

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**

**CRIMINAL APPEAL NO.0089 OF 2013**

**TIBESIGWA ELLY:.....APPELLANT**

**VERSUS**

**10 UGANDA:.....RESPONDENT**

*(Appeal from the decision of the High Court of Uganda sitting at Mbarara delivered on 19<sup>th</sup> June, 2013 in Criminal Session Case No. 0142 of 2011)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**

**HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

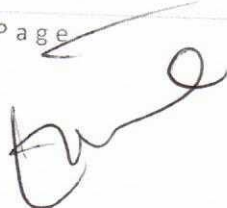
**15 HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA**

**JUDGMENT**

**Introduction**

The appellant was granted leave by Court to appeal against sentence only. He was convicted of murder on the 19<sup>th</sup> day of June, 2013 in High Court Criminal  
**20** Case No.0142 of 2011 and sentenced to 25 years imprisonment. The ground of appeal upon which he bases his appeal reads as follows;

- 1. The Learned trial Judge erred in fact and law when he made an erroneous evaluation of the manner of commission of the offence**





5        ***and came to an erroneous decision when sentencing the convict  
and occasioned a miscarriage of justice.***

At the hearing of the appeal, Mr. Sam Dhabangi appeared for the appellant while Mr. Alex Baganda, Assistant Director of Public Prosecution appeared for the respondent.

10      Counsel for the appellant submitted that the sentence of 25 years imposed on the appellant by the trial Judge was harsh and excessive. He faulted the learned trial Judge for emphasizing that this was a brutal murder hence sentencing the appellant as he did which to him was an improper basis for the decision. That the trial Judge did not also consider the period which the  
15      appellant had spent on remand and this rendered the sentence illegal. He prayed for Court to reduce the sentence to 10 years as the appellant was a first offender who had pleaded guilty and did not waste Courts time.

Counsel for the respondent conceded that the period the appellant had spent on remand had not been taken into account by the sentencing Judge and  
20      urged this Court to impose a sentence of 15 years.

The record shows that on the 29<sup>th</sup> day of October, 2011, the deceased went to a banana plantation to dig. The accused later appeared and demanded to know why the deceased was digging in the said banana plantation. The accused left and came back later armed with a panga and cut the deceased  
25      on the neck. People turned up but found the deceased dead. The accused was arrested thereafter, interrogated at Mashonga Police Post and led the Police to where he had hidden the panga. The panga was recovered and tendered in



5 Court at trial. The deceased was examined and the Post-Mortem report revealed the cause of death as extensive haemorrhage and spinal shock.

The duty of the Court as a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own  
10 conclusion on that evidence. **See Rule 30(1) of the Rules of this Court and Kifamunte Henry V Uganda, SCCA No.10 of 1997.**

The appellant contends that the trial Judge made an erroneous evaluation in the manner in which the offence was committed and called it brutal and because of this he meted out a harsh sentence which occasioned a  
15 miscarriage of justice. He seeks to have the sentence set aside. That the sentence was also illegal for contravening Article 23(8) of the Constitution.

It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made.  
20 It is not sufficient that the members of the Court would have exercised their discretion differently. **Kamya Johnson Wavamuno V Uganda Criminal Appeal No.16 of 2000,**

In sentencing the appellant, the learned trial Judge held that;

25 *"Murder is a serious offence and it is rampant in society. There is need to curb the same. The Convict committed it in a brutal manner. The convict showed no regard for human life that needs deterrent sentence. I have considered that P.G and that the*





5        *convict is a first offender. All factors together, the convict is sentenced to twenty five (25) years imprisonment."*

A reading of the sentencing order above by the trial Judge indicates that he indeed did not take into account the period of time that the appellant had spent in lawful custody.

10    A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. See ***Rwabugande Moses V Uganda Criminal Appeal No.25 of 2014***

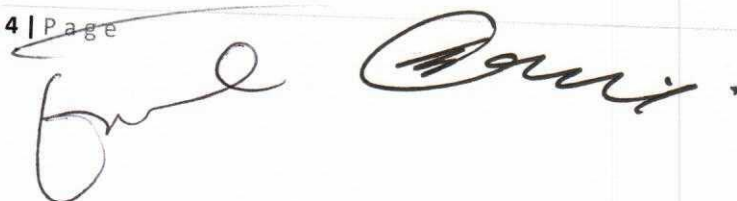
The sentence imposed by the trial Judge was illegal for not complying with  
15    the requirements of **Article 23(8)** of the Constitution and we set it aside.

Since the appellant did not appeal against his conviction, we shall proceed under section 11 of the Judicature Act and sentence him.

**Section 11 of the Judicature Act Cap 13** grants this Court power to impose an appropriate sentence. The section provides that;

20        *"For the purpose of hearing and determining an appeal. The Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."* **See also Rule 32(1) of the Rules of this Court.**

25    Counsel for the appellant proposed a sentence of 10 years imprisonment. We note that the appellant committed a grave offence in a brutal manner however there were mitigating factors which the sentencing Judge should have



5 considered for example he was a young man with a wife and 5 children,  
remorseful and a first offender. In ***Tumwesigye Anthony V Uganda, Court***  
***of Appeal Criminal Appeal No.46 of 2012***, the appellant was convicted of  
murder and sentenced to 32 years imprisonment, this Court reduced the  
sentence to 20 years and in ***Kakubi Paul and Muramuzi David V Uganda,***  
10 ***Court of Appeal Criminal Appeal No.126 of 2008***, this Court set aside the  
death sentence and substituted it with a custodial sentence of 20 years.

In view of the foregoing, we set aside the sentence of 25 years imposed by the  
trial Judge for being illegal and sentence him to 22 years. Having been on  
remand for 1 year and 6 months, he will therefore serve a sentence of 20 years  
15 and 6 months. The sentence shall run from 19<sup>th</sup> June 2013, the date of  
conviction.

**We so order**

Dated at Mbarara this.....2nd day of October 2018

20 .....  
**HON. LADY JUSTICE ELIZABETH MUSOKE**  
**JUSTICE OF APPEAL**

25 .....  
**HON. JUSTICE BARISHAKI CHEBORION**  
**JUSTICE OF APPEAL**

30 .....  
**HON. JUSTICE CHRISTOPHER IZAMA MADRAMA**  
**JUSTICE OF APPEAL**