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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CRIMINAL APPEAL NO. 018 OF 2022

ARISING FROM BUSIA CM. CRIMINAL CASE NO.467 OF 2022

RWAKA ISSA MACKENZIE OBWONGO ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

**JUDGMENT**

**BEFORE: HON. JUSTICE MR. HENRY I. KAWESA**

This appeal arises from the judgment of His Worship Okoth Thomas, a Chief Magistrate sitting at the Chief Magistrate's Court of Busia at Busia.

**Background**

The appellant was charged with theft contrary to **Section 254(1) and 261 of the Penal Code Act Cap. 120**. It was alleged in the charge sheet that the appellant stole cash money worth Four Hundred and Sixty Two Thousand Kenya Currency (Ksh. 462,000) on the 15<sup>th</sup> day of July, 2022 at Mawero East 'B' Busia Municipality in Busia District.

The appellant initially pleaded not guilty to the charge. The prosecution led evidence of three witnesses and closed its case. It was at that stage that the appellant changed his plea to a plea of guilty. Accordingly, he was convicted, sentenced to 3 years imprisonment, and ordered to compensate Four Hundred and Sixty Two Thousand Kenya Currency (Ksh. 462,000) to the complaint (PW1) within a period of 2 months.

This appeal is only against the sentence, and the order of compensation as far as its terms are concerned.

### **Grounds of the Appeal**

The grounds are:

1. *The learned trial Magistrate erred in imposing a sentence that was manifestly illegal.*
2. *The learned trial Magistrate erred in imposing a sentence that as too harsh and excessive.*

This court directed Counsel for the parties to file written submissions. However, only the appellant's Counsel did so. This court shall consider the submissions on record on determining the appeal.

Apparently, the first ground is against the compensation order even though it states otherwise. The submissions of the appellant's Counsel are quite explicit on that, notwithstanding that Counsel erroneously refers to the compensatory order imposed against the appellant as a sentence. Accordingly, the wording of the first ground shall be corrected.

- **First Ground:** *The learned trial Magistrate erred in imposing a compensation order that was manifestly illegal.*

In arguing this ground, the appellant's Counsel cited **Section 197(3) of the Magistrates Courts Act Cap.16** which provides as follows:

*Any order for compensation under this section shall be subject to appeal, and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal is presented, before the determination of the appeal.*

### **Court's Decision**

In this case, the trial court ordered that the payment of compensation be made within a period of two (2) months. It is evident that the order is contrary to the above provisions since it neither considers the period allowed for presenting the appeal nor the period for the determination of the appeal after which the compensation ought to be paid. Accordingly, the court agrees with the submissions of the appellant's Counsel that the order in question is manifestly illegal.

The first ground succeeds, therefore.

- **Second Ground:** *The learned trial Magistrate erred in imposing a sentence that as too harsh and excessive.*

The appellant's Counsel submitted that the appellant did pay the compensation ordered against him on the 7<sup>th</sup> of September 2022 and that there is an acknowledgment of payment by the complainant on court record. That the payment of the compensation renders the custodial sentence of 3 years too harsh and excessive.

Counsel added that the court should find the five (5) months the appellant did serve of the custodial sentence as of 20<sup>th</sup> of January 2023 when he was admitted to bail to be sufficient and accordingly release him unconditionally as having served the required period of custodial sentence.

Furthermore, the appellant's Counsel also submitted that the sentence of three (3) years in custody too harsh and excessive in the context of **Section 261 of the Penal Code Act** which provides that:

*Any person who steals anything capable of being stolen commits the felony called theft and is liable, unless owing to the circumstances of the theft or nature of the thing stolen some other punishments is provided, to imprisonment not exceeding ten years.*

### Court's Decision

It is a settled principle of the law that:

*...the appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is illegal or the appellate Court is satisfied that in the exercise of the discretion the trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was so excessive or low as to amount to an injustice (See Supreme Court in Kiwalabye vs. Uganda SCCA No.143 of 2001, and Bakabulindi Ali vs. Uganda SCCA No.02 of 2017).*

This court has studied the record of the trial court and found that the learned trial Magistrate took consideration of most of the mitigating factors and aggravating factors before he handed down the sentence in question, say, that the appellant was a first time offender, that he is remorseful, that he did not waste the court's time having pleaded guilty; and that the offence of theft was very notorious in Busia District and therefore the need to send a clear message.

However, under **Regulation 6(1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, the trial court is enjoined to also take into account any other circumstances it considers relevant when sentencing the offender. One important fact which the trial court did not take into account was the circumstances under which the offence was committed.

The commission of this offence was obviously facilitated by the naivety of the complainant, and the accused should not be blamed so much for having taken advantage of him. The complainant had never dealt with the appellant in his alleged scrap business, and yet he gave him a huge sum of money to boost it; and without making any feasibility analysis on the appellant's genuineness and ability to repay that money. The court feels that the appellant should not be punished so



much for that. It is, therefore, its view that the sentence of three (3) years was too harsh and excessive in circumstances.

The second ground succeeds as well.

### **Final Outcome of the Appeal**

This appeal was not against the imposition of the order of compensation but the legality of the terms of the order. In fact, the appellant paid the awarded amount already to the complaint as evidenced by a written acknowledgment on record. Accordingly, the order of compensation remains in place, except the terms that the appellant pays the awarded amount within a period of two (2) months which are hereby set aside.

With regard to the custodial sentence; the court is mindful of the appellant Counsel's suggestion that it considers the five (5) months the appellant has served in imprison as an appropriate custodial sentence, and accordingly release him unconditionally. However, under **Part VII of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, the sentencing range of an appropriate sentence for theft, to be determined after taking into account the factors aggravating or mitigating sentence in each case, is from one (1) year up to ten (10) years. This court shall, therefore, follow the said guidelines, and is unable to accept Counsel's suggestion. Given the circumstances of the case, the court finds that a sentence of one (1) year is an appropriate and is hereby substituted for that imposed by the trial court.

There is no remand period to deduct from the aforesaid sentence period. This is because the appellant was charged on the 18<sup>th</sup> of August 2022, according to the charge sheet; presented in court on the 19<sup>th</sup> of August 2022, convicted, sentenced, and received in prison that very day.

Thus, having already served part of his sentence for five (5) months (**between 19<sup>th</sup> of August 2022-when he was committed to prison- and 20<sup>th</sup> of January**


2023-when he was granted bail pending appeal), the appellant shall continue to serve the imposed sentence of one (1) year for another seven months.

The appellant's bail is hereby cancelled.

In conclusion, the appeal is allowed on the terms stated in this judgment.

It is so ordered.

Delivered at Tororo this 3<sup>rd</sup> Day of Nov. 2023

  
HON. JUDGE

In the presence of:

- 1.....Rwalea Issa Makenze Obwong'o - Accused / Appellant
- 2.....
- 3.....
- 4.....

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