

UGANDA / JUDGMENT

Ndacyayisaba v Uganda (Criminal Appeal 81 of 2022) [2023]

UGHCCRD 183 (31 July 2023)

[2023] UGHCCRD 183

COURT

HC: Criminal Division (Uganda)

BEFORE

Mutonyi, J

CASE / FILE NUMBER

Criminal Appeal 81 of 2022

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- **REPUBLIC OF UGANDA**,
- **IN THE HIGH COURT OF UGANDA**,
- **HOLDEN AT KAMPALA**,
- HCT-00-CR-CN-0081-2022
- (Arising from Entebbe Court Case No.09 of 2022)
- **NDACYAYISABA SAMUEL**=====APPELLANT

VERSUS**UGANDA**===== 8**BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JHC. \$10\$****1. Introduction 11**

NDACYAYISABA SAMUEL here in after referred to as the Appellant being \$12\$ dissatisfied with the sentence of Her Worship Stella Okwong Pacual, Magistrate 13 Grade One at the Chief Magistrates Court at Entebbe, delivered on 29th July 2022 \$14\$ filed an appeal against the said sentence only. 15

2. The appellant was represented by Counsel Sheila Kihumuro on state brief while 16

the respondent was represented by the learned Senior state attorney Ms. Tabaro 17

Caroline Ahereza. 18

Both parties proceeded by way of oral submissions in court. 19

- 3. The grounds of Appeal were as follows: 20
- 1. That the learned trial Magistrate erred in law and fact on imposing a harsh \$21\$ and severe sentence of 5 (five) years imprisonment on each count to the \$22\$ Appellant. \$23\$

4. Prayers on Appeal $\overline{\$24}$

The appellant prayed that sentence of 5 (five) years imprisonment on each count 25 be set aside and that it be substituted with a fair and lenient sentence in the 26 obtaining circumstances. 27

5. The brief background of the case. 28

The Appellant and 2 others were charged with the offences of burglary and theft 29

- contrary to sections 295 (2) and 261 of the Penal Code Act in counts 1 and 2 30
- respectively. 31
- When they were arraigned before court, they all pleaded Not guilty to the charges 32
- against them. As is required by law, the state prosecutor led evidence to prove all 33
- the ingredients of the two cases against the accused persons as they then were. 34
- In her finding, the magistrate noted at page 16 that; 35

"I have considered the points rendered in allocutus and mitigation. I have 36 also considered the nature of the offence. The accused attacked in the 37 night. It was the evidence of the complainant that they even brandished at 38 her a knife; roughly speaking, this should have been aggravated robbery. 39 $\mathbf{\$y}$

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She accordingly sentenced him to 5 years imprisonment on each count to run 41 concurrently and compensation to a sum of Uganda shillings 4.000.000/= 42

6. **Role of first Appellate court.** 43

It is trite law that the duty of the first Appellate court is to look at the proceedings 44 and evidence on record and reappraise it afresh subjecting it to exhaustive scrutiny. 45

It is at liberty to draw its own inferences of fact and arrive at its own independent 46 conclusions as to whether it should maintain the decision of the lower court or 47

there is need to vary it and or overturn it all together. 48

This role of the first Appellate court was well stated in the cases of **Pandya V R** 49 [1957] E. A 33 which has been followed in a plethora of cases. It basically 50 reevaluates the evidence bearing in mind that it did not witness the demeanor of 51 the witnesses. 52

7. Resolution 54

In her submissions, counsel for the appellant submitted that whereas the appellant 55 had only appealed against the harsh sentence, he also observed that his remand 56 period of 7 months had not been deducted from the sentence. She therefore called 57 upon this court to look into the issue. 58

In response, the state prosecutor did not dispute the issue on calculating the 60 remand period and further noted that this was an Appellate court vested with the 61 discretion to tamper with the sentence if it found that it was excessive or so low. 62 She conceded that indeed as per page 16 of the record, the appellant's remand 63 period was not considered. 64

- She also sought leave of court to submit further on the sentence. 65
- She submitted. 66

"He was sentenced to 5 years, for the offence of burglary C/S 295 (2) of the 67 PCA. Burglary has a maximum sentence of 10 years and in this case he was 68 given 5 years. For theft, it is also 10 years. We are praying that sentences 69 are enhanced due to the following; -70

Look at page 3 of the proceedings from paragraphs 1,2,3, the circumstances \$71\$ in which the offences were committed were aggravating. The victim stated \$72\$

- she was shocked when accused attacked her at night. She could have high 73 blood pressure. The 1st appellant knelt at her and took a knife and demanded 74 for money. She was to choose between life and death. This aggravated the 75 offence of theft to aggravated robbery. 76
- The trial magistrate should have forwarded the case to High Court for 77 confirmation as she had indeed observed it. 78
- She did not recover her money 4 million. 79
- We pray that this Court uses its discretion to enhance the sentence from 5 80
- to 10 years and orders compensation to the victim. We so pray." 81
- 82
- In rejoinder, the appellant prayed to court that he be allowed to compensate 83 the victim after serving his sentence. 84
- 8. Analysis and Evaluation. 85
- 86

87 Section 173 of the Magistrates Courts Act, Cap 16, provides;

- "Where any sentence to which this section applies is imposed by a 88 magistrates' court (other than by a magistrate's court presided over by a 89 chief magistrate), the sentence shall be subject to confirmation by the High 90 Court." 91
- In view of the mandatory provision in the above section and as rightly referred to 92 by the respondent's Senior State attorney and in view of the fact that trial 93 Magistrate Grade one handed down a sentence of 5 years imprisonment, I find that 94 this is a classic case where the provisions of section 173 of the MCA ought to be 95 applied by this court. 96
- The state Attorney prayed that the sentence of the lower court be enhanced 97 because the offence was committed at night and in fact with the use of a knife 98 which actions should have ideally aggravated the offence of robbery. 99

Whereas the trial magistrate observed the same, she went ahead and handed 100 down a lenient sentence. She also prayed for a compensatory order of 4 million 101 shillings to the victim. 102

The purpose of confirmation of sentence by way of revision or review by the High 103 Court is basically to check the propriety and legality of the criminal process by the 104 grade one Magistrates Court. The court must also check on whether the sentence 105 was fair and just in the circumstance. 106

I am inclined to agree with the respondent's submission that firstly, the trial 107 Magistrate Grade one failed in her statutory duty to forward this file to the High 108 Court for confirmation. 109

I also find that the appellant committed the offences in the manner and time that 110 calls for a deterrent sentence. My view is that the sentence of 5 years was very 111 lenient and deserves to be enhanced. Night robbers or thieves are very scary and 112 dangerous. They deserve to be punished severely. 113

I have exercised my discretion and increased the sentences to 7 years 114 imprisonment since he subjected court to a protracted trial and is not remorseful. 115

On the issue of compensatory order, it is trite law that an order of court should 116 not be made in vain. No evidence was led by the prosecution to show that the 117 convict has the capacity to repay the money. In fact he was a common thief with 118 no clear source of income or property. Such an order may have the effect of 119 promoting recidivism in a bid to clear the debt owed to the victim. 120

- I am accordingly constrained from making such an order in vain. The compensatory 121 order made by the trial court is consequently set aside. 122

- With regards to the arithmetic calculation of the remand period; Article 23 (8) of 123 the 1995 Constitution provides; "Where a person is convicted and sentenced to a 124 term of imprisonment for an offence, any period he or she spends in lawful 125 custody in respect of the offence before the completion of his or her trial shall be 126 taken into account in imposing the term of imprisonment." 127
- In the case of **Rwabugande Moses Vs Uganda, SCCA No.25 of 2014**, the justices of 128 the court of Appeal gave the meaning of Article 28(8) Supra. s 129

"Our appreciation of Article 23 (8) of the constitution, is that the 130 consideration of the court of the period spent on remand by a convict is 131 mandatory. A sentencing judge is under a duty to consider the exact period 132 spent on remand in upholding the provisions of the supreme law of the 133 land. For avoidance of imposing ambiguous sentences, we hold that the 134 period spent on remand must be arithmetically deducted. This renders 135 justice to the convict". 136

In view of the above authorities therefore, it is incumbent upon every trial court 137 to arithmetically, calculate the period the convict has spent on remand from the 138 date of first remand all the way through to the date conviction. 139

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Perusal of the lower court record, reveals that the appellant first appeared before 140 the magistrate Grade one on 7th January 2022 for plea taking. He continued 141 attending court for hearing while on remand at Kigo Prison until 29th July 2022 142 when he was convicted and sentenced to serve 5 years. 143

This implies that at the time of conviction, the appellant was supposed to serve 5 144 years less 6 months and 22 days which the convict had already spent on remand. 145 However, since this court has enhanced his sentence to 7 years, the appellant 146 herein is now bound to serve 6 years 6 months and 8 days after deducting the 147 period he spent on remand. 148

In accordance with Article 28 (3) of the Constitution and section 17 (2) of the 149 **Judicature Act**, I set aside the sentence of 5 years and replace it with a sentence of 150 6 years 6 months and 8 days which is his full sentence less the period spent on 151 remand. This sentence started counting from the date when the applicant was 152 convicted. 153

In view of the above, this appeal partly succeeds with the following 154 orders: 155

- a) The sentence of the appellant is enhanced to 7 years less the period of 156 remand which leaves him with a sentence of 6 years 6 months and 8 days. 157
- b) The compensation order by the trial court is hereby set aside. 158

I so order. 159

The parties are free to appeal against this decision if not satisfied within the 160 statutory time.
161

Dated at Kampala this 31st day of July 2023. 163

- MARGARET MUTONYI, JHC 166
- CRIMINAL DIVISION. 167

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