

UGANDA / JUDGMENT

Byarugaba v Uganda (Criminal Appeal 667 of 2014) [2024] UGCA 295 (15 October 2024)

[2024] UGCA 295

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Muzamiru, JA, Tibulya, J

CASE / FILE NUMBER

Criminal Appeal 667 of 2014

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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

(Coram: Geoffrey Kiryabwire, Muzamiru Mutangula Kibeedi & Margaret Tibulya, JJA)

CRIMINAL APPEAL No. COA-00-CR-CN-0667-2014

BYARUGABA GERESSENSIO :::::::::::

VERSUS

UGANDA.... ::::::::::RESPONDENT

[An appeal against the conviction and sentence by the High Court of Uganda at Fort Portal (Hon. Justice Mike. J Chibita) made on the 12th June 2013 in Criminal Session Case No. HCT-01-CR-SC-00184-2010]

JUDGMENT OF THE COURT

Introduction

[1] The Appellant was convicted of the offence of Aggravated Defilement contrary to Section 129(3), 4(a) of the Penal Code Act, Cap. 120 and sentenced to twenty-one (21) years' imprisonment.

Background facts

[2] The prosecution case before the trial Court was that the Appellant, a resident of Nyabahuma village in Kyegegwa District, on the 15th day of May 2010 at 15:00hrs grabbed his step daughter (the victim) aged 9 years and had sexual intercourse with her. The victim was on her way going to fetch water. $\mathcal{L}$.

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- The victim reported the incident to her mother, Kabatoro Penina, when she returned from [3] the market and she, in turn, reported to a one Pastor Bakwate Onesmus who arrested the Appellant and escorted him to Hapuyo Police Post. Medical examination of the victim revealed that she was 9 years old and had signs of a ruptured hymen. Medical examination of the Appellant revealed that he was of sound mind and of the apparent age of 27 years.
- The Appellant was indicted for Aggravated Defilement. He pleaded not guilty to the [4] charge and was subjected to a full trial before the High Court of Uganda at Fort Portal. The Appellant was convicted as charged and sentenced as mentioned above.

The Appeal

The Appellant being dissatisfied with both the conviction and sentence filed a Notice of [5] Appeal. However, the Appellant has failed to pursue the appeal on its merits because the available record of appeal is incomplete. The Judgment of the trial Court, the sentencing proceedings and the sentencing Ruling are all missing. As such, on 20th August 2024 the Appellant filed the Memorandum of Appeal in which he set only one ground of appeal, namely:

That the trial Court failed to avail a complete record of proceedings and a copy of the judgment to the Appellant thereby constraining him from preparing and presenting a substantive appeal to this Honourable Court, hence occasioning the Appellant a gross miscarriage of justice.

Representation

At the hearing of the appeal, Ms. Angella Bahenzire, Counsel, appeared for the [6] Appellant on State Brief, while Ms. Harriet Adubango Chief State Attorney in the Office of the Director of Public Prosecutions (ODPP), appeared for the Respondent.

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- The Appellant was present in court. [7]

- The parties, with leave of the Court, proceeded by way of Written Submissions as [8] directed by the Court. This judgment has therefore been prepared largely on the basis of the Written Submissions.

Analysis - Incomplete record of proceedings

The law on incomplete records of appeal appears to be settled. Fredrick Egonda-Ntende, [9] JA summarised it in the lead Judgment in Ephraim Mwesigwa Kamugwa Vs the Management Committee of Nyamirima Primary School (Civil Appeal 2011/101) [2019] UGCA thus:

> "What is the law with regard to an incomplete record on appeal? The law on missing record of proceedings has long been established. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances, the Appellate Court has the power to either order a retrial or reconstruction of the record by the trial Court. See *East African Steel Corporation Ltd Vs State-wide Insurance Co. Ltd* [1998-2001] HCB 33.

> Where reconstruction of the missing part of the record is impossible for whatever reason, but the Court forms the opinion that all the available material on record is sufficient to take the proceedings to a logical end, the Court may proceed with the partial record as long as none of the parties to the appeal is prejudiced. *Jacob Mutabazi Vs the Seventh Day Adventist Church*, Court of Appeal Civil Appeal No. 0088 of 2011

> However, where reconstruction of the missing part of the record is impossible and Court forms the opinion that all the available material on record is insufficient to take the proceedings to its logical end, a re-trial should be ordered. See *Nsimbe Godfrey Vs Uganda*, Court of Appeal Criminal Appeal No. 361 of 2014 (unreported), and *East African Steel Corporation Ltd Vs Statewide Insurance Co, Ltd* T1998-2001 HCB 3311."

[10] From the submissions of both parties, it is apparent that re-construction of the record of the trial Court is not an option. However, the parties agree that the missing documents, namely, the Judgment of the trial Court and the sentencing proceedings and Ruling, are critical in the preparation and presentation of the desired substantive appeal, and that

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their absence will greatly prejudice the Appellant's right to pursue the appeal on its merits. Both parties also agree that without the missing records this court will be constrained in effectively discharging its duty to re-appraise all the materials that were before the trial Court and make its own inferences on issues of law and fact.

- [11] What appears to be the point of contention between the parties is the appropriate remedy in the circumstances of this case. The Appellant contends that the conviction and sentence should be set aside by this Court and the Appellant immediately discharged in light

of what he terms "the inordinate delay of prosecuting the appeal that was lodged in 2014". In support of his proposition, the Appellant cites the cases of Tuuni Stephen & Another Vs Uganda [2018] UGCA 37, and Kaye Samuel Vs Uganda Court of Appeal Criminal Appeal No. 300 of 2010.

- [12] On the other hand, the Respondent argues that the Appellant having been convicted of Aggravated Defilement which is a serious offence and carries a maximum death penalty, it would be in the interest of justice to order a retrial. The Respondent cited the case of Obirai Andrew Francis Vs Uganda, Court of Appeal Criminal Appeal No. 470 of 2015 (unreported) to bolster her position.
- [13] We have reviewed the decisions relied upon by the parties, for which we are grateful to the Counsel in this matter. In Tuuni Stephen & Another Vs Uganda [2018] UGCA 37 where this Court quashed the convictions and set aside the sentences of the Appellants when the record lacked the Judgment, the reasons for the decision were summarised thus:

"As the record of appeal is incomplete, in the absence of the judgment 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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[14] In the case of Kaye Samuel Vs Uganda Court of Appeal Criminal Appeal No. 300 of

2010, this Court held:

"The interest of justice would not be met if an order for retrial was made in circumstances where an Appellant appeared to be suffering the full brunt of the administrative flaws ... a retrial in this case may not be advisable given the passage of time which could lead to eroded memory of the witnesses, and the quality of their evidence being compromised and or biased, fostering further injustice. This Court found in Tuuni Supra that the delay caused by loss of vital Court records is unjustifiable and the Appellants indeed deserved better from the justice system. We find that the judgment which would have been the basis of appeal in this case is irretrievably lost and the hearing of the Appellants appeal has been inordinately delayed for over 10 years. The Court concludes that failure to keep record leading to an injustice is not the Appellants' fault. The conviction and sentence against the Appellant are set aside. The Appellant is forth with discharged unless held on other lawful grounds."

[15] In *Obirai Andrew Francis Vs Uganda* (supra) the appeal was against a conviction for the offence of murder and the sentence of 35 years' imprisonment imposed by the trial Court. At the time of the appeal, the Appellant had served 9 years inclusive of the remand period of 5 years prior to his sentencing. In ordering a re-trial, this Court stated thus:

"... We have considered the circumstances in which the appellant spent about nine years on remand but had been charged with the serious offence of murder which carries a maximum penalty of death. The cause of justice is that such a trial should be conducted and succeed or fail on the merits..."

[16] Guided by the principles enunciated in the above decisions, we think that ordering a retrial of the Appellant would not meet the ends of justice in the instant case. The Appellant in the instant matter was found by the trial Court to have committed the offence of Aggravated defilement on 15th May 2010. At that time, he was of the apparent age of 27 years. He is currently about 41 years of age. He has already served 14 years out of the 21 years to which he was sentenced, if the remand period is included in the computation of the period. This implies that the Appellant has served about two-thirds of

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the sentence. If the period of remission were to be taken into account, the Appellant is about to be released from imprisonment.

- [17] We have also considered the justice of the case from the perspective of the victim. At the time she was defiled fourteen years ago, she was only 9 years of age. Right now, she is about 23 years of age. She needs and deserves a closure to her childhood trauma. A retrial will simply open the old wounds which have either healed or are in the process of healing. The retrial might possibly expose her traumatic past to persons she might not necessarily be happy to disclose it to, like her spouse (if any) or possible suitors. This potential risk can greatly undermine her commitment to fully cooperate with the prosecution to give the evidence necessary for the successful retrial.
- [18] Accordingly, we are satisfied that this is a proper case where the conviction and sentence against the Appellant should be set aside, and the Appellant discharged immediately.

§[19] Disposition

- **1** The appeal is allowed.
- The conviction and sentence is set aside. **2**
- The prayer for a retrial is declined. 3.
- The Appellant should forthwith be set free unless held on any other lawful grounds. **4**

We so order.

Dated and delivered at Fort Portal this 15th day of October 2024.

GEOFFREY KIRYABWIRE Justice of Appeal

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MUZAMIRU MUTANGULA KIBEEDI Justice of Appeal

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MARGARET TIBULYA
Justice of Appeal

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