

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0296 OF 2010

WAKHEYA STEPHEN.....

APPELLANT

VERSUS

UGANDA.....

.....RESPONDENT

[Appeal from the decision of the High Court of Uganda at the Anti corruption Division of the High Court Sitting at Kololo, before Honourable Justice Mugamba dated the 12th day of November 2010.]

CORAM:

HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

The appellant was on 12/ 11 /2010 convicted on 8 counts set out in the indictment and sentenced to 2 years imprisonment on each count all to run concurrently.

He was also ordered to refund shs. 31,915,040/-.

The memorandum of appeal contains only one ground which states as follows:-

(1) “ The learned trial Judge erred in fact in not considering the time the appellant spent on remand while sentencing”

At the hearing of this appeal on 3rd December 2013, the appellant
5 was represented by **Mr. Julius Galisonga** learned counsel and
the respondent was represented by **Ms. Namatovu**.

It was submitted for the appellant that learned trial Judge erred in
law when he did not consider the period the appellant spent on
remand while passing sentence.

10 He submitted that it was a Constitutional requirement Under
Article 23 (8) of the Constitution that Court must always take
into account the period a convict spends on remand while passing
sentence.

He submitted that the omission to do so occasioned injustice to
15 the respondent.

Ms. Namatovu submitted that there was nothing on record to
indicate that the appellant had spent 3 months on remand before
trial. She also submitted that it could not be conclusively stated
that the Judge did not take into account the period the appellant
20 spent on remand as the Court record did not contain the
allocutus.

The only issue before us is whether or not the learned trial Judge
while passing sentence took into account the period the appellant
had spent on remand.

We agree with Mr. Galisonga that this is a Constitutional requirement under **Article 23 (8)** of the Constitution.

That Article stipulates as follows;-

Article 23 (8)

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“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.”

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The above Article was considered by the Supreme Court in the case of **Katende Ahmed vs. Uganda Supreme Court Criminal Appeal No. 6 of 2004** (Unreported).

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While passing the sentence in this case before us the learned trial Judge stated as follows:-

“Sentence

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I have listened carefully to what the state had to say regarding possible sentence. I have heard also what was said by the convict. I feel sorry for what the convict let himself in for. He was either daring or a gullible. Sadly for him he could not hide from the inevitable. I do not have to mention Global Fund and its allout to underline

the gravity of the convict's role. Enough has been said already. I take into account the fact that he is a first offender and that he has family responsibility. His medical record has been shown to me showing his health is poor.

The convict acted recklessly and with impunity. He should be held to account therefore. I sentence him to two years' imprisonment each on count 1, count 2, count 3, count 4, count 5, count 6, count 7 and count 8. The sentences are to run concurrently.

In addition I order that he refunds Shs. 31,915,040 to the Government of Uganda which should initiate process for recovery.

15 Clearly the learned Judge did not take into account the provisions of **Article 23 (8)** of the Constitution while passing the sentence against the appellant.

However, there is nothing on record to indicate that the appellant was ever on remand. For the appellant to rely on **Article 23 (8)** 20 the onus is on him to prove to the Court that he actually was in lawfully custody before the conviction.

The only evidence we have on this issue was stated by Mr. Galisonga from the bar, when he was asked by Court how long the appellant had been in prison before conviction, he replied as 25 follows;-

“My Lords, he tells me that he stayed three months.”

The above is not sufficient for this Court to determine with certainty the period the appellant spent on remand.

It appears the appellant was at all materials times on bail, and
5 that is why the issue of the remand period was never raised at the time of sentencing.

We accordingly find that the appellant has failed to prove that he was in lawful custody for 3 months prior to his conviction.

Article 23 (8) of the Constitution set out above is therefore not
10 applicable.

For these reasons and for the reason we first gave on 3rd December 2013 this appeal fails and dismissed.

Dated at Kampala this 26th day of March.2014.

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HON. MR. JUSTICE RUBBY AWERI OPIO
JUSTICE OF APPEAL

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL