

The prosecution alleged that the Appellant and others, on June 9, 2024, at Don Petrol Station in Kyegegwa town, were found with various pieces of elephant tusks weighing 42.05 Kg. The Appellant did not have a license to possess or use them. The Appellant initially pleaded not guilty but later pleaded guilty. His colleagues pleaded not guilty, and I believe they are still undergoing trial. The Trial Chief Magistrate did not sentence the Appellant immediately after convicting him. She instead heard evidence from one prosecution witness and then sentenced the Appellant.

The Appellant was dissatisfied with the sentence imposed by the Trial Chief Magistrate, considering it to be harsh and excessive. This discontent led him to lodge this appeal because:

1. The learned trial magistrate erred in law and fact when she imposed a manifestly harsh and excessive sentence on the Appellant without due regard to the mitigating factors, thereby causing a miscarriage of justice.
2. The learned trial magistrate erred in both law and fact when she allowed the witness to testify against the accused person after he had pleaded guilty, without affording him the right to be heard.
3. The learned trial magistrate erred in law and fact when she considered the evidence received in court after the appellant's plea of guilty without affording him the right to be heard.
4. The learned Trial Magistrate erred in both law and fact when she sentenced the Appellant to ten years' imprisonment without considering alternative compensation or a fine, which is harsh and excessive, thus resulting in a miscarriage of justice.

He prays that the sentence is set aside and substituted with a more lenient one.

1. Representation

The Appellant is represented by M/s Ndiwa Walukano Advocates & Legal Consultants. Whereas Ms. Joanita Tumwikirize, a Senior State Attorney in the Office of the Director of Public Prosecutions, represented the Respondent.

1. Submission of the Parties

* 1. The Appellant's Submissions

Appeal Grounds 1 and 2

Counsel for the Appellant submitted that the trial magistrate erred in law when she adjourned the sentencing of the Appellant to hear a witness whose evidence was used in his sentencing, without giving the Appellant a chance to cross-examine the witness. He submitted that the use of PW1's unchallenged testimony caused a miscarriage of justice.

Secondly, he argued that a ten-year prison sentence imposed on the Appellant was excessive, considering that he had pleaded guilty, thus saving the court's time. He expressed remorse and had mitigating factors in his favour.

Thirdly, he argued that the ten-year sentence imposed on the appellant was excessive, especially in comparison to previous convicts who received sentences of six months, eight months, one year, and, in extreme cases, two years. For comparison, he referenced the following cases:

Uganda vs Obol Mariano, Criminal Session Case No. 188 of 199, in which the convict received a two-year sentence for pleading guilty to manslaughter.

Uganda vs Iralio Bibohere [1991] 21 HCB - The convict was sentenced to 8 months for pleading guilty to manslaughter.

Uganda vs Sgt Nicholas Rumanyika and 2 Others Criminal Session case number 91 of 1991: A1 and A3 were sentenced to 12 months' imprisonment, while A2 was cautioned for pleading guilty to manslaughter.

Uganda vs. Yolanimu Byansi [1991] 21 HCB 125 - the convict was sentenced to one year's imprisonment for pleading guilty to manslaughter.

He argued that, in light of these precedents, the ten-year sentence imposed on the Appellant should be substituted with a sentence of one year's imprisonment, less any time already spent on remand.

Appeal Grounds 3 and 4

He argued that the Trial Magistrate erred in law by considering the evidence of PW1 while sentencing the Appellant without providing him an opportunity to cross-examine.

Lastly, counsel submitted that where a penal provision provides for both a fine and imprisonment, the court ought to consider the fine first. He stated that, since the Appellant was a first-time offender, a family man, and had pleaded guilty, he should be sentenced to a fine.

*** + 1. The Respondents Submissions**

Appeal Grounds 1 and 4

The learned senior state attorney submitted that the Trial Magistrate considered both the aggravating and mitigating facts in sentencing the Appellant as raised by counsel during the mitigation of sentence.

Secondly, the Appellant was convicted of an offence that carries a maximum sentence of life imprisonment, a fine of UGX 200M, or both. She stated that the appellant was arrested with 42.5 Kg of elephant tusks; therefore, the Trial Magistrate correctly exercised her discretion in imposing a sentence of ten years' imprisonment. This sentence is not harsh.

She asserted that this court can only interfere with the trial magistrate's sentence in limited circumstances, given that the law grants the trial court discretion in sentencing. The instances in which an appellate court may intervene in a sentence include: if the trial court acted on a wrong principle, overlooked a material fact, if the sentence is manifestly low or excessive, or if the sentence is illegal.

Appeal Grounds 2 and 3

She submitted that no witness testified against the Appellant during sentencing. She said that PW1 testified against A2, and A3 after the Appellant had been convicted. Alternatively, she submitted that even if the evidence of PW1 was used in the sentencing of the Appellant, this did not constitute a miscarriage of justice because he had already admitted the charge.

She submitted Section 133(2) of the Magistrates Courts Act, which allows a Magistrate to make inquiries as deemed fit and to inform itself before passing sentence. Therefore, it was not irregular for the Trial Magistrate to select relevant evidence from the testimony of PW1 when sentencing the Appellant. The evidence of PW1 assisted the Trial Magistrate in arriving at the appropriate sentence for the Appellant.

1. Consideration of the Appeal

5.0.1. The Duty of the First Appellate Court

In *Afedra Juliano v Uganda (Criminal Appeal 165 of 2018)* [2025] UGCA 99, the Court of Appeal observed that:

We reiterate the established principle, as articulated in* *Bikanga Danile vs. Uganda CACA No. 38 of 2000***, that sentencing is a discretionary power vested in the trial court. This discretion, however, must be exercised judicially and in accordance with established principles. An appellate court will only interfere where there has been a failure to exercise discretion, a failure to consider material factors, an error in principle, or where the sentence is manifestly excessive.**

5.0.2. The Appeal

This appeal presents three key questions that need to be addressed to resolve the grounds of appeal, namely:

1. Whether the Trial Chief Magistrate erred in law when relying on the testimony of PW1 in sentencing the Appellant.
2. Whether the Trial Chief Magistrate considered the period of remand that the Appellant had spent in sentencing him
3. Whether the sentence imposed on the Appellant is harsh and excessive.

These will be addressed below in chronological order.

Whether the Trial Chief Magistrate Erred in Law when Relying on the Testimony of PW1 in Sentencing the Appellant.

The Appellant's case is that the Trial Chief Magistrate erred in law by relying on the testimony of PW1 in sentencing him without allowing him to cross-examine the witness. The Respondent submitted that there was nothing irregular in the Trial Magistrate considering PW1's testimony, first because the Appellant had already admitted the facts of the case when he pleaded guilty. Secondly, Section 133(2) of the Magistrates' Courts Act requires a Magistrate to make inquiries as deemed fit and to inform itself before passing sentence.

Section 133(2) of the Magistrates Courts Act provides that:

The court, before passing sentence, may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed and may inquire into the character and antecedents of the accused person and may take into consideration either at the request of the prosecution or the accused person in assessing the proper sentence to be passed such character and antecedents, including any other offences admitted by him or her whether or not he or she has been convicted of such offences; but—

(a)the accused person shall be given an opportunity to confirm, deny or explain any statement made about him or her, and in any case of doubt the court shall, in the absence of legal proof of the statement, ignore the statement;

(b)no offence of which the accused person has not been convicted shall be taken into consideration in assessing the proper sentence, unless the accused person specifically agrees that the offence shall be taken into consideration, and a note of that request shall have been recorded in the proceedings; and

(c)if for any reason the sentence passed by the court is set aside, the accused person shall not be entitled to plead autrefois convict in respect of any offence taken into consideration in assessing the sentence that was set aside.

Sentencing is an essential process in the criminal justice system because it involves, among other things, taking away an individual's liberty, which is protected under Article 23 of the Constitution. Therefore, judicial officers must approach sentencing with an informed mind and empirical data, so that the sentences arrived at fit the offender and the crime. For this reason, section 133(2) of the Magistrates Court Act permits a Magistrate to make appropriate inquiries as to the proper sentence before sentencing the convict. This inquiry may be made into the antecedents or character of the convict. However, in doing so, the court is obliged to allow the convict to interrogate, explain, and cross-examine their accusers, so that the court arrives at an appropriate and informed sentence.

In the case under consideration, the Trial Chief Magistrate acted within her powers to consider the evidence of PW1, who ably explained the role of the Appellant in the illegal acquisition of elephant tusks. As can be seen from the sentence, PW1's testimony was very useful. Be that as it may, the Trial Chief Magistrate forgot to allow the Appellant to cross-examine PW1 on material aspects of his testimony regarding the sentence. This contravened the Appellant's right to a fair trial in article 28 of the Constitution and in the process caused a miscarriage of justice.

Whether the Trial Chief Magistrate considered the Period of Remand that the Appellant Had Spent When Sentencing him.

The Appellant asked me to deduct the period spent on remand from the final sentence because the Trial Chief Magistrate did not take into consideration. The Respondent did not address me on this matter. The sentencing order of the Trial Chief Magistrate read as follows:

"The period that the convict has spent on remand shall be deducted from his sentence."

"The law as articulated by the Supreme Court in Rwabugande's case is that the period spent on remand must be mathematically be deducted from the final sentence. The Supreme Court has guided as follows:"

"We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. **Article 23 (8) of the Constitution (<https://ulii.org/akn/ug/act/statute/1995/constitution>) **(supra)** makes it mandatory and not discretionary that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretionary mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision."**

"We note that our reasoning above is in line with provisions of **Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, which provides as follows:"**

- "The court shall take into account any period spent on remand in determining an appropriate sentence."**
- "The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account."** **(Emphasis added)**

It is a judicial responsibility / legal requirement for the judicial officers, first to ascertain whether the convict has been on remand and secondly, to determine with precision the time the convict has spent on remand and thirdly, determine the appropriate custodial sentence to be imposed on the convict and ultimately to mathematically deduct the period spent on remand to arrive at the

final sentence. as was observed by the Supreme Court, failure to deduct the period spent on remand from the sentence mathematically makes the sentence ambiguous and therefore unlawful.

In this case, the Appellant was first remanded on 14th June 2024. He remained on remand until 25th July 2024. In total, he had spent one month and eleven days on remand before his sentencing. The Chief Magistrate should have deducted this period of remand from the sentence. She did not. Therefore, the Trial Chief Magistrate erred in law when she failed to mathematically deduct one month and eleven days that the Appellant had spent on remand from the custody of ten years.

Whether the Sentence Imposed on the Appellant is Harsh and Excessive.

The Appellant is unhappy with the Trial Magistrate's sentence, deeming it harsh and excessive. His primary complaint is that he deserved a more lenient sentence, as he pleaded guilty and saved the court's time. He also emphasised that he was a first offender and had a large family to support. The Respondent argued that the Appellant received a reasonable sentence of ten years' imprisonment, given that the offence carries a maximum penalty of life imprisonment or a fine of UGX 200m.

Sentencing is a matter that is best left to the discretion of the trial court. There are, however, exceptions to this cardinal rule. The Supreme Court in **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995**, laid down principles upon which an appellate court should rely to interfere with the trial court's sentence. The Supreme Court referred to **R vs. Haviland (1983) 5 Cr. App. R(s) 109** and held that:

*An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: **Ogalo s/o Owoura vs. R (1954) 21 E. A. C. A 126** and **R vs. MOHAMEDALI JAMAL (1948) 15 E. A. C. A 126**. (Emphasis ours)*

In ***Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000***, the Supreme Court observed that:*

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

Therefore, an appellate court will only interfere with the sentence of the trial court in the circumstances that:-

1. The sentence is illegal.

2. The sentence is manifestly low and excessive as to amount to a miscarriage of justice;
3. The trial court failed to consider a material fact, such as mitigating or aggravating factors.
4. There was an error in the principle applied.
5. The Trial Court ignored the Sentencing Guidelines and hence failed to exercise its discretion judiciously.

Turning to the merits of this case, the Trial Chief Magistrate considered the mitigating and aggravating factors in sentencing the Appellant. She noted that the Appellant had pleaded guilty and saved the court's time. She also said that the Appellant was a responsible man. Having considered these factors, the Trial Chief Magistrate, in accordance with the law, considered the aggravating circumstances, particularly emphasising the importance of protecting endangered wild animals, as listed under the Convention on International Trade in Endangered Species (CITES). She also considered the fact that the Appellant had caused the death of three elephants to obtain the tusks. These were material considerations. However, the Trial Chief Magistrate made an error by failing to mathematically deduct the period the Appellant had spent on remand from the final sentence. Additionally, she considered the testimony of PW1 in sentencing the Appellant, despite not providing him with an opportunity to challenge or respond to that evidence.

The Appellant argued that the ten-year sentence was excessive, citing other cases where convicts received less than two years for manslaughter. I have reviewed all these cases; however, they are not comparable to the present matter. In those cases, the offenders had stronger mitigating factors, such as being on remand for a lengthy period, and the manslaughter resulted from accidental homicide. Additionally, considerations such as infancy and old age influenced sentencing decisions. In contrast, the Appellant's case involved more aggravating factors that warranted a harsher sentence. Furthermore, unlike the other convicts, the Appellant was remanded for less than two months. Therefore, the Appellant's criticisms are unjustified.

Despite the weaknesses in the Appellant's case, the Trial Chief Magistrate committed significant errors as outlined above, which require me to intervene by setting aside the original sentence and replacing it with a more appropriate one. In reaching my decision, I have considered both the mitigating and aggravating factors that the Trial Chief Magistrate considered during sentencing. I have also considered the fact that the Appellant is in his late fifties and that the ivory was recovered. Additionally, I commend the Appellant for pleading guilty, which helped conserve the court's limited time and resources.

However, as the Trial Chief Magistrate and in accordance with Section 133 of the Magistrates' Courts Act, I must consider aggravating factors when determining an appropriate sentence for the Appellant. The aggravating factors include the need to protect endangered species that are critical for maintaining a stable ecosystem. In particular, elephants play a vital role in sustaining a healthy ecosystem, functioning as eco-engineers due to their significant environmental impact. They also play a crucial role in seed dispersal, creating habitats, and shaping landscapes, which

benefit a wide range of plant and animal species. *See worldwildlife.org.*

In Uganda, elephants significantly contribute to the country's tourism industry, generating substantial revenue that supports its development. Due to the crucial role elephants play in nature and national development, offenders who deliberately kill or cause the death of elephants do not deserve lenient sentences. Deterrent sentences are essential to eradicate illegal poaching of endangered animals, such as elephants. For this reason, I do not accept the Appellant's pleas for a fine as a first choice since the law provides for both fines and custodial sentences. Given the mitigating and aggravating factors present in this case, a fine would not be appropriate. I find that a custodial sentence of five years' imprisonment is suitable for the Appellant. In accordance with Article 28(3) of the Constitution, I am required to deduct one month and eleven days for the time the Appellant spent on remand. Consequently, the Appellant will serve a net sentence of four years, ten months, and nineteen days.

1. Decision

The Appeal is allowed, and the following Orders are issued:

The sentence of the Trial Chief Magistrate is set aside and substituted with a net sentence of four years, ten months and nineteen days' imprisonment.

It is so ordered.

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Gadenya Paul Wolimbwa

JUDGE

15th May 2025

I kindly request the Registrar of the Criminal Division to deliver this decision on 19th May 2025.

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AI-generated content may be incorrect.](data:image/png;base64...)**

Gadenya Paul Wolimbwa

JUDGE

15th May 2025

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