya; Tibatemwa-Ekirikubinza; Mugamba; JJSC, Tumwesigye, Ag.JSC]

10 **CRIMINAL APPEAL NO. 08 OF 2007**

BETWEEN

ALENYO MARKS ::::::::::::::::::::::::: APPELLANT

15

AND

UGANDA ::: RESPONDENT

20 *[An appeal from the judgment of the Court of Appeal No. 187 of 2003 before (Hon Justices: Kikonyongo, DCJ; Bahigeine; Byamugisha,JJA), dated 21st March 2007] and Court of Appeal No.75 of 2012 before (Hon. Justices: Nshimye; Mwondha and Kakuru, JJA dated 15th January 2015].*

25 ***Representation***

The appellant represented himself whereas the respondent was represented by Mr. Mulindwa Badru Patrick, a Senior Assistant Director of Public Prosecutions.

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JUDGMENT OF COURT

Background of the appeal

This is a second appeal against conviction and sentence. The record indicates that on 16th December 2000, the appellant together with five other Police Officers were on patrol duty in Jinja District. In course of their patrol, the appellant received communication from A1 to intercept motor vehicle UAB 787T which was suspected to be carrying armed robbers.

After interception of the said vehicle, the appellant together with his colleagues ordered its three occupants to get out and lie on the ground. The suspects were thereafter shot dead.

The appellants were indicted under **Sections 188 and 189** of the **Penal Code Act** in Jinja High Court for the murder of Kamuhanda Charles, John Walube and Ronald Walube.

In the High Court, the appellant entered a plea of 'Not Guilty' although he admitted intercepting and shooting the three deceased persons. The appellant stated in his defence that when he intercepted the motor vehicle, the occupants in the vehicle fired at him and his colleagues using a pistol in a bid to resist arrest.

The trial Judge rejected the defence, convicted the appellant as well as his co-accused (A1-Okello Lawrence and A2-Mujuni Denis) of murder. They were each sentenced to death. The appellant and the other convicts appealed to the Court of Appeal against both convictions and sentences but they were unsuccessful.

5 In regard to the conviction, the Court of Appeal upheld the trial Judge's findings and stated that the Police records did not show any reported case stating that the said motor vehicle was involved in any previous incident of robbery. Concerning the appellants' defence of self-defence, the Court of Appeal held that they were 10 satisfied that the trial Judge was right to reject that defence.

Having upheld the convictions, the Court of Appeal maintained the death sentences as was then required by the law.

Dissatisfied with the Court of Appeal decision, the appellants appealed to the Supreme Court against the convictions and 15 sentences.

At the time the appeal was due to be heard at the Supreme Court, the Court had abolished the mandatory death penalty in its decision of **Susan Kigula vs. Uganda**[1]. Consequently, the appellants' case was remitted to the High Court before Yorokamu 20 Bamwine, PJ for mitigation of their sentences. Upon mitigation, Bamwine, PJ sentenced A1 (Cpl.Okello Lawrence) to 25 years imprisonment while A2 (Denis Mujuni) and the appellant in this Court were each sentenced to 20 years imprisonment. The reason given by the sentencing Judge for the disparity in the sentences was 25 that A1 was the author of the false report that led to the deceased's death.

[1] Supreme Court Constitutional Appeal NO. 3 of 2006.

The appellant (Alenyo Marks) was dissatisfied with the sentence of 20 years imprisonment given to him. He appealed against that sentence to the Court of Appeal.

The Court of Appeal held that the sentencing Judge failed to comply with Article 23(8) of the Constitution as well as the Sentencing Guidelines by not deducting the remand period as well as the post-conviction custody period from the sentences. The appellant's sentence was therefore set aside and substituted with a new sentence of 27 years imprisonment.

Dissatisfied with the Court of Appeal decisions in regard to both conviction and sentence, the appellant (Alenyo Marks) appealed to this Court on the following grounds:

1. **The learned Justices of Appeal erred in law when they failed to protect the appellant's constitutional and legal right to a fair and public hearing thus occasioning a miscarriage of justice.**

2. **Their Lordships at the Appeal Court erred in law when they sanctioned and relied on the defence counsel's misguidance and interferences with the statutory procedure of court of law to uphold the conviction thus leading to a failure of justice.**

3. **The learned Justices of Appeal erred in law when they upheld his conviction relying on High Court decision**

5 **reached without regard to the Constitutional and legal requirement governing the assessors' participation in the trial, thereby causing a miscarriage of justice.**

4. The Court of Appeal Justices erred in law and in fact when
10 **they failed to consider the doctrine of common intention and to establish that the defence of self-defence was available to him, thus making a wrong decision thereby causing a miscarriage of justice.**

15 **5. The Court of Appeal Justices erred in law and fact when they neglected actual evidence before court and preferred their own theories and shifted the burden of proof to the appellant in upholding his conviction and there by caused a miscarriage of justice.**

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6. Their Lordships erred in law and fact when they did not treat the whole evidence to exhaustive scrutiny and based on prosecution's evidence marred with grave inconsistencies and irregularities to dismiss his appeal
25 **and thus caused a miscarriage of justice.**

7. The learned Justices of Appeal erred in law and fact when they upheld his conviction after failing to find that he was protected by lawful superior orders.

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5 **8. The Court of Appeal erred in law when it substituted an illegal and unconstitutional sentence with another illegal sentence.**

Prayers

The appellant prays that this Court allows the appeal, quashes the
10 conviction, sets aside the sentence of 27 years imprisonment and grants him absolute freedom.

In the alternative and without prejudice to the above prayers, the appellant prays for a lenient sentence because of undue delays in the trial as well as loyalty and good conduct he exhibited.

15 **Resolution of Court**

The appellant argued the grounds of appeal in a chronological order as they appear in his Memorandum of Appeal. The respondent replied to the grounds in a similar order.

Upon careful perusal of the Memorandum of Appeal, this Court has
20 deemed it fit to address ground 3 first because it has the potential of resolving the entire appeal.

Ground 3

Appellant's submissions

The appellant faulted the Court of Appeal for upholding the High
25 Court decision in which the two assessors who participated in the trial were not sworn in before taking on their role. The appellant

5 argues that this was contrary to **Section 67** of the **Trial On Indictments Act** which requires each assessor to take oath. The appellant buttressed his argument by relying on the authority of **Abdul Komakech vs. Uganda**[2] where this Court held that, "even if only one assessor participated in a criminal trial without taking
10 oath, the whole trial becomes defective and null without any alternative remedy except quashing a conviction."

The appellant contends that the failure of the assessors to take oath denied him a right to a fair trial.

Respondent's reply

15 The respondent counsel conceded that it was an error for the trial Judge to commence the trial without swearing in the assessors. Counsel however submitted that this error was not fatal and did not occasion a miscarriage of justice.

Counsel further argued that since the assessor's role in a criminal
20 trial is only advisory in nature and not binding on the judge, the error did not lead to a miscarriage of justice. Counsel contended that perhaps the Judge could have forgotten to indicate on record the fact that he had sworn in the assessors. Furthermore, counsel for the respondent argued that since the appellant's counsel did not
25 raise this issue in the Court of Appeal, there was no miscarriage of justice. Counsel prayed that this ground fails.

[2] Supreme Court Criminal Appeal No.1 of 1988.

5 **Court's Consideration of ground 3**

We first of all want to point out that this ground was not raised at the Court of Appeal. **Rule 70 (1) (a)** of the **Rules of this Court** bars a party without the leave of Court from arguing that the decision of the Court of Appeal should be reversed or varied on a ground not
10 specified in the Memorandum of Appeal.

We however note that the appellant is a self-represented litigant who might not have known the rigors of the law as well as the procedure of first seeking leave of this Court to argue a new ground of appeal.

15 Furthermore, we are alive to this Court's decision in **Imere Deo vs. Uganda**[3] where it was held that, *Court may consider a new ground of appeal, not raised in the lower court, for the first time on a second appeal especially where the ground touches on the legality of the trial or orders made.*

20 **Section 3** of the **Trial on Indictments Act** underscores the importance of assessors by providing for a mandatory requirement that all criminal trials in the High Court be conducted with at least two assessors. It therefore follows that assessors' participation and role in a criminal trial is vital. Their role goes to the legality of a
25 trial.

[3] Supreme Court Criminal Appeal No.16 of 2015.

5 Consequently, although this is a new ground, since it is concerned with the legality of the trial from which this appeal emanated, the Court will exercise its discretion and address the new ground.

The appellant faults the Court of Appeal for upholding his conviction based on an illegal trial by the High Court. The appellant
10 submitted that the trial proceeded without the assessors taking oath which led to a miscarriage of justice.

We have reviewed the record and have not seen any indication of the assessors having taken oath. Indeed, the respondent conceded to the fact that the assessors were not sworn in.

15 According to **Section 67** of the **Trial On Indictments Act**, the taking of oath is a mandatory pre-requisite in the trial process. The Section provides as follows:

> **At the commencement of the trial and ... after the preliminary hearing has been concluded, each**
> 20 **assessor <u>shall</u> 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.** (Emphasis of Court)

It is our finding that a trial which proceeds without the assessors
25 taking oath is a nullity.

Consequently, ground 3 succeeds.

5 Having arrived at the conclusion that the trial was a nullity, the question which then follows is: *should the Court order for a retrial of the 3 persons who were indicted for murder?*

In **Abdu Komakech vs. Uganda (supra)** this Court dealt with a similar issue-whether or not to order a retrial based on the fact that 10 one of the assessors in that case had not taken oath. The Court held as follows:

> **"This Court has a discretion to order a retrial, but, as was pointed out by the Court of Appeal for East Africa in Fatehali Manji V Republic (1966) E.A. 343 and 344 15 quoting parts of its judgment in Salim Muhsin vs. Salim Bin Mohamed & others:-**
>
> **... the discretion must be exercised in a judicial manner .... In general, a retrial will be ordered only when the original trial was illegal or defective; it will 20 not be ordered where the conviction is set aside because of the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, 25 it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should be made where the interests of justice require it and it should not be ordered where it is likely to**

5 **cause an injustice to the accused person."** (Emphasis of Court)

We note that two people (A1 and A2) indicted at the High Court together with the appellant have already served their sentences (25 and 20 years respectively). It is also on record that the appellant
10 was granted bail by this Court and has consequently so far served 12 years of the 27 years imposed on him by the Court of Appeal.

In light of the fact that A1 and A2 have already served their sentences and that the time already spent in custody by the appellant is also long, ordering a re-trial would cause an injustice to
15 the accused persons.

Orders

In line with **Abdu Komakech (supra)**, we decline to order a retrial.

Having held that the trial was a nullity and that a retrial would not serve justice in the present appeal, we hereby order for the
20 immediate release of the appellant unless he is being held for any other lawful cause.

Dated at Kampala this ......7th...... day of ....November....... 2019.

25 ....
STELLA ARACH-AMOKO
JUSTICE OF THE SUPREME COURT.

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ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT.

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PROF. LILLIAN TIBATEMWA- EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

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PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT.

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JOTHAM TUMWESIGYE
Ag.JUSTICE OF THE SUPREME COURT.

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