THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Barishaki Cheborion, Kibeedi, JJA*]

CRIMINAL APPEAL NO. 0465 OF 2016

(*Arising from High Court Criminal Session Case No.12 of 2013 at Soroti*)

BETWEEN

Eledu Ambrose==========Appellant

AND

Uganda==========Respondent

(*An appeal from the judgement of the High Court of Uganda [Wolayo, J] delivered on 11th April 2016*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that Eladu Ambrose on the 24th day of December 2012 at Acetgwen village in Soroti district murdered Asili Charles. The learned trial Judge convicted the appellant as charged and sentenced him to 36 years and 8 months imprisonment. Being dissatisfied with the conviction and sentence, the appellant has appealed on the following grounds:

> '1. The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record concerning a single identifying witness and the evidence of a dying declaration.
>
> 2. The Learned trial judge erred in law and fact when she failed to evaluate the mitigating factors thus reaching an erroneous decision to sentence the Appellant to a harsh sentence of 36

years and 8 months imprisonment which occasioned a miscarriage of justice.'

[2] The respondent opposed the appeal.

Submissions of Counsel

[3] At the hearing, the appellant was represented by Ms. Luchivya Faith and the respondent by Ms. Nakafeero Fatina, Chief State Attorney, in the Office of the Director, Public Prosecutions.

[4] During the hearing, the court brought it to the attention of the parties that the record of proceedings does not indicate that a plea was taken. Counsel for the respondent conceded that there was no plea taking which results into a mistrial. Counsel for the respondent prayed that this court orders a retrial within a period of three months basing on the authority of Rev. Father Santos Wapokra v Uganda [2016] UGCA 33.

[5] Counsel for the appellant agreed that there was a mistrial since no plea was taken but was of the view that a retrial would occasion a miscarriage of justice because the appellant has been in prison for over a period of 7 years. Ms. Luchivya was of the view that due to the uncertainty of a speedy trial, it is in the interest of justice that the appellant be discharged since he has served enough time. She prayed that the appellant be released from prison.

[6] Counsel for the respondent in reply submitted that the prosecution cannot be faulted for a technical error of court.

Analysis

[7] The facts according to the prosecution case are that on the 24th day of December 2012 in the night, Asili Charles (the deceased) and his wife were at their home sleeping at around 1:30 am when they were woken up by a knock at their door. The person knocking told the deceased to open the door because they had brought groundnuts to sell to them. Upon opening the door, the deceased found the appellant and an unknown man. The appellant had a gun. A struggle ensued and the appellant shot the deceased. He tried to shoot the wife but was unsuccessful and ran away. The wife who had been watching the incident from the house raised an alarm, neighbours responded and the deceased was rushed

to hospital. That before the deceased passed away, he told his relatives and recorded a statement to police that the appellant had killed him.

[8] We have perused, nay, scoured, the record of proceedings in the trial court. There is no indication that a plea was taken. The record shows that the trial commenced on 4th April 20016 with the trial court swearing in the assessors and admitting into evidence the agreed documents. Thereafter, the prosecution opened its case. No plea was taken. Much as there was no appeal on this matter, we cannot ignore such a fundamental irregularity once it comes to our attention.

[9] Section 60 of the Trial on Indictments Act provides:

> **'60. Pleading to indictment.**
>
> The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.'

[10] The foregoing provision is couched in mandatory terms. Every accused person to be tried by the High Court, and indeed any court, must plead to the indictment against them and the plea recorded by the trial court. Plea taking is fundamental to the holding of a fair hearing upon which a trial proceeds. An accused must be informed of the case he is to meet at his trial.

[11] This is premised on Article 28 (3) (b) of the Constitution which states:

> 'Every person who is charged with a criminal offence shall–
>
> (a)

(b) be informed immediately, in a language that the person understands, of the nature of the offence;'

[12] Where an accused person does not plead to the indictment, the trial is a nullity. See Rev. Father Santos Wapokra v Uganda [2016] UGCA 33.

[13] For the above reasons, we quash the conviction of appellant no.1 and set aside the sentence imposed against him.

[14] Counsel for the respondent prayed that in the event that this court finds that there was a mistrial, a retrial should be ordered. An order for a retrial is as a result of an exercise of the court's discretion. In Wapokra v Uganda [2016] UGCA 33, this court stated:

> 'The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However, that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the re-trial. An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the Courts: See: FATEHALI MANJI V. R [1966] EA 343.'

[15] Taking into consideration the fact that the appellant was convicted of a serious offence and the fact that the deceased was murdered in a manner most foul, it is only proper that the guilty party is brought to justice. However, this must be balanced with the appellant's constitutional right to a fair and speedy trial under Article 28 (1) of the Constitution. The offence was committed almost 8 years ago on the 24th December 2012. The appellant has been in detention since his arrest soon after this offence was committed to-date. There is no certainty as to when the re-trial would take place if ordered by this court. What is certain are

further delays if this matter were to start all over again. If the appellant was found to be innocent there is no recompense for the suffering he has endured so far and what would inevitably follow.

[16] Delay affects adversely both the ability of the prosecution and defence to present their cases. Witnesses may have died or moved from one place to another and may not be traceable. The quality of their memory may be in question. The onset of the current *Covid* 19 pandemic has adversely affected the operation of the Criminal Justice System and it is not known when the situation would normalise. The appellant had no part to play in the failure of the criminal justice system to accord him a trial as mandated by law.

[17] In the circumstances of this case we are satisfied that an order for a re-trial would not serve the ends of Justice. We decline to order the same.

Decision

[18] We order a stay of prosecution of the appellant and discharge him from the charges in this case. We order his immediate release unless he is held on some other lawful charges.

Signed, dated and delivered at Mbale this 25th day of September 2020.

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal