

1.4 Orders being sought in the appeal; that:-

1. The conviction be quashed and the sentence set aside; for
2. In the alternative – and without prejudice to the foregoing a more lenient sentence be issued.

2. On 21st day of May, 2014, when this appeal came up for hearing, Mr. Gaway Tegulle, Counsel for appellant abandoned grounds (b) and (c) of appeal. He only presented and argued ground (a) of appeal. Wherefore, grounds (b) and (c) of appeal stand dismissed.

3. Resolution of ground (a) of appeal by Court.

Counsel for the appellant Mr. Gaway Tegulle argued that in the charge sheet, that is, shillings 1,600,000/= and that considering the fact that the convict/appellant pleaded guilty, and never wanted the Court's time, that a sentence of 2 years imprisonment on each count to run consecutively was too harsh. He referred to two (2) authorities in support of his submissions:-

1. **Sebowa Cyrus and another vs Uganda, criminal appeal No.11 of 2011 before His Lordship Stephen Musota at Mbale.**
2. **Balikowa Nixon vs Uganda, criminal appeal No.24 of 2013 before His Lordship Lawrence Gidudu, at the Anti-corruption Court.**

He prayed that the appeal be allowed and the sentence of imprisonment be substituted with a fine.

In reply- Counsel for respondent submitted and argued that the sentence of two (2) years imprisonment on each count was not harsh in the circumstances. She supported the sentences that were handed down by the trial Magistrate. She prayed that the appeal be dismissed.

In passing the sentence of 2 years imprisonment on each count, the trial Magistrate considered the following mitigating factors; at page 4 of the record of the proceedings:-

“Court sentence: I have listened to the convicts’ allocatus in mitigation of sentence. I have in particular taken note of the fact that they are first offenders with no unknown previous record. Both accused pleaded guilty

and saved the Court's time and resources. The offences they are convicted with are rampant and are those that are committed by people who are indeed daring, impersonating a police officer and committing the offence from police establishment is an indication that the accused are indeed sophisticated offenders. The Court has a duty to fight this. Each accused sentenced to a prison term of 2 years on count 1 and 2. Both sentences will run consecutively. Court hopes this will teach them a lesson to desist from any unlawful conduct."

From the reasons given by the trial Magistrate in passing the sentence, the trial Magistrate it is my considered view that he endeavoured to pass a disserving sentence against the appellant. The offence of obtaining money by false pretences the appellant is convicted of carries a maximum sentence of 5 years imprisonment; then the sentence of 2 years imprisonment would be reasonable after the trial Magistrate considered the above-stated mitigating factors.

In final reply to the submission by Counsel for the respondent, Mr. Gawayu Tegulle submitted that:

"I contend that if sentences were running concurrently, the appellant would not have appealed. That the consecutive nature of the sentences makes it harsh."

In essence, Counsel for the appellant does not contest the sentence of 2 years on each count. He too, changed his mind on ground (a) of appeal. He only faults the trial Magistrate on the order of "sentences on counts 1 and 2 to run consecutively."

In addition to the above, Counsel for the appellant never convincingly faulted the trial Magistrate on the order:-

"Convicts are ordered to refund the money obtained from the complainants upon completion of their sentences."

Counsel for the appellant submitted that ordering restitution to be paid after 4 (four) years creates an absurdity. He quickly added that they are not contesting the order of restitution granted by the trial Magistrate.

I wish to note that much as the appellant is contesting the time for a refund, he has not intimated to this Court that he has the money and that he is ready to pay it now.

Considering the submissions by both Counsel and the reasons given by the trial Magistrate in passing the sentence, I hold that the sentence of 2 (two) years on each count would be reasonable.

However, in this instant appeal, I wish to note that Counsel for the appellant came to Court with the complainants in the case in the lower Court. I noted that the said complainants were greatly sympathising with the convict. My quick conclusion on that scenario was that the complainants just reported the said cases against the convicts (appellant) only to recover their money. They are more interested in money than seeing the appellant in the prison. In the Constitution (sentencing Guidelines) Direction Legal notice No..... of 2013, before sentencing it is advisable the prosecutor makes inquiries from the members of the public where the complainant and on how he/she/they feel(s) about the convict. This was not done by the prosecutor. Even it is important to note that after the Court adjourned this appeal for judgment, the complainants moved with Counsel for the appellant and the convict, instead of them waiting for the State Attorney. I could see that the said complainants had no contact with the State Attorney.

Further considering the money involved on counts 1 and 2 in the charge sheet is Shs. 1,600,000/= (Shillings one million six hundred thousand only) the sentences passed without an alternative sentence of a fine, would make the sentences of 2 (two) years on counts 1 and 2 to run consecutively too harsh in the circumstances of this appeal. In this proposition I am fortified by the case of **Lwanga Daniel –vs- Uganda, criminal appeal No. 38 of 2000**, whereby Court of Appeal of Uganda held that:-

“We agree with the statement of the law that sentencing is a discretionary power that has within the discretion of the trial Court. Like all discretionary

powers, it must be exercised judiciously and on good principles. To that extent, an appellate Court will not interfere with the exercise of discretion, unless it is shown that there has been a failure to exercise discretion or a failure to take into account a material consideration or an error in principle was made. As for the sentence, it has to be shown that it is the circumstances of the case. It is not enough that members of the appellate Court would have exercised their discretion differently.”

In the instant appeal, there were no exceptional aggravating factors that would have warranted the trial Magistrate to give such sentences with an order that the same run consecutively. There was failure by the trial Magistrate to take into account material considerations, such as: the convict pleaded guilty and thus never wasted the Court’s time and resources; the amount of money of Shs. 1,600,000/= (Shillings one million six hundred thousand only) involved and the fact that the convict is ready to refund the same. I am therefore of the considered opinion that there was failure to exercise properly the discretion by the trial Magistrate which made the sentence harsh and excessive in the circumstances of this appeal.

For the reasons given hereinabove in this judgment I shall interfere with the sentence imposed. I consider 2 years imprisonment on counts 1 and 2, both to run concurrently or in the alternative a sentence of fine of shs 3,000,000/= (three million shillings) on each said counts to run concurrently would be appropriate in the circumstances of this appeal.

The appeal is allowed. The sentence of 2 (two) years on counts 1 and 2 to run consecutively imposed by the trial Magistrate will be set aside and substituted with one of 2 (two) years imprisonment on counts 1 and 2 to run concurrently from the date of conviction or in the alternative to a sentence of a fine of Shs. 3,000,000/= (shillings three million) on counts 1 and 2 both run consecutively.

The order of the refund of the money obtained is upheld.

Dated at Kampala this 23rd day of May, 2014.

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Joseph Murangira

Judge

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

**CRIMINAL APPEAL NO.15 OF 2014 (Arising from Makindye Chief Magistrate's
Court Criminal Case No. 1699 of 2013)**

MUTEMA EMMANUEL::: APPELLANT

VERSUS

UGANDA :::RESPONDENT

COURT REPRESENTATION

Mr. Gawayo Tegulle for the appellant.

The appellant is in Court.

Ms Sarah Babirye, State Attorney for the respondent.

Ms. Margaret Kakunguru, the Clerk is in Court.

Court: Judgment is delivered to the parties. Right of Appeal is explained to the parties.

Joseph Murangira

Judge

23/5/2014.