

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

CRIMINAL APPEAL NO. 155 OF 2013

(Arising from High Court Criminal Appeal Case No.0058 of 2013)

1. IVAN GANCHEV

2. MILEN KATSARSKI

3. ADRIAN DIMITROV APPLICANTS

VERSUS

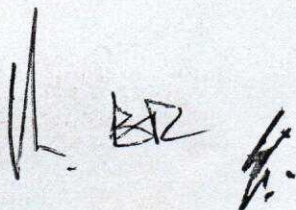
UGANDA RESPONDENT

**CORAM: HON MR JUSTICE RUBBY OPIO AWERI, JA
HON MR JUSTICE RICHARD BUTEERA, JA
HON MR JUSTICE GEOFFREY KIRYABWIRE, JA**

JUDGMENT OF THE COURT:

This is a second appeal. The three appellants and another were charged with 33 counts/charges of forgery c/s 342 and 347 and one count of conspiracy to commit a felony c/s 390, 342 and 347 of the Penal Code Act.

They were also charged with unauthorized access of Computer Data without authority c/s/ 12(1) of the Computer Misuse Act. The four were tried and convicted by a Magistrate Grade One at Buganda Road Court.



The three appellants were sentenced to 2 years imprisonment on the 33 counts. The fourth accused was sentenced to one year for the 33 counts. The sentences against each of the four accused on counts 1 to 10 were to run consecutively and the sentences on counts 11 to 33 would run concurrently.

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The present three appellants were therefore ordered to serve a total of 20 years imprisonment for the 33 counts.

The fourth accused was ordered to serve a total of 10 years imprisonment for the 33 counts.

The trial Magistrate left it to the Minister to consider a deportation order for the convicts after serving their sentences.

15 The convicts appealed to the High Court against the conviction and sentence by the Magistrate Grade One. The High Court Judge allowed the appeal of the fourth appellant. His conviction was quashed and sentence set aside.

20 The appeal of the present three appellants before the High Court was dismissed. Their conviction by the trial magistrate was upheld. Their sentences were, however altered by the High Court. They were each sentenced to 2 years imprisonment on each of 30 counts of forgery c/s 342 and 347 of the Penal Code Act, and were sentenced to 3 years imprisonment with respect to counts 23, 29 and 30, to run consecutively and therefore each of the appellants were to serve a total
25 of 9 years imprisonment.



The High Court Judge also ordered that after serving their respective sentences, each of them shall be deported to his country of origin as an undesirable alien. The three appellants were dissatisfied with the High Court decision hence this appeal.

5 According to the Memorandum of Appeal they have appealed on the following grounds:-

10 1. That the learned Justice of Appeal erred in law when he imposed different sentencing regimes for counts 23, 29 and 30 despite his finding that there was no rationale for creating the same since the offences had been committed in the same period and no loss had occurred hence occasioning a miscarriage of justice.

15 2. That the learned Justice of Appeal erred in law when he, in respect of counts 23, 29 and 30, enhanced the sentence of 2 years imprisonment to 3 years imprisonment.

20 3. That the learned Justice of Appeal erred in law when he ordered for the deportation of the appellants.

4. That the learned Justice of Appeal erred in law when he dismissed the appellants' appeal.

25 The appellants pray this Court to allow the appeal, set aside the sentence and or vary the sentence.



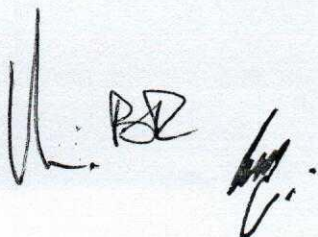
Background facts of the case.

The three appellants are Bulgarian Nationals who entered Uganda on diverse days. They were arrested at Natete Stanbic Bank Branch when the first and second appellants had fixed an ATM skimmer device which is an ATM card reader on the branch's ATM machine capture to PIN numbers from ATM Cards. They were travelling with the 3rd appellant and the fourth accused who was acquitted by the High Court on appeal. The vehicle they were travelling in was searched and cloned carvel ATM cards were recovered. Also recovered from the car was a list of numbers which were later found to be Personal Identification Numbers (PIN) of customers of Stanbic Bank. Other items were recovered from the car and others from their residence in Nalya.

The 3 appellant's were convicted in respect of 33 cards on the 33 counts of forgery. They were also charged and convicted for committing a felony c/s 390, 342 and 347 of the Penal Code Act and were also convicted for unauthorized access to Computer Data without authority c/s 12(1) of the Computer Misuse Act in count 36. They appealed against the conviction and sentence and the High Court altered the sentences as explained above. They were dissatisfied with the High Court decision hence this second appeal.

Legal representation.

At the hearing of the appeal the appellants were represented by learned counsel, Mr. Ochen Evans. The State was represented by Mr. Emmanuel Muwonge a Principal State Attorney.

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Submissions of Counsel for the appellant on ground one.

5 Counsel for the appellants submitted that the trial Magistrate Grade One had held that ordinarily consecutive sentences should not be order for offences that arise out of the same transaction. The magistrate went ahead to hold that in the instant cases the offences arose out of different transactions and he thus imposed consecutive sentences and this was in error.

10 The High Court Judge according to counsel, found that the offences were stated to have been committed in the same period and there was no rational for creating differences in the sentencing since the offence were committed in the same period and no loss occurred occasioning a miscarriage of justice. The appellants should have been sentenced to concurrent sentences. Counsel contended that there was no evidence at all that all the 33 customers of Stanbic Bank lost money in the fraud.

15 Counsel contends further that there was no justification for the judge to alter the sentences in respect of counts 23, 29 and 30 and for him to enhance the sentence in respect of the three counts and for ordering that the sentences run consecutively.

20 Counsel further submitted that there must be very exceptional circumstances to warrant court to order sentences to run consecutively when the appellants were convicted of offences that occurred in the same transaction. According to counsel there were no exceptional circumstances to justify the enhancement of the sentences and the order that they run consecutively.

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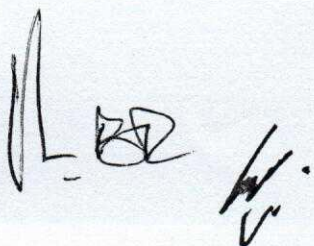
Ground 2:

Counsel for the appellant submitted that the learned High Court Judge enhanced the sentences in respect of counts 23, 29 and 30 from 2 years imposed by the learned trial magistrate to 3 years without following the correct procedure before enhancing the sentence against the appellants. He contended that for the appellant judge of the High Court to enhance the sentence there is a requirement for the appellants to have received prior notice either by way of a cross-appeal or by the an appellate court giving a warning to the appellants and this was not done in this case. There was no cross-appeal in this case and the appellants were not warned of the risk of enhancement of sentence.

Counsel submitted that the enhancement without following the right procedure occasioned a miscarriage of justice to the appellants and the 3 years sentences should therefore be varied.

Ground 3:

Counsel for the appellant submitted that the learned trial magistrate had left the issue of deportation of the appellants to the Minister of Internal Affairs who is empowered by sections 17 and 60 of the Citizenship and Immigration Control Act. Counsel contended that there was no argument on deportation on appeal and learned appellant judge altered the trial magistrates order on deportation by ordering the deportation of the appellants without giving them a chance to be heard on their deportation.




Counsel contended that deportation is not an automatic consequential order. The appellants, according to counsel, should have been afforded an opportunity to address court on the issue of deportation.

5 **Submissions of counsel for the respondent:**

10 Counsel for the respondent opposed the appeal. He supported both the conviction and the sentence. He submitted that the 33 ATM Cards were obtained from different Stanbic Banks and at different times. According to counsel that justified the two sentencing regimes and the concurrent sentences imposed by the High Court Judge.

15 Counsel for the respondent submitted that the offence of ATM fraud was on the rise and was a sophisticated offence which justified a stiff sentence to send out a strong message to the offenders. He further submitted that there was evidence by the Security Manager, Ojok Julius, that Stanbic Bank lost money in the commission of the instant offence and there was also evidence by one of the customers to the Bank who also testified that he lost money. The assertion of the appellants that no money was lost was therefore false.

20 Counsel contended that the learned High Court Judge had properly evaluated the evidence and came to the right decision in sentencing the appellant to the 2 sentencing regimes. He further contended that the High Court in effect reduced the sentence of the appellants. They originally were to serve 22 years in total by the order of the learned trial magistrate but by the order of the learned appellate judge
25 they were in effect to serve only 9 years which does not prejudice the appellants.

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Their sentences were therefore for all practical purposes reduced rather than increased and they should therefore not complain of enhanced sentences.

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The decision of Court:

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The appeal in the instant case is against sentence and not against conviction. The appellants are praying to this Court to set ^{aside} and or vary the sentences.

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We shall first handle the first and the second grounds of appeal. The two counts were argued together by both counsel. The first and second grounds of appeal are in respect of the High Court having altered and enhanced the sentences imposed by the trial magistrate in respect of counts 23, 29 and 30 from 2 years to 3 years and imposing different sentencing regimes and then ordering the sentences to run consecutively.

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We find it pertinent for us to first consider and state the law on the power and the procedure of an appellate court when dealing with sentencing. The power of an appellate court in sentencing is provided for by s.34(2) of the Criminal Procedure Code Act which states as follows.

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“34. Powers of appellate court on appeals from convictions.

34. (1)

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(2) Subject to subsection (1), the appellate court on any appeal may-

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(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;

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(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

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(c) with or without any reduction or increase and with or without altering the finding, alter the nature of the sentence.

The provision above quoted provides power to the High Court as an appellate court to vary a sentence imposed by the lower court, the court of the Magistrate Grade
15 One in the instant case, by reducing or increasing it.

In the instant case, the complaint is not on the power of the appellate court (the High Court) but on the exercise of that power and the procedure in the exercising of the power to alter and vary the sentence. The High Court is being faulted for not following the procedure.

The Supreme Court has had occasion to consider and state some general principles upon which an appellate court may interfere with a sentence imposed by the trial court. In the case of Kyalimpa Edward versus Uganda, Criminal Appeal No.10 of 1995. The Supreme Court referred to R vs De Haviland (1983) 5 Cr. App. R(s) 109 and held as follows at page 114:-
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5 “An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R.(1954) 21 EA.C.A.270 and R.V Mohamedali Jamal (1948) 15 E.A.C.A 126.”

What happened in the instant case was that the trial magistrate had sentenced the appellants to 2 years on counts 1 to 33. The sentences on counts 1 to 10 were to run consecutively, sentences on counts 11 to 33 were to run concurrently.

The three appellants would each to serve a total of 20 years imprisonment for the 33 counts.

15 The trial magistrate considered that ordinarily two consecutive sentences should not be ordered for two offences which arise out of the same transaction.

20 He held that in his view, **“the instant charges against the 4 accused do not arise out of the same transaction given that Data on each of the 33 closed ATM Cards was obtained on a different times and from different Stanbic Bank ATM locations”** (sic) and it was appropriate therefore to give consecutive sentences in the matter.

In consideration of the sentences on appeal the appellate learned judge held as follows:

“The charges were all stated to have been committed in the same period according to the charge sheet. I did not see the rationale of creating

differences in the sentencing regime where sentences in some charges run concurrently, yet in others they run consecutively, where there was no difference in the 33 charges.

5 The prosecution did not adduce evidence to show which, if at all, of the 33 customers of Stanbic Bank lost money in the fraud. According to the Security Manager Kiiza Frank PW2, only Ojok Julius in count 30 lost money. I noted that PW9 Difasi Lubega Muwonge in count 23 told court that he lost money but the bank never reimbursed him. Owor Amos in count 29 did not lose money but suffered due to the scam when his ATM card was captured by the system. PW2 admitted that there could be many others who lost money but he did not have details. Court will consider only what was prosecuted.

15 From the above well aware of the testimonies of the accused in mitigation, under provisions of S.34(2)(b) of the Criminal Procedure Code Act, I alter the sentence as follows.

20 The accused A1, A2 and A3 shall each be sentenced to 2 years imprisonment on each of the counts of forgery c/s 342 and 347 of the Penal Code Act, in respect of which this appeal was brought save for counts 23, 29 and 30 with the sentences to run concurrently. With respect to counts 23, 29 and 30 each of the accused is sentenced to 3 years imprisonment, with these sentences to run consecutively. This means that each of the three accused persons shall be imprisoned for a total of 9 years.

We shall first proceed to consider whether or not the leaned appellate court was right to alter the sentences and enhance them in respect of counts 23, 29 and 30.

The Supreme Court considered the issue of the procedure for enhancement of a trial court's sentence by an appellate court in case ^{Criminal appeal} No.10 of 2010 Mugasa Joseph vs. Uganda. It quoted with approval the Kenyan Court of Appeal in the case of JJW VS. Republic Criminal Appeal No.11 of 2011 [2013] I.E. KLR and held as follows:-

10 "It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 554(g)(ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at 15 the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times, this information is conveyed by the prosecution filing a cross-appeal in which it seeks enhancement of the sentence and that cross-appeal is served upon the appellant in good time 20 to enable him prepare for that eventuality. The second way of conveying that information is by the Court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence, only by warning him that he risks enhanced sentence at the end of 25 hearing of his appeal."

In that appeal, the Court of Appeal held that the sentence imposed by the High Court was unlawful because the prosecution had not urged for enhancement of sentence, nor appealed against the sentence passed by the High Court, nor did the Court grant an adjournment to enable the appellant to prepare adequately for his defence.

Decision

In conclusion, we find that the Court of Appeal erred in enhancing the sentence against the appellant without following the proper procedures. We find that the sentence imposed by the Court of Appeal was unlawful, and must be set aside.”

Applying the above principles to the instant case it's clear that the DPP had not appealed against sentence. It was the appellants who had appealed against the trial magistrate's sentence in respect of counts 23, 29 and 30.

It is not on record anywhere that the appellants were warned or were in anyway made aware of the enhancement of sentences in counts 23, 29 and 30.

We therefore, find that the learned appellate judge erred in enhancing the sentences of 2 years in counts 23, 29 and 30 to 3 years without following the proper procedure. The sentence in respect of the counts imposed by the learned High Court Judge therefore was unlawful and must be set aside.

That disposes off ground two of the appeal.



On ground one, the appellate judge was faulted for on imposing different sentencing regimes for counts 23, 29 and 30 despite his finding that there was no rationale for creating the same since the offences had been committed in the same period and no loss had occurred.

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The trial magistrate had found that the charges against the 4 accused do not arise out of the same transaction. According to the trial magistrate the data on each of the 33 closed ATM Cards was obtained on different times and from different Stanbic Bank locations. That was the magistrate's justification for consecutive sentences. The appellate justice at the High Court on the other hand was of the position that **"the charges were all stated to have been committed in the same period according to the charge sheet. I did not see the rationale of creating differences in the sentencing regime where some charges run concurrently, yet in others they run consecutively, where there were no differences in the charges."**

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We do find that it is true the charge sheet on all the counts was for offences committed on or around the 30th of August 2012 at Kampala. This is true even in respect of counts 23, 29 and 30. The charges were all in respect of forgery. The charges and even the evidence did not relate to offences committed at different locations of Stanbic Bank.

The appellate judge was therefore right in the observation that the charges were the same in respect of the period in which they were committed. There was, however, a difference between counts 23, 29 and 30 and other counts. The difference is in fact pointed out by the appellate judge.

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After he stated that the prosecution did not adduce evidence to show which, if at all, of the 33 customers of Stanbic Bank lost money in the fraud, the appellate judge goes ahead to explain that evidence and finds that Ojok Julius (PW2) lost money in count 30, PW9 Difasi Lubega Muwonge lost money in count 23 and Amos Owor did not lose money but suffered due to the scan when his ATM Card was captured by the system. The appellate judge did make the sentences in respect of counts 23, 29 and 30 consecutive to the sentences in other counts based on this finding that he had made.

We have to keep in mind our duty as a second appellate court as stated by the Supreme Court in Ongom John Bosco vs Uganda, Criminal Appeal No.21 of 2007 when it held:-

“A second appellate court is precluded from questioning the concurrent findings of facts by the trial court and first appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion.”

We find that the appellate judge justified his conclusion on the evidence he found on record. The trial magistrate too had ordered consecutive sentences except for counts more than only the three. There would be no reason for us as a second appellate court to interfere with the concurrent sentences in respect of counts 23, 29 and 30 except for having enhanced the same without following the right procedure which we have dealt with in disposal of ground two herein above.

In respect of ground one therefore we would retain the 2 years sentence for counts 23, 29 and 30 to run consecutively. The appellants would in total serve a total sentence of six years imprisonment. We so order.

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Ground No.3.

The trial court had left the order for deportation to be considered by the relevant Minister under S.17 of the Immigration Act and S.60 of the Uganda Citizenship and Immigration Act to initiate and enforce after the convicts have served their sentences.

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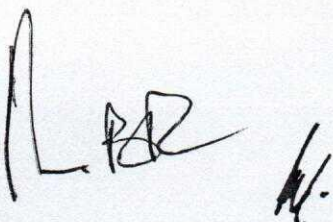
The appellate High Court Judge ordered that **“after their respective sentences, each of the accused persons shall be deported to his country as an undesirable sentence.”**

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The appellants are aggrieved and their counsel faulted the appellate judge for not affording the appellants a right to be heard on the deportation order on appeal if the same was to be altered.

The spirit of the Supreme Court decisions in **Magasa Joseph (supra)** and **Busiku Thomas (supra)** is that if a sentence against an appellant has to be altered and especially if that sentence has to result into enhancement of sentence, the appellant has to be informed and warned of the likely enhancement and should be afforded an opportunity to be heard by the appellate court on the possible enhancement.

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In the instant case, there was in effect no deportation order by the trial magistrate. The magistrate had only pointed out a possibility of deportation by the responsible Minister in accordance with the law.

5 We note that there was no appeal against the trial magistrate's order. There was no cross-appeal by the Director of Public Prosecutions. The matter was not argued at all on appeal. The complaint by the appellants that they were not afforded a right to be heard on the order of deportation, we find is therefore justified.

10 We therefore, quash the deportation order by the High Court Judge. We substitute it with the order of the Magistrate Grade One against which no appeal was preferred. It should be up to the Minister to consider deportation of the appellants in accordance with the law after they have served their sentences. We so order.

15 Dated this day at Kampala.....17th.....of.....July.....2015.

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Hon. Justice Rubby Opio Aweri
JUSTICE OF APPEAL.

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL.

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Hon. Justice Geoffrey Kiryabwire
JUSTICE OF APPEAL.

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