

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

HIGH COURT REVISIONAL CAUSE NO. MSK-00-CR-CV-0014 OF 1999

(Arising from Original Criminal Case No. Semb. 0002 of 1999)

Uganda

Prosecution

Versus

Katende Kasmoni

Accused

**BEFORE: THE HONOURABLE MR. FMS EGONDA-NTENDE**

**REVISIONAL ORDER**

1. The accused, Katende Kasmoni, was charged with the offence of escaping from lawful custody contrary to Section 103 of the Penal Code Act in the magistrate grade 11 court at Sembabule. The particulars of the offence were that Katende Simon on the 26<sup>th</sup> day of November, 1998 at Lwemiyaga Administration Prison in Ssembabule District being under the custody of No. 0014 Sgt. Sembatya escaped. The accused initially denied the charge. Three months later he changed his plea to guilty and was convicted and sentenced to twelve months imprisonment.
2. This file was subsequently forwarded to the High Court by the Chief Magistrate with the following remarks.  
" The above file is forwarded to your Lordship for revision on the following grounds: (1) The reasons given for sentence are grossly irregular hence the sentence of 12 months was not based on good reasons. (2) Accused was not given a fair hearing as he was not given a chance to mitigate his penalty hence the 12 months. (3) The plea was not properly recorded as it is apparent the accused was not made to understand the charge."
3. At the hearing of this matter Mr. Khaukha learned Resident Senior State Attorney, appearing for the state, submitted that the plea taken was properly taken in this case. He, however, submitted that the sentence in this case was excessive. Before the change of plea on 11<sup>th</sup> March 1999, the accused had been in custody since 5<sup>th</sup> March 1999. Given the fact that the offence was a misdemeanor the trial court ought to have given the accused an option of a fine or lesser time of imprisonment.
4. I drew the attention of Mr. Khaukha to the fact that custody in which the accused is supposed to have escaped from had just been quashed following the quashing of the plea, conviction and sentence in High Court Revisional Cause No. MSK-00-CR-CV-0015 of 1999, Uganda versus Kasimoni Katende. The plea in that case was found to be equivocal. Mr. Khaukha replied that for as long as the conviction and sentence stood, and had not been set aside, escaping from such custody, amounted to escaping from lawful custody.
5. The key element to the offence of escaping from lawful custody is that custody must be established to have been lawful. On the face of it in the instant case by the time the accused

escaped, he was serving a sentence of imprisonment ordered by court. It turns out that before this revisional cause was heard, the original sentence and originating conviction were set aside for being bad in law. I think the substratum of the offence of escaping from lawful custody has now disappeared as the custody from which the prisoner is supposed to have escaped has been dissolved for being bad in law. I am unable to continue holding the accused to that charge and subsequent conviction. I would set aside the conviction in this case.

6. I now turn to the proceedings for sentence. The trial court just heard from the prosecutor and then proceeded to pass sentence. The trial court did not inquire of the accused if he had anything he wished to say. He just proceeded to order a sentence he thought appropriate in the circumstances. This was irregular and highly undesirable.
7. Section 134 (5) of the Magistrates Courts Act, 1970 states, "The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence."
8. Section 131 (2) of the Magistrates Courts Act, 1970 states, " The court, before passing sentence, may make such inquiries as it thinks fit in order to inform itself as to the sentence proper to be passed and may inquire into the character and antecedents of the accused person and may take into consideration either at the request of the prosecution or the accused person in assessing the proper sentence to be passed such character and antecedents including any other offences admitted by him whether or not he has been convicted of such offences: ....."
9. Although the immediate foregoing provision is not couched in mandatory terms, in my view, no sentence ought to be passed without inquiring of the accused if he had anything to say in mitigation or otherwise before the court proceeded to pass sentence. In any case where, in our adversarial setting, one side is heard on a matter, the principles of fair trial and natural justice require that the other side be heard in respect of the same matter. The trial court ought to have given the accused an opportunity to be heard in the matter of sentence and then recorded as required by Section 134 (5) of the Magistrates Courts Act, all that the accused said in the matter.
10. Having failed to do so will result in the sentence being set aside. Accordingly, I would set aside the sentence imposed by the trial court.
11. In its reasons for sentence in this case, the trial court stated, " The act of running from Prison is a dangerous one especially when one is serving a sentence of stealing cattle. People in our society are fed up with criminals, few are arrested and brought to justice the many unfortunate end up being killed by mobs. I thus sentence the accused to serve 12 months imprisonment." I agree that the act of escaping from prison is dangerous. I am not sure if this is more so if one is serving a sentence of stealing cattle. Mob justice and the fact that few criminals are arrested were not relevant considerations in sentencing this particular accused person. The court did not attempt to show their relevance to the order it made. I think this sentence was imposed based on the wrong reasons. I would set aside the sentence for that reason too.
12. In the circumstances of this case I agree with the learned Resident Senior State Attorney that a sentence of 12 months imprisonment was excessive and harsh. The offence the accused was convicted of was a misdemeanor. An option of a fine should have been considered by the trial court after inquiry into, among other things, the means of the accused to pay. As I have set aside the conviction, it is not necessary to proceed with sentence in this regard.
13. The charge of escaping from lawful custody is dismissed, conviction and sentence are set aside, and the accused is forthwith to remain at liberty.

Dated, Signed and Delivered this 25<sup>th</sup> day of August 1999.

FMS Egonda-Ntende  
Judge