

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA**

CRIMINAL APPEAL NO. 390 OF 2017

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CORAM:

Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Catherine Bamugemereire, JA

Hon. Mr. Justice Stephen Musota, JA

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**ABIGAIL NKOSOLWANA FUNIWE :::: APPELLANT
VERSUS**

UGANDA::: RESPONDENT

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*(Appeal against the decision of the High Court of
Kampala before Hon: Justice Yasin Nyanzi in High Court
Criminal Appeal No. 381 of 2017 delivered
on 2nd October 2017.*

*(Arising out of Criminal Case No.0743of16
Chief Magistrates Court of Entebbe)*

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JUDGMENT OF THE COURT

Background

The facts of the case as ascertained from the lower court record are that on the 21st day of November 2016, the appellant was intercepted at the departures lounge of Entebbe International Airport and when searched she was found in unlawful possession of Narcotic drugs to wit 0.8 Kgs of Cocaine locally valued at UGX 221,520,000/=.

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The appellant was convicted on her own plea of guilty and was sentenced by the Chief magistrate to a fine of UGX 150,000,000/= or in the alternative she was to serve 10 years imprisonment in default. Dissatisfied with the magistrate's decision, she appealed to the High Court, which set aside the fine and sentenced her to a term of 10 years' imprisonment without the option of a fine.

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The appellant being dissatisfied with the orders of the High court appealed to this honourable court against sentence only.

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Ground of Appeal

1. That the learned trial judge erred in law and fact by **imposing a manifestly harsh sentence on the appellant.**

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Representation

At the hearing of the appeal, the appellant was represented by Ms Sarah Awelo from Nansubuga & Awelo Co. Advocates while the respondent was represented by
15 Learned Chief State Attorney Ms. Anne Kabajjunga from the office of the Director of Public Prosecutions.

Appellant's Submissions

Counsel for the appellant submitted that the sentence of 10
20 years was manifestly harsh. She further submitted that the Appellant pleaded guilty and did not waste court's time. She relied on the case of **Johnson Abaasa v Uganda Court of Appeal Criminal Appeal No. 33 2010** to submit that this court will only interfere with a sentence imposed by a trial
25 court in a situation where the sentence is illegal or founded on a wrong principle of the law. Counsel invited this court to review the sentence because the sentence for the offence of trafficking in narcotic drugs is predicated upon the value of the drugs.

Respondent's Submissions

Counsel for the respondent submitted that the law prescribing the offence provides for a term of imprisonment not less than 10 years and not more than 25
5 years. She contended that the learned 1st Appellate Court Judge sentenced the appellant to the bare minimum since the maximum sentence is 25years. Her submission was that both the aggravating and mitigating factors were taken into account and prayed that the sentence be upheld, and
10 the appeal dismissed. She relied on the case of **Alex Njuguna Kimani v R Criminal Appeal No. 65 of 2012** to propose that the punishment for drug trafficking is predicated upon the value of the drugs.

Consideration of the Appeal

15 This is a second appeal and it's only against sentence. **S. 132 (1) (b) of the Trial on Indictments Act, cap 23** provides that (1) Subject to this section—*(b) an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than*
20 *a sentence fixed by law.*

This case originally emanated from the Chief Magistrates Court of Entebbe and was appealed to the High Court at Kampala as the 1st Appellate Court. The Appellant pleaded guilty to the offence of Possession of Narcotic Drugs
25 contrary to section 4(1) and 2(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act 2015.

The role of the second appellate court was explained by the Supreme Court in the case of **Henry Kifamunte v Uganda Criminal Appeal No.10 of 97** where court stated that;
"On second appeal, the Court of Appeal is precluded from
5 questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a
10 question of law."

Further, **Section 45 (1) of the Criminal Procedure Code Act, Cap 116** provides that;

" Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate
15 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.

In **Tigo Stephen v Uganda Supreme Court Criminal Appeal No.08 of 2009**, it was stated that on a second
20 appeal, the appellant has a right of appeal only against the legality of the sentence, not its severity. (Emphasis is mine). It is settled law that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong
25 principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstances. (see **James v R (1950) 18 E.A.C.A 147; Ogalo**

s/o Owoura v R. (1954) 24 E.A.C.A 270; Kizito Senkula v Uganda, SCCAppeal No. 24 of 2001; Bashir Ssali v Uganda, SCCA No. 40 of 2003, and Ninsiima Gilbert v Uganda, C.A. Criminal Appeal No. 180 of 2010).

5 By way of providing context, the appellant contests being sentenced to 10 years imprisonment for possession of a narcotic drug. This sentence of 10 years is not necessarily discretionary since it is written into the law as the minimum sentence for the offence under s. 4 for Possession
10 under the **Narcotic Drugs and Psychotropic Substances (Control) Act 2015**.

The law on possession of narcotic drugs and psychotropic substances stipulates as follows:

4. Penalty for possession and psychotropic substances

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

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

20 **(a) In respect of a narcotic drug listed in the Second Schedule to 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;**

25 A close look at s.4 (1) and (2) (a) reveals that the offence attracts both a fine or in default thereof, a minimum custodial sentence of 10 years imprisonment. However,

while the sentence of 10 years imprisonment on the face of it appears to be lawful, the principles of law such as how it is applied to a first offender in lieu of a fine become imperative.

5 In view of the above law we took a granular look at the record of the lower courts and found that the learned Chief Magistrate sentenced the Appellant to a fine of UGX 150,000,000, Uganda Shillings One Hundred Fifty Million. On appeal to the High Court the learned 1st Appellate
10 Court Judge found, and rightly so in our view, that the learned Chief Magistrate had no basis of sentencing the Appellant to a fine of that magnitude since the value of the drugs she was found in possession of was not ascertained as under s.91 of the Narcotics Drugs and Psychotropic
15 Substances Control Act 2015. For purposes of clarity the section stipulates as follows:

91. Valuation of goods for penalty

(1) Where in any prosecution under this Act a fine is to be determined by the market value of the narcotic
20 drug, psychotropic substance or prohibited plant, a certificate of the market value of the narcotic drug, psychotropic substance or prohibited plant, signed by a proper officer, shall be accepted by the court as *prima facie* evidence of the value of the narcotic
25 drug, psychotropic substance or prohibited plant.

(2) In this section “proper officer” means an officer authorised by the Minister, by notice published in the *Gazette*, for the purposes of this section.

We do agree with both counsel that in line with s.91 (1) of the Act, a sentence of a fine for an offence of possession under s.4 is predicated upon the value of the drugs found. The section can be interpreted to state that when the market value of the narcotic drug has been ascertained by a proper officer, whose office appears in the Uganda Gazette, a certificate of the market value can then be presented to the court. A market value cannot be a matter of guesswork, intuition or premonition. It must be scientifically arrived and fully certified by a specified officer.

The 1st Appellate Judge was correct in setting aside the sentence passed by the learned Chief Magistrate for lack of a valuation certificate. However, in sentencing the Appellant to 10 years’ imprisonment he failed in his role. While the law provides this sentence as an alternative to the fine, the option of a fine should have been exercised. The ten years’ sentence is in default of a fine especially where the appellant is a first offender. We find that the 1st Appellate court did not correctly apply the law under s.4 (2) (a). We therefore set aside the sentence of 10 years’ imprisonment and will proceed under s.11 of the Judicature Act to pass a fresh sentence.

S. 11 of the Judicature Act, Cap 13 provides that;

“For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the
5 exercise of the original jurisdiction of which the appeal originally emanated.”

The law under s. 4 (2) (a) provides for a fine of not less than five hundred (500) currency points or three times the market value of the drug, whichever is greater.

10 Since, in this case, the value of drugs was not ascertained, this court will rely on the sentence as provided for under the First schedule of the Act. The first schedule provides that a currency point is equivalent to twenty thousand shillings. This offence attracts a sentence of 500 currency
15 points. A currency point weighs UGX 20,000.

We hereby sentence the Appellant to a fine of UGX 10,000,000. Uganda Shillings Ten Million in default of which she will serve a sentence of 10 years’ imprisonment.

20 Dated at Kampala this..... day of2022

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ELIZABETH MUSOKE
JUSTICE OF APPEAL

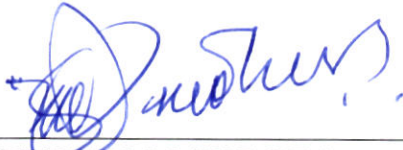
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10 **CATHERINE BAMUGEMEREIRE**
JUSTICE OF APPEAL

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25 **STEPHEN MUSOTA**
JUSTICE OF APPEAL