

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT NAKAWA**  
**CRIMINAL APPEAL NO. 29 OF 2013**  
**(Arising from Mityana Criminal Case No. 106 of 2012)**

**MUHAMMED SSEMAKULA ::::::::::::::::::::::::::::::::::::::**  
**APPELLANT**

**V E R S U S**

**UGANDA ::::::::::::::::::::::::::::::::::::::**  
**DEFENDANT**

**BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA**

**JUDGMENT**

This is an Appeal arising out of the Judgment of His Worship Lubowa Daniel Magistrate Grade 1 delivered on the 24<sup>th</sup> April 2012. The Appeal is against sentence.

**Back Ground:**

The Appellant was charged with two counts for the offence of theft contrary to Sections 254 (1) and 261 of the Penal Code Act. The Prosecution case was that on the 22<sup>nd</sup> day of July 2011, Ssemakula Muhammed *alias* Ssemwogerere Medi while at Wabigalo village, Mityana District, stole a motor cycle Registration No. UDT 111 U Bajaj Boxer Red Engine No. DUMBUA-20052 Chasis No. MD2 DD DM 22 UWA- 25261 valued at UgShs 2,900,000/= (Two million nine hundred thousand only). The motor cycle belonged to Sseguya Tito. Immediately after stealing the motor cycle or soon afterwards, he stole a mobile phone "Saga Blue", valued at Shs 200,000/= (Two hundred thousand shillings only) property belonging to Kalyango Joseph.

At the hearing, the Prosecution called four witnesses whereas the Accused gave evidence on his behalf. In his Judgment, the Trial Magistrate held the Accused guilty of the offence of theft on both counts. The Accused was convicted and ordered to serve a term of imprisonment of 4 years and 1 year on count 1 and 2 respectively. Furthermore, an Order for compensation of the stolen items was made against the Accused. The Appellant prayed that this Court sets aside the sentence and Order for compensation made by the Trial Court.

The grounds of the Appeal are that:

- i. The Sentence was too harsh and excessive in so far as the imprisonment is for a sum of 5 years accompanied by an Order to compensate ( pay back ) stolen items;
- ii. The Trial Court erred in fact and in law when it omitted to consider that the Appellant was a first offender and the offence was not grave;
- iii. The Trial Court misdirected its discretion when sentencing in that it did not consider the mitigation of the Appellant with empathy when the Appellant pleaded for leniency for the sake of his 5 children not studying and out of them 2 got lost, 3 are looked after by the neighbor;
- iv. The Trial Court omitted to consider the repentant conduct of the Appellant coupled with the fact that he never wasted Court's time;
- v. The above said errors and omissions constituted and caused a miscarriage of justice to the Appellant.

On Appeal, the Appellant was represented by M/s Kawenja, Othieno & Co Advocates whereas the Respondent was represented by Ms. Elima Doreen, the State Attorney.

Both parties filed Written Submissions which I have had an opportunity to read through. The State Attorney raised an objection of Law as to the competence of the Appeal before this Court which I will consider later.

## **GROUND 1**

Pertaining to the first ground which relates to whether the sentence was too harsh and excessive given that the imprisonment terms were 4 years and 1 year for count 1 and count 2 respectively, accompanied by an Order to compensate the stolen items, Counsel for the Appellant referred Court to the provisions of Section 261 of the Penal Code Act. Under this Section, an Offender is sanctioned to a term of imprisonment not exceeding ten years. Additionally, Section 265 stipulates for a sentence of 7 years imprisonment. Furthermore, he submitted that the sentence was manifestly excessive considering the factors stated in mitigation. For instance, the fact that the offence was committed in a non-violent manner; the loss to be compensated; the gravity of the offence, circumstances of the offender being a single parent with suffering children; the character of the Appellant and the fact that the Appellant was a first offender. The Appellant's Counsel cited the decision of *Uganda v Charles Aliba (1978) HCB 273* in which Odoki Ag.J observed that where the Legislature has prescribed maximum penalties for each offence, such maximum penalties may assist in determining the gravity of the offence compared to another. However, there are other additional factors that a Court must take into account in addition to the maximum sentence fixed by the Statute. *Counsel for the Appellant did not specify what the Aliba case listed as being pertinent. I take note of the fact that the Aliba as cited was decided by a Judge of the High Court so it is not binding on me per se. It can only be persuasive.*

Counsel for the Respondent asked Court to uphold both the sentence and conviction since they were fair and reasonable considering that the stolen properties were not recovered.

I have addressed myself to the record and also the authorities which Counsel for both parties cited. First of all, I note that a Magistrate's Court has power to sanction a convict to a term of imprisonment and to also make an Order for compensation thereof.

*Section 197(1) Magistrate Court Act authorizes a Magistrate Court to award compensation for material loss or personal injury. It states that: "when any accused person is convicted by a Magistrate's Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the Court, recoverable by that person by Civil suit, the Court may in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the Court deems fair and reasonable"* [Emphasis added]

According to the Record, the Appellant was convicted by Court of the offence of theft of a motor cycle, which was the property of Sseguya Tito (PW1) and a mobile phone belonging to Kalyango Joseph. He was sentenced to a term of 4 years imprisonment and 1 year imprisonment on counts 1 and 2 respectively and ordered to compensate the owners of stolen items. The motor vehicle was valued at Ug.shs 2,900,000/= whereas the mobile phone was valued at Ugshs 200,000/= thus totaling to shs 3,100,000/= (Three Million One Hundred Thousand Shillings). No evidence was adduced as to how the sum was computed or how the valuations were made and by whom.

I have also observed that there were no brutal circumstances surrounding the theft, rather, the Appellant obtained the motor cycle through dubious means. Kalyango Joseph, who testified as PW2, stated that he lost consciousness and was able to regain consciousness after 2 days when he discovered that he was in Mityana Hospital and his motor cycle together with

the phone were missing. Through tracing, it was discovered that the same had been sold to third parties by the Appellant. Further, I have observed that, although the trial Magistrate allowed the *alloctus*, he did not give any reasons for the sentence and compensation thereof. It is also true that the Appellant did not show any remorse. In fact, contrary to the submission of Counsel for the Appellant that the Appellant did not waste Court's time, the trial Court entered plea of not guilty against the Appellant.

It was not an outright case of pleading guilty. Therefore, the Appellant did not admit to having committed the offence. It therefore necessitated a full hearing. Consequently, a full trial was held in which the Appellant was allowed to call evidence.

The principle of law is that an Appellate Court such as this can only interfere with the sentence where a trial Court failed to exercise its discretion judiciously or acted on wrong principles. In the Court of Appeal decision of

***Kiwalabye v. Uganda Court of Appeal Criminal Appeal No. 143 of 2001*** Court observed that:

*“the law is well settled that whenever a trial Court has exercised its discretion on sentence, an appellate Court will not interfere unless the discretion had been exercised unjudicially (sic) or on wrong principles. Where the trial Court gives reasons, the Appellate Court will interfere only if the reasons given are clearly wrong or untenable. Where no reasons are given for the decision, the appellate Court will interfere if it is satisfied the order is wrong.”*

According to the record of the trial Court, the Prosecutor was allowed to submit on *alloctus* of the Appellant. He stated that there was no previous record against him. He prayed for a deterred sentence and compensation. The Appellant, in mitigation, stated that he had 5 children who are not in school, 2 of the children got lost and the three are looked after by the neighbor. These factors may or may not sway a Judge during sentencing. I

note that the maximum sentence for theft of motorcycle would be 10 years. The Appellant was given 4 years as a first offender.

Therefore, premised on the above reasoning, I hold that the sentence made by trial Magistrate was legally entered. I am cognizant of the fact that the Appellant was convicted of two counts; one of theft of a motor cycle and that of theft of a mobile phone and given a lesser sentence. Otherwise if the trial Court would have considered the maximum sentence relating to each of the offences, the Appellant's contention would be accepted.

With respect to the amount of compensation recoverable, as I had earlier noted, there is no evidence on record on how the amount was computed. Relating to the issue of compensation, the Trial Magistrate seems to have taken the Complainant's statement as being gospel truth and did not subject these claims to any proof. Notwithstanding the lack of proof, the Appellant did not object to the same during trial. In my opinion, the compensation awarded by the trial Magistrate was entered in error since the same was not proved by cogent evidence pertaining to when the stolen items were bought, proof of cost, price, market value at the time the items were stolen and so forth. In this case, the amount recoverable was not proved in anyway therefore, it cannot stand.

I also note that the Appellant's Counsel contended in his submissions that the Trial Court omitted to indicate whether the sentence was to run concurrently or consecutively. Pursuant to *Sections 192 Magistrates' Court Act*, the norm would be should be that where a Magistrate fails to specify whether the sentence will run concurrently, it would be deemed to run consecutively. This means that, ideally, the Appellant/Accused will serve the sentence and also compensate the owners of the property. However, in the case before me, having found that there was no proof of compensation nor guidelines thereof on how that compensation was computed.

In my view the sentence was within the law in that a Magistrate can sentence an Accused to an imprisonment term as well as order him to compensate the complaint. In the current matter, however, there are issues connected to the compensation awarded. My understanding is that the Appellant is contesting the Trial Magistrate's sentencing order of giving the Accused 5 years imprisonment coupled with compensation. It is my considered opinion that it would be a miscarriage of justice for a Magistrate to award compensation without any guidelines. I therefore strike out the order for compensation. Ground 1 is allowed in part only.

## **GROUND 2**

Grounds 2, 3, 4, and 5 of the Appeal all relate to the issue of mitigation of sentence and the exercise of discretion by the trial Magistrate. I reiterate what I have already resolved in ground 1 that the trial Magistrate exercised her discretion judiciously and the sentence was within the ambits of Section 162 of the Magistrates Courts Act. Therefore, grounds 2, 3, 4 and 5 fail.

## **Whether the Appeal is competent**

As I noted in the introduction of this Judgment that Counsel for the Respondent raised an Objection in relation to the competence of the Appeal before Court. In her submissions, the State Attorney stated that the Appeal was filed out of time whereas the Appellant made no application for extension of time before filing the Appeal. She called the Court's attention to the fact that seeking extension of time is a legal requirement which cannot be dispensed with. Therefore, the State Attorney submitted that the Court should summarily dismiss the Appeal. The State Attorney relied on the provisions of Section 28 (1) and 31(1) of the Criminal Procedure Act Cap 23. In rejoinder, Counsel for the Appellant cited Section 30 of the Criminal Procedure Act on the premise that the provision imputes that imprisonment can be a ground of disability which I would exempt a convict from filing within the stipulated time. Further, that in view of the fact that the Appellant

was in detention on the 24<sup>th</sup> April 2012, when the sentence was passed against him in prison, he fell within the exception.

In the light of the above submissions, it is pertinent to note that in a letter dated 12.02.2013 addressed to the Registrar High Court Nakawa, the Appellant sought the assistance of Court to allow him to file his Appeal out of time. However, an extension of time to file Court documents is not done via a letter. There must be an Application of some sort. Even if it were, there is no correspondence from the Registrar to the Appellant in this regard.

The law relating to Appeals is that an Appeal is a creature of Statute. Pursuant to Section 28(1) Criminal Procedure Act, Cap 116, an appeal shall be lodged within a period of 14 days from the date of judgment from which the Appeal is preferred. Further, I have noted the submission of Counsel for the Appellant that Section 30 of the Criminal Procedure Act exempts an inmate from filing his appeal within time. My view is that the section provides a mechanism through which persons who are under incarceration may tender in their Notice of Appeal. This can be done through tendering the same to the Prison Officer. However, everything still has to be done within the stipulated period of 14 days. Section 30 provides: *'if the Appellant is in prison he or she may present any document relating to his or her Appeal to the officer in charge of the prison who shall then forward the document to the Registrar, and for the purpose of Section 28 on the date of the presentation, any such document shall be deemed to have been lodged with the Registrar.'*

According to the record, the Judgment in Criminal Case No. 106/2012 was delivered on the 24<sup>th</sup> April, 2012 which implies that the Appellant was obliged to file a Notice of Appeal within 14 days, which would fall on the 8<sup>th</sup> May, 2012 or seek leave to file his Appeal out of time. No such leave was sought. However, despite this defect, Article 126 (2) (e) Constitution of the Republic



of Uganda 1997 requires Courts to administer justice without undue regard to technicalities. It should be observed that the interests of justice require that I should admit this Appeal as if it was filed on time and consider it. The preliminary objection is therefore not sustained.

Consequently, in view of the above, I find that ground 1 of the Appeal is allowed in part; grounds 2, 3, 4, and 5 fail. Thus, the Appeal is allowed in part and fails as indicated.

Resultantly, the Accused should only serve the imprisonment term as meted out by the Trial Magistrate.

I so order.



Signed:

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**Hon. Lady Justice Elizabeth Ibanda Nahamya**

**J U D G E**

04<sup>th</sup> February 2014