

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPEAL No. 0027 OF 2016
(Arising from Arua Grade One Magistrates Court Criminal Case No. 0983 of 2014)

BABAYO ALEX **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Appellant was on 24th September 2014 before the Chief Magistrate’s Court of Arua at Arua charged with the offence of Assault occasioning Actual bodily Harm c/s 236 of *The Penal Code Act*. It was alleged that on 17th September at Arua Hospital Blood Bank Offices, he unlawfully assaulted a one Lalam Monica, causing her actual bodily harm. He was granted bail and the hearing of the case commenced on 7th May 2015 with the testimony of the complainant. Three other prosecution witnesses testified. The appellant then testified in his defence and called one other witness. The trial was conducted by the Grade One Magistrate of that court.

The prosecution case was briefly that the complainant and the appellant were together employed at the Arua Regional Blood Bank. On 18th September 2013 as the complainant and two other female workmates waited at their office for official transport to take them to Arua Public School for a blood donation exercise, the appellant came to them and began demanding for plasters and alcohol swipes in a menacing manner. When the complainant passed to him a book requiring him to make a proper requisition, the appellant instead began quarrelling accusing the complainant of behaving as if the supplies asked of her were her personal property. He eventually grabbed the complainant, slapped her on the cheek, kicked and boxed her onto the ground from where he continued to stamp on her. She sustained multiple injuries on the lips and right arm, as a result of

the assault. As her two other female fellow workmates intervened to stop the assault, the accused picked a chair and a stool threw them at the complainant. All this occurred within the laboratory. The complainant reported the incident to the police and the appellant was arrested and prosecuted.

The appellant's defence was briefly that on the fateful day, he was supposed to have been part of the team that was due to proceed to Arua Public School for a blood donation exercise but arrived late at 11.00 am only for purposes of picking the results of the blood donation exercise. He proceeded to Arua Public School only to find that plasters and alcohol swipes were in short supply. He sent a driver to pick new supplies only for the driver to return and inform them the complainant had refused to provide them insisting that one member of staff had to go personally and pick them. The appellant proceeded to the blood bank to pick supplies personally only to be asked to sign in a book which he refused to do unless the supplies were given to him first. He and the complainant descended into a quarrel. The complainant slapped him and got hold of his legs. He forcefully disentangled himself from her grasp and their other workmates present intervened and separated them. He denied having assaulted the complainant and instead reasoned she could have sustained the injuries as she knelt down to grab his legs.

Despite his defence, the trial court was satisfied that the prosecution had proved the case against him beyond reasonable doubt. He was accordingly convicted and sentenced to serve six months' imprisonment and to compensate the complainant in the sum of shs. 800,000/= payable within nine months from 27th October 2016. Being dissatisfied with the decision, the appellant initially appealed both conviction and sentence. At the hearing of the appeal, he abandoned all grounds in his memorandum of appeal which were against conviction and instead made an oral application for leave to appeal against sentence only by arguing the only ground left in the memorandum of appeal, challenging the sentence. The application not being opposed by the learned Senior Resident State Attorney, leave was duly granted to him to appeal against sentence only.

Submitting in support of that single ground, counsel for the appellant Mr. Muhammad Buga submitted that the sentence was harsh and excessive and ought to be set aside. For a trial court to award compensation, three factors must be satisfied; - the victim must have suffered material

loss or injury, such award must be recoverable by way of a civil suit and the court must have inquired into the ability of the accused to pay the compensation awarded. In the instant case, the record does not disclose that the complainant suffered any material loss or injury, and the court did not make an inquiry into the appellant's capacity to pay the amount assessed. There was no victim impact assessment and therefore the trial court did not have any material before it to offer guidance in its assessment of the amount to be awarded as compensation. The appellant in his mitigation disclosed that he had lost his job as a result of this offence, which he had only recently secured, and therefore did not have the means to pay any compensation. This was a minor offence that did not deserve a custodial sentence contrary to the sentence guidelines which discourage custodial sentences of convicts with many dependants. He should instead have been sentenced to a community service order.

In response, the learned Senior Resident State Attorney, Ms. Harriet Adubango submitted that since the maximum penalty for the offence of Assault occasioning Actual bodily Harm c/s 236 of *The Penal Code Act* is five years' imprisonment, a sentence of six months' imprisonment was neither harsh nor excessive, more especially since the complainant was assaulted at her place of work, within a laboratory. Regarding the order of compensation, she argued that the trial magistrate took into account all the three factors and had made a proper assessment of the appropriate award. Sufficient material was availed to the court during the submission in aggravation of sentence only that the appellant did not respond to that aspect during his *allocutus* and submission in mitigation of sentence. He had the opportunity to respond but chose not to. She prayed that the sentence be upheld.

The circumstances in which an appellate court may interfere with the sentence of a trial court were specified in *Kiwalabye Bernard v. Uganda, S. C. Criminal Appeal No. 143 of 2011* where the Supreme commented as follows;

The appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle.....The Court may not

interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial Court. (See *Ogalo S/o Owou v. Republic (1954) 24 EACA 270*).

This court therefore may interfere with the sentence imposed by the trial court only if it comes to the conclusion either that; (i) the sentence is excessive, given the background of the appellant and the circumstances of the offence; (ii) the sentence is illegal; or (iii) there was an error in a principle of sentencing which resulted in an unreasonable sentence. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles (see *R v Ball 35 Cr App Rep16*). This appeal will succeed only if the appellant can satisfy this court that one of these conditions applies to the sentence meted out to him. If the appellant shows that the trial court made an error in principle, failed to consider a relevant factor or overemphasised appropriate factors, this court in its appellate capacity can intervene. Ultimately, except where a trial court makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

On the other hand, this Court at the same time being a first appellate court, is under a duty to reappraise the evidence and draw its own inferences of fact, among others, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. (See: *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”). Since in this appeal the only ground raised regards the propriety of the sentence, reappraisal of the evidence will be restricted to those aspects which are relevant to the determination of the appropriate sentence.

The first aspect of the appellant’s argument is that the sentence of six months’ imprisonment is manifestly harsh and excessive. Sentencing remains one of the most delicate stages of the criminal justice process. Although this task is governed by provisions in *The Magistrates Courts Act* and *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, and although the objectives set out in those sources guide the courts and are clearly

defined, the process nonetheless involves, by definition, the exercise of a broad discretion by magistrates' courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing. Appellate courts give wide latitude to trial courts in matters of sentencing since they have, inter alia, the advantage of having heard and seen the witnesses. The sentencing court is for that reason in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives set out in the law and the sentencing guidelines.

That a sentence is harsh and excessive can be determined comparatively by considering the type and length of sentences generally given previously for that type of offence in which the circumstances are similar to the instant case and the background of the accused is similar by showing that the sentence represents a substantial and marked departure from the sentences customarily imposed for similar offenders who have committed similar crimes; or by demonstrating that the trial court ignored or placed too much emphasis on one of the sentencing principles, resulting in a disproportionate sentence or one that does not fit the crime or the offender in the circumstances as to amount to a wholly disproportionate penalty; or that the court failed to individualise the sentence by its failure to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence, such that all that was done was to punish the crime; or that for some other manifest reason, the punishment is demonstrably grossly disproportionate to what would otherwise have been appropriate. The appellant should be able to show that the sentence is startlingly or disturbingly inappropriate.

A lawful sentence of whatever description, magnitude or duration which is not disproportionate in itself or on the face of it would be so, if the sentencing range provided for by the law is indiscriminately applied without taking into account factors which would aggravate or mitigate the seriousness of the offence. Generally, a sentencing court is allocated wide latitude to dispense proportionate and fair punishment. However, a court's discretion in sentencing is not without limits, the sentence must comply with the legislation that applies to the offence and fall within the sentencing powers of the court. Some of the factors to be considered by the trial court at sentencing are outlined in section 133 (2) of *The Magistrates Courts Act* and Regulations 5 and 6

of *The Magistrates Courts Act* and *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* and they include; the character and antecedents of the convict, including any other offences admitted by him or her whether or not he or she has been convicted of such offences, denunciation (public criticism) of the unlawful conduct, deterrence to the offender and to others of a similar mind, protection of the public, rehabilitation of the offender, and reparation (make amends) for harm done to victims or to the community while promoting a sense of responsibility in offenders. Under section 172 of *The Magistrates Courts Act*, a magistrate's court may pass any lawful sentence, combining any of the sentences which it is authorised by law to pass. Furthermore, section 178 (2) of *The Magistrates Courts Act*, authorises magistrates court, to sentence a person liable to imprisonment instead to pay a fine in addition to or instead of imprisonment.

Proportionality is a limiting principle that requires that a sentence should not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. It is with such consideration that in *Uganda v. Ali Katumba [1974] HCB 117*, it was observed that there is a judicial practice of treating first offenders with lenience by granting them the option to pay a fine rather than imposing a custodial sentence in exercise of judicial discretion under the then section 192 (b) of the *Magistrates' Courts Act, 1970* (similar to the current section 178 (2) of *The Magistrates Courts Act, Cap 16*). This option though is more readily afforded a convict of a misdemeanour or a minor felony.

What length of imprisonment is appropriate in a case such as the instant one, a case with no unusual mitigating circumstances where an immediate custodial sentence cannot properly be avoided, will be a question which the sentencing Magistrate has far greater latitude to decide. Extremely short sentences, measured in days or weeks or months rather than years, may well be appropriate for first time offenders on whom any period of incarceration is likely to have a great punitive impact. It is, however, impossible to categorize the sort of circumstances which will be so exceptional as to justify departing from the general public expectation that violent crime ought to be punished by a term of imprisonment. Attaining the delicate balance which satisfies all considerations at sentencing is determined on a case by case basis as stated by the Supreme Court of Canada in *R. v. Lacasse, [2015] 3 SCR 1089*, thus;

Proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. Both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts..... There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. Thus, the fact that a judge deviates from a sentencing range established by the courts does not in itself justify appellate intervention.

I have considered the reasons given by the trial magistrate in imposing the custodial sentence which she stated as follows;

I have listened to both submissions of the prosecution and defence and I have also considered those of the victim.....The offence of assault is a very rampant offence within the jurisdiction of court that calls for a deterrent sentence. I have also considered the circumstances in which the offence occurred.....asking him to requisition for items is only standard procedure that does not amount to provocation. I have also had opportunity to look at P.F.3....I have had the opportunity of looking at the convict throughout the trial... he does not look remorseful whatsoever. As a deterrence therefore, I sentence the convict to serve a 6 months' custodial sentence...

It does not seem to me that the trial magistrate was labouring under any error of principle in the determination of the sentence or that there was such an error as resulted in the sentence being unreasonable. Counsel for the appellant has not demonstrated that the trial court ignored or

placed too much emphasis on one of the sentencing principles, resulting in a disproportionate sentence or one that does not fit the crime or the offender in the circumstances as to amount to a wholly disproportionate penalty. To the contrary, the trial record demonstrates an effort by the court to individualise the sentence by considering the relevant mitigating factors without placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence. The court sought not only to punish the crime but also the offender. I have not been furnished with any earlier decision in which the circumstances are similar to the instant case and the background of the accused is similar where the court imposed a different or lighter sentence and therefore there is nothing to suggest that the sentence represents a substantial and marked departure from the sentences customarily imposed for similar offenders who have committed similar crimes. I note that the maximum punishment prescribed by section 236 of *The Penal Code Act* is five years' imprisonment yet the sentence imposed is only six months' imprisonment. It is on the face of it a lawful sentence passed within the range of the court's sentencing powers as regulated by section 162 of *The Magistrates Courts Act*. The sentence reflects a consideration of all the relevant factors. The local situation factor did not clearly nor disproportionately magnify the exemplary focus of the sentence as to overshadow its individualised character.

Determination of a just and appropriate sentence is a highly individualised exercise. The primary sentencing factors for a court to consider are the protection of the public, the gravity of the offense, and the rehabilitative needs of the offender. I have considered the fact that this was a male professional physically assaulting a female professional at their place of work, in the presence of other workmates, and of all places, inside a laboratory; a place usually festured with corrosive and other dangerous chemicals and apparatus. One would expect a professional to make use of peaceful conflict resolution mechanisms in place at one's place of work. That the appellant resorted to physical confrontation instead, is a manifestation of a rather short temper, a fact suggestive of a high likelihood to offend in this way again. Personal deterrence inevitably had to play a part in sentencing the appellant, hence the imposition of a custodial sentence of such a duration as the court considered was reasonably proportionate to the gravity of the offence and would be likely to have a deterrent effect upon the appellant. I therefore agree with the learned trial Magistrate that the case was sufficiently serious to justify a custodial sentence.

As long as the trial court considered the proper factors and the sentence was within the statutory limits, the appellate court will not set it aside unless it is so excessive as to shock the public conscience. A sentence will be considered harsh and excessive if it has the tendency to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances of the case. Having found that the term of imprisonment imposed in the instant case is well within the limits of the maximum sentence and is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people, I have not found any reason to interfere with it.

The second limb of counsel for the appellant's argument is that in imposing the order of compensation, the trial court failed to take into account the three factors; - that the victim suffered material loss or injury, that such award is recoverable by way of a civil suit and inquiry into the ability of the accused to pay the compensation. He argued that the complainant did not suffer any material loss or injury, the court did not make an inquiry into the appellant's capacity to pay the amount and therefore came to an entirely erroneous conclusion regarding the amount assessed.

There are two aspects to this limb of the appellant's arguments; it questions the procedure by which the decision to order compensation was reached and at the same time the quantum of the amount assessed. In ordering the appellant to compensate the complainant, the trial court invoked its jurisdiction under section 197 of *The Magistrates Courts Act* which provides as follows; -

197. Order for compensation for material loss or personal injury.

- (1) 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.

This provision empowers a magistrate's court, in exercise of its criminal jurisdiction, to award compensation to any person who has suffered loss or injury by the offence, when in the opinion of the Court, such compensation would be recoverable by such person in a Civil Court. This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence. For those reasons, the word "may" in section 197 of *The Magistrates Courts Act* should be interpreted to be obligatory whenever in any criminal trial, it is proved that the complainant suffered material loss or personal injury in consequence of the offence committed for which substantial compensation is recoverable in a civil suit.

There are obvious advantages of allowing one court to deal with the criminal and civil liability of an injury caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim than a request for the order. It can be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

I would refer in this connection to Working Paper 5 of the Law Reform Commission of Canada, October 1974, where in dealing with restitution (which it conceives in wide terms covering and going beyond what is embraced section 197 of *The Magistrates Courts Act*), the Commission says (at p. 6) that "not only is restitution a natural and just response to crime, it is also a rational sanction". In proposing that "restitution ... become a central consideration in sentencing and dispositions" that it should merit foremost but not exclusive consideration, the Commission made a number of relevant observations (at pp. 7-8):

Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victim. Society gains from restitution in other ways as well. To the extent that restitution works toward self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not only by Parliament, the courts, police and correctional officials but also by ordinary citizens and potential victims.

Similarly, section 197 of *The Magistrates Courts Act* is a provision designed to accord civil justice to the victim within the criminal trial. By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

While the court has discretion to order compensation under this provision for injury caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of injury caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

For example in the Sudanese case of *Awad El Kad1 v. Mohammed Hussein Badran*, (1925) S.L.R., Vol. 1, 274, the appellant sued a group of fifty people for libel when they signed a petition which alleged he was not a suitable person to sit on the Traders Tax Assessment Board, which statement was defamatory of the appellant. He failed to recover compensation in a civil suit for defamation because the Court of Appeal was of the opinion that he did not suffer any special damages and could not be awarded general damages, because his character or reputation which was injured was sufficiently vindicated by criminal proceedings in which all signatories to the petition had been convicted and fined.

From the procedural perspective, the power to order compensation under section 197 of *The Magistrates Courts Act* is in my view subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused. That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the injury resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

In the instant case, the record of proceedings reveals that the complainant, who testified as P.W.1 narrated the type of injuries she sustained as having included “multiple injuries on the right arm, the lips / mouth and bruises.” P.W.2, an eyewitness to the assault, testified that the complainant “sustained injuries on the mouth and bruises arising out of the assault.” P.W.3, the Clinical Officer who medically examined the complainant for the injuries she sustained, testified that she sustained “laceration on the inner aspect of the upper lip, swelling of the gum of the lower jaw and bruises on both knees and on the right forearm. The injuries were soft tissue injuries amounting to harm. They were not life threatening and no obvious maim.” Although section 197 of *The Magistrates Courts Act* does not define “personal injury,” I take it to mean “serious bodily harm” or any hurt or injury, whether physical or psychological, that interferes in a

significant way with the physical or psychological integrity, health or well-being of the complainant.

The injuries revealed by this evidence amply established the fact that the complainant sustained such injuries. In the result I find that the prosecution placed before the trial court sufficient material on basis of which the court came to its finding that the complainant had sustained material personal injury in consequence of the offence committed for which substantial compensation was recoverable in a civil suit. The accused and his counsel had ample opportunity to cross-examine each of these witnesses. Since this evidence was introduced entirely during the prosecution case, the appellant was given ample opportunity to reply or respond to it, and to adduce such evidence as he may have deemed necessary, in rebuttal thereof. He failed to do either. On the facts of the present case, the order was appropriate in principle.

What was left for the court to determine was the quantum. The court does not appear to have expressed any specific reasons behind the quantum awarded. The reasons for the custodial sentence appear to have been the same reasons advanced for the order of compensation. The power to award compensation in a criminal trial is a most peculiar power. The court's sentencing powers are limited by section 162 (1) (b) of *The Magistrates Courts Act* to sentences of imprisonment for periods not exceeding ten years or fines not exceeding one million shillings or both such imprisonment and fine. Section 180 thereof further restricts the power to impose fines by prescribing that where the amount of the fine which may be imposed is unlimited it shall nevertheless "not be excessive," and lays down a guiding sliding scale in respect of comparable terms of imprisonment in default of payment of fines imposed. In contrast, the power to award compensation is not expressly restricted in a similar manner. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large.

Whereas the power to impose fines is limited by law, section 197 of *The Magistrates Courts Act* does not impose any such limitation and thus, this power should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a magistrate. There is nothing like a power without any limits or constraints. That is so even when a court may be vested with wide discretionary power, for even discretion has to be exercised only along well-

recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. An order for compensation should only be made with restraint and with caution. The court should be mindful that under this provision, the accused is deprived of many of the protections which he would have in an ordinary civil action. For instance, the convict does not really have notice of the claim beforehand and cannot defend it properly. He has no right to discovery by which he could attempt to elicit proper proof of the damage occasioned by his offence. Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly not intended to be in substitution for the civil remedy, the court should be slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. Section 197 of *The Magistrates Courts Act* is not to be used *in terrorem* as a substitute for or reinforcement for civil proceedings.

Section 197 of *The Magistrates Courts Act* reflects a scheme of criminal law administration under which injuries inflicted or property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability, and may be ordered by the criminal court to be returned to the victimised owner or that reparation be made by the offender, either in whole or in part under an order for compensation, where injury was inflicted. It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial magistrate to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The trial magistrate should have been mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, she would have been forced to prove her loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the

civil remedy, especially in cases of crime against property committed by persons against whom a civil condemnation is likely to be of some practical value.

For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the injury suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances and the court may allow a reasonable period for payment, if necessary by instalments. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation. Evaluation brings reasonableness not only to the exercise of power but to the ultimate conclusion. Evaluation in turn is best demonstrated by disclosure of the reasons behind the decision or conclusion. In that case, an appellate court will have the advantage of examining the reasons that prevailed with the court making the order. Conversely, absence of reasons in an appealable order deprives the appellate court of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own

The criteria which a court must consider in determining whether an order of compensation should be made in addition to another sentence passed have been set out by the Supreme Court of Canada in *R. v. Zelensky*, [1978] 2 S.C.R. 940. There Laskin C.J. stated at p. 961:

The Court's power to make a concurrent order for compensation as part of the sentencing process is discretionary. I am of the view that in exercising that discretion the Court should have regard to whether the aggrieved person is invoking s. 653 (*in pari materia* with section 197 of *The Magistrates Courts Act*) to emphasize the sanctions against the offender as well as to benefit himself. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. There are other factors that enter into the exercise of the discretion, such as the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss, although I do not read s. 653 as requiring exact measurement.

Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents. Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. “Where the amount lost by the victims of the appellant's criminal conduct is admitted it would not be sensible to require them to incur the additional expense of undertaking civil proceedings to establish their loss, nor do I believe that it would assist in the appellant's rehabilitation to permit him to put his victims to this additional trouble and expense” (aptly stated by Martin J.A. in *R. v. Scherer (1984)*, 16 C.C.C. (3d) 30, at p. 38). A victim of crime in a situation where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

Since the trial magistrate did not explain the reasons behind her assessment of the amount awarded as compensation, it is now incumbent upon this court to reconsider the evidence that was presented to her in the determination of whether or not the award was appropriate. I have reviewed the prosecution case and nowhere was evidence adduced regarding the costs incurred or losses suffered, if any, as a result of the injuries the complainant sustained. Since no clear evidence emerged in the course of the trial on basis of which a compensatory approach to the award of compensation on the principle of *restitutio in integrum* could be made, the trial court needed to conduct an inquiry, albeit summary in nature at the time of sentencing, to determine the paying capacity of the offender and thereafter to ascribe some reasons, which may not be very elaborate, for the amount awarded.

The record indicates that at the time of sentencing, the State attorney made the following submissions;

We pray for monetary compensation for the cost of treatment she underwent through (sic) as a result of the convict's acts. 1,000,000/= would be appropriate in the circumstances.

In response, counsel for the appellant submitted as follows;

... the convict had opted to settle the case, only that the complainant turned the settlement down....it cost the convict his first job where he was earning. Nevertheless, he has just gotten a new job not even one year old whereof he looks after his siblings...even the complainant has gone ahead to file a civil suit No. 0026 of 2016...according to the medical form, the complainant suffered only bruises, not to the extent the prosecution has said

Although on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence, however the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. Whereas the summary inquiry conducted by the trial court as indicated above yielded some information regarding the capacity of the appellant to pay compensation, it still failed to yield any evidence on basis of which a compensatory approach to the award of compensation on the principle of *restitutio in integrum* could be made. The submission by the learned State Attorney that the complainant had incurred costs of treatment to the tune of shs. 1,000,000/= was not supported by any evidence. The resultant order for compensation made in these proceedings was consequently somewhat arbitrary as to amount.

I have considered the quantum of compensation in light of the nature of the offence for which the appellant was convicted, the injury suffered the justness of claim by the victim, the ability of accused to pay, the fact that the complainant has already filed a civil suit seeking recovery of damages from the appellant over the same incident and found that an award of shs. 800,000/= that proceeded on an apparent *restitutio in integrum* basis was misconceived. Although the court allowed a reasonable period for payment, I find the award manifestly excessive. In making a compensation order, an offender's means should be taken into account but should not be the controlling factor in every case. The violent acts of the appellant warranted imposition of the order, even though the appellant's means were minimal at the time of sentencing, as an effective means of rehabilitating the appellant by quickly making him directly responsible for making

restitution to the complainant and thereby help to preserve the confidence of society in the criminal justice system. On that basis, I hereby set aside the order of shs 800,000/= awarded as compensation to the complainant by the trial magistrate and in place thereof order the appellant to pay shs. 300,000/=. The period within which the payment is to be made remains as ordered by the trial court.

In the final result, the appeal is allowed in part in so far as the order for compensation is set aside but varied so as to impose an order directing compensation to be paid by the appellant to the complainant in the sum of shs. 800,000/= payable within nine months from the date of conviction. The appellant is to serve the custodial sentence imposed by the trial court.

Dated at Arua this 23rd day of December 2016.

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Stephen Mubiru
Judge