THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

Coram: Egonda Ntende, Bamugemereire & Mulyagonja, JJA

CRIMINAL APPEAL NO. 077 OF 2020

BETWEEN

OKELLO ROBERT :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Oyuko Ojok, J. dated 10th June, 2018 at the High Court of Uganda Holden at Arua in HCT CS Case No. 0084/2016)

JUDGMENT OF THE COURT

The Appellant was indicted for the offence of aggravated robbery contrary to sections 284 and 286 (2) of the Penal Code Act. He was convicted and sentenced to 42 years' and 3 months' imprisonment.

Background

The background to the appeal, as far as can be ascertained from the record, was that the victim, Patrick Munguci was a *boda boda* rider. On 21st August 2015, the appellant asked him to transport him from the *boda boda* stage at which he was stationed to Muni National Teacher's College. Along the way, they stopped for the appellant to withdraw some money from a mobile money kiosk. He withdrew the money from the phone whose number was registered in the names of his wife. They then proceeded towards their destination but when they got to Muni Teacher's College, the appellant made a telephone call to someone called Solomon and then

asked the victim to move to a place at which he said Solomon was washing clothes.

As they moved towards a valley, they got to a point where they were surrounded by trees and the appellant asked the victim to stop. When he stopped, three people jumped out of the bushes, and accosted them. Two of them armed with guns threatened to kill the victim if he did not surrender his motorcycle. He then gave them the key and they rode off, together with the appellant. The appellant was later arrested and indicted with the offence of aggravated robbery. After a full trial, he was convicted and sentenced to 42 years and 3 months' imprisonment. Being dissatisfied with the result, he appealed to this court on the following grounds:

1. That the learned trial judge erred in law and fact when he failed to write and/or deliver a reasoned judgment in law, and thus occasioned a miscarriage of justice.
2. That the learned judge erred in law and fact when he convicted the Appellant on the uncorroborated and unreliable evidence of the prosecution thereby arriving at a wrong conclusion of guilt, thereby causing a miscarriage of justice
3. That the learned judge erred in law and fact when he failed to evaluate evidence on record that was so insufficient to meet the standard of proof required and thus arriving at wrong findings that the prosecution had discharged the required burden thereby occasioning a miscarriage of justice.
4. That the learned judge erred in law and fact when he relied on the prosecution evidence that was full of grave contradictions and inconsistencies, to convict the Appellant, and thus occasioned a miscarriage of justice.

5. That the learned judge erred in law and fact when he sentenced the convict to 42 years' imprisonment which is manifestly harsh, excessive and unreasoned in the circumstance of the instant case.

Representation

At the hearing of the appeal on 28th March, 2023, Mr Joseph Sabiiti Omara appeared for the Appellant. Mr Joseph Kyomuhendo, Chief State Attorney from the Office of the Director of Public Prosecutions, represented the Respondent.

Duty of the Court

The duty of this Court as a first appellate court, is stated in rule 30(1) of the Rules of this Court (SI 10-13). It is to re-evaluate the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious that it did not observe the witnesses testify.

Submissions of Counsel

The appellant's counsel addressed ground one of the appeal alone and grounds 2, 3 and 4 together. Ground 5 was addressed on its own. Counsel for the respondent filed submissions in reply to the first ground of appeal only.

In respect of ground one, counsel for the appellant submitted that the learned trial judge erred in law and fact when he failed to write and or deliver a reasoned judgment in law and thus occasioned a miscarriage of justice. He invited court to look at page 17 of the record of proceedings where he said there was a judgment consisting of only one paragraph. He

contended that it bore no reasons and therefore did not meet the standard of a judgment in law.

Counsel further submitted that Halsbury's Laws of England, 3rd Edition defines a judgment as *"Any decision by a court on a question or questions or issues between parties to proceedings properly before court."* He further referred to Osborn's Law Dictionary where a judgment is defined as,

> **"The Decision or sentence of a court in a legal proceeding – Also the reasoning of a judge which leads him to his decision, which may be reported and cited as an authority, if the matter is of importance and can be treated as a precedent."**

Counsel went on to draw the court's attention to section 86 of the Trial on Indictments Act and Order 22 rule 4 of the Civil Procedure Rules. He pointed out what ought to be contained in a judgment and referred to the decisions of the courts in **Kagoye v R [...] EA 900** *(sic)* and **Okeno v R [1972] EA 32**. He submitted that all these were not included in the record placed before court. He prayed that this court finds that there was an error in law and fact; that there was a miscarriage of justice occasioned to the appellant and this court should make orders in favour of the appellant.

Without prejudice to the submissions above, counsel for the appellant filed further submissions on the rest of the grounds of appeal, which we see no reason to set out here or refer to in the circumstances.

In reply, counsel for the respondent referred to the decisions in **Pandya v R [1957] EA 335** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997,** wherein the courts set out the duty of the first appellate court. He further submitted that, he was unable to reply to the submissions of the appellant since one of the grounds of the appeal was that the learned trial judge failed to deliver a reasoned judgment.

Counsel went on to explain that he perused the original record of proceedings and found that the typed record was not a true reflection of the original handwritten record that was created during the proceedings in the lower court. That while the typed record shows that the trial judge delivered a judgment, at page 22 of the record, the original handwritten record showed that what is headed "Judgment" on that page is actually the *allocutus* where the aggravating factors were stated.

He further submitted that the handwritten record of proceedings was jumbled up by the typist as it was shown on page 22 thereof. He contended that this was a case of a missing record and not a failure to deliver a judgment. He was therefore unable to argue with certainty on whether the trial judge properly evaluated the evidence or not and accordingly prayed that this court be pleased to exercise the powers vested in it under section 11 of the Judicature Act, evaluate the evidence and deliver judgment in the matter. In the alternative, that the appeal be adjourned until the missing record is found.

Before the hearing, court requested the Registrar to bring up the original record of the court and she did so. She supplied copies of the handwritten notes of the trial judge which the court analysed but found to be incomplete.

Court asked counsel for both parties to propose solutions that could remedy this gap in the record of proceedings. At this, counsel for the respondent proposed that the file be sent to the trial judge to write the judgment. In the alternative that the court orders for a retrial. It was his opinion that while doing this, the court should consider the interests of the innocent victim.

Counsel for the appellant opined that both alternatives would occasion an injustice to the appellant.

Determination of the appeal

The duty of this court as a first appellate court, is stated in rule 30(1) of the Court of Appeal Rules (SI 10-13). It is to re-evaluate the whole of the evidence adduced before the trial court and reach its own conclusions on the facts and the law. We have therefore considered the whole of the record that was set before us and the submissions of counsel for both parties on the first ground of appeal.

We note that as counsel for the appellant pointed out in his submissions, there is indeed no record that a judgment was delivered by the trial judge. What appears at page 22-23 is the following text with the heading, "Judgment,"

Judgment

> *Robbery is a very serious offence, maximum penalty is death sentence, circumstances of this case, the offence was very well planned, if this victim had resisted, he been killed, motorcyclist and never recovered, this another case court case O82L/2OL5. Not concluded escaped. This convict has a lot of...to steal people's motorcycles. Protects the community and the motorcycle. Deterrent sentence is Langi ... sentence. With help reform but also sent warning signs we so humbly pray. Mitigation No criminal case...the convict has children, very remorseful. Pray for leniency, been on record. Been on remand 2 years and 9 months, leaving him with 42 years and 3 months.*

Counsel for the respondent surmised that this could have been an error by the secretary who typed the word *"judgment"* were it was not supposed to be, above the submissions of counsel in mitigation of the sentence. Indeed, from perusal of the contents of the typed record below that

heading, it appears the trial judge recorded the submissions of counsel about the sentence. He however did so in a disjointed manner.

We perused the hand written record that was made by the trial judge. We further observed that the word *"Judgment"* appeared below the opinion of the assessors. There is nothing recorded after the opinion where the final decision of the trial judge would normally be. After a careful search for the rest of the record by the Registrar, she returned the finding that no judgment in the matter was found. Counsel for the respondent also did not seem to know whether a judgment was ever delivered at the trial or not. We thus came to the conclusion that if he delivered judgment as it was noted in his handwritten notes, that judgment was not placed on the file. We therefore have nothing to go by to determine the appellant's appeal since there is no judgment to appeal against.

Curiously, after the opinion of the assessors at page 24 of the record, there appears a Commitment Warrant signed by the trial judge on 20th June 2018. By that warrant, the appellant was sent to prison to serve a sentence of 42 years for the offence of aggravated robbery. His appeal was also about that sentence because he was aggrieved that it was manifestly harsh and excessive in the circumstances of the case.

The Trial on Indictments Act (TIA) sets out the process of the criminal trial on an indictment thereunder step by step. At the end of the trial, it is provided in section 83 of the Act that a verdict and sentence shall be returned by the court in the following terms:

> **82. Verdict and sentence.**
>
> **(1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall**

record each such opinion. *The judge shall take a note of his or her summing up to the assessors.*

(2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.

{Emphasis added}

While there is a note in the handwritten record of the trial judge, as well as in the typed record, that judgment was delivered, and what appears to be the joint opinion of the assessors, there is no record that the trial judge summed up the law and the evidence to the assessors. If it was done, there is no record of it before us. We therefore find that this is another mandatory step of the trial that the trial judge did not take since he did not record the summing up as it was required by law.

Further to that, section 85 of the TIA provides for the mode of delivery of judgment as follows:

85. Mode of delivering judgment.

(1) The judgment in every trial in the High Court shall be pronounced, or the substance of the judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time, of which notice shall be given, *to the parties and their advocates, if any; except that the whole judgment shall be read out by the judge if he or she is requested so to do either by the prosecution or the defence.*

(2) The accused person shall, if in custody, be brought up, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where his or her personal attendance during the trial has been dispensed with and the sentence is one of fine only or he or she is acquitted.

(3) ... ***{Emphasis added}***

Sub-section (1) of the provision above presupposes that before it is delivered or read, the judgment must be written. Section 86 then states it categorically when it sets out the contents of the judgment as follows:

86. Contents of judgment.

(1) *Every judgment delivered under section 85 shall be written* by, or reduced to writing under the personal direction and superintendence of, the judge in the language of the court, and shall contain the point or points for determination, the decision on it and the reason for the decision and shall be dated and signed by such presiding judge as on the date on which it is pronounced in open court.

(2) For the purposes of subsection (1), any judgment may be recorded in shorthand or by any mechanical means under the superintendence of the judge and the transcription of it signed by that judge.

(3) In the case of a conviction, the judgment shall specify the offence of which, and the section of the written law under which, the accused person is convicted.

(4) *The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence.*

{Emphasis added}

In the case now before us, there is no judgment, written or otherwise, that was pronounced by the trial judge which is contrary to section 86 (1) of the TIA. As a result, there is nothing upon which the appellant can base his arguments in his appeal.

In addition to that, subsection 4 of section 86 provides that the proceedings that follow the pronouncement of the judgment where the accused person has been convicted must be recorded. This means that the whole of the proceedings after a judgment on conviction must be on the record of the court. In this case, all we have are disjointed notes at pages 22 and 23 wherein counsel for both the State and the appellant stated the aggravating and mitigating factors. Much as the trial judge notes that there

was judgment, there is no record that the appellant was formally sentenced. There are no reasons for the sentence of 42 years in prison. We are also not able to see whether or not the trial judge considered the period that the appellant spent in custody before he was convicted and sentenced to serve 42 years in prison.

Counsel for the respondent prayed that we order a new trial for the accused. We note that the appellant has been in prison for a period of almost five years from 18th June 2018. We would order a new trial but we are of the view that it would be an injustice to subject him to waiting in prison until such a trial is organized by the State.

Moreover, we are of the view that because of the clear omissions that we observed and set out above, the appellant was subjected to a mistrial in the lower court. In **R v Rose & Others [1982] 2 All ER 536,** the Court of Appeal of England and Wales explored what constitutes a mistrial. The court came up with the following criteria, at page 543:

> *"... The first requirement is irregularity in procedure. Secondly, it seems from this analysis that the irregular incident may happen at any stage of the proceedings. Thirdly, the defect must be fundamental. The trial must be marred by an irregularity so serious as to entitle the defendant to a retrial at the least, so serious that it can be properly termed a 'mistrial' or, as some authorities put it, a 'nullity'."*

We can safely say in this case that there being no judgment on the record and no explanation as to how the trial judge arrived at the sentence of 42 years in prison for the appellant, the errors were so fundamental that what transpired cannot validly be referred to as a trial under the TIA. It was a nullity, and we so find.

Further to that, we are not inclined to order a retrial because a whole five years has passed since the appellant was convicted. Before that he was

in prison for 2 years and 9 months, which makes a total of about 7 years and nine months in prison. In the circumstances, the appellant should be discharged. He should be released from prison forthwith, unless he is held on other lawful charges.

Dated at Gulu this 18th day of May 2023.

Frederick Egonda-Ntende
JUSTICE OF THE COURT OF APPEAL

Catherine Bamugemereire
JUSTICE OF THE COURT OF APPEAL

Irene Mulyagonja
JUSTICE OF THE COURT OF APPEAL