

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 124 OF 2009

LUBANGA EMMANUEL

APPELLANT

VERSUS

UGANDA.....

.....RESPONDENT

[Appeal from a conviction and sentence of the High Court of Uganda at Nakawa before His Lordship the Hon. Mr. Justice Joseph Murangira dated the 02nd day of June 2009.]

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT

This is an appeal from the Judgment of His Lordship Joseph Murangira J in High Court Nakawa Criminal Session Case No. 414 of 2005.

The appellant was indicted with the offence of aggravated defilement contrary to **Section 129 (3)** of the Penal Code.

At the trial the appellant pleaded guilty to the offence and was convicted accordingly. He was sentenced to 15 years imprisonment.

This appeal is against sentence only.

On appeal the appellant was present in person and was represented by learned counsel **Ms. Wakabala Susan Sylvia**. The respondent was represented by **Ms. Wakoli Samalie** Senior
5 State Attorney.

The memorandum of appeal initially had two grounds; however, learned counsel for the appellant at the hearing of this appeal abandoned ground one. The remaining ground states as follows:-

10 ***“That the learned trial Judge erred in law when he did not subtract from the sentence the period the appellant had spent on remand”***

It was submitted for the appellant that whereas the appellant had spent on remand one year and four months, this period was not subtracted from the sentence of 15 years imprisonment imposed
15 by the learned trial Judge.

It was submitted further that under **Article 23 (8)** of the Constitution the appellant was entitled to have the remand period subtracted from the sentence.

Learned counsel Ms. Wakabala relied on the Supreme Court
20 Authority in the case of **Kizito Senkula versus Uganda ; Criminal Appeal No. 24 of 2001**. (Unreported)

She submitted that in that case the Supreme Court held that it was not enough to take into account the period the appellant had spent on remand. It must also be clear from the sentence that
25 the period spent on remand had been reduced from the sentence.

She also relied on the authority of ***Byarihe Vincent versus Uganda (COA CR APP No. 53/ 196)***.

She prayed for the appeal to be allowed and the sentence imposed by the trial Judge to be set aside and substituted with a
5 sentence of 15 years imprisonment reduced by 1 year and 4 months spent on remand.

Ms. Wakoli the learned Senior State Attorney, in reply submitted that the learned trial Judge had indeed taken into account the period the appellant had spent on remand, and clearly set that
10 out in his reasons for sentencing.

The 15 years she submitted was to commence on conviction.

Ms. Wakabala submitted in rejoinder that the issue of the period the appellant had spent on remand was not specially considered by the learned trial Judge. That the learned trial Judge referred to
15 it generally.

Article 23 (8) of the Constitution requires Courts while sentencing a convicted person to take into account any period he or she spends in lawful custody in respect of the offence before completion of the trial.

20 That Article provides as follows:-

Article 23 (8)

“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.”

- 5 While applying the above provisions of the Constitution the Supreme Court in the case of ***Kizito Senkula vs. Uganda*** (Supra) observed as follows:-

10 ***“In the instant case, it is clear that the learned trial Judge took into account the period of two years the appellant had spent in remand. But it is not clear whether he considered that the sentence to be imposed should be 17 years, reduced by 2 years to make 15 years, or whether the sentence was***
15 ***15 years to be reduced by 2 years to 13 years. Both the learned Principal State Attorney and the counsel for the appellant were of the view that the latter was what the learned trial Judge must have meant. The***
20 ***Court of Appeal did not advert to it.***

As we understand the provisions of article 23 (8) of the Constitution, they mean that when a trial Court imposes a term of imprisonment as sentence on a convicted
25 ***person the Court should take into account the period which the person spent in remand prior to his / her conviction.***

Taking into account does not mean an arithmetical exercise. Further, the term of imprisonment should commence from the date of conviction, not back-dated to the date when the convicted person first went into custody. (Emphasis added).

In this particular case, the learned trial Judge before passing the sentence noted ***as follows;-***

“SENTENCE AND REASONS FOR THE SAME:

In passing the sentence against the convict, regard is made to the following factors.

a) All the mitigating factors in submissions advanced by both counsel.

b) The age of the victim being 1 year at the time of the offence was committed.

c) The fact that the convict, according to the medical report never ravaged the victim's private parts. That is there was no physical penetration into the victim's private parts by the convict's penis. Her hymen was never ruptured.

d)The convict exposed the victim to HIV/AIDS.

e)The convict has been on remand for a period of 1 year and 4 months.

5 ***All in all, the convict is sentenced to 15 (fifteen) years imprisonment in prison.”***

We agree with the learned State Attorney that the learned Judge took into account the period of remand before passing the sentence as required by the Constitution.

10 We notice that the memorandum of appeal faults the trial Judge for failure **“to subtract from the sentence the period the appellant had spent on remand”**

This presupposes that a sentence is first pronounced then the remand period is subtracted.

15 With all due respect to learned counsel for the appellant we do not agree.

Article 23 (8) of the Constitution requires Courts of law to **take into account the period a convicted person has spent in lawful custody** before imposing the term of imprisonment. The
20 Constitution does not require Courts to **subtract the period** the convict spends in lawful custody, but requires the Court simply to take that period into account.

The Supreme Court clearly clarified this when in the ***Kizito Senkula case*** (Supra) it stated that;-

“Taking into account does not mean an arithmetical exercise.”

We are satisfied that the learned trial Judge properly pronounced the sentence and we hereby uphold it.

5 Accordingly this appeal fails and is dismissed.

Dated at Kampala this 1st .day of April.2014.

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HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE
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