

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 391 OF 2017

*(Arising from High Court Criminal Appeal No. 382 of 2016 Holden at
Kampala)*

ANIUGO GLORIA ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF COURT

This is a second appeal.

In the Chief Magistrate's court Entebbe, the appellant was charged, tried and convicted of the offence of Possession of a narcotic drugs contrary to section 4(1) and (2) (a) of the Narcotic Drags and Psychotropic Substances (Control) Act 3 of 2015 and was sentenced to a fine of 100,000,000= or in default to serve a custodial sentence of 11 years imprisonment. The appellant was dissatisfied with the sentence passed by the trial court and appealed to the High Court. The High Court set aside the fine but maintained the default sentence

of 11 years imprisonment. She was dissatisfied again and appealed to this court against sentence only on the ground that;

The learned trial Judge erred in law and fact in imposing a manifestly harsh sentence on the appellant.

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Background

The appellant was, on 25th November 2016, at Entebbe International Airport, found with narcotic drugs to wit 5.4 kgs of Heroin valued at Shs. 153.360.000= (One hundred fifty-three million three hundred
10 sixty thousand). She pleaded guilty and was convicted on 14th December 2016 and sentenced to a fine of Shs. 100,000,000= (One hundred million) or serve a sentence of 11 years imprisonment in default by the Chief Magistrate's Court of Entebbe. It was ordered that after serving sentence, she would be deported to her country,
15 Nigeria. The appellant filed an appeal to the High Court which set aside the order to pay a fine but maintained the default sentence of 11-years imprisonment.

The appellant filed this appeal before us against sentence only on a sole ground that;

20 *"The learned trial Judge erred in law and fact by imposing a manifestly harsh sentence on the appellant."*

Leave to appeal against sentence only was granted under S. 132 (1) (b) of the trial on Indictments Act.

Due to the covid-19 pandemic, the appellant attended court through video link and was in touch with her lawyer throughout the hearing.

Representation

5 When this appeal came up for hearing, Counsel Sarah Awelo appeared for the appellant while Sherifah Nalwanga, Chief State Attorney, appeared for the respondent.

Appellant's submissions

Counsel for the appellant relied on the decision in **Abaasa Johnson**
10 **Vs Uganda Criminal Appeal No. 33 of 2010** for the proposition that this court will only interfere with a sentence imposed by a trial court in a situation where the sentence is illegal or founded on a wrong principle of the law. That the appellant pleaded guilty and did not waste court's time and thus should have got a more lenient sentence.
15 Counsel submitted further that punishment in drug trafficking is predicated upon the value of the drugs and in this case, there was no evidence adduced at all as to the value of the drugs.

Respondents' submissions

Counsel submitted that the appellate court dealt with the issue of the
20 value not having been determined and was alive to the principles of interference in a sentence and indeed found that there was no valuation certificate. That the court allowed the appeal in part and upheld the sentence of 11 years, which was not excessive since the maximum sentence for the offence is 25 years under Section 4(2) (a)

of the Narcotic and Psychotropic substances (Control) Act. That the court considered both the aggravating and mitigating factors of the case and passed a sentence that was neither illegal nor excessive.

The case of **Alex Njuguna Kimani Vs R Criminal Appeal No. 65 of 2012** held that punishment in drug trafficking is predicated upon the value of the drugs. However, Section 4(2) (a) of the Narcotic and Psychotropic substances (Control) Act 2015 provides that on conviction, the sentence can either be a fine or imprisonment and Section 91 provides for determination of a fine by the market value of the narcotic drug. However, the imprisonment sentence does not depend on the market value of the drugs. The imprisonment sentence should not be less than 10 years and not exceed 25 years.

Consideration of the Appeal

It has been consistently held in numerous cases, both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993** [unreported] that:

'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.'

The foregoing principles are equally applicable in the instant case.

In the present case, the appellant pleaded guilty at the trial court and was convicted and sentenced to a fine of 100,000,000/= or serve a sentence of 11 years imprisonment in default. The appellant filed an appeal to the High Court which set aside the order to pay a fine and maintained the 11 year imprisonment sentence.

On appeal to the High Court, the appellate Judge set aside the fine of 100,000,000/= for reasons that there was no valuation certificate for the drugs and under the Act, an order for a fine could not stand. The appellate Judge considered the aggravating and mitigating factors as considered by the trial Magistrate and found that the sentence of 11 years imprisonment was not excessive as the maximum sentence for the offence is 25 years imprisonment. The appellate Judge's order was as follows:

“iii) The sentence of 11 years imprisonment is maintained. However the appellant having spent 1 year on remand, court deducts the period spent on remand and sentence the appellant to 10 years imprisonment without an option of a fine, effective from the date of conviction and sentence in the trial court.”

The sentencing order of the learned appellate Judge set aside the fine, for lack of a valuation certificate, but maintained the 11-year imprisonment sentence. We must note that the 11 year imprisonment sentence was given in default of payment of the 100,000,000/= fine. This was one sentence and it was therefore an error for the learned appellate Judge to set aside the fine but

maintain the default sentence of 11-years imprisonment. The appellate Judge should have gone ahead to exercise jurisdiction as a first appellate court, set aside the sentence of the Chief Magistrate and re-sentence the appellant. We therefore set aside the sentence
5 for being incomplete and proceed to resentence the appellant under Section 11 of the Judicature Act.

We note that there was no valuation certificate of the Narcotic drugs as stipulated under **Section 91(1)** of the **Narcotic and Psychotropic substances (Control) Act 2015**. However, **Section 4(2) (a)** of the
10 **Narcotic and Psychotropic substances (Control) Act 2015** states that;

4. Penalty for possession of narcotic drugs and psychotropic substances

*(1) Subject to subsection (3) any person who has in his or her
15 possession any narcotic drug or psychotropic substance commits an offence.*

(2) A person who commits an offence under subsection (1) is liable on conviction—

*(a) in respect of a narcotic drug listed in the Second Schedule to
20 a fine of not less than five hundred currency points **or** three times the market value of the drug, whichever is greater; **or** to imprisonment of not less than ten years but not exceeding twenty five years, or both;*

(b) ... (Emphasis ours)

5 The appellant was charged and convicted under Section 4(1) (2) (a) as stated above. This section gives court the discretion to sentence an accused (appellant) to a fine of not less than 500 currency points or three times the market value of the drug, or imprisonment of not less than 10 years but not exceeding 25 years or both. We reiterate that there is no valuation certificate in this case to ascertain the value of the drugs. The section gives an option of a sentence of not less than 500 currency points, which in our view, is appropriate in the absence of a valuation certificate. According to the first schedule to 10 the **Narcotic Drugs and Psychotropic substances (Control) Act 2015**, a currency point is equivalent to Ugsh 20,000/= (twenty thousand), with 500 currency points being equivalent to 10,000,000/=, we sentence the appellant to a fine of Ugsh. 10,000,000/= (one million) and in default, to serve 10 years 15 imprisonment.

We so order.

Dated this 24th day of February 2022

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Hon. Justice Elizabeth Musoke, JA



Hon. Justice Catherine Bamugemereire, JA

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Hon. Justice Stephen Musota, JA

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