

THE REPUBLIC OF UGANDA



IN THE COURT OF APPEAL OF UGANDA (COA) AT
KAMPALA

CRIMINAL APPEAL NUMBER 0022 OF 2020

10 PROCEEDINGS BEFORE:

HON. MR. JUSTICE FREDRICK EGONDA NTENDE, JA

HON. LADY. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

15 PARTIES;

BANGALY KOUROUMAAPPELLANT

VS.

UGANDA:.....RESPONDENT

DATE: 24th AUGUST, 2021

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Appearances:

Mr. Isaac Muwanga: Counsel for the Appellant

Mr. Sam Oola: Senior Assistant DPP/ Counsel for the
Respondent

Apio Jane: Court Clerk

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Evelyn Ampaire: Transcriber

Mr. Kyomuhendo:

May it please you your lordships,
Joseph Kyomuhendo Chief State
Attorney from the office of the DPP.
Your lordships I will hold brief, the
matter has been called and I am not
sure of who is supposed to be holding
it.

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Justice Madrama:

How can you be holding brief for an
unknown?

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Justice Bamugemereire: When you say you are not sure, you are not sure of the person from the side of the respondent, or you are not sure who is for the appellant?

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Mr. Kyomuhendo: My lord I am not sure of who is on the side of the respondent.

Justice Egonda: The submissions were filed by Mr. Sam Oola

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Mr. Kyomuhendo: My lords, I am holding brief for

Justice Egonda: For Sam Oola

Mr. Kyomuhendo: Yes my lords.

My lords, we filed submissions in this matter

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Justice Madrama: Who is for the appellant?

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Mr. Muwanga:

May it please your lordships Muwanga Isaac I appear for the appellant in this matter. My lords the appellant is in court via video link from Luzira prison.

Justice Egonda:

He understands English?

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Mr. Muwanga:

Not so well.

Justice Egonda:

Mr. Kourouma are you following what is going on? Are you hearing us. Okay we can hear.

Mr. Muwanga:

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My lords, we filed our written submissions in this matter on the 21st day of May 2021 together with it, we filed supplementary record that contains the memorandum.

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In that regard my lords, I would like to pray that memorandum that had earlier been filed by the appellant himself and the record of appeal be expunged and a new one be adopted, the supplementary for

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purposes of determination of this appeal.

We also pray that our submissions be adopted for purposes of determination of this appeal.

We so pray.

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Mr. Kyomuhendo: My lords, we have no objection to the supplementary memorandum of appeal. My lords we filed a reply to the appellant's submissions and we equally pray that the same be adopted by this Hon. Court.

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Mr. Muwanga: The submissions were never served on us. We do not have a copy of the written submissions.

Mr. Kyomuhendo: My lord I pray that we be allowed to serve him after the court proceedings.

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Justice Egonda: Mr. Kyomuhendo, we have looked at this file and the record, it appears that the element of probation was actually never

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considered in respect of the ...possession
was not proved, constructive possession
was

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Mr. Kyomuhendo: My lord I pray to hand over to my senior
colleague who is in personal conduct of the
matter Mr. Oola sam

Justice Egonda: Personal conduct when you have been
holding his brief.

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Mr. Oola: My lords I apologize I had stepped out to get an
authority which we had by oversight failed to
attach onto our submissions. So I had gone to
make some copies from the library but I appear
for the respondent in this case.

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Justice Egonda: I was saying Mr. Oola that from the record
of evidence, actual possession of the ...was

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not proved. I am wondering constructive possession was.

Mr. Oola:

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My lords there was evidence that the appellant was part of a group that was in a vehicle in which the ivory was actually recovered. So we are saying that looking at the circumstances and then the fact that when a police officer approaches the vehicle, the appellant and all the occupants of the vehicle all take off running away and he has to be chased

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Justice Egonda:

It is not that the police officer approached the vehicle, they were passing by. They had nothing to do with the vehicle.

Mr. Oola:

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So that even creates another problem. Why was he running away.

Justice Egonda:

He gives his explanation why he was

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Mr. Oola:

Okay he is one of the occupants, we are saying he is one of the occupants of the vehicle and all of them run away and one of them is arrested. So the circumstances were such that much it could not be proved that a vehicle belonged to him but on the doctrine of common intention

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Justice Egonda:

No, ...common intention

Mr. Oola:

These are all occupants of one vehicle and all of them.

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Justice Egonda:

No, all you have are rumors about a Congolese dealing in ...the person that goes to negotiate with them never testified.

Mr. Oola:

He didn't testify but there was the evidence

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Justice Egonda:

Never testified, somebody is apprehended and it is claimed he was in that in vehicle, he says he wasn't, he was simply ...what

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you have is oath against oath. Which means that one version is ...before but each version ...that's just one affidavit. You ... the question of possession which is an essential ingredient. You get somebody in the vicinity and you say he must have been in that car. You do not produce the owner; he doesn't tell you who had possession of the car. No evidence is produced to show who brought the car in that area. And you think there is constructive possession by somebody picked running away and is there circumstantial evidence points to possession.

Mr. Oola:

Well my lords that is our contention. Having regard to the evidence on record that the circumstances and the conduct of

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the appellant was such that it only led to an inference that he was part of the group.

Justice Egonda:

Even if he could have been part of the group that were in the car, what evidence is there to show that he was aware there

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was ivory in that car?

Mr. Oola:

Well there is no direct evidence but we are relying on the circumstantial evidence we have pointed out and as found by both

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Justice Egonda:

The running away?

Mr. Oola:

We talk about the findings of the 2 lower courts that he was actually one of the occupants of the vehicle. That was the finding of the 2 courts below.

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Justice Egonda:

If we...with possession, first of all there is question whether that finding was relied

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upon but even if it is, possession is still not there.

Mr. Oola:

Well most obliged but we have put that in our submissions

Justice Madrama:

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Counsel you are an officer of the court. So you should not submit only on your side but you should seek for the cause of justice. So what is the cause of justice, for instance did you call evidence about who is the owner of the vehicle and who was the driver

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Mr. Oola:

Well the evidence before court was that the vehicle did not belong to the appellant, it belonged to a lady who was stated to be either a Congolese or somebody. From the evidence on record, the vehicle did not belong to the appellant. At least the record showed that vehicle was in the name of a lady

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Justice Madrama: Who was in charge, like the learned judge says who was in charge of the vehicle, who had command of the vehicle?

Mr. Oola:

My lord, if I remember it was I think a man whose name I do not specifically remember, it wasn't the appellant.

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Justice Bamugemereire: There was a man in this tory called

Julie, could that have been the one.

Because this appellant says a man called Julie called him and asked him to meet at Mendo.

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Mr. Muwanga:

My lord if I may, the Julie person was the person the appellant had contacted to meet for some business.

However, the person who was in possession of the car according to the evidence of the owner of the car, her statement which is DH1, the person was called Malu Malu Albert who is a

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Congolese. That's the person she left her car with and she provided even his number.

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So according to the evidence, there is nothing that shows actually the appellant was in the ca, close to the car or in possession of the car and I agree with this Hon. Court on that comment.

Mr. Oola:

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Well my lords, perhaps as an officer of this court then I will concede that the conviction of the appellant in respect of count one which is about possession of a protected species cannot be supported having regard to the evidence on record. And that his appeal on that ground ought therefore to succeed.

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But it is our submission that the conviction on the 2nd count which is about illegal entry and stay in Uganda be upheld.

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Justice Egonda:

Thank you Mr. Oola.

This 2nd count ...as a charge in relation to the 1st one but it is because his visa had expired, he had entered long here, the visa expired. Is something you still want to pursue

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Mr. Oola:

Well I think he would still be guilty on the basis of illegal stay in the country because I think the Section covers both illegal entry and stay. So the 2nd leg of, it would still be covered by the fact that he was actually illegally in the country.

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Justice Egonda:

Do you have the Immigration Act here?

Mr. Oola:

My lords I don't have a copy here.

Actually the count was unlawful stay in Uganda, when you look at page 5 and 6 of the record of proceedings, hand written.

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Justice Bamugemereire: The main issue there was the deportation order, whether the court could actually order deportation. Whether the court could make a recommendation to the Minister.

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Mr. Oola:

My lords we think that order is really superfluous because it is not operate within the powers of court to issue a deportation order and no application, I think was made for that. So we think it is really inconsequential.

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The deportation order, I think it was unnecessary as the appellate judge also noted that, I think the trial Magistrate went overboard in making the order.

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Justice Egonda: So he never supported the deportation

Mr. Oola:

Yes, it is something that can be done even outside.

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Justice Egonda:

What you support is?

Mr. Oola:

The conviction and sentence.

Justice Egonda:

Probably the appellant has finished serving that sentence, it was issued in September 2019, we take it is 3 years, remission of one year, it would be 2 years.

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He has finished serving that sentence.

Justice Egonda:

When was he arrested?

Mr. Muwanga:

2017

Mr. Oola:

We do not have those records but the file was reactivated in 2018 but I see on page 28 the file is reinstating as 27th 2017 October, the file ...for want to prosecution and reinstated on 5th January 2018.

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So clearly the sentence of that count has been served. So there is no justification for this person to remain in prison any longer.

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Mr. Oola:

My lords, it will depend on how you compute the

Justice Egonda:

Okay do 2018, 2019, 2020, those are 3 years.

Mr. Oola:

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My lords, at some point as like you rightly noted, I think he was released on bail or the case was dismissed like you say

Mr. Muwanga:

He has never been released on bail.

Justice Egonda:

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It had been dismissed for want of prosecution. He was then brought to court on the 5th of January 2018. Then we are told the matter was reinstated on 20th August 2018 and a production warrant issuefor some reason he was never released. He was always in custody. The new plea was taken on 19th September 2018 but he had been in custody.

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Mr. Oola:

But my lords when you look at page 56 and 57 hand written of the record of proceedings.

Justice Egonda:

That's relating to the decision by the High Court

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Mr. Oola:

Where the judge actually deducted, he deducted the period the appellant had been on remand from the final sentence.

Justice Egonda:

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He deducted 11 months and 15 days spent on remand that he is left to serve 2 years and 15 days. So the Judge deducted 11 months. That means at the time the trial court stated his...he had spent almost a year in prison. So the appellate judge reduced the sentence to 2 years and 15 days to start from the date of the sentence in the trial court. Is that sentence still running? What was the date of the sentence by the trial court, of the date of

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judgment? It is 6th August 2019. So 2 years running from this date, the 1st year would be 2020 and then 2021 August. So the sentence has run and this is not taking into account remission.

10 **Mr. Oola:**

Well 3 years and 15 days. Well if you take into account into remission then he would remain with 2 years and 15 days

Justice Egonda:

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No, the sentence is 2 years, if you take into account remission you would be remaining with less than 18 months.

That's with respect with 2 years without talking about remission. 6th August. So

the 1st year would finish on 5th August of 2020, the 2nd year would finish on 05

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August 2021 and you add 15 days. It would be 20th August 2021. What is the date today?

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Mr. Oola:

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My lords, I now agree with you. When I look at page 57 again the handwritten pagination where the learned appellate judge states "therefore after deducting the 11 months and 15 days spent on remand, he is left to serve 2 years and 15 days". Now the law is that sentence begins to run

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from the date of conviction. And as the court has rightly pointed out, the date of conviction was 6th of August 2019. Now that would mean

Justice Madrama:

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Counsel the mathematics has been done why do you want to repeat what you have been told. The calculation was made, 2 years ends in August this year. Around the 5th of August this year, so 15 days from there is 20th of August. Therefore, the sentence has already run if you do not

take into account remission. So what more is there to say.

Mr. Oola:

So in any event the appellant would have served his sentence already unless he is held on other lawful grounds.

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Mr. Muwanga:

My lords, just to make a few comments, even then we are taking issue with the sentence but as it has been served, however we will abandon that argument since

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Justice Egonda:

If you did we shall consider that in your written submissions.

This is the judgment of the court;

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Mr. Oola Senior Assistant DPP concedes that the conviction on count one the ...and it doesn't ...

We allow the appeal against conviction on count one and we shall give our reasons

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on notice. We quash the conviction and set aside judgment on that count.

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With respect to count two, we observe that the sentence of imprisonment has been served in full. We set aside the orders of deportation and shall give our reasons on notice.

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In light of the foregoing, we order immediate release of the appellant unless he is being held on some other lawful charge.

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HON. JUSTICES OF APPEAL
24TH AUGUST 2021