

UGANDA / JUDGMENT

Kiyaga v Uganda (Criminal Appeal 3 of 2021) [2022]

UGHCCRD 132 (15 March 2022)

[2022] UGHCCRD 132

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Appeal 3 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA

Criminal Appeal No. 3 of 2021 (Arising from Entebbe Court 489 of 2019)

| KIYAGA ABDULLAH | :::::::::::::::::::: | APPELLANT |
|-----|-----|-----| | VERSUS | | UGANDA | :::::::::::::::::::: |
RESPONDENT |

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant **Kiyaga Abdullah** brings this Appeal against sentence. HW Kabugho Elizabeth Magistrate Grade I sitting at Entebbe found him guilty and sentenced him on three counts namely:

- i. Unlawful possession of Government Stores c/ss 316 (2) of the Penal Code Act
 - ii. Possessing an Instrument of Housebreaking c/ss (1) (b) of the Penal Code Act
 - iii. Possessing Suspected Stolen Property c/s 314 (4) of the Penal Code Act
- The background to this matter is that on the 27th of June 2019 there was a report to the Police of the housebreaking to the prejudice of several persons in Lugonjo found in Entebbe Municipality in Wakiso District.

Following reports of the break-ins evidence pointed at the appellant. When his house was searched items were recovered. They were an army pair of trousers, an army pair of shoes, house breaking implements, a mountain bicycle, 2 panga, flat irons, loud speakers and screw drivers. The items were identified by their owners who had reported cases of house breaking in the past.

Following a full trial the appellant was found guilty on all counts and convicted.

He was sentenced as follows:

- a. 2 years in respect to Count 1
- b. 7 years in respect to Count 2
- c. 3 years in respect to Count 3

The Court directed that the sentences were to run consecutively.

Being dissatisfied with the findings and sentence of the lower Court, the appellant filed this appeal. Initially, an appeal against both conviction and sentence was filed. The appellant subsequently filed a supplementary memorandum in which he challenge only the sentence. His written submissions have also addressed the Court only on the sentence. The grounds of appeal are:

- 1. The trial magistrate erred in law and in fact when she failed to consider important matters and circumstances in passing sentence
- 2. That the trial magistrate erred in law and in fact when she ordered that the sentence run consecutively

The appellant has filed written submissions. The Respondent on the other hand has left the matter to the Court.

Determination

I will handle the grounds jointly.

Grounds

- **1. The trial magistrate erred in law and in fact when she failed to consider important matters and circumstances in passing sentence**
- **2. That the trial magistrate erred in law and in fact when she ordered that the sentence run consecutively**

The submission for the appellant is that the trial Court imposed sentences of 2 years, 7 years and 3 years for Counts 1, 2 and 3 respectively. That these were harsh and excessive sentences. That the Court did not take into consideration the appellants mitigating factors which included the fact that he had children of tender age to look after. Secondly that he was in poor health as he has a kidney condition

As stated the State (Respondent) did not file any submissions in reply.

After conviction, the prosecution argued that the appellant was a repeat offender. He had previously been convicted in Entebbe Court Case no 777 of 2019. That the offences for which he was found guilty are synonymous with a criminal mind. That he deserved the maximum sentence as a deterrent.

In mitigation, it was the prayer of the appellant that the Court exercise lenience so that he may return home to look after his children. He also stated that he had a kidney problem and therefore poor health.

The trial Court took note of the appellant's prayers in mitigation but noted that he was a guilty of a grave offence. That it was the duty of the Court to protect the community and not turn a blind eye against the public's outcry on criminality. That the Court had a duty to protect the public against persons who instilled fear in them and deprived them of hard earned property. The court deemed it proper to pass a deterrent sentence and went to mete out the sentences mentioned above.

Firstly, just as stated by the prosecution in mitigation, the properties stolen in this matter remained unclaimed. No one testified about the stolen items. There was therefore no evidence adduced to sustain the Count 3 of Possession of Suspected Stolen Items. The conviction in this regard is there quashed and set aside.

The principle on appeal against sentence to first appellate court has been stated as follows:

The Supreme Court in Kiwalabye versus Uganda (Criminal Appeal No. 143 of 2001) stated:

The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle

It was also stated by the Supreme Court in **Kamya Johnson Wavamuno vs. Uganda, Criminal Appeal No. 16 of 2000 at p. 17.**

It is well settled that the Court of Appeal will not interfere with the exercise of the discretion unless there has been a failure to exercise discretion, or a failure to take into account a material consideration or an error in principle was made. It is not sufficient that members of the court would have exercised their discretion differently before passing sentence.

This Court has considered the circumstances of this case. It is not true that the trial court ignored the appellant's submissions on mitigation. They were specifically taken into account as stated by the learned trial magistrate in her order.

A sentence is a matter for the discretion of the trial court which applies its judicial mind to the law, facts and what is just in the circumstances of the matter before court. It is not court acting on whims. In this case the trial magistrate gave a well-reasoned and measured decision.

Additionally is the query regarding whether the sentences should run consecutively or concurrently. Section 175 (1) of the Magistrates Courts Act provides for sentencing in such circumstances. Sentences in cases of conviction of several offences at one trial. It states,

When a person is convicted at one trial of two or more distinct offences, the court may sentence him or her, for those offences, to the several punishments prescribed for them which the court is competent to impose, those punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently.

Clearly the default is for sentences to run consecutively. The decision to pass a multiple sentences on different counts in the same matter is arrived at following an application of the discretion of the Court. I have therefore found no evidence of the court taking into account immaterial or unlawful matters in arriving at its decision in this matter.

Generally a maximum sentence should not be imposed on a first offender (see **Mavuta v Republic** [1973] 1 EA 89). However, I have perused the Court Case Administration system and established that the appellant's previous convictions were also for Housebreaking. In these circumstance therefore a maximum sentence was not illegal. In the result, this Court holds as follows:

- i. The sentences in respect to Counts 1: 2 years
- ii. The sentence in respect to Count 2: 7 years

Are both hereby confirmed and shall run consecutively.

- iii. The sentence in Count 3 is hereby set aside.

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Michael Elubu Judge 15.03.2022

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Prepared on 14 October 2026 · Esheria