

UGANDA / JUDGMENT

Cherop v Uganda (Criminal Appeal 244 of 2024) [2025] UGCA 98 (10 April 2025)

[2025] UGCA 98

COURT

Court of Appeal of Uganda

BEFORE

Mulyagonja, JA, Tibulya, JA/JCC, Kazibwe, JA

CASE / FILE NUMBER

Criminal Appeal 244 of 2024

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⁵ THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HEID AT MBALE

Corom: Mulyagonjo, Tibulyo & Kozibwe Kowumi, JIA

CRIMINAL APPEAL NO. O244 OI2024

BETWEEN

CHEROP GEORGE APPELLANT

AND

UGANDA RESPONDENT

(Appeal against the decision of NamundiJ delivered in Mbole Criminal Appeal No.022 of 2022 on 79th Morch 2024) 15

JUDGMENT OF THE COURT

This a second appeal arising from a decision of a Magistrate Grade 1 of the Chief Magistrates Court of Kapchorwa at Kapchorwa where the Appellant was convicted on a charge of Causing Grievous Harm contrary to section 219 of the Penal Code Act and sentenced to three years' imprisonment. He appealed against the conviction and sentence in the High Court at Mbale 20 but the appeal was dismissed on 19th March 2024. 25

Background

The facts admitted at the trial are that the Appellant and Yapchemusto Madina were neighbours in Kapchorwa Municipality. On 15th February 2018 at about 8.00pm at Laketet Cell while Madina was walking home with

her husband and children, she was attacked by the appellant.

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⁵ The appellant is alleged to have hit Madina with a stick on the right shoulder and then stepped on her leg but she was saved by her daughter who flashed her torch in the direction where the scuffle was taking place. Madina's husband who was walking behind them heard the scuffle and ran to the scene to rescue his wife. The appellant fled from the scene warning Madina about an alleged plot she had hatched with his wife to kill him. 10

The trial court found the evidence sufficient to convict the appellant who lodged Criminal Appeal in Mbale High Court vide Criminal Appeal No.022 of 2022 which was dismissed resulting into this second appeal on four grounds.

Grounds of Appeal

- 1-. The Learned Appellate Judge erred in law when he upheld the trial court's judgment/ conviction that was premised upon illegal/ fu nda menta lly defective proceedings.
- 2. The Learned Appellate Judge erred in law when he failed to appraise/re-evaluate the evidence on the court record pertaining to causation, participation and identification of the Appellant thus arriving at an erroneous decision.
- 3. The Learned Appellate Judge erred in law when he failed to reappraise the evidence on the Court record regarding the ingredients of the offence causing grievous harm contrary to section 2L9 of the Penal Code Act thus arriving at an erroneous decision.
- 4. The Learned Appellate Judge erred in law when he upheld an illegal sentence imposed by the trial Magistrate without taking into account the pre-trial remand period.

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⁵ Representation

At the hearing of the appeal on 1-2th March 2025, Ms. Agnes Wazemwa represented the Appellant while Mr. Oola Sam, a Senior Assistant DPP in the Office of the Director of Public Prosecutions represented the Respondent. Counsel for the parties filed written submissions which with leave of the court were adopted as their arguments for the determination of this appeal.

Duty of the Court

On a second appeal, the court is required to re-appraise the evidence placed before the trial judge and make its own conclusions not disregarding the judgment appealed from but weighing and considering it. 15

Section 45 of the Criminal Procedure Code Act [CAP 116] spells out the duties of this Court on a second appeal in the following terms;

"45. Second appeals

(L) Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law."

Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10 further provides that; -

"2. General powers of the court

(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

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The effect of the above provisions is to bar appeals on matters of fact or mixed law and fact. This was further espoused in the case of Areet Sam V. Uganda [2019] UGCA 165 where the Court observed that U - 5

> "... it is trite law that as a second appellate Court we are not expected to reevaluate the evidence or question the concurrent findings of fact by the High Court and the Court of Appeal. However, where it is shown that they did not evaluate or reevaluate the evidence or where they are proved manifestly wrong on findings of fact, this court is obliged to do so and ensure that justice is properly and truly served."

We shall be guided by the above provisions of the law in determining this appeal.

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Determination

In the first ground of appeal, the first appellate Judge is faulted for upholding the trial court's decision for allegedly being premised upon illegal/ defective proceedings. However, the ground of appeal does not illustrate what renders the proceedings illegal or defective contrary to the Rule 55 (2) of the Court of Appeal Rules which provides as follows;

"66. Memorandum of appeal

public or general importance wrongly decided." (2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great

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This court stated in *Mugerwa John v Uganda CACA No.0375 of 2020* that:

"An appellant cannot and should not throw grounds of appeal at the court and expect the court to wade through them looking for where the learned trial judge went wrong. An appellant has a duty under rule 66 (2) of the Rules of this court to set forth concisely the ground of objection to the decision appealed against."

15 The same position has been taken by the court in numerous other instances where grounds of appeal are not framed to the standard set by rule 66 (2) of the Rules of the Court. See *Kayanja Hassan v Uganda* 120241 UGCA 30, *Senoga Sentumbwe v Uganda* [2013] UGCA.

20 In the absence of an illustration of the points of law allegedly wrongly decided by the first appellate court, the ground of appeal falls short of the requirements of Rule 66 (2) and is accordingly struck out.

,q The second and third grounds of appeal are premised on the alleged failure by the appellate judge to evaluate the evidence placed before the trial magistrate which would be an error of law since that is the duty of a first appellate court. It is however evident from the judgment of the appellate court that the Judge evaluated the evidence before rendering the decision now appealed against.

30 The Judge restated the duty of the first appellate court and the standard of proof that was required of the Prosecution at the trial stage. The Court then evaluated the evidence relating to proof of the ingredients of the offence the appellant was charged with.

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The appellate court then reviewed the evidence of both sides relating to the identification of the Appellant basing on the conditions set out in *Abdala Nabulere & Another v Uganda* [1979] HCB 77 before dismissing the appeal on being satisfied that the reviewed evidence supported the finding that the Appellant was properly identified as the aggressor and his alibi had been destroyed. 10

We find it imperative to set out the excerpt of the judgment relating to the decision on the issue of the alibi raised by the Appellant;

"I am satisfied that the evidence adduced by the prosecution placed the accused squarely at the scene of crime. All the prosecution witnesses were consistent in giving evidence that they all knew the accused who is a neighbour. PW3 flashed a torch and she and PWL were able to see the accused's face and recognized him as their neighbour. They also recognized his voice when he uttered the words that his wife was using the complainant to kill him therefore he was going to kill her first. The prosecution witnesses positively identified the accused."

- 25 From the above analysis, we find no reasons to hold that the first appellate court did not properly evaluate the evidence placed before the trial magistrate to come up with the decision appealed against in this court. The second and third grounds of appeal have no merit and are accordingly dismissed.
- 30 Ground of Appeal No.4

The Learned Appellate Judge erred in law when he upheld an illegal sentence imposed by the trial Magistrate without taking into account the pre-trial remand period.

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This ground of appeal raises a matter of law which merits consideration on a second appeal. We find it necessary to re-produce the sentencing notes by the trial magistrate in order to determine the legality of the sentence complained about by the Appellant.

"Court sentence

I have listened to the submissions of the state Attorney and the accused. I had the chance to also hear from the complainant. It is indeed true that this is a case of 2018 and it took over 5 years to be disposed of. I also note that the case was delayed partly because of constant *complaints of the Accused against the presiding Judicial* Officers. Nevertheless, it was his right to raise those *complaints if he felt he was handled partially.*

I have also observed as noted by the state that the convict is not remorseful, he is disrespectful and arrogant even when convicted.

Be that as it may, I take into consideration the fact that the convict is an elderly person of 60 years and above. He is a family man with many children, some of whom are school going. The maximum penalty for the offence is 7 years as per section 219 of the Penal Code Act. I therefore find a sentence of 3 years appropriate in the circumstances and hereby sentence the convict to 3 years' imprisonment.

I so order."

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- ⁵ We noted from the sentencing order that the sentence was imposed by the trial magistrate on 9th November 2022. It is also evident from the sentencing notes that the trial magistrate considered mitigating factors being the age of the appellant and aspects about his family life.
- The trial magistrate however did not take into account the period spent on remand by the appellant as mandated by Article 23(8) of the Constitution which provides as follows; - 10

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

Article 23 (8) of the constitution is couched in mandatory terms and failure to take into account the period a convict spent on remand renders the sentence illegal. Accordingly, the sentence imposed by the trial magistrate was illegal. The High Court in the exercise of its appellate powers should have reviewed and set aside the sentence imposed by the trial court and substituted it with one compliant with the requirement of Article 23 (8) of the constitution. 20 25

We thus invoke the powers of this court in Section 11L of the Judicature Act to set aside the sentence imposed by the trial court and re-sentence the Appellant afresh. In re-sentencing the appellant we are bound to consider the mitigating and aggravating factors pertaining to the case. The appellant was above 60 years at the time he was sentenced on 9th November 2022. It was noted that he was a family man with many children many of whom were school going and in the allocutus, he pleaded that he was sick.

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5 10 We did not have the opportunity of perusing the aggravating factors from the complainant but only note what the trial magistrate attributed to the State Attorney. We respectfully do not consider the appellant's alleged lack of remorse, disrespect and arrogance to be factors to be considered in aggravation of the sentence. We however, note that the appellant should have invoked lawful means of settling whatever dispute he had with the complainant more especially given that they were neighbors.

15 Considering the mitigating and aggravating factors highlighted above, we are of the view that a sentence of three years' imprisonment was appropriate in the circumstances of this case. The appellant was arrested and later released on bail after 21- days from when he was charged in the trial court. From the record of the 1st appellate court, he remained on bail until it was cancelled by the learned appellate Judge on 19th March 2024.

- 20 The period of 21- days the Appellant spent on remand shall be deducted from the sentence. The Appellant shall serve 2 years, 11 months and 9 days from the 19th day of March 2024 when his appeal was dismissed by the 1st appellate court and the bail cancelled.
- 25 14 Dated and delivered at Kampala this to day of 2025

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Irene Mulyagon Justice of Appeal

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Moses Kazibwe Kawumi Justice of Appeal.

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