

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA**

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**AT KAMPALA**

**CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.**  
**HON. LADY JUSTICE C.N.B. KITUMBA, JA.**  
**HON. MR. JUSTICE S.B.KAVUMA, JA**

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**CRIMINAL APPEAL NO.86 OF 2007**

**DONG YUN KIM** ..... **APPELLANT**

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**VERSUS**

**UGANDA** ..... **RESPONDENT**

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*[Appeal from the decision of the High Court of Uganda, (Tinyinondi, J)  
dated 17/9/2007 in Criminal Appeal No.11 of 2007]*

**JUDGEMENT OF THE COURT**

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This is a second appeal by Dong Yun Kim, the appellant, from the Judgement of the High Court, whereby his appeal from the decision of the trial magistrate against conviction and sentence was summarily dismissed.

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The appellant was charged with two counts. On count 1 of assault, occasioning bodily harm, contrary to section 236 of the Penal Code Act. On count II, he was charged with doing grievous harm, contrary to section 219 of the Penal Code Act. On 25<sup>th</sup> June 2007, he was convicted as charged and sentenced to 6 months imprisonment on the first count and to 18<sup>th</sup> months imprisonment on the second count.

The sentences were to run concurrently.

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Appellant's counsel filed a notice of appeal on his behalf, which ended with the following sentence.

***“The appellant’s counsel desires to peruse the record of the lower court  
before formulating the grounds of appeal”***

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The memorandum of appeal was filed in court apparently on 26/6/2007. It ended with the following sentence.

***“The appellant intends to file a supplementary ground of appeal after perusing the record of proceedings”***

The grounds of appeal which were filed read as follows –

- 5           ***“1. The learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence of the defence thereby arriving at wrong decision.***
- 10           ***2. The learned Trial Magistrate erred in law and fact when he completely ignored the grave inconsistencies and contradictions of the prosecution witnesses thereby arriving at a wrong decision.***
- 15           ***3. The fair hearing of the appellant’s case was compromised when the Trial Magistrate personally approached the appellant and entered into negotiations between the appellant and complainant.***
- 20           ***4. The fair hearing of the appellant’s case was compromised when the Trial Magistrate divulged the result of the judgment to the appellant before the said judgment was delivered.***
- 25           ***5. The learned Trial Magistrate erred in law and fact when he indulged his mind in speculation and conjecture as to the alleged cause of the complainant’s injury to convict the appellant which was not supported by evidence on record.***
- 30           ***6. The learned Trial Magistrate misdirected himself when he relied on personal observations to hold that the injuries on the complainants bodies were a direct consequence of the alleged appellant’s attack on them, thereby arriving at a wrong decision.***
- 35           ***7. The Trial Magistrate erred in law and fact when he shifted the burden of proof upon the appellant.***
- 40           ***8. IN THE ALTERNATIVE BUT NOT WITHOUT PREJUDICE TO THE A FOREGOING, the learned trial Magistrate passed a harsh and excessive sentence in the circumstances.***
- 45           ***9. The learned Trial Magistrate erred in law by flouting the sentencing principles by his failure to order an alternative of a payment of a fine to a custodial sentence in the circumstance”.***

On 17<sup>th</sup> September 2007, the appeal came up for hearing in the High Court for the first time. The appellant’s counsel sought for an adjournment so that he could peruse the certified copy of the record of the proceedings that he had received on 12<sup>th</sup> September, 2007 and file supplementary grounds of appeal. The learned judge declined to grant the adjournment. He dismissed the whole appeal according to section 17 (2) of the Judicature Act.

Dissatisfied with the above decision, the appellant has filed his appeal to this Court on two grounds namely: -

- 5           1. *That the learned Appellate Judge erred in law and fact when he misdirected himself as regards the application and interpretation of S.17 (2) of the Judicature Act.*
- 10           2. *That by summarily dismissing the appellant's appeal, without a thorough evaluation of the facts at hand, the learned Appellate Judge reached an erroneous decision which is tantamount to a miscarriage of justice to the prejudice of the appellant.*

He prayed this Court to allow the appeal and make an order that Criminal Appeal No.11 of 2007 be heard on its merits.

15 During the hearing of the instant appeal, the appellant was represented by learned Counsel, Mr. Henry Kuunya and learned Senior State, Ms. Annete Koote appeared for the respondent. Counsel for the appellant argued the two grounds separately whereas the respondent's counsel argued the two grounds jointly.

20 Mr. Kuunya's complaint on ground one was that the learned appellate judge erred in law and misapplied the provisions of section 17 (2) of the Judicature Act (Cap 13). He submitted that the section gives the High Court supervisory powers over Magistrates' Courts. He argued that since the appellant had already been tried and convicted by the Magistrate's Court, the case has been removed from that jurisdiction. According to counsel, the appeal was coming for hearing before  
25 High Court for the first time. There was, therefore, no delay to be curtailed. The judge was wrong to dismiss the appeal under section 17(2) of the Judicature Act.

The Senior State Attorney supported the learned appellate judge's decision. She contended that the judge in dismissing the appeal was curtailing delays. It was her strong argument that the  
30 record of proceedings in the lower court was ready by 2/7/2007. She argued that it is the usual practice that counsel for the appellant must have a record of proceedings before applying for bail. In that case appellants' counsel was able to file a detailed memorandum of appeal on 2/7/2007, although the appeal was coming for hearing for the first time. She argued that appellant's Counsel was negligent and was trying to delay the hearing of the appeal. The learned appellant  
35 judge was justified to dismiss the appeal in order to curtail the delays.

We have carefully listened to both counsel, perused the record and considered the relevant law. Apart from the submission of the Senior State Attorney from the bar, there is no evidence on record that appellants' counsel received the copy of the record of proceedings before 12<sup>th</sup> September, 2007. The letter from the Deputy Registrar, informing counsel for the appellant that the record of proceedings in Criminal Appeal No.11 of 2007, Dong Yun Kim Vs Uganda was ready, is dated 12<sup>th</sup> September, 2007. Counsel for the appellant endorsed receipt of the same on the same date. It is appreciated that Mr. Ojok who appeared for the respondent stated that he received his certified copy of the record of proceedings on 2/7/2007. However, that is no proof that counsel for the appellant received his copy on the same day or was in a position to do so on that day.

We are convinced that, the appellants' counsel could not have formulated the supplementary grounds of appeal as argued by the Senior State Attorney.

The appellant has the Constitutional right under Article 28 (3) (c) of the Constitution to adequately prepare his appeal. His counsel indicated on the notice of appeal and on the memorandum of appeal that he wished to peruse the certified copy of the proceedings in order to file supplementary grounds of appeal. He was entitled to such a facility. In the appeal before us, it was necessary for the appellant to have a fair trial.

Regarding the negligence of his counsel, which counsel for the respondent has eluded to, there is no evidence on record to prove that. However, even if counsel was negligent that is no good reason to penalise the appellant and refuse him his constitutional right. The law is now well settled that the mistake of counsel should not be visited by court on his client.

Section 17 of the Judicature Act provides –

“17,

***supervision of magistrates courts.***

- (1) ***The High Court shall exercise general powers of supervision over magistrates courts.***
- (2) ***With regard to its own procedure and those of the magistrates courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays,***

*including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.”*

5 We appreciate the submissions by appellant’s counsel that the learned appellate judge misapplied the provisions of section 17 (2) of the Judicature Act. This caused a miscarriage of justice to the appellant, as his appeal was not heard on merits.

We shall not deal with the second ground of appeal as the above disposes of the whole appeal.

In the result, the appeal is allowed.

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It is hereby ordered that the record of appeal in Criminal appeal No.11 of 2007 be remitted to the High Court for trial by another judge. The appellant is currently on bail and should continue being so on the same terms.

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**Dated at Kampala this 29<sup>th</sup> day of April 2008.**

**L.E.M. Mukasa- Kikonyogo**  
**DEPUTY CHIEF JUSTICE**

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**C.N.B. Kitumba**  
**JUSTICE OF APPEAL**

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**S.B.K. Kavuma**  
**JUSTICE OF APPEAL**