IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0024 of 2014

In the matter between

KINYERA PHILLIP **APPELLANT**

And

UGANDA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Procedure *— Appeals — section 204 (3) of The Magistrates Courts Act — no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a magistrate's court except as to the legality of the plea or to the extent or legality of the sentence. — Sentencing — five factors guide courts when deciding on an appropriate sentence, namely; just punishment, rehabilitation, deterrence, denunciation and community protection. — An appellate court will not interfere with sentence imposed by a trial Court merely because it would have imposed a different sentence. It is now settled, that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstances.— Save for the exceptional "rarest of the rare" type of cases which in some cases may not even be mitigated by a guilty plea, in general the maximum sentence should not be imposed where the accused has pleaded guilty.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant was charged with the offence of Assault Occasioning Actual Bodily Harm C/s 236 of *The Penal Code Act*. It was alleged that on 25th November, 2014 at Gulu United Car Washing Bay in Gulu District the appellant unlawfully assaulted Ociti Allan thereby occasioning him actual bodily harm. He was convicted on his own plea of guilty and sentenced to five years' imprisonment.

[2] The facts as narrated to the court and confirmed as correct by the appellant are that on 25th November, 2014 at around 1.00 pm the complainant, who was a 15 year old pupil at Gulu Public Primary School, was washing clothes from her grandmother's compound. The appellant emerged and began insulting the complainant's grandmother. The complainant intervened to stop the appellant. The appellant reacted by pelting the complainant with stones which inflicted injuries on his back and waist. The appellant slapped both the complainants' ears before the complainant was rescued by a third party, and taken to hospital. He was found to have sustained a small cut and swelling at the lower lumbar area. The injuries were classified as harm. The appellant was arrested and charged.

[3] When sentencing the appellant, the trial magistrate stated that the appellant appeared to be a cruel person as submitted. But throughout his plea he had appeared remorseful. He had also pleaded guilty. The offence the convict committed carries a maximum sentence of five (5) years' imprisonment. He assaulted a very young child with a lot of force. This child could not fight back or defend himself. The law cannot condone conduct of this nature. Children are protected by society and the law is in place to ensure that mankind lives peacefully with one another. There is no reason given as to why the complainant was assaulted by the appellant. It is fair that the appellant suffers pain equivalent to that suffered by the complainant under his powerful hand. The appellant was accordingly sentenced to five (5) years' imprisonment.

Grounds of appeal;

[4] Dissatisfied with the outcome, the appellant appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law when he failed to take into account the mitigating factors in sentencing, thereby sentencing the appellant to five years' imprisonment.
2. The trial Magistrate erred in law when he passed an excessive sentence against the appellant.

[5] The appellant did not file submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did counsel for the respondent file submissions.

Duties of a first appellate court.

[6] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997 and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997,* where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[7] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function

of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

[8] Perusal of the record shows that the appellant was convicted and sentenced on her own plea of guilty. According to section 204 (3) of *The Magistrates Courts Act*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a magistrate's court except as to the legality of the plea or to the extent or legality of the sentence. In the instant case, the two grounds of appeal raise issues of the extent of the sentence imposed.

[9] An appellate court will not interfere with sentence imposed by a trial Court merely because it would have imposed a different sentence. It is now settled, that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstances (see *James v. R. (1950) 18 E.A.C.A. 147*; *Ogalo s/o Owoura v. R. (1954) 24 E.A.C.A. 270*; *Kizito Senkula v. Uganda, S.C. Criminal Appeal No. 24 of 2001*; *Bashir Ssali v. Uganda, S.C. Criminal Appeal No. 40 of 2003*, and *Ninsiima Gilbert v. Uganda, C.A. Criminal Appeal No. 180 of 2010*). The sentencing court, unlike the appellate court, has the benefit of being able to directly assess the other evidence, the testimony and the submissions of the parties, as well as being familiar with the needs and current conditions of and in the community where the crime was committed.

[10] Five factors guide courts when deciding on an appropriate sentence, namely; just punishment, rehabilitation, deterrence, denunciation and community protection. A sentencing court must impose a sentence that is sufficient, but not greater than

necessary, to: reflect the seriousness of the offence; promote respect for the law; provide just punishment for the offence; adequately deter criminal conduct; protect the public from further crimes by the convict; and provide the convict with needed educational or vocational training, or medical care. The most important offence-specific sentencing considerations are the extent and value of the damage or destruction caused; the risk caused by the offender's conduct; the method used to cause damage or destruction; the degree of planning involved; the offender's purpose; the type of property damaged; and the drain caused on public resources.

[11] In general terms criminal law theorists believe that sentences serve two purposes. First, they serve the goal of deterring future crime by both the convict and by other individuals contemplating a committal of the same crime. Second, a sentence serves the goal of retribution, which posits that the criminal deserves punishment for having acted criminally. When sentencing a convict, court should, subject to any maximum or minimum terms set by parliament, impose the least severe sentence that still achieves both goals, while also considering the need for societal protection (the principle of parsimony). The length of the term of imprisonment depends on the seriousness of the offence and the maximum penalty for the crime allowed by law.

[12] The maximum punishment for the offence of Assault Occasioning Actual Bodily Harm C/s 236 of *The Penal Code Act* is five years' imprisonment. In this case, the appellant was sentenced to the maximum. It has been laid down time and again that the maximum sentence should be reserved for the worst examples of the kind of offence in question. Imposition of the maximum sentence provided for any offence may be justified by a number of reasons, such as; when the court considers that the seriousness of the offence is in the category of "rarest of the rare" of that type of crime; when the court considers that the offender poses a significant risk to the public of causing serious harm by the commission of further offences of similar gravity; extreme gravity or brutality of the crime committed; or

where the prospects of the offender reforming are negligible. The maximum penalty is reserved for the worst offender (see *R v. Carroll (1995) 16 Cr App R (S) 488*), for which reason courts must regard community protection as the primary purpose of sentencing serious offenders.

[13] The question which the court below had to consider is whether the circumstances of this case were so grievous as to fall within the very worst examples. It was necessary for the court to compare the seriousness of the circumstances of this particular offence in relation to the worst type of circumstances which could attend a contravention of the penal section. I agree with the court's opinion that it was a very bad case considering the vulnerability of the victim, the unprovoked nature of the attack, the deadly weapon involved and the possibility that it was induced by drug abuse. It was so grievous an example as to justify the imposition of the maximum sentence, even on a first offender. The seriousness of the crime eclipsed most of the mitigating factors advanced, including that of being youthful and a first offender.

[14] Be that as it may, save for the exceptional "rarest of the rare" type of cases which in some cases may not even be mitigated by a guilty plea, in general the maximum sentence should not be imposed where the accused has pleaded guilty. An accused who acknowledges from the outset that his actions are criminal and pleads guilty at the earliest opportunity, usually on the eve of trial, will by sentencing practice or convention of the courts, technically receive credit for accepting responsibility for his actions, by way of a reduced sentence.

[15] The practice of taking guilty pleas into consideration is a long standing convention which now has a near statutory footing by virtue of regulation 21 (k) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. As a general principle (rather than a matter of law though) an offender who pleads guilty may expect some credit in the form of a discount in sentence. The requirement in the guidelines for considering a plea of guilty as a

mitigating factor is a mere guide and does not confer a statutory right to a discount which, for all intents and purposes, remains a matter for the court's discretion. However, where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see *R v. Fearon [1996] 2 Cr. App. R (S) 25 CA*). In this case therefore I have taken into account the fact that the convict readily pleaded guilty, as one of the factors mitigating his sentence.

[16] As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount (see: *R v. Buffrey (1993) 14 Cr App R (S) 511*). Similarly in *R v. Buffrey 14 Cr. App. R (S) 511*). The Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an appropriate discount. In light of the convict's plea of guilty should have reduced the appropriate sentence to a range of 2 – 3 years' imprisonment. This would be in line, for example, with *R v. Greene (1993) 14 Cr App R (S) 682*, where the maximum sentence of five years' imprisonment for violent disorder was reduced to three years on the ground that the accused had pleaded guilty.

[17] When sentencing the appellant, the trial Magistrate took into account both the aggravating and mitigating factors. The sentence is not illegal but is affected by a failure to accord sufficient weight to a material consideration. The result was a harsh and manifestly excessive sentence in the circumstances. The sentence is disproportionate to the offence and the antecedents of the appellant. There is therefore a justifiable reason to interfere with it.

Order:

[18] In the final result, for those reasons, the appeal succeeds. The sentence of five years' imprisonment is set aside. Instead the convict is sentenced to three years' imprisonment.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :