5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION)
CRIMINAL APPEAL NO. 053 OF 2024.
[Arising from Makindye Court Criminal Case No. 1584 of 2023]

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ATWINE FRANK::APPELLANT

VERSUS

15 **UGANDA:::ACCUSED**

JUDGMENT

20 **BY JUSTICE GADENYA PAUL WOLIMBWA**

Introduction.

This Appeal is against the judgment of H/W Arinaitwe Elisha, Magistrate Grade I, delivered on October 11th 2023. The appeal is against the sentence.

25 Frank Atwine, hereinafter called the Appellant, was charged with Personating a Public Officer c/s 92 (b) of the Penal Code Act and Unlawful Possession of Government stores c/s 316 (2) of the Penal Code Act.

The prosecution alleged that the Appellant, on 5th January 2023 at Kibiri Police Post, Makindye, falsely represented himself to be a person employed in the Public Service as ASP Atwine Allan, Regional Flying Squad Commander, Kampala Metropolitan South, whereas not. In count II, the prosecution alleged that 30 the Appellant was found in possession of two pairs of police uniforms, a pair of PIPS of the Superintendent of Police, and a black belt of the Uganda Police Force on 4 September 2023 at Sanga Buwonzi in Wakiso district, which were suspected of having been stolen or unlawfully obtained. The Appellant pleaded guilty to all the charges. In Count I, he was sentenced to three years' imprisonment and in Count II, to two years' imprisonment. The court ordered the sentences to be served consecutively.

35 The Appellant, being aggrieved with the sentence, filed the present appeal.

Ground of Appeal.

The learned Trial Magistrate's sentence was harsh and excessive in the circumstances, occasioning a miscarriage of justice.

40 **Representation.**

The Appellant was self-represented, while Ms. Apolot Joy Christine, a Senior State Attorney in the Office of the Director of Public Prosecutions, represented the Respondent.

Arguments of parties.

The Appellant told the court that the sentence imposed on him was excessive and harsh, given that he was a first offender and ignorant about court procedures. He asked the court either to grant him a lenient sentence or to set him free since he had spent nine months on remand so that he could go back and attend to his ailing mother.

The Respondent submitted that since the Appellant, in count 1, had been charged under repealed law, the conviction and sentence should be set aside. Regarding the second count, the Respondent asked the court to review the sentence if the Trial Magistrate did not follow the Sentencing Principles.

Duty of first appellate court.

The duty of a first appellate court is well articulated in **Dusabe alias Musamabende v Uganda (Criminal Appeal No. 70 of 2016) [2022] UGCA 59 (3 March 2022)**. In this case, the Court of Appeal held that:

It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and to draw our conclusions about the law and facts of the case, bearing in mind that we did not have the opportunity to observe the witnesses testify, in assessing their credibility. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13- 10, Bogere Moses v Uganda [998] IJGSC 22 and Kifamunte Henry v [Jsanda tl998I L] GSC 20.

I will respectfully adopt and follow the guidance of the Court of Appeal in dealing with this appeal.

The role of the first Appellate Court in sentencing.

In **Livingstone Kakooza Vs Uganda SC Criminal Appeal No. 17 of 1993**, the Supreme Court held that:

An Appellate Court will only alter a sentence imposed by a trial court if it is evident it acted on a wrong principle or overlooked a material factor or if the sentence is manifesting excessive in view of the circumstance of the case. Sentences imposed in previous cases of a similar nature, while not being precedent, do afford material for consideration. See Birungi Moses Vs Uganda Cr. Appeal 172/2014 (COA), 2014 UG CA 51 (18 December 2014).

I will also equally abide by the Supreme Court when reviewing the sentence imposed on the appellant.

Consideration of the Appeal.

Before delving into the merits of the appeal, I noted that the Appellant, in count I, was charged with Personating a Public Officer c/s 92 (b) of the Penal Code Act. However, this section of the Penal Code Act was repealed by Section 69 of the Anti-Corruption Act (Act 6/2009). An accused person cannot be charged under a non-existent or repealed law. Such charges are not tenable. This being the case, the charge against the appellant cannot stand. The Appellant is, therefore, acquitted of this charge, and the sentence of three years imposed against him is hereby set aside.

I will now address the merits of the appeal regarding the severity of the sentence imposed on the appellant in the second count.

The Appellant was charged with being in Possession of Government Stores c/s 316 (2) of the Penal Code Act. This offence is a misdemeanour and attracts a maximum sentence of two years' imprisonment under Section 22 of the Penal Code Act. The Trial Magistrate sentenced the Appellant to the maximum sentence of two years' imprisonment. In sentencing the Appellant, the Trial Magistrate considered the following mitigating factors: -

a) The convict pleaded guilty and saved the court's time.

b) The convict was very remorseful.

The Trial Magistrate also considered the following aggravating factors: -

a) Being conversant with court processes, the convict pleaded guilty to escape a severe sentence.
b) The convict falsely claimed to be the son of Justice Emmanuel Baguma.
c) And that the convict was a habitual offender who deserved a deterrent sentence.

The Appellant contended that the sentence imposed on him was harsh and excessive, given that he pleaded guilty, was a first offender, and was remorseful. In the circumstances, he requested the court to give him a lenient sentence so he could go home to look after his ailing mother. The Respondent asked the court to review the sentence if it found that the Trial Magistrate did not follow the Sentencing principles.

As the Supreme Court observed in **Livingstone Kakooza vs Uganda SC Criminal Appeal No. 17 of 1993**, an Appellate court will rarely interfere with the discretion of the trial court in sentencing the convict because it is the court that interacted with the convict, knows him well, and, in that regard, is in the best position to sentence him. An Appellate court will only interfere with the sentence in any of the following circumstances:

a) Where the trial court failed to exercise its discretion or abused it.

b) Where the trial court failed to consider the principle of sentencing.

c) The sentence imposed is manifestly excessive or low as to amount to injustice.

d) The sentence imposed is unjust or illegal.

e) The trial court looked over a material fact when sentencing the convict. *See* **Kiwalabye Bernard versus Uganda SCCA 143/2001**.

I have considered the Trial Magistrate's reasons for giving the Appellant the maximum sentence. The reasons are generally convincing and appropriate given that the Appellant meticulously executed the offence by consciously and willfully securing the uniforms of the Uganda Police Force to further his criminal enterprise. The Appellant dared to secure police uniforms that any law-abiding citizen would hesitate to acquire. I am sure the Appellant used the uniforms to commit offences and disabuse the legal process for his benefit. For these reasons, the Appellant, therefore, deserved a deterrent sentence.

In sentencing the Appellant, I note that the Trial Magistrate never considered the one month and nineteen days he had spent on remand as directed by the Constitution. Article 28 (3) of the Constitution directs the court to deduct the period a convict has spent on remand from the final sentence. A sentence that does not consider the period spent on remand is illegal and, as directed by the Supreme Court in **Rwabugande vs Uganda [2017], UGSC 8 (3 March 2017)**, should be set aside. Therefore, since the Trial Magistrate did not deduct the period the appellant had spent on remand from the sentence, the sentence imposed on the Appellant is illegal and set aside. The Appellant will be sentenced afresh.

120 In resentencing the Appellant, I found that the actions of the Appellant were high-handed, meticulously executed, daring, and a great source of insecurity and harm to the public. From the admitted facts, the Appellant was using the uniforms to pass around as a Police Officer to the extent of assuming the identity of a serving police officer. The Appellant also used the uniform to harass and intimidate the public for his own selfish and unlawful interests. Given the level of preparation, planning and risks taken by the Appellant, he does not deserve a lenient sentence. The Appellant rightly deserves a deterrent sentence, but 125 being a first offender, he will not get the maximum sentence, usually reserved for the worst offenders. I consider a sentence of eighteen months' imprisonment appropriate for him. However, since the Appellant spent one month and nineteen days on remand, I will deduct this period from the sentence. The Appellant is, therefore, sentenced to sixteen months and eleven days' imprisonment.

Decision.

130 The Appeal is allowed with the following orders;

a) The appellant's conviction on a charge of Personating a Public Officer, c/s 92 (b) of the Penal Code Act, is set aside.
b) The sentence of the Trial Magistrate imposed on the Appellant in count II is illegal and set aside.
c) The Appellant is sentenced to sixteen months and eleven days' imprisonment for being in 135 possession of government stores c/s 316 (2) of the Penal Code Act.

It is so ordered.

Gadenya Paul Wolimbwa
JUDGE
140 5th June, 2024

The judgment was delivered in open court in the presence of Mr Amerit Timothy, Senior State Attorney, who was holding brief for Ms. Apolot Joy Christine, the Appellant, and Mr Kayemba, Court Clerk.

145 Gadenya Paul Wolimbwa
JUDGE
5th June 2024

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