THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0029/2010

(Arising from Tororo Criminal Case TOR-00-CR-04261/2010

OTIM FUSTINO……..…….APPELLANT

VERSUS

UGANDA……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This is an appeal against sentence only. The appellant Otim Fustino through his lawyer M/s Majanga & Co. Advocates complained in the memorandum of appeal that:-

1. The learned Chief Magistrate erred in law in imposing a manifestly harsh and excessive sentence upon the appellant having regard to the circumstances of the case.
2. The learned Chief Magistrate erred in law in failing to guide the appellant in his allocutus.

The appellant prayed that this court:-

(a) Allows the appeal.

(b) Sets aside or reduces the custodial sentence.

The appellant was charged, tried and convicted on his own plea of guilty for the offence of doing a rash and negligent act c/s 228 (d) and 22 of the Penal Code Act. Upon plea of guilty, prosecution led the following facts:

> "*On 2nd October 2010 at Kalachi village, Mukuju one Oyet Janie was at her compound at about 9:00a.m. She was peeling beans. The dog of the accused came and bit her left arm. She tried to chase the dog away, it bit her on the left leg again. Complainant grabbed her children and locked themselves inside a house. The accused was informed went for treatment at Divine Mercy and Alupe in Kenya. When the victim asked the accused to foot the bill, he refused and the matter was reported to police. The total expense was shs.650,000/=. The accused was accordingly charged. Some receipts are here, others with complainant at home*."

The appellant acknowledged the facts as true and added that he paid the complainant 55,000/=. That the complainant had demanded for 1 million which he could not afford. The appellant was convicted. In an apparent allocutus before sentence, the appellant retorted that:

> "*The money demanded by the complainant is too much. There is no way I can get that money*."

Court sentenced the appellant to one year's imprisonment as a first offender who saved court's time.

During the hearing of the appeal, Mr. Majanga for the appellant and Alpha Ogwang the learned Resident State Attorney were allowed to file written submissions in support of their respective cases.

In her submissions, the learned Resident State Attorney supported the sentence arguing that the offence being a misdemeanor whose maximum sentence is 2 years the trial magistrate was right to sentence the appellant to one year in prison. Further that the failure by the trial Magistrate to inquire into the antecedents of the convict did not occasion a miscarriage of justice since it is not mandatory for court to conduct such inquiry before sentence. That the trial Magistrate did not rely on speculative circumstances but was guided by the facts. That there is no legal basis that a person who pleads guilty should be pardoned or not handed a custodial sentence. Finally the State Attorney submitted that failure by the learned Chief Magistrate to expressly take the appellant's allocutus did not occasion a failure of justice.

Mr. Majanga for the appellant submitted to the contrary in support of the grounds of appeal.

Before I make my decision on the grounds of appeal, I am of the view that the offence the appellant was convicted of did not come out in the facts aired by the prosecution in the lower court. It is not clearly stated what rash and negligent act the appellant committed leading to his conviction. From what he told court before

sentence, the appellant, who was not represented, did not understand why he was going to be sentence. He said,

> " *the money demanded by the complainant is too much. There is no way I can get that money*."

Earlier on, before conviction he told court that he paid 55,000/= only because the complainant was demanding 1 million which he could not afford. Clearly the appellant's answer to the charge could not amount to an unequivocal plea of guilty to the offence of doing a rash and negligent Act. Had learned Counsel for the convict argued this aspect of the case, I think a decision would have been made in his favour.

Turning to the main ground of appeal about sentence, I agree with the submission by Mr. Majanga as opposed to that of the learned Resident State Attorney. The learned Chief Magistrate did not consider the principles guiding sentencing in criminal cases. As rightly submitted by Mr. Majanga the principles were laid out in the case of ***Uganda v. Charles Eliba [1978] HCB*** per Odoki Ag. J (as he was) which this court restated in the case of ***Nansibika Peter Wejuli vs. Uganda Mbale Cr. App. No.628 of 2009*** (unreported). The said principles are echoed in a South African case of ***THE STATE V. MUKWANYANE 1995, CASE NO CCT/3/94*** of the Constitutional Court of South Africa. Although this decision referred to the death penalty the pronouncements are relevant to all sentencing processes.

It was held *inter alia* that:

> "*Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of*

aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention…….."

A sentencing court must therefore consider the manner in which the offence was committed, the actual loss occasioned, and the prevalence of the offence and then the circumstances of the offender which include his social position and his character to guide it to arrive at a fair and well balanced view of the gravity of the offence. This can only be possible if an inquiry is done by court.

I am mindful that a trial magistrate has discretion to impose a sentence which an appellate court may not interfere with unless it is illegal or based on wrong principles. But in the instant case, I am unable to agree that the learned trial Chief Magistrate base his sentence on correct principles.

The lower court record is silent as to whether the appellant was guided by the trial court while giving his allocutus before he was sentenced. It is the practice in criminal trials that court must guide the convict especially where he is not represented by a lawyer to put forth factors that can enable court to reach an

appropriate sentence in the circumstances of a given case (***The State v. Mukwanyane*** (Supra).

The record does not indicate that the prosecution or the appellant was called upon to help court in the inquiry leading to an appropriate sentence. Failure to do a proper inquiry about the appellant's personal circumstances and other subjective factors prejudiced the appellant.

In the instant case, the appellant pleaded guilty. He accepted that his dog bit the complainant who is his neighbor. He compensated the neighbor with 55,000/= which was within his means. The appellant is a first offender who saved court's time. If an inquiry was done and all mitigating factors were considered, the lower court would have found that custodial sentence was not the most suited mode of punishment. The appellant readily owned up his wrong which as I said he may not have understood, and put up a reconciliatory stance. The trial court ought to have considered that at the time of sentence, the appellant was 56 years old and the offence was not his own but his dog's. The court ought to have considered that the complaint in the criminal case was substantially civil and the complainant should have brought a civil action which would address her grievances instead of a criminal court.

Given that the offences created under S.228 of the Penal Code Act are misdemeanor which if no punishment is prescribed are punishable with imprisonment for a period not exceeding two years' imprisonment, sentencing the appellant to one year which is a half the prescribed sentence was harsh and excessive given the circumstances of this case as outlined hereinabove.

I will consequently allow both grounds of appeal. This appeal is allowed. The sentence of 1 year imprisonment is set aside and substituted for a sentence that will ensure that the appellant is set free forthwith since the appellant has been serving sentence from 27th October 2010. The period of slightly above 3 months the appellant has served is adequate punishment in the circumstances of this case.

The appellant is set free.

Musota Stephen

JUDGE

16.03.2011

15.3.2011

Appellant in court.

Alpha Ogwang Resident State Attorney.

Wegoye on brief for Majanga.

Kimono Interpreter.

Resident State Attorney: For judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

16.03.2011