

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 0032 OF 2023

ARISING FROM THE CHIEF MAGISTRATES’ COURT OF KIRA CRIMINAL CASE

10

NO. 687 OF 2022

OLUKA CAROLYNE MICHEAL APPELLANT

Vs.

UGANDA RESPONDENT

15

JUDGEMENT

BEFORE HON. JUSTICE GADENYA PAUL WOLIMBWA

1.0. Introduction

On 12th April 2023, the Appellant was convicted on his guilty plea by H/W Roselyn Nsenge, the Chief Magistrate of Kira Court, for obtaining money by pretences contrary to section 305 of the Penal Code Act. At trial, the prosecution case was that in January 2022, the Appellant at Nsasa Zone in Wakiso, with intent to defraud the complainant (James Kamulindwa), obtained 18,000,000/= by falsely pretending that he was going to give him a contract to supply murram to Lagan Doft Namirembe Ltd whereas not. On 18th May 2023, the Appellant was sentenced to Three (3) years imprisonment. He was also ordered to pay the complainant compensation of UGX18M.

Dissatisfied with the sentence, the Appellant filed a Notice of Appeal on 11th September 2023 (approximately three months and 29 days after the decision was made). Until 31st January 2024 (the day for hearing the Appeal), No Memorandum of Appeal had been filed by the Appellant. Being an unrepresented Court in its discretion, the Appellant triggered Article 126(2) (e) of the

Constitution, which obliges the court to promote substantive justice over procedural regularities. The Appellant orally argued his grounds of Appeal, including:

1. The Sentence was harsh and excessive in light of the Mitigating factors like poor health and a father to 3 children.
- 35 2. The sentence was illegal because the period spent on remand was not calculated off the sentence.

2.0. Issue for Determination

1. Was the Sentence of 3 years' imprisonment harsh, excessive, and illegal?
40

3.0. Determination of Issues

Issue: Was the Sentence of 3 years harsh, excessive, and illegal?

Under Section 34 (1) of the Criminal Procedure Code Act, an appellate court can only interfere with a sentence if it appears that the lower court acted on the wrong principle or overlooked
45 some material facts or if the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

In the instant case, the Appellant was sentenced to three years' imprisonment for the Offense of Obtaining Money by False Pretenses contrary to Section 305 of the Penal Code Act. The Trial Chief Magistrate mutually considered the Aggravating and Mitigating factors in sentencing the
50 Appellant. At page 5 of the record, the Trial Magistrate stated as follows:

*The convict has not wasted courts' time however, given the nature of the offence. I am inclined to sentence the convict to 3 years' imprisonment given the nature of the offence and how it was committed inclusive of the period spent on remand. The convict requesting court to be given an opportunity to pay back the lost money to the complainant but even when court waited for the
55 convict to pay back for over 6 months before sentencing, the convict abused this opportunity.*

As formerly mentioned, sentences can only be set aside on appeal if the sentence is either manifestly harsh and excessive or illegal.

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions provides for thirty months' imprisonment as the starting point for the offence of obtaining money by false pretences. However, depending on the aggravating and mitigating factors, the court may sentence the convict to as low as six months' imprisonment or the maximum sentence of five years. In the lower court, the trial Chief Magistrate considered the following aggravating factors in sentencing the Appellant: the nature of the offence, the way the offence was committed, and the failure of the Appellant to compensate the complainant, even after the court had given him ample time to make the restitution. Regarding the mitigating factors, the court considered that the Appellant had pleaded guilty and saved the court's time and resources.

Having weighed the aggravating and mitigating factors, the court sentenced the Appellant to three years' imprisonment, six months above the mid-range sentence for obtaining money by false pretences. The sentence imposed by the Trial Magistrate is appropriate for the Appellant, considering the gravity of the offence, the meticulous nature with which the Appellant planned the offence, and the dangers white-collar crime poses to the community. The Appellant also abused the trust reposed in him by taking advantage of the complainant. He also obtained financial benefits, albeit unlawful, for his selfish reasons. Additionally, the Appellant failed to return the complainant's money to amicably resolve the case even after giving him a window of opportunity.

If the Appellant wished the court to exercise mercy on him as a father of three children, he could have shown more urgency in taking responsibility by undertaking to compensate the complainant without further delay. However, in court, I observed that the Appellant was not remorseful as he kept disputing the lower court's judgment even when he had been convicted on his guilty plea. A court is duty-bound to exercise its mercy if the convict shows remorse. A remorseful apology communicates self-condemnation of the behaviour and willingness to pay restitution to return the complainant to the pre-offence state. In criminal law, a convict who wishes to benefit from the court's mercy must acknowledge that he wronged the complainant. He must unequivocally accept that he wronged the complainant. He must offer to pay restitution and must apologise unconditionally. Considering that the Appellant was not remorseful and considering that the Trial Chief Magistrate considered the aggravating and mitigating factors in sentencing the Appellant. Considering that the sentence imposed is within the sentencing range and is neither

outrageously high nor low, I see no reason to interfere with the sentence. The Appellant shall, therefore, serve a sentence of three years less the time spent on remand.

90 It is a well-established legal principle that a sentence arrived at without considering the period spent on remand is illegal for failure to comply with a mandatory constitutional provision under Article 23(8) of the Constitution.

Article 23(8) provides that:

95 *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.*

In **Rwabugande Moses v Uganda, SCCA No. 25 of 2014**, the Court held that:

100 *...we have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula. It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence...We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on*

105 *remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence.*

In the instant case, the Trial Magistrate stated:

110 *... I am inclined to sentence the convict to 3 years' imprisonment given the nature of the offense and how it was committed inclusive of the period spent on remand...*

Such a generally phrased sentence is ambiguous and raises doubt in a reader's mind as to whether the court accounted for the remand period in arriving at the final sentence. The record shows the Appellant was remanded on 21st October 2022 and sentenced on 18th May 2023. This means the Appellant spent approximately six months and 29 days on remand. This period spent

115 on remand shall be deducted from the sentence of three years' imprisonment imposed on the

Appellant for Obtaining Money by False Pretenses. The Appellant shall, therefore, serve a net sentence of two years, five months and one day.

Before I take leave of this matter, my attention has been drawn to an illegality in the Warrant of Commitment of the Appellant where it is stated as follows:

120 *And was sentenced to 3 years' imprisonment and order to compensate the complainant after serving the sentence.*

Perusal of the record reveals that the Trial Chief Magistrate never ordered compensation. As one of the aggravating factors considered, she simply stated that:

125 *The convict requesting court to be given an opportunity to pay back the lost money to the complainant but even when court waited for the convict to pay back for over 6 months before sentencing, the convict abused this opportunity.*

Nowhere did she make an order for Compensation.

Section 34(2) of the Criminal Procedure Code Act provides that:

130 *Subject to subsection (1), the appellate court on any appeal may—(a)reverse the finding and sentence, and acquit or discharge the appellant, or order him or her to be tried or retried by a court of competent jurisdiction;(b)alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence by imposing any sentence provided by law for the offence; or(c)with or without any reduction or increase and with or without altering the finding, alter the nature of the sentence.*

135 An Appellate court is given authority under the preceding section to alter the sentence to meet the goals of justice. In this case, the Appellant defrauded the complainant of UGX18M under the false pretext of obtaining a procurement contract for her. Of course, the Appellant failed to deliver the purported promise. The complainant suffered material loss due to the Appellant's conduct, for which the latter accepted responsibility. This case is, therefore, a proper case for
140 which the Appellant should offer restitution to the complainant under article 126(2)(c) of the Constitution, which commands courts to award adequate compensation for victims of wrongs, such as the complainant and section 197 of the Magistrate Courts Act, which provides for the authority to award compensation victims of wrongs who have suffered material loss. I,

therefore, direct the Appellant to pay the complainant compensation of eighteen million shillings
145 with interest of 12 percent per annum from April 12, 2023 (the date of his conviction) till
payment in full.

4.0. Decision

The Appeal succeeds in part. The Court makes the following orders.

- 150 1. The sentence of 3 years' imprisonment is set aside and substituted with one of 2 years,
five months, and one day's imprisonment.
2. The Appellant is Ordered to Compensate the Complainant a Sum of UGX—
18,000,000/= with interest of twelve percent from April 12, 2023, the date of conviction,
till payment in full.

155 It is so ordered.



Gadenya Paul Wolimbwa
JUDGE.

160 15th February 2024

I request the Deputy Registrar to deliver the judgment on 19th February 2024.



165 Gadenya Paul Wolimbwa
JUDGE.
15th February 2024

170 Judgment delivered on 19th February 2024 in the presence of the Appellant and Mr. Kayemba
Edward, Court Clerk..

Festo Nsenga
175 **Deputy Registrar**
19th February 2024.

