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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0512 OF 2014**

[Arising from Kampala Mitigation Criminal Session Case NO. 191 of 2013]

[Arising from Masaka Criminal Session Case No. 116/2004]

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(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

KAWOOYA JOSEPH:.....:APPLICANT

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VERSUS

UGANDA:.....:RESPONDENT

JUDGMENT OF THE COURT

20 This is an appeal against the decision of Joseph Murangira delivered on the 22/11/ 2013 in which he convicted the appellant of the offence of murder contrary to sections 188 and 189 of the Penal Code Act in counts 1 and 2. He sentenced him to life imprisonment for each count. In count 3, the appellant was convicted of the offence of robbery contrary to sections 285 and 286(2) of the Penal Code Act and was sentenced to 30 years imprisonment. The
25 sentences were to run concurrently.

The facts of this appeal as ascertained from the court record are that the two deceased persons, Paul Kajubi and his wife Kevina Nakafeero lived next to their son, Malinzi Gerald (PW6) at Kibonzi village, Batelemu, Kyotera in Rakai District. During the night of April 1995,
30 the appellant invaded the deceased's house and severely hacked Kajubi six times on the head using a panga which caused his death. Nakafeero was tied hands behind and dragged some five meters away from the house to a place, in the banana plantation, where her body was found with her left ear pierced with a sharp object which caused a concussion into the

5 brain and immediately led to her death. The assailant took off with the deceased's household items and bicycle which after a thorough investigation were found in possession of the appellant. He was later on arrested and charged with the offence of murder in counts 1 and 2 and the offence of robbery in count 3. He was tried, convicted and sentenced to death.

10 Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which 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 re-sentenced the appellant on counts 1 and 2 to life imprisonment on each count of murder and on count 3 to 30 years imprisonment to run concurrently.

15 Being dissatisfied with the above decision, the appellant appealed to this Court against sentence only on grounds;

1. *That the learned trial judge erred in law and fact when he sentenced the appellant without considering the period spent on remand.*
 2. *That the learned trial judge erred in law and fact when he sentenced the appellant to imprisonment for life (on counts 1 and 2), and 30 years imprisonment on count 3 which is manifestly harsh and excessive.*
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At the hearing of this appeal Mr. Mooli Albert Sibuta represented the appellant on State Brief whereas Ms. Namatovu Annet Ddungu Senior State Attorney from the office of the Director Public Prosecutions represented the respondent.

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At the commencement of the hearing, counsel for the appellant sought leave under Section 132 (1) (b) of the Trial on Indictment Act to appeal against sentence only, which was granted. He then submitted that the appeal is against sentence on two limbs. Firstly that, the learned trial Judge failed to consider the period the appellant spent on remand hence contravening Article 23(8) of the Constitution which imposes a duty on a sentencing court to take into

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5 account the period a convict spent on remand from the time of arrest to the time of conviction. Counsel also referred to the case of **Wabamutabaniwe Jamil vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007** to support his submission. Counsel averred that since Court did not address this, it renders the sentence illegal in the circumstances. He added that this Court has the power under Section 11 of the Judicature Act to set aside the illegal sentence
10 and impose a lawful sentence provided by law.

On the second limb, counsel contended that the sentence was harsh and excessive. He submitted that the appellant was sentenced to life imprisonment for counts 1 and 2 and 30 years imprisonment in respect of count 3 which in his view was harsh and manifestly excessive. He relied on the authority of **John Kasimbazi and 6 others vs Uganda, Court of Appeal Criminal Appeal No. 167 of 2013** where the appellants were charged with murder
15 and sentenced to life imprisonment and on appeal this Court reduced the sentence to 12 years. He also referred to the case of **Magala Ramathan vs Uganda, SCCA No. 1/2014** where the Supreme Court reduced the sentence of 2 counts of murder from 14 years to 7 years imprisonment in respect of each count.

20 Counsel prayed that this Court also considers the mitigating factors which he presented and imposes a lenient sentence on the appellant. He proposed a sentence of 25 years imprisonment on each of the 3 counts less the 9 years the appellant spent on remand.

Conversely, counsel for the respondent submitted that it was not necessary for the lower court to subtract the period spent on remand in circumstances where the appellant was sentenced
25 to life imprisonment. She referred to the case of **Tigo Stephen vs Uganda, Criminal Appeal No. 08 of 2009** which defined life imprisonment as imprisonment for the natural life of the convict and that since it does not have a definite time of service, Article 23 (8) of the Constitution is not applicable. Further that, the appellant was to serve life imprisonment and the sentence of 30 years imprisonment concurrently and as such the fact that the remand
30 period was not subtracted from the latter sentence did not occasion a miscarriage of justice.

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Counsel contended further that in considering whether the sentence of life imprisonment is justifiable, the court takes into account the factors aggravating a death sentence listed in guideline 20(f) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 as to whether the offender caused loss of life in the course of the commission
10 of another grave offence. He submitted that the circumstances of this case are that the appellant set out to rob the couple and he ended up killing his victims in the presence of their child who was gravely affected by the offence psychologically. Counsel submitted that both murder and robbery are very serious offences yet they were committed in one transaction and that it was shown on record that the appellant was consistently committing such crime.

15 She added that counsel for the appellant did not provide this Court with any reasons to warrant varying the sentence of the lower court and so it should not be interfered with. Further that, counsel for the appellant did not cite any circumstances to show that the sentence was harsh and excessive. In conclusion, counsel prayed that this Court upholds the sentence of life imprisonment as having been passed legally.

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In rejoinder, counsel for the appellant submitted that in the **Tigo case (supra)** the Supreme Court held that life imprisonment meant imprisonment for the natural life time of a convict though the actual period of imprisonment may stand reduced on account of remission earned, but if on the other hand it is computed under the Prisons Act, it amounts to 20 years
25 imprisonment. Basing on this, counsel submitted that there are 2 sentences running, namely; life which under the Prisons Act could be equivalent to 20 years imprisonment and a sentence of 30 years imprisonment. Counsel referred to the Supreme Court case of **Mbunya Godfrey vs Uganda, Supreme Court Criminal Appeal No. 4 of 2011** in which the court emphasized the need for consistency in sentencing. He contended that the sentence of life imprisonment
30 and 30 years imprisonment if borrowed from the words of the Court in that case is vague and

5 as such prayed that this Court puts the record straight by imposing a sentence that is appropriate.

Court's Consideration

10 We have carefully listened to the submissions of both counsel and also perused the court record and the authorities cited to us. This Court, as a first appellate court, has a duty to re-appraise the evidence and make its own inferences on all issues of law and fact. **See: Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

15 This Court can only interfere with the sentence of a lower court where in the exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. **See: Kiwalabye Bernard vs Uganda, Criminal Appeal No.143 Of 2001 (Unreported); James vs R, (1950) 18 EACA 147 and Ogalo s/o Owoura vs R, (1954)24 EACA 270**

20 With the above principle in our minds, we now turn to consider the arguments of both counsel. The appellant faults the trial Judge for not taking into account the period he had spent on remand during sentencing and also imposing an excessive sentence upon him.

While sentencing the appellant, the trial Judge stated thus;

25 *“Reasons for the sentences against the convict, the following mitigating factors are considered:*

1. *All the mitigating factors advanced by counsel for both parties.*
2. *.....*

5 *In view of all the mitigating factors/reasons for sentence, the convict deserved a death sentence. However, using my discretion and pursuant to Guideline 17 of the constitution sentencing guidelines (supra), I sentence the convict on:*

 (1) *Count I to imprisonment for life.*

 (2) *Count II to imprisonment for life*

10 (3) *On count III to 30 years imprisonment in prison*

All sentences passed herein above shall be carried out by the convict concurrently.”

On the first ground of appeal, regarding the sentence of life imprisonment, we are guided by a recent decision of the Supreme Court in ***Magezi Gad vs Uganda, SCCA No. 17 of 2014***, in which it was held as follows;

15 *“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 ie. a quantified period of time which is deductible. This is not the case with life or death sentences.”*

20 From the above decision, we find that the period the appellant had spent on remand could not and cannot be deducted from the sentence of life imprisonment. We thus reject the appellant’s prayers in as far as this issue is concerned.

25 In regard to the offence of robbery where the appellant was sentenced to 30 years imprisonment, we note that the re-sentencing Judge while passing the sentence did not take into consideration the period the appellant had spent in lawful custody and this contravened Article 23 (8) of the Constitution. His failure to do so rendered the sentence illegal. It was held by the Supreme Court in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014***, that:-

“A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.”

5 We therefore set aside the sentence of 30 years imprisonment for being illegal.

On the second ground of appeal regarding severity of sentence, we have looked at other decided cases with similar circumstances in regard to the count of murder and we find that the sentence of life imprisonment imposed upon the appellant in this case is harsh and excessive. We accordingly set it aside and invoke section 11 of the Judicature Act which
10 permits this Court to exercise the power of the trial court to impose an appropriate sentence.

In so doing, we take into consideration the aggravating factors presented namely that; the male deceased was severally cut six times with a sharp object on his head, there was use of malice in killing the deceased, the murder was planned, the impact of the crime on the family, relatives and the community at large, the appellant did not only rob but also committed
15 murder, he is dangerous to the community. Counsel prayed that this Court considers this case as one of the rarest of the rare cases and thus upholds the death sentence. The mitigating factors are that; the appellant is remorseful and capable of reforming, he was on remand for 9 years, counsel urged this Court to consider these mitigating factors and impose a lenient sentence.

20 In ***Bwarenga Adonia vs Uganda, CACA No. 276 of 2009***, where the appellant murdered 2 people and was sentenced to death, on appeal this Court reduced the sentence to 30 years imprisonment.

In Okecha Mugumba & 3 others vs Uganda, CACA No. 0183 of 2009 the appellants cut a 78 years old woman with a panga and also beat her with clubs leading to her death. The
25 appellants were arrested and indicted of two counts of murder, tried, convicted and each sentenced to 20 years imprisonment on each count. The sentences were to run concurrently. On appeal to this Court against both conviction and sentence, the appeal was dismissed and the conviction and sentence upheld.

5 In ***Odongo Ronald vs Uganda, CACA No. 048 of 2010***, the appellant was convicted of murder of two people by shooting and sentenced to death. On appeal to this Court, the sentence of death was found to be harsh and manifestly excessive and it was thus substituted with a sentence of 18 years and 4 months imprisonment.

10 It is clear from the above previous decisions of this Court that the sentence for the offence of murder ranges between 18 years to 30 years imprisonment depending on the facts and circumstances of each case. In this case, we believe that a lesser but long custodial sentence commensurate with the gravity of the offence will meet the ends of justice.

15 Having taken into account both the aggravating and mitigating factors in this appeal as set out above and the range of sentences in cases of murder, we find that a sentence of 27 years imprisonment is appropriate for each count of murder. However, Article 23 (8) of the Constitution enjoins court to take into account the period a convict has spent on remand while sentencing. The appellant was on remand from 9/5/1995 to 29/11/2004 which amounts to 9 years 6 months and 20 days. Taking that period into account, we sentence the appellant to 18 years imprisonment for each count of murder.

20 In regard to severity of sentence for the offence of robbery, we have also looked at the sentences this Court has imposed in similar offences with more or less similar circumstances in the spirit of maintaining consistency in sentencing as expressed by the Supreme Court in ***Mbunya Godfrey vs Uganda (supra)***.

25 In ***Olupot sharif & another vs Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014***, the appellant was convicted of the offence of robbery and was sentenced to 40 years imprisonment. On appeal, this Court reduced the sentence to 32 years imprisonment.

In ***Ogwal Nelson & 4ors vs Uganda, Court of Appeal Criminal Appeal No. 606 of 2015***, the appellants were convicted of robbery and the 1st appellant was sentenced to 35 years,

5 the 2nd appellant to 25 years, the 3rd appellant to 30 years and the 4th & 5th appellants to imprisonment for life. On appeal to this Court, each of their sentences were reduced to 17 years and 6 months.

Similarly, in **Adama Jino vs Uganda, CACA No. 50 of 2006**, the appellant was convicted of three counts of robbery and sentenced to death. This Court, in reviewing the sentence set
10 aside the death sentence and substituted it with 15 years imprisonment.

Considering the sentencing range for the offence of robbery in the above decided cases, we are of the view that, a sentence of 25 years imprisonment will meet the ends of justice. However, we take into account the period of 9 years 6 months and 20 days the appellant spent on remand and sentence him to 16 years imprisonment which will run from 29/11/2004,
15 being the date of conviction.

In conclusion, we allow this appeal in the above stated terms and order that the sentences are to be served concurrently.

We so order.

Dated at Kampala this 25th day of June 2019

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Elizabeth Musoke
JUSTICE OF APPEAL

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Hellen Obura
JUSTICE OF APPEAL



Ezekiel Muhanguzi
JUSTICE OF APPEAL