

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 133 OF 2021

JAMES KAZUNGU ALUKO::: APPELLANT

VERSUS

UGANDA::: RESPONDENT

(Arising from the decision of the High Court in Criminal Appeal No. 08 of 2021 dated 30th March 2021)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF COURT

Background

On 28th October 2017 at Namataba village Kira Municipality in
15 Wakiso district, the appellant, who was also the husband to the
victim, attempted to cause her death by pouring acid on the victim.
The victim had told the appellant to leave her home so that they live
separately but when the victim returned home at around midnight
with her supermarket attendant, they found that their house did not
20 have power. The victim got out of the car and started walking towards
the house when she noticed the appellant and before she started
asking him what he wanted, she felt a liquid poured on her and she
screamed for help.

The appellant was charged and convicted of the offence of attempted murder contrary to section 204 (a) (b) of the Penal Code Act and doing grievous harm contrary to section 4(2) of the Domestic Violence Act, 2010. He was sentenced to 8 years' imprisonment on the count of attempted murder, and 1 year imprisonment on count 2 for doing grievous harm. The appellant was dissatisfied and on appeal to the High Court, the appellant's conviction was upheld and the sentences were not interfered with considering that he did not appeal against sentence.

The appellant filed a second appeal to this court against sentence only on a sole ground that;

1. The learned Judge erred in law when he maintained an illegal sentence that did not take into account the period the appellant had spent on remand.

Representation

At the hearing of the appeal, Ms. Wakabala Susan Sylvia appeared for the appellant while Ms. Fatimah Nakafeero, Chief State Attorney, appeared for the respondent.

Appellant's submissions

Counsel submitted that whereas the appellant did not raise this ground in the lower court and would ordinarily not be allowed to raise it on a second appeal, the ground raises a point of law which is enshrined in the Constitution. Counsel relied on the decision in **Alenyo Marks Vs Uganda S.C.C.A No. 08 of 2007** in which the

Supreme Court quoted with approval the case of **Imere Deo Vs Uganda S.C.C.A No. 16 of 2015** where it was held that court may consider a new ground of appeal not raised in the lower court for the first time on a second appeal especially where the ground touches on the legality of the trial or orders made.

Counsel submitted that from the record of proceedings, the appellant first appeared in court on 20/11/2017 which means he had been in lawful custody for 13 days which should have been deducted from the final sentence and failure to do so rendered the sentence illegal. Counsel relied on the Supreme Court decision in **Rwabugande Vs Uganda S.C.C.A No. 25 of 2014** where it was held that taking into account the period spent on remand by a court is arithmetical because the period is known with certainty and precision.

Counsel submitted that the appellant has no previous criminal record, is a family man, was remorseful and prayed that he be given an appropriate sentence to help him reform.

Respondent's submissions

Counsel submitted that the respondent concedes to the appeal and notes that the trial court did not take into consideration the period the appellant had spent on remand. Counsel argued that from the sentencing notes, there was no consideration of the time the appellant spent on remand which is a constitutional dictate under Article 123(8) of the Constitutional.

Consideration of the appeal

It has consistently been 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:

5 *'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*
10 *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.

Article 23(8) of the Constitution requires court to take into account the period the person has spent on remand. In the case of **Abelle Asuman Vs Uganda S.C.C.A No. 66 of 2016**, the Supreme Court
15 held that;

20 *"The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in **Article 23(8) of the Constitution** is for the Court to take into account the period spent on remand."*

The sentencing order of the trial Magistrate states that;

The accused person is said to be a lecturer at Kyambogo University. He is a well-educated man. He has been convicted of

attempted murder and doing grievous harm. I note that the first count 1 involves an offence of attempt to take the life of a person. Life in itself is a precious gift given only by God and no one has authority to take it away except by law. I note this was a crime of passion. The accused (convict) had the opportunity to move on with his life instead of resorting to an unlawful act. No amount of mistreatment as submitted by counsel for the accused can justify attempt to take life of another.

The prosecution has asked for the maximum custodial sentence while the accused through his advocate asked for a none custodial sentence. The Penal Code Act provides that a person convicted for attempted murder shall be liable to imprisonment for life and while a person convicted of doing grievous harm under section 4(2) of the Domestic Violence Act shall be liable to a fine not exceeding 48 currency points or imprisonment not exceeding two years or both.

Considering the circumstances of this case, court finds it appropriate to sentence the convict to a custodial sentence. As a result, the convict is sentenced to 1 year imprisonment. The sentence shall run concurrently.

On compensation, court was not guided on the same in terms of evidence on expenses incurred. The complainant can pursue a civil remedy to recover the same.”

We note that the transcribed record of proceedings appears incomplete and this has prompted us to read the handwritten sentencing order of the trial Magistrate. We noted that the paragraph indicating the sentences was omitted. It states that;

5 *“As a result, the convict is sentenced to 8 years imprisonment on count 1. On count 11 the convict is sentenced to 1 year imprisonment”*

The learned sentencing magistrate did not take into consideration the period the appellant had spent on remand and under **Article 23(8)** of the **Constitution**, therefore the sentence is an illegal sentence. We
10 thus set it aside and proceed to re-sentence the appellant.

This court has the same powers as the High Court, pursuant to **Section 11** of the **Judicature Act**. It states,

15 ***‘11. Court of Appeal to have powers of the court of original jurisdiction.***

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 exercise of the original jurisdiction of which the appeal originally emanated’

20 The Supreme Court decision in **Abelle Asuman Vs Uganda (supra)** held that although the process is not a mathematical exercise as stated above, a sentencing Judge should clearly indicate the mitigating and aggravating factors he/she has taken into account, particularly the remand period.

We note that the appellant was a first offender, was remorseful and is a family man with a son and other dependants to take care of. He had also spent 22 days on remand. On the aggravating side, the appellant committed a grievous offence that nearly caused death of the victim. Having considered the period the appellant spent on remand, we find that a sentence of 8 years imprisonment will meet the ends of justice in this case on count 1 of attempted murder and 11 months imprisonment on count 2 of causing grievous harm. The sentences are to run concurrently

5

10 We so order.

Dated this 14th day of March 2022

Handwritten signature

Hon. Justice Elizabeth Musoke, JA

15

Handwritten signature

Hon. Justice Catherine Bamugemereire, JA

20

Handwritten signature

Hon. Justice Stephen Musota, JA