

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
Criminal Appeal No. 55 of 2020
(ARISING FROM CRIMINAL CASE NO. 690 -2019)

OCHOL CHARLES:.....APPELLANT

VERSUS

UGANDA :.....RESPONDENT

JUDGMENT

BEFORE HON. JUSTICE TADEO ASIIMWE

Introduction:

This appeal arises from the Judgement and sentence of His Worship Okumu Jude, grade one Magistrate Makindye court dated 30/10/2019 in Criminal Case no. 690 - 2019.

The appellant was charged with another on three counts with the offence of Burglary C/S 254(1), 261, Theft C/S 254 and 261 and conspiracy to commit a felony C/S section 390 of The Penal Code Act.

The trial magistrate found the Appellant and another guilty on both counts of burglary and theft and not guilty for conspiracy to commit a felony. The appellant was convicted and sentenced to three years' imprisonment on each count to run consecutively.

Being dissatisfied and aggrieved by that decision, the appellant appealed to this court raising 9 grounds but amended the memorandum of appeal to raise only one ground as follows; -

1. That the learned trial magistrate erred in Law and in fact in sentencing the appellant to serve a sentence of 3 years' imprisonment for each of the two counts to run consecutively (making it 6 years).

Although the appellant's counsel framed only one ground in relation to the sentence, it raises two issues; -

1. Whether it was illegal for the trial magistrate to order that both sentences run consecutively.
2. Whether the trial magistrate did not consider the remand period.

Both counsel made written submissions which I shall consider in this judgement.

Counsel for the appellant submitted at length arguing that the trial magistrate ignored the appellants request his allocutus and instead sentenced the appellant to 6 years being 3 years on each count to run consecutively thus making the sentence too harsh. He further submitted that the appellant had spent 5 months on remand which the trial magistrate did not consider hence passing an illegal sentence against the sentencing guidelines. He finally prayed that this court considers the remand period and set aside the conviction and sentence of the trial magistrate.

In response the learned state attorney raised a preliminary objection stating the memorandum of appeal was defective for reasons that the ground of appeal was too general.

In the alternative, she submitted that the trial magistrate considered all the mitigating factors and allocutus in his sentence. She further submitted that the maximum sentence of burglary is 10 years and that the sentence of 3 years on each count was quite lenient. She however conceded that the trial magistrate did not consider the remand period and that court should give a proper sentence.

RESSOLUTION.

Preliminary objection.

I am aware of the principle of law that grounds of appeal should be concise none argumentative and should include matters of law or fact in regard to which the court appealed from is alleged to have averred.

In my opinion I find nothing wrong with the ground of appeal raised. I wonder if the state attorney would have preferred duplicated ground or expected the appellant's

counsel to set mark grounds of law and fact. The ground of appeal is not general in nature as it raises specific issues of law and facts.

I therefore find no merit in the preliminary objection and the same is hereby overruled.

I shall therefore proceed to determine the merits of this appeal.

Before I can resolve the issues raised in the above ground of appeal and submissions of both counsel, *it is a principle of law that "that sentence is a matter of discretion an appellate court will not interfere with the exercise of discretion of a sentencing judge unless the sentence imposed is illegal or manifestly excessive. See **Kyalimpa Edward vs Uganda supreme court criminal appeal no.1 of 1995.***

Bearing this in mind I shall proceed to resolve the 1st issue arising out of the ground of appeal. Whether the trial magistrate considered mitigating factors and whether it was illegal for the trial magistrate to order that both sentences run consecutively.

The general principle in sentences is that court must consider mitigating factors while sentencing.

In this appeal, I have perused the sentence in question and I shall quote it verbatim "*.... the court has considered both submissions of the state and allocutus more specifically that they are first time offenders....*"

It is not mandatory that the sentencing court must restate everything stated in mitigation and allocutus in his sentence as long as he/she mentions that he has considered them and gives reasons for his sentence.

I find that the trial magistrate ably considered mitigating factors and allocutus of the appellant and gave reasons for his sentence.

On the issue of a consecutive sentence, it is a principle that whether a judge opts for a consecutive or a concurrent running of sentences, the reasoning should be on record.

Be that as it may, it is a principle of law that in ordering consecutive sentence, the total sentence must be proportionate to the offence and the circumstances surrounding each case.

The above principle is reflected in **Section 8** of the Sentencing guidelines which provide that:

(1) *Where the court imposes consecutive sentences, the court shall first identify the material part of the conduct giving rise to the commission of the offence and determine the total sentence to be imposed.*

(2) *The total sum of the cumulative sentence shall be proportionate to the culpability of the offender.*

Further, **Section 175 of the Magistrates Courts Act Cap 16** provides that:

175. Sentences in cases of conviction of several offences at one trial.

(1) *When a person is convicted at one trial of two or more distinct offences, the court may sentence him or her, for those offences, to the several punishments prescribed for them which the court is competent to impose, those punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently.*

(2) *In the case of consecutive sentences it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.*

(3) *For the purposes of appeal or confirmation the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.*

The import of the above law is that a trial judge or magistrate has discretion to sentence a convict on different count for sentences to run concurrently or consecutively depending on the circumstances of each case.

However, in cases where a person has been charged with and convicted on more counts involving the same transaction, an order for sentences to run concurrently would be most appropriate in my view.

Court in the case of **SSENTEZA MOHAMMED VS UGANDA CRIMINAL APPEAL NO 150 OF 2018** court held as follows; -

"We note that with the procedure adopted, if the appellant had been hypothetically found in possession of various forged notes amounting to 1000 severable forged notes, he would be charged with 1,000 counts and if sentenced to 1 year on each count as in this appeal, he would be liable to serve 1000 years if the court does not

order otherwise that the sentences be served concurrently. It was an innovative way of multiplying the counts and was erroneous in law. The appellant was guilty of a specific offence of being in possession of several forged notes. The contents of a charge are provided for under section 85 of the MCA while joinder of counts is provided for under section 86 of the MCA. In the premises, the learned first appellate court judge ought to have set aside the numerous sentences for the 10 counts of the charge of being in possession of forged currency notes.

I agree with the above holding. Although in the present case Burglary and theft are provided for by different sections of the penal code act, one is the result of the other and are a result of the same transaction.

In the case of **R v Sawedi Mukasa (Criminal Appeal No. 182 of 1945) [1946] EACA** which has almost similar facts court held as follows;

The practice in cases where a person has been charged with and convicted on two counts involving the same transaction, one for burglary or housebreaking and one for stealing has been to direct the sentences to run concurrently. In the present case the accused, a person with a long list of previous convictions, was found guilty on two counts, one for burglary and one for stealing, and sentenced to consecutive sentences of 7 years on each count. While we recognize that the accused is a hardened criminal deserving of a severe sentence, our view is that where, as here, both offences have been committed at the same time and in the same transaction, the practice referred to should be adhered to save in very exceptional circumstances, where, for instance, a person breaks and enters a house and commits the felony of rape therein where an order that the sentences on both counts might be directed to run consecutively. In this case we increase the sentence on the charge of burglary to 10 years, allow the sentence for theft 7 years to stand, and direct that the sentences shall run concurrently.

I entirely agree with the above holding. In the present case, although the trial magistrate gave the reason for ordering that sentences of three years on each count to run consecutively due to the fact that the appellant had done the unspeakable to break and steal from the church was not justification enough to order sentences to run consecutively in principle.

However, this court is cognizant of the trial magistrate's reasons for sentence and indeed to serve 3 years on each count of Burglary and theft for both to run concurrently would be too lenient considering the circumstances of the case where the convict stole from the church and disrupted the activities. In addition, the fact

that the maximum sentence of burglary as per section 261 of the penal code Act is 10 years' imprisonment.

I shall therefore increase the sentence on the charge of burglary to 6 years, allow the sentence for theft 3 years to stand, and direct that the sentences shall run concurrently.

I shall now proceed to resolve the issue Whether the trial magistrate did not consider the remand period.

Article 23(8) of the Constitution provides:

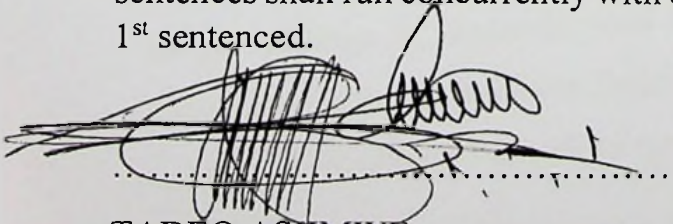
'Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.'

This Court has recently held in **Rwabugande Moses vs. Uganda Criminal Appeal No 25/2014**. that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Further that, consideration the time spent in lawful custody means deducting that period from the final sentence.

In the lower court case from which this appeal arises, the trial magistrate took considered all mitigating factors but did not deduct the remand period of 5 months from the sentence which was an error.

I therefore take in to account the remand period of 5 months and deduct it from 6 years sentence for Burglary and 3 years sentence for Theft

In conclusion, this appeal is allowed and the appellant shall serve a sentence of 5 years and 7 months for Burglary and 2 years and 7 months for Theft. The said sentences shall run concurrently with effect from 30/10/2017 when the appellant was 1st sentenced.



TADEO ASIMWE

JUDGE

31/03/2022