THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Owiny-Dollo DCJ, Musoke & Tuhaise, JJA

Criminal Appeal No. 62 of 2018

Katalyebwa Christopher..... Appellant

Versus

Uganda..... Respondent

[Appeal from the judgment of Yasin Nyanzi, J in High Court Criminal Appeal No. 36 of 2017 delivered on 18th June 2018]

Judgment of Court

The appellant was charged with attempt to commit a felony contrary to section 388 of the Penal Code Act. He was convicted on his own plea of guilty and was sentenced to 5 years imprisonment by the Grade 1 Magistrate of the Chief Magistrate's Court of Kampala at Nateete/Rubaga. He appealed against the sentence to the High Court which reduced the sentence to imprisonment for two and a half years. Being further dissatisfied with the High Court sentence he now appeals to this court.

The brief background to this appeal is that the appellant confided in his friend that he desired to kill his wife for refusing to cook for him and denying him conjugal rights. The appellant's friend alerted the police about his plans. Police officers posed as the intended killers and this led to the arrest of the appellant.

The appellant's initial ground of appeal was that the sentence of two and a half years' imprisonment was harsh and excessive in the circumstances. However, he subsequently filed an amended memorandum of appeal on the sole ground of appeal that:-

1. The learned appellate Judge erred in law when he imposed on the appellant an illegal sentence of imprisonment for two and a half years for an attempt to commit a felony.

Representation

At the hearing of this appeal Mr. Asiku Nelly, learned Senior State Attorney represented the respondent. Ms. Nansukusa Marion, learned counsel holding brief for Okwalinga Moses, represented the appellant. The appellant was present in Court during the hearing of this appeal.

Submissions for the Appellant.

Counsel for the appellant submitted that the sentence of two and a half years' imprisonment was illegal since it did not fully take into account the mitigating circumstances raised by the appellant, namely that he was a first time offender, married with two wives and 10 children, and the primary care giver of his entire family as well as his old mother aged 100 years. Counsel also submitted that, in addition, the appellate Judge did not follow the sentencing guidelines.

Counsel contended that the failure by the first appellate court to consider the mitigating factors when passing the sentence and other important factors, as well as its failure to fully follow the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (referred to as "Sentencing Guidelines" in this judgment) rendered its sentence illegal. According to Counsel, if the said court had considered the mitigating factors, it would have realized that the appellant had been forgiven by his wife, and that he was remorseful. He argued that a custodial sentence would break, disadvantage, and waste away the appellant's family since he was the sole bread winner.

Counsel invited this Court to interfere with sentence imposed by the appellate court and to set it aside, and also to release the appellant who had served over one and a half years of the said sentence. He relied on the Sentencing Guidelines, and the case of **Kiwalabye V Uganda, Supreme Court Criminal Appeal No. 143 of 2001** to support his submissions.

Counsel also submitted that the first appellate court did not re-hear the case on appeal for purposes of reconsidering all materials which were before the trial court and making up its own mind, neither did it evaluate the material evidence as a whole. According to Counsel, this constituted an error in law. He cited the case of **Aharikundira V Uganda Criminal Appeal No. 27 of 2015 [2018] UGSC 40** and **Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No. 10 of 1997** to support his submissions.

Submissions for the Respondent

Counsel for the respondent submitted that the learned first appellate Judge correctly and properly applied the law applicable, in that he considered section 388 of the Penal Code Act which provides that the maximum sentence for the offence of attempt to commit a felony is seven years imprisonment.

Counsel referred this Court to pages 24, 25 and 26 of the record of appeal and submitted that the learned first appellate Judge also considered both mitigating and aggravating factors before imposing the sentence of two and a half years imprisonment. He contended that the Judge rejected the additional evidence the appellant tried to adduce before court that the victim's family and that of the appellant had reconciled, and that the victim had also forgiven the appellant. According to Counsel, the appellate Judge found the said evidence persuasive, but advised that it should have been presented before the lower court since all the parties concerned were present. Counsel argued that the learned appellate Judge would have committed a big procedural error at that level of the case to purport to hear the mitigation. He cited section 41 of the Criminal Procedure Code Act and argued that because the learned first appellate Judge did not take either of the said options before passing sentence, his considering the additional matters raised by the appellant would have made the sentence illegal.

Consideration of the appeal by Court

This is a second appeal. The role of this Court as a second appellate court is laid down under rule 32 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10, which provides that:-

"On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

Regarding second appeals from the High Court in its appellate jurisdiction, section 45 of the Criminal Procedure Code Act, provides that:-

"Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law."

This Court is therefore obliged to examine whether the principles which a first appellate court should have applied, that is, to re-examine and re-evaluate the evidence and come to its conclusion, were properly applied and if it did not, for this Court to proceed and apply the said principles. In applying the said principles, this Court shall have power to appraise the inferences of fact drawn by the trial court. Also See **Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No. 10/1997**.

In this appeal, the appellant faults the learned first appellate Judge for imposing an illegal sentence of two and a half years on the appellant; for not following the Sentencing Guidelines; and for not considering fresh evidence in mitigation in favour of the appellant. Counsel invited this Court to interfere with sentence imposed by the first appellate court, that is, to set it aside, and also to release the appellant who had served over one and a half years of the said sentence.

Sentencing is the discretion of a sentencing Judge. It was held in **Kiwalabye Bernad V Uganda, Supreme Court Criminal Appeal No. 143/2001**, that:-

It is an established principle that an appellate court is not to interfere with the sentence imposed by the 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 a 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."

Also see **Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No. 10 of 1995.**

The record of appeal shows on page 30 that after the learned trial magistrate had convicted the appellant on his own plea of guilty, the State (respondent in this appeal) submitted through Counsel that the accused was a first time offender, had pleaded guilty and had not wasted court's time. However the respondent's Counsel prayed for a deterrent sentence to deter the accused carrying out his plans to kill his wife and also deter public at large.

In mitigation, the defence counsel submitted that the convict (appellant in this appeal) is a first time offender. He stated to the trial court however that the reason he committed the offence was because on 25th December 2017, on Christmas, his wife (the complainant) refused to cook for him; that three months later, she denied him conjugal rights. Counsel stated that this, together with the guidance from the devil, set his mind ablaze and he became frustrated. He started making the plans to kill. Counsel further stated to the trial court that the convict is a father and to date he had never battered the complainant; that if given a second chance he would become saved; that the time he had spent in prison was a time of learning. Counsel accordingly prayed for a lenient sentence to be able to return home and look at his children and wife; that the convict was asking court and his wife for forgiveness.

In her judgment the learned trial magistrate wrote:-

"The convict pleaded guilty and has not wasted Court's time and he is said to be a first offender. However the offence he was charged with is grave in nature and the convict didn't just passively but actively participated in crime..."

She went on further to state that:-

"This falls within gender based violence which is very rampant in this Country and Jurisdiction in which this Court sits. This must be condemned in the loudest way possible. The convict asked for forgiveness if his wife can still forgive him but evidently in Court the complainant his wife was much traumatized. I believe taking all factors above into consideration the convict deserves a deterrent sentence to deter him and other would be offenders in the public from carrying out such acts. The complainant also needs time to get over the trauma and be able live a life free of fear from harm befalling her from her own husband and father of her children. I thus sentence the convict to serve a five year imprisonment term without remission inclusive of time on remand."

We note from page 32 of the record that the learned trial magistrate considered all the mitigating factors as submitted by his lawyer, except the aspect of not considering the remand period in favour of the appellant.

The learned trial magistrate's stating that the five year imprisonment term she imposed against the appellant was *"without remission inclusive of time on remand"* was an error of law on her part. The learned first appellate Judge correctly faulted her since she was fettering an obligation by the prisons authorities, and the matter was not before her for review which falls within the jurisdiction of a High Court Judge.

Secondly, the learned trial magistrate's statement that the sentence against the appellant would not include the remand period violated Article 23 (8) of the Constitution which states 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."

In **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No. 25 of 2014**, it was stated that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

We note however, that, on page 24 of the record, the learned first appellate Judge correctly addressed the errors in law of the learned trial magistrate referred to above, when he stated in his judgment that, with consent of the Director of Public Prosecutions (DPP), the orders against non-consideration of remission, and the remand period of one month, were set aside.

The record shows that the appellant's challenging the sentence imposed against him by the first appellate court was based on the fact that court did not consider his submissions before it that the appellant pleaded guilty, was a first offender, was remorseful, did not waste court's time, had family responsibilities, was a sole bread winner of the family with seven children aged between 6 to 18 years and an ailing mother, that the victim/complainant was his wife, that he had reconciled with his wife, and that the offence he was convicted of did not involve personal violence.

When sentencing the appellant, the learned first appellate Judge stated:-

> *"I have considered the reasons advanced by the learned advocates for mitigation and the aggravating reasons especially in aggravation breach of trust; People don't exempt their own to turn around to be the serpent to bite them. The people you sleep with, you dine with, you don't expect them to be your own killers.* ***Nevertheless, the fact that the convict pleaded guilty, he will deserve some consideration. I accordingly reduce the sentence from the 4 years and 11 months imprisonment to 2 years and 5 months imprisonment considering the remand period from this appeal order.*** *This sentence will run from the date it was imposed by the lower court."* (emphasis added).

We note from the first appellate Judge's statements that he did not only consider the aggravating and mitigating factors when sentencing the appellant, he also took into account the remand period.

Regarding the period of remand, the first appellate Judge may not have stated in exact words that he had deducted the period the appellant spent on remand, but the language of his statement suggests that he was alive to this factor, and he took it into consideration. It is apparent from his judgment that he considered the one month the appellant spent on remand, which would

reduce the five years imprisonment sentence imposed by the learned trial magistrate against the appellant to four years and eleven months imprisonment. This is borne out by the fact that, on page 26, he referred to the sentence imposed by the learned trial magistrate as being four years and eleven months, which he reduced to 2 years and 5 months imprisonment. Secondly, in his judgment, he noted that it was not discretionary for the sentencing court not to take the period of remand into account, and that it was a constitutional requirement.

This, in our considered opinion, is well within the Sentencing Guidelines. We do not accept the appellant's arguments that the learned first appellate Judge imposed an illegal sentence against the appellant.

The appellant also faulted the learned first appellate Judge for rejecting additional evidence which the appellant tried to adduce before court to the effect that the appellant had reconciled with his wife.

We note from the record on page 25 that the learned first appellate Judge found the reasons advanced by the appellant's counsel about the appellant's reconciling with his wife to be persuasive. Section 41 of the CPC provides as follows:-

> *"In dealing with an appeal from a lower court, the appellant court if it thinks additional evidence is necessary, may record its reasons and may take that evidence itself or may direct it to be taken by the lower court"*

The learned first appellate Judge therefore had the discretion to take the additional evidence or direct it be taken by the lower court, since he found it to be persuasive. To that extent, the learned first appellate Judge's statements that those were considerations for trial court not the appellate court, were misconceived.

Nonetheless, we note that, the information regarding the appellant's antecedents and circumstances was made with a view to mitigating sentence, by way of *allocutus*. It had nothing to do with adducing of evidence for purposes of convicting or acquitting the accused person (now appellant). The question of the need to adduce further evidence could not arise at the stage of

an inquiry after conviction, for purposes of sentencing. What the appellant's counsel did at this stage was to avail information to the first appellate court that the appellant's reconciliation with his wife should mitigate his sentence. Secondly we note that counsel was introducing to court new information he had not availed the trial court when he stated to the first appellate court that the appellant had reconciled with his wife.

For those reasons, we find no merit in the appellant's claims that the learned first appellate Judge should have taken additional evidence concerning the appellant's having reconciled with his wife, or that he should have considered it as a mitigating factor.

In conclusion, based on the reasons given and the circumstances of this case, we uphold the orders of the learned first appellate Judge.

The appeal is dismissed.

Dated at Kampala this ..... 18th ..... **day of** ..... February ..... **2020.**

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Alfonse Owiny-Dollo

Deputy Chief Justice

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Elizabeth Musoke

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal