THE REPUBLIC OF UGANDA

IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT, AT KOLOLO

CRIMINAL APPEAL NO.18 OF 2020

(Arising out of Anti-Corruption Division Criminal Case No 0007 of 2018)

WOMOLI DENNIS ..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: Justice Jane Okuo Kajuga

JUDGEMENT

This is an appeal against the decision of her Worship Namusobya Sarah Mutebi Magistrate Grade 1 of the Anti-Corruption Court, delivered on 23rd June 2020 whereby she convicted the appellant of two counts of Interfering with goods under Customs Control **C/S 203 (f)** of the East African Community Customs Management Act of 2004, sentenced him to 2 years' imprisonment on each count to run concurrently. She also ordered him to pay a fine of Ushs 2,000,000 (Two Million) on both counts.

The brief facts of this matter are as follows:

The appellant was a clearing agent working with Giant Cargo. Prosecution alleged that around November 2017, he and Magezi Yahaya contracted a clearing firm called Zawedde Investments Nakawa, and requested them to transit motor vehicles from Mombasa to Kampala. The firm captured the entry in the Uganda Revenue Authority's (URA) Ascyuda system. This was done by Nakaggwa Farida who testified as PW2. The appellant and Yahaya said they were going to Mombasa to verify the units which were a Mercedes Benz Chassis No. WDC2030402R199785 and Subaru Outback Chassis No. BP9045567. In the system transit documents were generated that allowed the said

vehicles to move from Mombasa to Kampala but the vehicles did not reach the destined place which was Chatha Investment Car bond. It is prosecution's case that the appellant and others at large diverted the said vehicles to an unknown destination there by causing loss in tax.

The prosecution called 5 witnesses and tendered various documents as exhibits. When the appellant was put on his defense, he gave his evidence on oath and called 2 witnesses. At the conclusion of the trial, the Magistrate convicted the appellant, who being dissatisfied with the findings of the Court, lodged this appeal against both the conviction and sentence, on the following grounds;

1. The learned trial magistrate erred in fact and in law when she made the Appellant to proceed with the cross examination of three witnesses after rejecting the Appellant's prayers of adjournment for his counsel to handle it on another date, thereby infringing on the Appellant's right of choice to legal representation as enshrined under Article 28(3)(d) of the constitution of the Republic of Uganda.

2. The Learned trial magistrate erred in law and fact when she admitted more prosecution exhibits during defense case which was prejudicial to the appellant and occasioned a miscarriage of justice.

3. The learned trial magistrate erred in law and fact when she considered and unilaterally relied on the prosecution evidence in isolation of the defense evidence wherefore other defense evidence were not adjudged which occasioned a miscarriage of justice.

4. The learned trial Magistrate erred in law and fact when she convicted the appellant on insufficient evidence to prove the ingredients of the offences charged hence occasioning a miscarriage of justice.

5. The learned trial magistrate erred in law and fact when she convicted the appellant without paying due regard to the inconsistencies and contradictions in the prosecution evidence.

6. The learned trial magistrate erred in law and fact when she imposed a manifestly harsh and excessive sentence on the appellant.

Representation

The appellant represented himself, while the Respondent was represented by Ms. Hilda Bakanansa Walaga from URA legal and Board Affairs Department. Both parties filed written submissions.

Consideration of the appeal

The duty of a first appellate court is to carefully and exhaustively reevaluate the evidence as a whole and come to its own decision on the facts, being mindful of the judgement appealed from and the fact that it did not have the opportunity to see the witnesses testify. **Kifamunte Henry V Uganda SCCA No. 10 of 1997 and Bogere Moses and Anor V Uganda Supreme Court Criminal Appeal No. 1 of 1997**). I proceed to subject the evidence to fresh and exhaustive scrutiny without ignoring the judgement that has been appealed from.

Ground 1

The learned trial magistrate erred in fact and in law when she made the Appellant to proceed with the cross examination of three witnesses after rejecting the Appellant's prayers of adjournment for his counsel to handle it on another date, thereby infringing on the Appellant's right of choice to legal representation as enshrined under Article 28(3)(d) of the constitution of the Republic of Uganda.

The complaint in ground 1 is that the learned trial magistrate erred in law and fact when she made the appellant proceed with cross examination of three prosecution witnesses after rejecting his prayer for adjournment to be represented by his counsel on another

date. He contends that this went against his right to legal representation under **Article 28(3) (d)** of the **constitution.**

He faulted the trial magistrates ruling on page 10 of the record of proceedings where she stated that this was not a case of mandatory representation there by denying him a right to legal representation. He cited **Makula International V His Eminence Cardinal Wamala Civil Appeal No. 04 of 1981** to support his prayer that these actions constituted an illegality which court cannot sanction. He further referred to **Odongo Christopher V Uganda, Criminal Appeal No 164 of 2015** where it was held that trial courts should follow the prescribed procedure in all matters where the law lays down the procedure to be followed during the trial

Counsel for the Respondent supported the decision of the trial magistrate and submitted that Section 158 of the Magistrates Courts Act (MCA) connotes a possibility or option of representation for an accused person. She is therefore in agreement with the trial magistrate when she noted that. . . '*This case does not require mandatory representation by counsel, yet that right is being used to delay trial.*'

It was further her submission that it is the duty of Counsel to take all necessary steps to represent his client but in this case the appellant's lawyer kept absconding on scheduled dates. She pointed these dates to Court and referred to **Yusuf Ahmed alias Fara V Republic [1959] EA 615** to support the exercise of the trial magistrate's discretion to reject the application for adjournment in the circumstances. In this case it was held that an appellant court will not interfere with that exercise unless it was based on any wrong principle.

Resolution of court

Article 28 of the constitution provides the right to a fair trial which is one of the non derogable rights under **Article 44 of the constitution. Article 28(3)(d)** is to the effect that every person who is charged with a criminal offence shall be permitted to appear before the court in person or at that person's expense, by a lawyer of his choice.

In **Uganda V Stella Nyanzi High Court Criminal Appeal No 79 of 2019** characteristics of a fair hearing include inter alia;

- That the accused's legal rights are safe guarded and respected by law.
- A lawyer of the accused's choice looks after his defense unhindered.
- There is compulsory attendance of the witnesses if need be.
- Allowance is made of a reasonable time in the light of prevailing circumstances to investigate properly, prepare and present one's defense.
- Accused person's witnesses, himself or his lawyer are not intimidated.

Further in the case of **Soon Yeon Kong Kim and another V Attorney General, Mpagi Bahigeine, JA (As she then was)** stated as follows;

> *'Accused must be given and afforded those opportunities and means so that the prosecution does not gain an un deserved or un fair advantage over the accused, and so that the accused is not impeded in any manner and does not suffer unfair disadvantage and prejudice in preparing his defense, confronting his accusers and arming himself in his defense and so that no miscarriage of justice is occasioned.'*

In the instant case, the appellant faults the trial magistrate's finding on page 10 of the record of proceedings that. . . *'The accused was granted the opportunity to have witnesses return for cross examination by counsel after he opted not to do so himself. Today he raises a similar prayer yet counsel was sent to hold brief. This case does not require mandatory representation by counsel, yet this right is being used to delay trial. Court cannot condone this, so no further adjournment can be granted for the same purpose.'*

From the record it is clear that appellant had Counsel of his choice to represent him. On the day he first appeared on 17th January 2018, the defense lawyer did not appear. The appellant informed the court after taking plea that his lawyer was yet to arrive with the sureties. The prosecutor in opposing the application informed the court that the lawyer was aware that his client was appearing that very day. No reason was advanced as to why he had not arrived within time. On 24th January 2018, the bail application was heard by court in the presence of the appellant's lawyer, Marshall Alenyo. The case was adjourned for mention on 1st February when the hearing was fixed for 12th March 2018 in the presence of defense Counsel. Unfortunately, trial magistrate was indisposed. Counsel was present.

On the next dates of 7th May and 7th June 2018 the lawyer did not appear. On 12th July when the hearing commenced the defense lawyer was absent. PW1 testified and thereafter the appellant informed the court that his lawyer was running late but would cross examine the witness. At that point, Mr. Kalyango walked in and informed court that he had instructions to seek an adjournment. No explanation is on record explaining why Counsel was running late or why he had applied for an adjournment of the matter. This application was apparently rejected and the other witnesses before court testified, i.e. PW2 and PW3. The case was then adjourned to 2nd August for cross examination of the three witnesses. Kalyango, who held his brief was present at the time. Both the appellant and Kalyango were in position to update Counsel regarding the next date for hearing and the fact that the witnesses would be returning to court for his cross-examination. Clearly the adjournment and return of witnesses had been necessitated by his absence.

On the due date, the defense lawyer did not appear and the magistrate rejected the application for adjournment and directed the appellant to cross-examine. The appellant had reported that he was in the High Court. PW1 and PW2 were cross-examined and the case was adjourned to 5th September 2018, then to 1st October, 23rd October and 21st November 2018, 7th January 2019, 20th February 2019 and on these occasions the defense lawyer did not appear. The case was adjourned on those dates for various reasons other than his absence. During this period the accused jumped bail and was rearrested.

On 20th Feb 2019 was when the appellant finally cross examined PW3, in the absence of the lawyer.

Considering the above record, I am satisfied that the accused was granted the opportunity to have his lawyer cross examine PW 1, 2 and 3. He didn't turn up and no sound reasons advanced for his absence. The conduct of the lawyer from the beginning of the case was sufficient to indicate to the court the fact that he did not take representation of his client seriously. It was up to the appellant to act on this conduct by taking the option to instruct another lawyer or opt to represent himself. He did not show court any dissatisfaction with his lawyer nor seek leave to instruct another. Maybe in the circumstances, such an

application would have amounted to justifiable cause for an adjournment for cross examination.

Be it as it may this was not a case that required compulsory representation under **Article 28 (3) (e)** which provides for mandatory legal representation for offenses that carry a sentence of death or imprisonment for life. The appellant had an opportunity to exercise his right to be represented by the lawyer but his lawyer did not turn up. The right to legal representation has to be balanced against the right to a speedy trial and the interests of the complainants or victims of crime in accessing justice. The actions of the magistrate in refusing to grant an adjournment and directing him to cross examine were therefore not an illegality.

In **Bagarukayo Charles V Uganda Court of Appeal Criminal Appeal No 0080 of 2013**, the appellate judge proceeded without representation of the appellant following three adjournments and on appeal, it was held that he was justified in doing so it was not mandatory for the appellant to be represented.

I therefore find no reason to fault the trial magistrate. This ground of appeal fails.

Ground 2

The Learned trial magistrate erred in law and fact when she admitted more prosecution exhibits during defense case which was prejudicial to the appellant and occasioned a miscarriage of justice

It is the appellant's complaint that prosecution presented PExh3, PExh5, PExh 6 and PExh 7 after the close of its case which according to him was irregular.

The respondent on the other hand contends that these were admitted during cross examination that is provided for under **Section 136(2) of the Evidence Act Cap 6**

In resolving this issue, court has to consider the purpose of cross-examination. **Black's Law dictionary, 8th Edition**, defines cross examination as follows:

'The purpose of cross examination is to discredit a witness before the fact finder in any of several ways, as by bringing out contradictions, and improbabilities in earlier testimony, by suggesting doubts to the witness and by trapping the witness into admissions that weaken the testimony.'

Section 145 of the Evidence Act provides that during cross examination, a witness may be asked questions that test his or her veracity and those which shake his or her credibility.

It is for the above reasons that failure to cross examine on a crucial matter will lead the court to rightly draw an inference that the evidence is accepted. **(James Sawo- Abiri and another V Uganda, SCCA No 5 of 1990).**

In the instant case the appellant in his evidence denied handling any transactions with Yahaya Magezi since his arrest and he had not kept in touch with him. Throughout his defense he faulted PW5 for failure to get the right culprit.

The exhibits tendered by prosecution during cross-examination of the appellant (DW1) all showed transactions which the appellant had conducted on behalf of Yahaya on dates when he had claimed that he did not know where he was. P Exh 3 reflected transactions dated 9th and 8th October 2018, PExh4 reflected transaction dated 25th and 2nd November 2018 while P Exh 7 was for a transaction dated 23rd February 2018.

This evidence adduced during cross examination rebuts the assertion by the appellant that he did not know where Yahaya was and that he did not have any further transactions with him. The exhibits were therefore related to and relevant to the matter in issue and were rightly admitted. The appellant read them out in court and showed that he was familiar with them, although he claimed that Magezi Yahaya and Magezi Moses were different people. This objection was a matter for the court to resolve. I note that the evidence before court was that these three names referred to the same person.

Documents may be produced in evidence by either party in support of its case. The appellant himself was not precluded from having documents admitted during cross examination of the prosecution witnesses as long as the documents were relevant, satisfied the ends of cross-examination by impeaching the credibility of the witness and met the standards for admissibility.

I am in agreement with the respondent that no miscarriage of justice was suffered by the appellant when those exhibits were tendered in. A miscarriage would have occurred only where the documents were wrongly admitted.

This ground also fails

Ground 3 and 4

I will handle grounds 3 and 4 together since the two are related.

3. *The learned trial magistrate erred in law and fact when she considered and unilaterally relied on the prosecution evidence in isolation of the defense evidence wherefore other defense evidence were not adjudged which occasioned a miscarriage of justice.*

4. *The learned trial Magistrate erred in law and fact when she convicted the appellant on insufficient evidence to prove the ingredients of the offences charged hence occasioning a miscarriage of justice.*

It was the appellant's contention that the trial magistrate considered the prosecution case in isolation of the defense case. He faulted the trial magistrate for ignoring defense evidence at pages 28 and 29 of the record of proceedings which amounted to an error in law.

The appellant further contends that the trial magistrate convicted him on insufficient evidence to prove the ingredients of the offences he was charged with. In his considered view there was no evidence of his participation in the offence of interfering with goods under customs control. The appellant is further aggrieved that he was convicted after prosecution had failed to prove the offences beyond reasonable doubt and after unilaterally relying on only prosecution evidence.

Counsel for the Respondent on the other hand submitted that the defense case was considered and had been discredited by the magistrate.

On ground 4, the respondent stated that the facts as relayed before trial court were to the effect that the appellant together with Yahaya Magezi approached Zawedde Investments Limited requesting to be facilitated for custom purposes to transit vehicles from Mombasa to Kampala. That on several occasions he informed PW1 that the goods had a penalty

and thus had delayed to arrive. He also informed PW5 that he had been told by Yahaya that goods had been stolen at Mukono but no incident of robbery or theft was recorded as alleged. That contrary to his claim that he was only a broker evidence presented shows he was continuously involved and kept in close contact with Yahaya Magezi.

The state contends that the fact that the goods did not arrive at the designated destination, a fact not disputed by the defense goes to imply interference by the appellant who was in charge and worked hand in hand with Magezi Yahaya.

In all criminal matters, a trial court is expected to consider the burden and standard of proof. **Article 28(3)(a) of the 1995 constitution of the Republic of Uganda** provides that every person who appears before a court or tribunal is presumed innocent until proved guilty. In **Woolmington V DPP [1935] AC 462** in the House of Lords of **United Kingdom, Viscount Sankey J stated;**

'Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.'

In **Miller Vs Minister of Pensions [1947]2 ALL ER 372,** it was held that the prosecution evidence should be of such standard as to leave no other logical explanation to be derived from the fact that he accused committed the offence.

Mindful of my duty as the 1st appellate court I proceed to reevaluate the evidence and see if the offences of interference with goods under customs control were proved beyond reasonable doubt;

Section 203(f) of the East African Community Customs Management Act states as follows;

A person who, in any matter relating to customs except by authority moves, alters, or in any way interferes with any goods subject to customs control commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars.

The ingredients of the above offence are that;

1. The matter must be relating to customs

2. It must be moved, altered or in any way interfered with by any person when it is subject to customs control.

The first ingredient is not in contention I shall therefore not delve in it.

I therefore go ahead to evaluate the other ingredients.

In the instant case the subject matter or the units were two motor vehicles i.e. Mercedes Benz Chassis No. WDC2030402R199785 and Subaru Outback Chassis No. BP9045567.

According to the evidence of PW1, at page 6 of the record of proceedings, the appellant and Magezi Yahaya approached his firm and requested them to transit motor vehicles from Mombasa to Kampala. He identified the appellant as a fellow clearing agent working with Giant Cargo. He further states that the appellant and Magezi told him that they would be travelling to Mombasa to proceed with the verification that side. He kept checking in the system and realized that the units had been released. He confirms that he heard from them when they were in Mombasa but after that they never returned to the office. URA was giving him two weeks to bring the vehicles so he called the appellant who informed him that vehicles had a penalty at Malaba border but they were coming. Two days later he told him that the cars were at the bond and waiting for validation. PW1 went to the bond and the vehicles were not there. He realized he was lying so he got him and handed him over to URA.

From the evidence of PW1 it is clear that the appellant was part and parcel of the transactions relating to the transportation and movement into Uganda of the Units in issue. This is contrary to his Defence claim that it was PW1 and PW2 who were the agents and who should be held responsible. The evidence suggests a relationship where PW1 trusted the appellant to handle the transaction to the end. This is supported by the lies that the appellant told him about the whereabouts of the vehicles. At no point did the appellant disassociate himself from the transportation of the units, until he appeared in court.

The evidence of PW1 is corroborated by that of PW2 at page 8 of the record of proceedings where she states that the appellant who was also a clearing agent came to their offices with Yahaya Moses and asked them to capture for them a WT8, transit

document. They had a bill of lading and an export certificate. The appellant and Yahaya appointed their company as a clearing firm and PW1 went ahead to process the paper work and entries. She then printed the WT8 and gave the documents to the appellant himself. Thereafter she only needed to check online and see if the vehicles were released and follow up on phone with appellant. After 10 days the appellant kept saying the vehicles were coming and at one point said they were at Chatha bond yet when PW2 went there the vehicles were not there.

This evidence tallies with that of PW 1 and shows that they trusted the appellant who they knew as a clearing agent to conclude the process. Indeed, the appellant never distanced himself from the same and his actions and false explanations support his knowledge and involvement in the commission of the offense. If indeed he had been innocent as he claimed in his defense, there would have been no pressure on his part to tell lies about the cars. Rather he would have advanced the explanation that he gave to court.

Court notes that the appellant failed to destroy the evidence of PW 1 and 2 during cross examination.

PW3 confirms that he generated the transit documents for the two said vehicles and gave them to one called Rashid Kasule in December 2018. Under cross examination, he stated that he was a clearing agent who requested for the documents on behalf of Yahaya who was the consignee. The appellant argues that since the documents were handed to Rashid, there was no way that he could be held liable and that this evidence greatly affected the prosecution case.

Whereas this was not addressed by the trial Court, it did not lead to a miscarriage of justice because it does not invalidate the participation of the appellant in the transactions relating to the transportation of the vehicles. It does not reduce the value of the evidence I had previously analyzed of lies and participation. Rashid Kasule becomes another link in the chain, especially after the disappearance of Yahaya, the consignee. The court however considered the conduct of the appellant regarding this and stated in her judgement as follows:

'The accused stated that he had bothered to look for Magezi Yahaya, he gave his contacts to the investigators and authored a commitment- PEX6 to help in the arrest of Magezi Moses. What is baffling though is that the accused person remained in touch with Yahaya Magezi even after he was charged in court on 7th of January 2018. This is evidenced by PEX3, PEX4 and PEX 5. Another perplexing revelation was the fact that the accused had ever been convicted under a plea bargain in a matter involving the dumping of rice.'

She concluded that from the above, the appellant had assisted Magezi Yahaya in the commission of the offenses.

PW4 in his evidence on page 16 of the record of proceedings states that he was approached by Grace Auma on 8/2/18. She was the intelligence officer seeking to know the clearance process of units and showed him 2 documents which were TIs (Transit documents) declared by Zawedde Investment in favor of Mr. Magezi Yahaya. That after he checked the system a Mercedes Benz and Subaru had been declared and the documents were authentic but no border process had been performed on them and this implied that they had never reached the boarder.

All the above evidence proves that the vehicles did not reach their destination hence they were diverted to an un known destination.

The appellant contends that prosecution failed to prove that he is actually the one who diverted the vehicles and that the evidence of PW1 and PW2 is purely circumstantial.

The law regarding circumstantial evidence has been discussed in a number of cases.

In **Twinomugisha Godfrey V Uganda COA Criminal Appeal N0 011 of 2009**.Court referred to the case of **C.Chenga Reddy and others V State of A.P[1996] Ind law Sc 3059** where it was held thus;

'In a case based on circumstantial evidence, the settled law is that circumstances from which the conclusion of guilt is drawn should be fully proved, and such circumstances must be conclusive in nature. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'

Court in that same case referred the case of **Teper V R [1952] AC 480** at **489**, where it was held that it was also necessary before drawing inference of the accused's guilt from circumstantial evidence to be sure that are no other co- existing circumstances which could weaken or destroy the inference.

In the instant case, all evidence adduced clearly shows that the appellant was an agent of Yahaya.

This is a case where the doctrine of common intention applies. It stems from **Section 19(c) of the Penal Code Act Cap 120** which provides that;

When an offence is committed, every person who aids or abets another person in committing the offence is deemed to have taken part in committing the offence and he may be charged with actually committing the offence.

In **Ismail Kisegerwa and another V Uganda Court of Appeal Criminal Appeal No 06 of 1978,** court stated that;

'In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence.'

That intention can be deduced from the conduct and utterances of the appellant and from the lies which he told regarding the vehicles and their whereabouts.

From the instant case it is clearly shown that the appellant approached Zawedde Investments with Yahaya. All evidence adduced shows that the two worked hand in hand and in fact had subsequent transactions together.

The appellant's assertion that its Yahaya who was the real culprit does not stand as it's clear that both of them had the common intention of diverting the motor vehicles.

It follows therefore that all facts are inconsistent with the innocence of the appellant.

I therefore find that the offences of interfering with goods under customs control were proved beyond reasonable doubt against the appellant.

Whereas the trial Magistrate did not consider the evidence of Rashid Kasule or the fact that the cars could not have been moved from Mombasa to Kampala without the TIs that were given to him, I am satisfied that this did not occasion a miscarriage of justice. My own evaluation of the evidence shows that she arrived at the right conclusion that the accused was involved in the commission of the crime.

Grounds 3 and 4 also fail

Ground 5

The learned trial magistrate erred in law and fact when she convicted the Appellant without paying due regard to the inconsistencies and contradictions in the prosecution evidence.

The appellant also faults the trial magistrate for overlooking contradictions and inconsistencies in the prosecution case which go to the root of the case citing evidence of PW5 and PW1 in as far as who the consignee was. The appellant contends that there were statements by the prosecution that tend to insinuate that he was the consignee in the transaction.

In reply, Counsel for the respondent submits that the appellant failed to identify any contradiction in his being the consignee and that the whole record is clear that he was a clearing agent who approached Zawedde Investments on behalf of his client Yahaya

The main approach to inconsistencies and contradictions is that where court finds them grave, unless resolved, the evidence must be rejected. If they are minor, they would normally not have that effect except where they are found to be pointing to deliberate falsehood. **See Alfred Tajar V Uganda EACA-Criminal Appeal N0 69 of 1969**

PW5 on page 22 of the record of proceedings clearly states that…

'I charged Womoli Dennis for interfering with goods under customs control because he is a customs agent and Yahaya Moses was his client. The accused picked documents and he was involved. He took the client to Zawedde Investments for bonding.'

Pw1 on page 6 of the record of proceedings also states that…

'*The accused came to our office around November 2017 with Magezi Yahaya the client in this matter.*'

Both witnesses clearly state that the appellant was an agent and Yahaya was his client. None of them refer to the appellant as the consignee.

I am therefore in agreement with the respondent that there were no inconsistencies in this regard. This ground also fails.

Ground 6

The learned trial magistrate erred in law and fact when she imposed a manifestly harsh and excessive sentence on the Appellant

Lastly, the appellant is aggrieved by the sentence passed by the trial magistrate as being harsh and excessive given the circumstances of the case. It is his submission the learned trial magistrate overlooked some of the mitigating factors for example the appellant, being the sole bread winner of his family and having two very young children there by passing a harsh and excessive sentence.

He prayed that the appeal be allowed and the conviction and sentence be quashed or in the alternative the sentence of 2 years' imprisonment be reduced and the fine of 2,000,000 on each count be quashed.

The Respondent submitted that the sentence was neither harsh nor excessive as contended by the appellant considering that the maximum sentence is 3 years' imprisonment and the appellant was sentenced to two years' imprisonment and a fine of UGX 2,000,000 on each count.

The respondent finally prayed that the appeal be dismissed and the sentence and judgment of the trial court be upheld.

In **Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No.10 of 1995** the principles upon which an appellate court should interfere with a sentence were considered. It was 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 court was manifestly so excessive to amount to an injustice.'

The sentence can also be interfered with on appeal if an important matter or circumstance which ought to have been considered is ignored by the trial Court.

On page 7 of the judgement the trial magistrate sentenced the appellant to a sentence of 2 years' imprisonment on each count and a fine of UGX 2,000,000 on each count to run concurrently, stating that the appellant was a habitual offender who wasted court's time and that the sentence given to him was to serve as a lesson for other clearing agents who wish to use their positions to aid people in circumventing the payment of taxes.

Nowhere does she say that she considered the mitigating factors as were as stated by the appellant.

Section 203(f) of the East African Community Customs Management Act is to the effect that....

A person who, in any matter relating to customs except by authority moves, alters, or in any way interferes with goods subject to customs control commits an offence and shall be liable on conviction to **imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars.**

It is important to note that the charging section gives a fine as an option to imprisonment meaning that it is either imprisonment or a fine but not both.

The trial magistrate sentenced the appellant to both imprisonment and a fine which was an illegality.

I also note that the period spent on remand by the appellant was not taken into consideration at the time of sentencing. This is contrary to Article 23 (8) of the Constitution which provides that *'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'*

This is the position in **Nashimolo Paul Kibolo V Uganda** (Supreme Court Criminal Appeal No 46/2017) which further provides that the trial court must show how this period has been taken in consideration by deducting the same from sentence.

I find that this is a clear case where an appellate court can interfere with the sentence of the trial magistrate because it is illegal, harsh and manifestly excessive.

I therefore set aside the sentence. This ground therefore succeeds.

The conviction of the appellant is maintained as grounds 1- 5 of the appeal failed.

Sentence

Having found that the Magistrate's sentence was illegal, I hereby invoke Section 34 (2) (b) of the Criminal Procedure Code Act to arrive at an appropriate sentence. This section provides:

'subject to subsection 1, the appellate court on any appeal may alter the finding and find the appellant guilty of another offense maintaining the sentence or with or without altering the finding, reduce or increase the sentence by imposing any sentence provided by law for the offense.'

I hereby consider the mitigating factors raised by the appellant. He stated that he was remorseful for having caused pain to the State. He pleaded for lenience as these were covid times and he was the sole bread winner. He asked for a non-custodial sentence or fine or a suspended sentence. He asked the court to consider the period he has spent on remand.

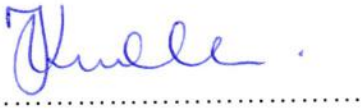
On the other hand, the state informed court that the appellant had a previous conviction for a similar offense in which he entered a plea bargain. This was not contested. The offenses of this nature were rampant and the appellant was breaching the trust bestowed on him as a clearing agent. Further, these offenses lead to loss of tax revenue. She prayed for the maximum penalty for deterrence and to punish. She prayed for a custodial sentence.

I have considered the factors presented by both parties. Considering that the appellant has a previous conviction and the seriousness of the offense and circumstances of its commission, I am convinced that the factors favour a sentence which is deterrent and which will teach the appellant that commission of crime does not pay. This should teach him to reform. A fine is not suitable in the circumstances. I consider imprisonment of 2 years on each count as sufficient.

I accordingly sentence the appellant to 2 years' imprisonment on each count. I have ascertained from the Prisons Officer Warder No 6904 that the appellant was on remand from 17th January 2018 to 25th January 2018 when he was released on bail. This was 8 days. He was then remanded again when his bail was cancelled on 16th July 2019 He stayed on remand till his conviction on 23rd June 2020. This was another 342 days. The total number of days spent on remand as confirmed from Prisons is 350 days, or 11 months and 20 days.

The period he spent on remand shall be taken into consideration by deducting it from the two years' sentence. He will serve one year and 10 days on each count, running concurrently, from the date of his conviction.

The right of appeal within 14 days explained.



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Jane Okuo Kajuga
Judge of the High Court
Delivered this 22.1.2021

In the presence of:

The appellant: Womoli Dennis
Counsel for the Respondent: Kalungi Tonny holding brief for Hilda Bakanansa