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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT GULU**  
**CRIMINAL APPEAL NO. 0336 OF 2014**

(CORAM: Kenneth Kakuru JA, F.M.S Egonda-Ntende JA and Hellen Obura, JA.)

10 **AMARIA MICHEAL**.....**APPELLANT**

**VERSUS**

**UGANDA**.....**RESPONDENT**

*(Appeal from the decision of Hon. Lady Justice Percy Night Tuhaise holden at  
Kampala High Court Criminal Session Case No. 72 of 2006 delivered on  
25/11/2013)*

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**JUDGMENT OF THE COURT**

The appellant was re-sentenced by Hon. Lady Justice Percy Night Tuhaise to 45 years imprisonment for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. He now appeals against sentence only.

**Background to the Appeal**

The facts giving rise to this appeal as far as we could ascertain from the court record are that on 02/01/2004 at 8:00 a.m, PW6 Sergeant Aliga and PW5 Constable Sabuni arrested the deceased, Dezu Leonora and PW3, Adrapi Denis for assaulting a one Alex and took them to the police station. While at the police station, the deceased went to the latrine to ease herself and on her way back to the hall, she found the appellant holding a gun. When she turned to look at him, he immediately shot her six times in the forehead and she died on the spot. The appellant then went to Sergeant Aliga and handed

5 over his gun to him whereupon he was arrested by Constable Sabuni and taken into police custody.

He was indicted, tried, convicted of the offence of murder and sentenced to death which was a mandatory penalty for murder at the time.

Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which  
10 abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing. Having heard the submissions of both counsel in the mitigation proceedings, the Judge sentenced the appellant to 45 years imprisonment.

15 Being dissatisfied with the decision of the sentencing Judge, the appellant appealed to this Court against sentence alone on the following two grounds;

1. *The learned sentencing Judge erred in law and fact when she passed a manifestly harsh and excessive sentence of 45 years against the appellant.*
- 20 2. *The learned sentencing Judge erred in law and fact when she failed to comply with article 23 (8) of the Constitution of the Republic of Uganda.*

### **Representations**

At the hearing of this appeal, Ms. Akello Alice Latigo represented the appellant on state brief while Ms. Rose Tumuheise, Principal State Attorney  
25 from the Office of the Director Public Prosecutions represented the respondent.

5 **Submissions for the Appellant**

Counsel sought leave for extension of time and for the appellant to appeal against sentence only. She also sought leave to amend the memorandum of appeal by inserting the words, "*In the result rendering the sentence a nullity*" at the end of the 2<sup>nd</sup> ground as set out therein. Leave was granted and the  
10 Notice of Appeal that was filed out of time was validated. The appellant was allowed to appeal against sentence only and the 2<sup>nd</sup> ground of appeal was amended to read:

2. "*The learned sentencing Judge erred in law and fact when she failed to  
15 comply with article 23 (8) of the Constitution of the Republic of Uganda in the result rendering the sentence a nullity.*"

Counsel argued the 2<sup>nd</sup> ground as amended first. She submitted that the sentencing Judge did not comply with Article 23 (8) during re-sentencing of the appellant. She quoted the decision of the sentencing Judge at page 10  
20 of the court record where she stated;

*"In my opinion, owing to the highlighted mitigating factors, but mindful of the grave nature of the offence and the fact that the aggravating factors outweigh the mitigating factors, and being guided by the Sentencing Directions 2013, if the trial court had heard the mitigation,  
25 and if the death penalty had not been mandatory at the time of conviction, a custodial sentence of forty five years would have been appropriate in the circumstances. Accordingly the death sentence on the conviction for the offence of murder is substituted by a custodial sentence of forty five years. I note that the convict served some years*

5            *on remand and after sentence while on death row. This period should  
be deducted from the custodial sentence."*

Counsel submitted that there was uncertainty of what should be deducted since the trial Judge simply stated that the period which the convict had spent  
10 in lawful custody should be deducted. She argued that this contravened Article 23 (8) of the Constitution which requires court to take into account the pre-trial period a convict spends in lawful custody. Counsel relied on ***Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*** were the Supreme Court stated that the taking into account the  
15 period spent on remand by a court is necessarily arithmetical and such period should be deducted from the final sentence to be served.

Counsel urged this Court to find the sentence a nullity and invokes section 11 of the Judicature Act which gives this Court the powers of the court of  
20 original jurisdiction to pass an appropriate sentence. She proposed a sentence of 20 years from which the period of 2 years the appellant spent in lawful custody should be deducted.

#### **Submissions for the Respondent**

Counsel conceded to ground 1 in view of the decision in ***Rwabugande***  
25 ***Moses vs Uganda (supra)*** and agreed with the submission of counsel for the appellant that this Court should invoke section 11 of the Judicature Act and impose an appropriate sentence taking into account both the aggravating and mitigating factors.

5 **Court's consideration**

We have heard the submissions of both counsel and carefully perused the court record especially the sentencing proceedings. In determining this appeal, we are guided by Article 23 (8) of the Constitution and the decision in *Rwabugande Moses vs Uganda (supra)*.

10 Counsel for the respondent conceded to the ground on illegality of sentence imposed by the sentencing Judge. We accept the submissions of counsel for the appellant that the wording of the learned Judge while sentencing the appellant was ambiguous and it cannot be said with certainty that the period the appellant spent in lawful custody was taken into account. As a result we  
15 find the sentence of 45 years imprisonment illegal as it was passed in contravention of Article 23 (8) of the Constitution. We therefore set it aside. Having done so, we invoke **Section 11 of the Judicature Act** which gives this Court the powers, authority and jurisdiction as that of the trial court to impose a sentence of its own.

20 We have taken into account the aggravating factors namely that, the offence of murder carries a maximum penalty of death and the citizens of this country ought to be protected. The mitigating factors we have also considered are that; the appellant is a first time offender as he has no record of any previous conviction. He has family responsibilities of taking care of his 9 children as  
25 he lost his wife in 2008. He is remorseful and appears to have suffered from the death row syndrome.

We have also considered the need for parity in sentences and to that end, we have looked at the range of sentences in offences of similar nature.

5 In ***Atiku Lino vs Uganda, Court of Appeal Criminal Appeal No. 0041 of 2009***, the appellant was convicted of the offence of murder and sentenced to life imprisonment. On appeal, this Court sitting at Arua reduced the sentence to 20 years imprisonment.

10 In ***Tumwesigye Anthony vs Uganda, Court of Appeal Criminal Appeal No. 046 of 2012***, the appellant had been convicted of murder and sentenced to 32 years imprisonment. The Court of Appeal sitting at Mbarara set aside the sentence and substituted it with 20 years imprisonment.

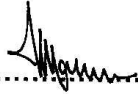
15 In ***No. 14459 SPC Oneti Dante vs Uganda, Court of Appeal Criminal Appeal No. 0007 of 2014*** where the appellant was convicted of murder and sentenced to life imprisonment. On appeal, this Court substituted the sentence of life imprisonment with a sentence of 20 years imprisonment.

20 Considering the circumstances of this case and the range of sentences for murder in the above cited cases and others we have not cited here, we are of the view that a sentence of 20 years imprisonment will meet the ends of justice. We are enjoined by Article 23 (8) of the Constitution to deduct the period of 3<sup>1</sup>/<sub>2</sub> years the appellant spent in lawful custody. In the result, we sentence the appellant to 16<sup>1</sup>/<sub>2</sub> years imprisonment to be served from the date of conviction which is 04/07/2007.

25 We so order.

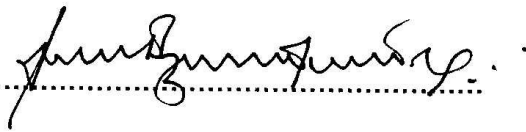
Dated at Gulu this... 7<sup>th</sup> day of November .....2017

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Hon. Mr. Justice Kenneth Kakuru  
**JUSTICE OF APPEAL**

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Hon. Mr. Justice F.M.S Egonda-Ntende  
**JUSTICE OF APPEAL**

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Hon. Lady Justice Hellen Obura  
**JUSTICE OF APPEAL**