

UGANDA / JUDGMENT

Kibirige Umar aka Obama v Uganda (Criminal Appeal No. 696 of 2015) [2021] UGCA 184 (22 December 2021)

[2021] UGCA 184

COURT

Court of Appeal of Uganda

BEFORE

Musota, JA, Buteera, DCJ, Barishaki, JA

CASE / FILE NUMBER

Criminal Appeal No. 696 of 2015

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT JINJA
[Coram: Richard Buteera, DCJ; Cheborion Barishaki and Stephen Musota, JJA]
CRIMINAL APPEAL NO. 696 OF 2015

KIBIRIGE UMAR BAKER a.k.a. OBAMA : APPELLANT 10 VERSUS

<table> UGANDA :

(Arising from the decision of Faith Mwendha, J, sitting at Nakawa in High Court Criminal case No.26 of 2010, dated the 9th day of April 2013)

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JUDGMENT OF THE COURT

Introduction

The appellant, Kibirige Umar Baker was indicted with the offence of Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act. He was convicted and sentenced to 15 years imprisonment by Faith Mwendha, J, as she then was.

Legal Representation

When the matter came up for hearing on 28th September 2021, the appellant was represented by Mr. Mutange Ian Derrick on State brief while the respondent was represented by Mr. Oola Sam, a Senior Assistant Director of Public Prosecutions.

Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Prisons.

During the hearing, counsel for the appellant informed Court that he liaised with the $\$$ Registrar of this Court and they found that the appellant's file which reflects the lower Court record is missing. According to counsel, they later learnt that several correspondences in relation to the missing file had been made by the appellant to the Registrar High Court and the Judicial Service Commission, in order to retrieve the file. He noted that the file has never been located. $\$10$

Counsel thus averred that he was unable to file a memorandum of appeal and written submissions in support of the appeal since the said file had not been found.

Counsel for the respondent opposed counsel for the appellant's arguments and contended that there is no evidence that the High Court Registrar reported to this

- Court that the record of proceedings before the High Court could not be obtained. 15 He argued that **Rule 64 (1) of the Court of Appeal Rules** provide that it is the duty of the High Court Registrar to prepare the record of appeal. He added that Rule 64 (6) of this Court's Rules provide that the Registrar must certify the record and then forward copies to the appellant, the respondent and the Registrar of this Court within 6 weeks of preparation of the record.
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Counsel contended that it would be premature for this Court to take a decision on this matter in the absence of evidence that the High Court Registrar made a formal report to the Registrar of this Court about the said missing file. He noted that reliance on the correspondences made by appellant would be speculative.

The appellant told Court that the sentence of 15 years imprisonment was given 25 without consideration of the 2 years and 7 months that he spent on remand. He noted that he would be finishing his sentence in 1 year and four months. He prayed that the same be considered in determination of his appeal.

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Court adjourned this matter to 27th October 2021 such that the Registrar of this Court $\$$ attains the High Court record or a letter from the Registrar High Court, confirming that the record is indeed untraceable.

When the matter came up for hearing on 27th October 2021, the appellant was represented by Mr. Thomas Oosan, holding brief for Mr. Ian Derrick Mutange on State brief while counsel for the respondent was absent.

Counsel for the appellant told Court that he had received a copy of an internal memo from the Registrar of this Court where he stated that the file in the lower Court could not be traced.

The appellant told Court that he was sentenced to 15 years imprisonment on the 9th of April 2013. He noted that Prisons were considering remission, therefore, he had 15 only 1 year and 4 months left to finish his sentence. He added that he was arrested in 2010 and the trial Judge did not consider the 2 years and 7 months he spent on remand.

In conclusion, counsel for the appellant sought Court's guidance on how to proceed with this matter. 20

Consideration by the Court

We have considered the arguments made by both counsel for the appellant and counsel for the respondent, the concerns personally raised by the appellant and the relevant laws.

This is a matter where the file including the lower Court record of proceedings could not be traced. This was confirmed by the Assistant Registrar of this Court in an Internal Memo dated 26th October 2021, in which he stated that the High Court confirmed that the said record could not be traced.

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We therefore have to consider whether this Court orders a retrial or discharge the S appellant.

The law on a missing record or proceedings was restated by this Court in *Civil* Appeal No. 0101 of 2011, Ephraim Mwesigwa Kamugwa vs. The Management *Committee of Nyamirima Primary School*, where Court stated:

"... The law on missing record of proceedings has long been established. 10 *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 v. Statewide Insurance Co. Ltd [1998-2000] 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 proceeding to its logical end, the *Court may proceed with the partial record as long as none of the parties to* the appeal is prejudiced. See Jacob Mutabazi v. The Seventh Day Adventist Church. Court of Appeal Civil Appeal No. 088 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 retrial should be ordered. See *Nsimbe Godfrey v. Uganda, Court of Appeal Criminal Appeal No. 361 of 2014 (unreported), and East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331."*

In Rev. Father Santos Wapokra vs. Uganda, Court of Appeal Criminal Appeal No.204 of 2012, Court noted that an order for a retrial is as a result of the judicious

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exercise of the Court's discretion. This discretion must be exercised with great care S and not randomly. The Court stated some of the principles that ought to be taken into consideration to be:

"As to whether the appellant shall be subjected to a double jeopardy if a retrial is ordered, we appreciate that any criminal trial is an ordeal for an accused in terms of resources expended, the discomfort of having a criminal charge hanging over the accused and being subjected to Court attendance and, where one is not on bail, being on remand. On the other hand, where one is alleged to have committed a serious crime against society, the interests of justice demand that such a one be subjected to a criminal trial, where his/her innocence or guilt may be established. This is, depending on the facts of the particular case, even where it involves a re-trial of the case.

In the case before us, given the grave nature of the offence, and those involved in it as victim and as accused, we are persuaded to hold that the interests of justice will best be served by a retrial being ordered."

In the present case, the entire lower Court record of proceedings is missing and there is no evidence on record that it could be reconstructed by the High Court. The right procedure would be to send this matter back to the High Court for retrial.

We have taken into consideration the peculiar circumstances of this case.

The Notice of Appeal on record shows that the appellant was convicted on 9th April 2013 for the offence of aggravated robbery and he was sentenced to 15 years imprisonment. The appellant stated that he was arrested in 2010. He was on remand

for 2 years and 7 months which period was not taken into account by the trial Judge. He will have finished serving his sentence in one year and four months.

If an order for retrial is made in this matter, it is probable that the appellant will have completed his 15 years sentence by the time the matter is heard afresh in the High Court.

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Considering the fact that the appellant has served a substantial part of the sentence, S the possibility of remission from Prisons and the length of time it would take to prepare the appellant's case for retrial, it would be unjust for this Court to order for a retrial in this matter.

In the interest of justice, we order for the immediate release of the appellant unless he is being held on other lawful charges.

We so hold.

\$nd\$ Dec Dated at Kampala this... . day of...2021

RICHARD BUTEERA DEPUTY CHIEF JUSTICE

CHEBORION BARISHAKI JUSTICE OF APPEAL

STEPHEN MUSOTA JUSTICE OF APPEAL

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