

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

January 3, 2013

Lyle W. Cayce
Clerk

No. 12-10074

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSEPH MUDEKUNYE,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:08-CR-348-2

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Joseph Mudekanye was convicted by jury verdict for one count of conspiracy to aid and assist in the preparation and presentation of false and fraudulent returns, three counts of aiding and assisting the preparation and presentation of false and fraudulent individual income tax returns, and two counts of using means of identification of another to commit a federal offense. At his resentencing, the district court sentenced him to 97 months of imprisonment, two years of supervised release, and \$4,222 restitution. On

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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appeal, he argues that the district court violated Federal Rule of Criminal Procedure 32(h) by failing to provide him with notice prior to sentencing him above the advisory guideline range.

Rather than utilizing an upward departure, the district court imposed Mudekunya's sentence through the use of an upward variance. Because Rule 32(h) does not apply to variances, there was no Rule 32(h) violation in this case. *See United States v. Mejia-Huerta*, 480 F.3d 713, 721-22 (5th Cir. 2007).

The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED. The Government's alternative motion for an extension of time in which to file a brief is DENIED as unnecessary.