THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 769 OF 2014

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

ADING ANDREW} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala (Alividza, J) delivered on the 30th of July 2014)

JUDGMENT OF THE COURT

The facts of this appeal were that the appellant was charged with two counts of the offence of murder contrary to sections 183 and 184 of the Penal Code Act (before revision and which are now sections 188 and 189 of the Penal Code Act). The particulars of the offence were that the appellant on 8th April, 2001 at Popara East Village in Masindi district murdered Ayot Christine. On the second count, it is stated that on 8th April, 2001 at Popara village in Masindi district the appellant murdered Akello Sharon. He was convicted as charged by Justice Yorokamu Bamwine, judge of the High Court as he then was on 14th November, 2003 and sentenced to the then mandatory death penalty on 14th November, 2003. Pursuant to the nullification of the mandatory death penalty by the Constitutional Court which decision was affirmed by the Supreme Court in the **Attorney General v Susan Kigula and 417 others Constitutional Appeal Case No 1/2006**, the appellant's sentence was rendered a nullity upon nullification of the death penalty and he was sent back to the High Court for hearing on

the question of appropriate sentence. The appellant was subsequently re-sentenced on 30th July, 2014 by Justice Elizabeth Jane Alividza to 45 years imprisonment on both counts which sentences were to run concurrently.

The appellant being aggrieved with sentence alone with the leave of this court appealed against sentence on the ground that:

> **The sentence was illegal as it contravened Article 23 (8) of the Constitution or in the alternative the sentence was harsh and manifestly excessive in the circumstances.**

In the memorandum of appeal the appellant prays that the appeal is allowed and the sentences set aside and substituted with an appropriate one. Secondly, the appellant prayed for any other order that may be issued to meet the ends of justice.

Representation

At the hearing of the appeal learned counsel Mr Richard Bwiruka appeared for the appellant while the learned State Attorney Ms Joanita Tumwikirize appeared for the respondent. The appellant was present in court.

Submissions of the appellant

The appellant's counsel submitted that the sentence imposed by the High Court was illegal because it was imposed in contravention of Article 23 (8) of the Constitution. The resentencing judge combined the period after conviction with the period before conviction. The appellant had spent 2 years and 9 months and 21 days in lawful custody prior to his first conviction. On that basis, the sentence of the appellant of 45 years imprisonment was unlawful. The appellant's counsel prayed that this court moves under section 11 of the Judicature Act to set aside the sentence and resentence the appellant to an appropriate sentence.

In the alternative, the appellant's counsel submitted that the sentence of 45 years imprisonment was harsh and excessive. The appellant is 55 years at the time the appeal was heard. He was 35 years old as indicated in the charge sheet at the time he was charged with the offences. When he testified on 28th October, 2008, he was only 38 years old. The sentence of 45 years imprisonment does not allow the prisoner to reform and be reintegrated into society. He proposed a sentence of 20 years imprisonment to run from the date of conviction. He prayed that the appeal is allowed and the appellant sentenced to 20 years imprisonment.

Submissions of the respondent

In reply Ms Joanita Tumwikirize opposed the appeal only on the alternative ground. Learned counsel for the respondent conceded that the sentence was passed in contravention of Article 23 (8) of the Constitution and did not oppose the first ground of appeal.

As far as the appropriate sentence is concerned, she prayed that the court imposes an appropriate sentence. She submitted that the victim was raped before being killed. The deceased was seven months pregnant and lost the foetus. Secondly, the appellant also killed the daughter of the deceased and was charged with two counts of murders. She prayed for a sentence of 43 years from which the two years that the appellant spent in lawful custody before his conviction be deducted.

The respondent's counsel relied on **Bakukye Muzamiru and Jjumba Tamale Musa v Uganda; Supreme Court Criminal Appeal No 56 of 2015**, where a judge sentenced the appellants to 40 years imprisonment and 30 years imprisonment respectively for the offences of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The appellant *inter alia* appealed against sentence and the Court of Appeal affirmed the

sentence. On further appeal to the Supreme Court, the sentence was affirmed. The respondent's counsel prayed that the appeal is allowed on the terms that she proposed.

Consideration of the appeal

We have carefully considered the applicant's appeal, the submissions of counsel as well as the applicable law.

The issue of whether the sentence of 45 years imprisonment imposed on the appellant was in contravention of Article 23 (8) of the Constitution of the Republic of Uganda is a question of law. We are mindful of the fact that the respondent's counsel conceded that the sentence contravened Article 23 (8) of the Constitution.

If this court finds that the sentence contravened Article 23 (8) of the Constitution of the Republic of Uganda, it would be unnecessary to consider the alternative ground of the appeal as to whether the sentence imposed was harsh and manifestly excessive as to amount to an injustice because this court would set aside the sentence.

The concession of the respondent's counsel notwithstanding, we are obliged to consider the merits of the point of law as to whether the sentence contravened the above stated provision of the Constitution of the Republic of Uganda. This is what the learned trial judge said about the period the appellants spent in lawful custody:

> The convict has been in custody since 2001, which is 13 years. I also reduce 13 years from the remaining sentence of 57 years leaving a balance of 44 years.

The appellant had been convicted and sentenced to death on 14th November, 2003 and therefore could not have been in custody for 13 years prior to his conviction and sentence. The period considered by the learned trial judge in the sentence is an omnibus period that included the period

the appellant was in the death row waiting to be executed having been sentenced to death. Article 23 (8) of the Constitution of the Republic of Uganda provides that:

> (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.

The period that ought to be taken into account before the imposition of the sentence is the period in lawful custody before completion of the trial of the accused. The trial ends with the conviction. The period that the appellant had spent before the completion of his trial could therefore not be discerned from the judgment of the learned trial judge in the resentencing the appellant. Article 23 (8) of the Constitution was considered in **Rwabugande Moses v Uganda [2017] UGSC 8** by the Supreme Court. On the issue of certainty of the period prior to conviction, the Supreme Court held:

> It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.
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> We must emphasise that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the sentence. Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period.

In **Rwabugande Moses v Uganda** (supra) the Supreme Court made it explicitly clear that the trial judge should account for the remand period in arriving at the sentence. The trial judge can only account for that period when it has been ascertained. In this case the period the appellant had spent in lawful custody had not been set out by the trial judge who relied

on an omnibus period which purportedly included the pre-trial period and the time the appellant was on death row prior to resentencing. In the premises, we hold that the period the trial judge considered in compliance with Article 23 (8) of the Constitution the Republic of Uganda included the post - conviction period and this is contrary to the requirement of Article 23 (8) of the Constitution the Republic of Uganda. This rendered the sentence illegal and we accordingly allow the appeal and set aside sentence.

Having set aside the sentence, we do not have to consider the alternative ground of whether the sentence of 44 years imprisonment that had been imposed on the appellant was harsh and excessive in the circumstances. Exercising the powers of this court under section 11 of the Judicature Act, we shall proceed to impose an appropriate sentence after considering the circumstances and judicial precedents in similar cases.

The brief facts of this appeal, as far as is relevant to the sentence, are that the appellant had killed Ayot Christine, a mother and her three year old daughter Akello Sharon. By the time the Ayot Christine was killed, she was pregnant with a seven month's old foetus. The foetus was found outside the body. Secondly, Akello Sharon was dismembered. By the time the bodies were found after about four days, they were decomposed and the exact method of killing was not established with certainty. The trial court which convicted the appellant considered whether the appellant was guilty as charged and convicted him accordingly. This is what the learned trial judge found about the murder:

> The doctor found the body of Ayot hidden in a thicket. It was nude, having been stripped naked. As for Sharon, the headpiece was detached from the trunk, wrapped in clothes apparently from the murdered mother about 150 meters away. Both were in an advanced stage of decomposition. Therefore, the doctor was unable to see external marks of violence, if any. ···

> The doctor was unable, as already observed above, to tell the cause of death because of the decomposition which had set in. He, however, remarked in respect of Ayot Christine, that since the body had been stripped naked, it was open to assumption that the killer first raped her and then strangled her before hiding the body where it was found under the thicket. The doctor was also of the view that the mother's clothes could have been used to strangle the daughter. I am acutely aware that the doctor's observations were a matter of opinion. It is, however, an opinion of an expert. To that extent, I attach some weight to it. I have considered the fact that the bodies were found hidden in the bush. They had signs of strangulation coupled with possible rape especially the body of Ayot. ···

To say the least, the doctor's findings were inconclusive as to the method used to kill the deceased. We are mindful of the fact that this is an appeal against sentence only and take into account the above aggravating factors where a vulnerable woman was killed with her child when she was pregnant. At the time of commission of the offence the appellant was stated to be 35 years old in the charge sheet. Other factors were not material for consideration because the appellant had been sentenced under a mandatory provision that prescribed the death penalty as the only penalty for murder. No sentencing discretion was used and therefore the mitigating and aggravating factors were not relevant in arriving at a sentence. We note that the learned resentencing judge considered the reform of the appellant while in the prison custody after his conviction. Mitigating factors ought to be those factors at the time of commission of the offence and not afterwards except for such post commission of offence factors such as remorse, forgiveness and reconciliation as provided for by Article 126 (2) (d) of the Constitution of the Republic of Uganda.

The appellant was a first-time offender with no previous record of conviction. It is indicated that he was on remand for two years and seven months before conviction and had since spent 10 years and eight months after conviction at the time of his resentence. He had reported himself to the authorities after the incident. He was also very remorseful.

We have further considered precedents involving the offence of murder. In **Francis Bwalatum v Uganda; Court of Appeal Crim Appal No 48 of 2011**, the appellant had been charged and convicted in the High Court of Uganda with two counts of murder contrary to sections 188 and 189 of the Penal Code Act. He was sentenced to 50 years imprisonment and appealed to this court *inter alia* on the ground that the 50 years imprisonment was harsh and excessive in the circumstances. This court held that prior to the appellant's conviction he had spent one year and seven months on remand. Secondly, he was 57 years old at the time of the appeal and was about 54 years of age when he committed the offence. He had been convicted of two very serious offences involving the loss of two lives of which the maximum penalty is death. The appeal against sentence was allowed and the sentence of 50 years imprisonment was nonetheless reduced to 20 years imprisonment on each count to be served concurrently.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant had been tried and convicted of two counts of murder by the High Court and sentenced to life imprisonment. He appealed to this court against sentence only on the ground that the sentence imposed by the learned trial judge was manifestly excessive, harsh and unfair in the circumstances. This court took into account the fact that the appellant was a first offender and had spent 2 ½ years on remand prior to his trial and conviction. He was 29 years old and a relatively young man at the time of commission of the offence. Nonetheless, he had committed a very serious offence leading to the loss of life in each count. It was a senseless and brutal murder of two suspects already under arrest which undermined the process of the rule of law which had been set in motion in respect of the suspects. The appeal was allowed and the sentence set aside. The appellant was resentenced to 18 years imprisonment on each count to be served concurrently from the date of conviction.

In **Rwahire Ruteera v Uganda, Court of Appeal Criminal Appeal No 72 of 2011**, the appellant had been indicted and convicted of two counts of murder contrary to sections 188 and 189 of the Penal Code Act by the High Court. He had murdered his wife and stepdaughter. He was sentenced to 20 years imprisonment on each count with the sentences to be served consecutively. In effect he was sentenced to 40 years imprisonment in aggregate. He appealed to this court against sentence only on the sole ground that the learned trial judge had erred when he sentenced the appellant to an illegal sentence contrary to Article 23 (8) of the Constitution of the Republic of Uganda. The respondent conceded that the sentences imposed on the appellant were illegal because the period he had spent on remand was not deducted from each sentence. This court considered the fact that the appellant was a first offender, he was 42 years old at the time he committed the two offences in the most despicable and brutal manner when he murdered his wife and stepdaughter. This court found that the appropriate sentence for the first count was 20 years imprisonment and for the second count was 20 years imprisonment from which the court deducted the 5 years the appellant had spent on pre-trial remand and sentenced him to 15 years imprisonment which sentences were to be served consecutively amounting to 30 years imprisonment from the date of conviction.

In the facts and circumstances of this case, the appellant was a first-time offender and he was remorseful but had committed a gruesome offence against two vulnerable citizens and the Nation. Taking into account the factors listed above, we hold that a sentence of 30 years imprisonment would be appropriate. From that we would take into account the period of 2 years, 9 months and 21 days that the appellant had spent in lawful custody on pre-trial remand before his conviction. We deduct the period of two years nine months and 21 days and sentence the appellant to 27 years

2 months and 9 days imprisonment which sentence shall commence running from the date of his conviction on 14th November, 2003.

Dated at Fort Portal the 30th day of July 2019

Frederick Egonda – Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal

Brenda Rukesh for Appellant on State Brief.
- Wesswe Adams RSSA holding brief for Tumwikirize Joan SA for Respondent
- Appellant in court.

30/07/19.