THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 82 OF 2011

(Coram: Egonda – Ntende, Hellen Obura & Madrama C, JJA)

KAGORO DEO}..... APPELLANT

VERSUS

UGANDA}..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Fort Portal (Akiiki Kiiza, J) delivered on 17th March, 2011 in Criminal Session Case No 88 of 2010)

JUDGMENT OF THE COURT

The appellant was indicted for the offence of aggravated defilement contrary to section 129 (1), (4), (a) of the Penal Code Act Cap 120, tried and convicted for the offence as charged and sentenced to life imprisonment. The facts are that the appellant performed a sexual act with one K. A. a girl aged 2 ½ years. Being aggrieved by the sentence only, the appellant with the leave of court appealed against the sentence on the sole ground;

> That the learned trial judge erred in law and fact when he sentenced the appellant to life imprisonment which is manifestly harsh.

Representation

At the hearing of the appeal, the appellant was represented by learned counsel Ms Julian Nyaketcho while the respondent was represented by the learned Senior Assistant Director of Public Prosecutions Mr David Ndamurani Ateenyi. The appellant was present in court.

Submissions of the appellant

Ms Nyaketcho adopted her written submissions on court record which she had filed on 10th June, 2019 as the appellants submissions while the respondent's counsel addressed the court orally.

The appellant's counsel submitted that the learned trial judge erred in law and fact when he sentenced the appellant to an illegal sentence of life imprisonment without reducing the period he spent on remand prior to his conviction. She relied on Article 23 (8) of the Constitution of the Republic of Uganda 1995 as well as rule 15 (1) of **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** and submitted that the cited law requires that while sentencing any person convicted of an offence, the court shall take into account any period spent on remand in determining an appropriate sentence. The appellant's counsel further relied on the case of **Rwabugande Moses v Uganda; Criminal Appeal No 25 of 2014** for the proposition that the period spent on pre-trial detention before conviction shall be calculated and deducted from the total sentence imposed by the trial court.

She further drew the attention of the court to the case of **Tigo Stephen v Uganda; Supreme Court Criminal Appeal No 8 of 2009** where the term *life imprisonment* was defined to mean imprisonment for the natural life of the convict. From those premises, she contended that it can be maintained that it would be impossible to deduct the pre – trial remand period since it is not ascertainable when the convict would die so as to be able to sentence the convict to a specific number of years and then deduct the pre-trial remand period from the specific term of imprisonment.

The appellant's counsel contended that according to section 47 of the Prisons Act Cap 304, life imprisonment means 20 years imprisonment. Further, she contended that this court has discussed the Supreme Court

decision in **Tigo v Uganda** (supra) and in **Kia Erin v Uganda; Criminal Appeal No 172 of 2013** and came to the conclusion that the intention of legislature is that life imprisonment should be defined as a sentence of 20 years imprisonment. Accordingly, she prayed that the court sets aside the sentence of life imprisonment and substitutes it with a sentence of 18 years imprisonment for the offence of murder.

The appellant's counsel further submitted that the learned trial judge in sentencing the appellant did not take into account the period he spent on pre-trial remand of about 2 years. She submitted that this contravened Article 23 (8) of the Constitution and Rule 15 (2) of the Sentencing Guidelines (supra). Consequently, the sentence was illegal (see **Rwabugande Moses v Uganda** (supra)).

In the alternative she submitted that the learned trial judge erred in law and fact when he sentenced the appellant to life imprisonment which is a manifestly harsh and excessive sentence. She submitted further that the appellant had prayed for leniency but the judge held that he deserved no mercy and for that reason sentenced him to life imprisonment. Ms Nyaketcho invited the court to consider its earlier sentencing ranges in cases of a similar nature. For instance in **Okello William v Uganda; Criminal Appeal No 146 of 2014,** this court sentenced the appellant to 10 years imprisonment for the offence of aggravated defilement by reducing the sentence of 18 years imprisonment which had been imposed by the High Court.

She prayed that the appeal is allowed and the sentence of life imprisonment reduced to 15 years from which the two years the appellant spent in lawful custody prior to his conviction should be deducted.

Submissions of the respondent

In reply, Mr. Ndamurani Ateenyi opposed the appeal and submitted that the deduction of a period spent on pre-trial custody before conviction under Article 23 (8) of the Constitution of the Republic of Uganda does not apply to a sentence of life imprisonment which is an indeterminate sentence. He submitted that since the decision of the Supreme Court in **Tigo Stephen v Uganda** (supra) the term *life imprisonment* means imprisonment for the natural life of the convict. Therefore a judge who passes a sentence of life imprisonment could not be expected to effect the deductions directed under Article 23 (8) of the Constitution which provision does not apply to a sentence of life imprisonment.

With reference to the submission of the appellant's counsel on the application of section 47 of the Prisons Act as to the definition of life imprisonment to mean 20 years, the respondent's counsel submitted that in in **Abelle Asuman v Uganda; Supreme Court Criminal Appeal No 66 of 2016**, the Supreme Court clearly held that the Prisons Act was not intended for the guidance of judicial officers in sentencing offenders. It was meant according to the preamble thereto to: "*consolidate the Law relating to Prisons and to provide for organisation, powers and duties of Prisons Officers and for matters incidental thereto*". In the premises he submitted that the Prisons Act does not apply to the act of sentencing which should be guided by the penal section which defines the offence and prescribes the penalty.

On the second limb of the submissions Mr. Ndamurani submitted that every case is peculiar in its own way and in the circumstances of the appellant's offence and the aggravating factors the sentence of life imprisonment can be considered to be just. This is because the appellant ravished a toddler of the age of 2 ½ years while he was 63 years old at the time of commission of the offence. He submitted that this was the rarest of

the rare cases intended to attract stiff sentences as stipulated in **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. He submitted that this court has a duty to protect society and especially vulnerable members of society like a toddler of two years from someone like the appellant who was 63 years at the time of commission of the offence. He submitted that this readily explains why the sentencing judge opted to impose a sentence of life imprisonment. He prayed that the appeal is dismissed accordingly.

Consideration of the appeal

We have carefully considered the appellants appeal, the submissions of counsel and the applicable law generally.

The first limb of the submissions of counsel is on illegality of sentence. The issue and submissions disclose an important point of law as to whether the period in lawful custody that a convict had spent prior to his conviction should be taken into account when he is sentenced to life imprisonment. The appellant's counsel primarily relies on section 47 (6) of Prisons Act, Cap 304 and the import of her submission is that because life imprisonment is deemed to be a period of 20 years imprisonment, Article 23 (8) of the Constitution of the Republic of Uganda applies to it and therefore the period that the appellant had spent on pre-trial remand before his conviction ought to be deducted based on the presumption that a sentence of life imprisonment means a term of 20 years. Section 46 (6) of the Prisons Act Cap 304 was repealed by the Prisons Act, 2006 and had provided that:

> For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be 20 years imprisonment.

While section 125 of the Prisons Act 2006 had repealed the Prisons Act Cap 304, the Prisons Act, 2006 still retained the provision under section 86 which provides that:

> 86. Grounds for grant of further remission by the President
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> (1) The Commissioner General may recommend to the Minister responsible for justice to advise the President under article 121(4) (d) of the Constitution to grant a further remission on special grounds.
>
> (2) The Commissioner General may restore forfeited remission in whole or in part.
>
> (3) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment.

The wording of section 86 (3) of the Prisons Act, 2006 is exactly the same as that of the repealed section 46 (6) of the Prisons Act Cap 304.

The submissions of counsel in this appeal relate to the crucial issue of whether for purposes of Article 23 (8) of the Constitution the sentence of *life imprisonment* should be deemed to be a sentence of 20 years imprisonment from which the period that the appellant spent in lawful custody prior to his conviction should be deducted. On the other hand the respondent's submission is that the term *life imprisonment* should be considered to be an indeterminate term of imprisonment and therefore Article 23 (8) of the Constitution of the Republic of Uganda does not apply to it. It should be noted that Article 23 (8) of the Constitution of the Republic of Uganda seems to apply only to a sentence of imprisonment for a definite term of years from which a deduction of the pre-trial remand period can be made. Even using the term taking into account such a period of pre-trial remand to the credit of the convicts operates to the same effect of the imprisonment term imposed to be less than the pre-trial remand period. Where the imprisonment is for the remainder of the convict's life, the period the appellant spent on pre – trial remand cannot be deducted from it or taken into account because it is an indeterminate term of

imprisonment until the convict dies. Article 23 (8) of the Constitution provides that:

> 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.* (Emphasis added)

The expression *term of imprisonment*, is considered as meaning a sentence of imprisonment of a definite term of years that can be ascertained rather than an indeterminate period of time depending on the lifespan of the convict. The argument of the respondent's counsel is that because life imprisonment is an indefinite period of time that cannot be ascertained, Article 23 (8) of the Constitution of the Republic of Uganda cannot be applied to it. This is presumably because the sentence is deemed to run until the convict dies as we shall consider below. It follows that a definition of the expression *life imprisonment* is crucial to determine the issue.

The term *life imprisonment* has been defined conclusively by the Supreme Court. After the Constitutional Court outlawed the mandatory death penalty for certain capital offences in Uganda and held that the trial court has discretionary powers whether to impose a death penalty or not and that decision was upheld by the Supreme Court in **Attorney General v Susan Kigula and 417 others Constitutional Appeal No 3 of 2006** Courts were faced with the question of whether life imprisonment meant 20 years imprisonment or imprisonment for the remainder of the life of the convict.

In **Tigo Stephen v Uganda**; **Criminal Appeal No 08 of 2009**, the High Court had sentenced the appellant to life imprisonment for the offence of defilement contrary to section 127 (1) (as it then was) of the Penal Code Act and the matter in controversy was whether the sentence was vague. The Court of Appeal dismissed the appeal and confirmed the sentence of life imprisonment. On further appeal to the Supreme Court, the ground of

appeal was that: **The learned Justices of Appeal erred in law when they upheld the sentence which sentence is illegal by virtue of its ambiguity**. The argument was that the sentence was indeterminate and ought to be substituted with a definite sentence. The High Court had taken into account the period the appellant had spent in lawful custody prior to his conviction in the following words:

> I take into account the fact that he has been on remand for 2 years, so taking that into account, he is sentenced to life imprisonment (20 years), so that the rest who do the same can stand warned.

It was submitted that the sentence was based on the Prisons Act (See section 86 (3) of the Prisons Act 2006). The Supreme Court held that:

> The provisions of Section 47 (6) of the Prisons Act have sometimes been cited as authority for holding the imprisonment for life in Uganda means a sentence of imprisonment for twenty years. However, there is no basis for so holding. The Prisons Act and Rules made there under are meant to assist Prison authorities in administering Prisons and in particular sentences imposed by the courts.
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> The Prisons Act does not prescribe sentences to be imposed for defined offences. The sentences are contained in the Penal Code and other penal statutes and the sentencing powers of courts are contained in the Magistrates Courts Act and the Trial on Indictment Act, and other Acts prescribing the jurisdiction of courts.
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> The most severe sentences known to the penal system include the death penalty, imprisonment for life and imprisonment for a term of years. Imprisonment for life which is the second gravest punishment next only to the death sentence is not defined in the statutes prescribing it. It seems to us that it is for that reason that the Prisons Act provided that for purposes of calculating remission, imprisonment for life shall be deemed to be twenty years. It is noteworthy that the Act is clear that twenty years is only for purpose of calculating remission. The question remains whether there are purposes for which life imprisonment means something more than 20 years, e.g. imprisonment for life.

The holding is clear that the Prisons Act does not prescribe the penalties for defined offences which penalties are prescribed by the Penal Code Act and

other penal statutes while Courts derive powers to pass sentences from the Magistrates Courts Act and the Trial on Indictment Act among laws. Secondly, imprisonment for life is the second gravest sentence next to the death sentence and is not defined. The Supreme Court held that life imprisonment means:

> ... imprisonment for the natural lifetime of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

Further to the pertinent issue in this appeal, the Supreme Court further noted in **Tigo Stephen v Uganda** (supra) that it would be absurd if specific terms of imprisonment beyond twenty years were held to be more severe than life imprisonment.

> We note that in many cases in Uganda, courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. *It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment.* (Emphasis added)

The Supreme Court decision was delivered on 10th May, 2011 and reaffirmed its decision in **Ssekawoya Blasio v Uganda, Supreme Court Criminal Appeal No 24 of 2014** and held that the term *life imprisonment* means imprisonment for the remainder of the convict's life subject to the right of remission and secondly, life imprisonment was a less severe sentence than the death penalty. The decision of the Supreme Court states the law as obtaining in England in terms of the general rule of construction under section 1 of the Penal Code Act Cap 120 laws of Uganda which provides that:

> 1. General rule of construction.
>
> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise

expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

The term *life imprisonment* has been defined under English criminal law. Under English criminal law, a sentence of *life imprisonment* is defined by the Court of Criminal Appeal of England in **R v Foy [1962] 2 All ER 245**. Lord Parker CJ who delivered the judgment of court held *inter alia* that:

> Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentence of life imprisonment remains on them until they die.

The holding brings out a cardinal principle that the release of a prisoner before the full penalty is served does not amend the court sentence as such. The release by the Prison Authorities or the Minister of Internal Affairs after the prisoner has earned remission according to the case of **Ssekawoya Blasio v Uganda** (supra) is a matter for management of the sentence by the Prisons Authorities and has nothing to do with the sentence. Similarly, we consider the earning of remission under the Prisons Act in the same light. This is confirmed by the Supreme Court decision in **Abelle Asuman v Uganda; Supreme Court Criminal Appeal No 66 of 2016** where the Supreme Court held that:

> According to the preamble to the Prisons Act, it was enacted as "An Act to consolidate the Law relating to prisons, and to provide for the organization, powers and duties of Prison Officers and for matters incidental thereto."
>
> We do not find that the Prisons Act was legislation intended for guiding of judicial officers in the exercise of sentencing offenders. The Court of Appeal Justices correctly made no reference to it while sentencing the appellant. It is preposterous for counsel for the respondent to assume they did.

The holding of the Supreme Court makes a clear dichotomy between sentencing powers under the law dealing with sentencing as well as defining the offence and prescribing the penalty thereof and the

management of sentences imposed by the courts by prisons authorities under a separate enactment. It must be emphasized that Article 28 (12) of the Constitution the Republic of Uganda provides that:

> (12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

The definition of the penalty of *life imprisonment,* in **Tigo Stephen v Uganda** (supra) supports the submission of the respondent's counsel that Article 23 (8) of the Constitution of the Republic of Uganda is inapplicable. This is because it imports the conception that the sentence of life imprisonment is for an indefinite period of time depending on the lifespan of the convict. If a convict is sentenced at the age of 30 years, he would spend a longer time in prison presumably depending on life expectancy than a person sentenced at the age of 60 years who may generally be considered to have a shorter lifespan left. We think that such issues are matters for the Prison Authorities or the Minister responsible to handle since they are responsible for whom to release for good conduct.

From that perspective we do not see any contradiction if a prisoner who is on a *life imprisonment* sentence earns remission and for that purpose 20 years is used as a statutory guide only for purposes of calculating the remission. That is the sole reason why a sentence of imprisonment is deemed to be 20 years imprisonment.

The matter is however not free of controversy and ought to be further clarified by the Supreme Court. In **Wamutabanewe Jamiru v Uganda; Supreme Court Criminal Appeal No. 74 of 2007**; the Supreme Court dealt with a similar matter. In that appeal the Court of Appeal exercised its jurisdiction under section 11 of the Judicature Act and imposed a sentence of 35 years imprisonment without remission. The Supreme Court reaffirmed its decision in **Tigo Stephen v Uganda** (supra) that:

> The Prisons Act and Rules made thereunder are meant to assist the prison authorities in administering prisons and in particular sentences imposed by the courts. The Prisons Act does not prescribe sentences to be imposed for defined offences.

Further, in **Wamutabanewe Jamiru v Uganda** (supra), the Supreme Court stated that:

> We note that the maximum penalty for the offence of murder, which the appellant was convicted of, is death and that the sentence he is appealing is less severe than the death penalty he had earlier been handed. Nevertheless, given that remission is a function of the penal institution which has to exercise it in accordance with the Prisons Act we find it illogical for any court, let alone the Court of Appeal in the instant matter, to ordain that the appellant shall serve his sentence without remission.

We note that in **Wamutabanewe Jamiru v Uganda** (supra) it was argued that the period the appellant had spent on remand was not considered contrary to Article 23 (8) of the Constitution. The court relied on its earlier decision in **Rwabugande Moses v Uganda; Supreme Court Criminal Appeal No 25 of 2014** for the proposition that it is illegal not to comply with article 23 (8) of the Constitution which is a mandatory constitutional provision. As a matter of fact the Supreme Court found that the Court of Appeal took into account the period that the appellant had spent in lawful custody before his conviction and sentence. We hold that the holding in **Wamutabanewe Jamiru v Uganda** (supra) is distinguishable on the ground that the Supreme Court was dealing with a definite term of imprisonment of 35 years. On the other hand we agree that life imprisonment by its very nature is an indeterminate sentence and is the severest sentence next in severity to the death penalty. This was also determined in **Magezi Gad v Uganda; Supreme Court Criminal Appeal No 17 of 2014,** where the Supreme Court determined the issue of whether a sentencing judge who sentences the convict to life imprisonment should take into account the period the convict spent on remand prior to his or her

conviction as provided for in Article 23 (8) of the Constitution and they stated that:

> We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23 (8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e. a quantified period of time which is deductible. This is not the case with life or death sentences.

The problem and contradiction is in the practical application of the sentences. The practical application of the sentence is that 35 years imprisonment would be more severe than a sentence of life imprisonment because of the practice of the prisons authorities to deem life imprisonment to be 20 years for purposes of calculating remission. It follows that for purposes of calculating remission just as was done to calculate the period spent in pre-trial detention in the **Wamutabanewe Jamiru v Uganda** (supra), a person sentenced to life imprisonment might end up serving a lesser term of imprisonment than one sentenced to say 34 years or 35 years imprisonment which sentences are supposed to be less severe than that of life imprisonment.

For the above reasons, it is our holding that the provision for taking into account the pre-trial period of detention of a convict prior to his conviction under Article 23 (8) of the Constitution of the Republic of Uganda is inapplicable to a sentence of life imprisonment pursuant to the definition of life imprisonment by the Supreme Court in **Tigo Stephen v Uganda** (supra). It is a matter for legislative reform to deal with any practical and contradictory effect of the above decisions so that life imprisonment, if the legislature deems fit to amend the law would remain in practical terms the most severe penalty next in severity to the death penalty.

In the premises, we agree with the submissions of the respondent's counsel in the first limb of the appeal that the court was not required to take into

account the period the appellant spent on remand prior to his conviction and this limb of the appeal has no merit and is disallowed.

The second limb of the sole ground of appeal is that the sentence of life imprisonment is harsh and excessive in the circumstances.

The Supreme Court of Uganda in **Kyalimpa Edward v Uganda; Criminal Appeal No. 10 of 1995** held that:

> ...an appropriate sentence is a matter for the discretion of the sentencing judge; each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: Ogalo s/o Owoura v R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) E.A.C.A. 126

What is an appropriate sentence should also reflect proportionality in terms of gravity of the offence in relation to similar offences as well as consistency so that cases of similar nature will more or less receive similar sentences. Every person is equal before and under the law in terms of Article 21 (1) of the Constitution of the Republic of Uganda and courts should be consistent in meting out just punishment for similar offences. Unequal treatment reflected in wide disparity in sentencing for same offences committed under similar circumstances goes against the constitutional principles of equality before and under the law.

The facts giving rise to this appeal are no longer in controversy and are stated in the judgment of the trial judge. The appellant committed a sexual act with a girl of only 2 ½ years of age which victim of offence is his granddaughter. The sentencing notes of the learned trial judge are as follows:

> The accused is allegedly a first offender. He has been on remand for about 2 years. I take this into account while considering the sentence to impose on the

accused. He has prayed for leniency. He is 63 years old. However, the accused committed a very serious offence. The maximum possible sentence upon conviction is a death penalty. This shows the gravity of the offence of aggravated defilement. The accused in this case, defiled his own granddaughter who was aged only 2 ½ years. This is to say the least is despicable and abominable in our African culture. Actually it was even incest on his part. He is expected to take care of the victim as he said that, the victim is the daughter of his own son Rajab. However accused decided to be antisocial and anti-culture and decided to have sex with the little granddaughter. In my view the accused deserves no mercy. Putting everything into consideration I sentence the accused to life imprisonment.

We have duly considered the facts of this case. This was a case of aggravated defilement and the aggravation is not only about how the offence was committed but also the age of the victims and the fact that the appellant is the grandfather of the victim.

We have considered precedents with similar facts and taken into account the need to maintain consistency and proportionality in sentencing.

As far as consistency in sentences is concerned, the Supreme Court in **Katende Ahamad v Uganda, Criminal Appeal No. 6 of 2004**, considered sentence in a case where the appellant defiled his biological daughter of 9 and allowed a sentence of 10 years imprisonment after deducting the period of 2 and a half years spent on remand.

In **Babua Roland v Uganda; Criminal Appeal No. 303 of 2010**, the victim who was 12 years old at the time was under the care of the appellant and her aunt to whom the appellant was married. The appellant was indicted and convicted of aggravated defilement by the High Court and sentenced to life imprisonment. On appeal, this court held that a sentence of life imprisonment was harsh and excessive and substituted it with a term of 18 years' imprisonment.

In **Kizito Senkula v Uganda; Criminal Appeal No. 24 of 2001** the Supreme Court held that a sentence of 15 years imprisonment for the offence of defilement where the victim was 11 years was an appropriate sentence.

In **Ninsiima Gilbert v Uganda; Criminal Appeal No. 0180 of 2010** the appellant was convicted of aggravated defilement of a victim of 8 years of age and sentenced to 30 years imprisonment. On appeal, this court reduced the sentence to 15 years imprisonment.

In **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010**, this court upheld a sentence of 13 years imposed on the appellant for the offence of aggravated defilement of a victim of 13 years.

In the premises, considering the aggravation of defiling a granddaughter of 2 ½ years, we will only allow the appeal and set aside the sentence on the ground of the sentence being harsh and excessive in view of other precedents.

We accordingly exercise our mandate under section 11 of the Judicature Act and find a sentence of 22 years imprisonment to be appropriate in the circumstances. From this sentence we deduct a period of 2 years that the appellant spent on remand before his conviction and sentence him to 18 years imprisonment which sentence shall run from the date of his conviction on 17th of March 2011.

Dated at Fort Portal the 20th day of June 2019

Frederick Egonda – Ntende

Justice of Appeal

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Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal