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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 0118 OF 2014

(Coram: Bamugemereire, Madrama & Luswata, JJA)

KAJOOBA VESENCIA} APPELLANT

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VERSUS

UGANDA} RESPONDENT

(Appeal from the decision of the High Court Hon. Lady Justice Elizabeth Nahamya at Nakawa Kampala in Criminal Session Case No 301 of 2011 delivered on 4th April 2012)

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JUDGMENT OF COURT

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The Appellant was indicted for the offence of aggravated defilement contrary to section 129 (3), (4) of the Penal Code Act. The facts are that the appellant on 22nd of November 2010 at Kinoni Village LC1 Kyegonza sub - county in Gomba district had sexual intercourse with N.A, a girl who was then 11 years old. The appellant pleaded guilty to the offence and was convicted on his own plea of guilty and sentenced to 15 years imprisonment.

The appellant was aggrieved with the sentence of imprisonment only and appealed to this court on one ground of appeal namely:

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That the learned trial judge erred in law and fact when she passed an illegal sentence of 15 years without subtracting the period the appellant spent on remand thereby occasioning a miscarriage of justice.

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The appellant prayed that the pre-trial period he spent on remand be deducted from the sentence imposed by the trial judge.

At the hearing of the appeal, Ms Caroline Nabaasa the learned Principal Assistant DPP appearing with Emily Mutuzo the learned state attorney represented the respondent while learned counsel Ms Shamim Nalule appeared for the appellant on state brief. The appellant attended court

5 via tele video link from Kitalya prison in Wakiso District. Both counsel of the parties addressed the court by way of written submissions and judgment was reserved on notice.

Appellant's submissions.

10 The appellant's counsel submitted that it is a well settled principle that the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law (see **Kifamunte Henry v Uganda; Criminal Appeal No 10 of 1997**). The appellant's counsel also relied on the decision of the Supreme Court in **Rwabugande Moses v Uganda SCCA 25 of 2014** for the application of article 23 (8) of the Constitution of the
15 Republic of Uganda. In that appeal, it was held that the court must take into account the period the convict spent on pre-trial remand before imposing a sentence of a term of imprisonment. Counsel further relied on page 15 of the record of proceedings for the notes of the trial judge in the sentencing proceedings and particularly the words:

20 I will consider the reformatory and rehabilitation principles of sentencing. Hence youthful age and the time spent on remand have been underscored.

According to the appellant's counsel, the word "underscore" used by the trial judge means "emphasised" according to Webster's Dictionary. With reference to the decision of the Supreme Court in **Rwabugande Moses v**
25 **Uganda** (supra) counsel submitted that the period that the convict spent on remand is known with certainty and precision and ought to be subtracted from the sentence that the trial judge intends to impose for purposes of taking it into account in terms of article 23 (8) of the Constitution of the Republic of Uganda.

30 In the premises the appellant's counsel submitted that the sentence imposed of 15 years imprisonment was an illegal sentence for failure to take into account the period of the convict had spent on remand prior to his sentence in breach of article 23 (8) the Constitution. He prayed that the period of three years and five months that the appellant had spent on
35 pre-trial remand should be deducted from the sentence of 15 years for the court to arrive at a lawful imprisonment term.

Submissions of the respondent in reply.

The Principal Asst DPP submitted that sentencing is at the discretion of the trial judge and the court will only interfere with the sentence imposed by the trial judge if it is evident that the trial judge acted on a wrong principle or overlooked a material factor or if the sentence is manifestly harsh and excessive in view of the circumstances of the case (See **Bashara Sharif v Uganda SCCA No 16 of 2000** and **Kamya Johnson Wavamunno v Uganda, SCCA No 16 of 2000**).

Learned counsel contended that the learned trial judge took into account the period that the appellant had spent on pre-trial remand and cited the words of the learned trial judge:

... I will consider the reformatory and rehabilitation principle of sentencing. Hence your youthful age and the time spent on remand have been underscored.

The learned principal Asst DPP submitted that the sentence was legal. She relied on article 23 (8) of the Constitution of the Republic of Uganda and submitted that the words "taking into account" did not require an arithmetical exercise until the decision of the Supreme Court in **Rwabugande Moses v Uganda SCCA No 25/2014**. She contended that the decision in **Rwabugande Moses v Uganda** did not operate retrospectively and was not binding on the trial judge by the time she delivered her decision (See **Sebunya Robert and Another v Uganda SCCA No 58 of 2016** and **Karisa Moses v Uganda SCCA No 23 of 2016**). She contended that the decision from which this appeal emanates was delivered on 4th April 2014 before the decision in **Rwabugande Moses** (supra) which was delivered on 3rd March 2017.

The learned principal Asst DPP submitted that since the sentence from which the appeal lies was passed before the decision in **Rwabugande Moses v Uganda** (supra), there was no requirement for a mandatory arithmetic deduction of the period spent on remand by the trial judge.

Lastly the learned principal Asst DPP relied on **Abelle Asuman v Uganda SCCA No 25 of 2014** for the proposition that taking into account of the period a convict spent on pre-trial detention did not have to be arithmetic

5 and the words used by the trial judge should demonstrate that he or she took into account that period.

Consideration of appeal

We have carefully taken into account the appellant's appeal, the submissions of counsel and the laws referred to as well as the judicial precedents and the law generally.

This is a first appeal and because there are no factual controversies, the ground of appeal relates to a question of law as to whether the words used by the learned trial judge amounted to taking into account the period that the appellant had spent on pre-trial detention in terms of article 23 (8) of the Constitution of the Republic of Uganda before she imposed a sentence of 15 years imprisonment. We therefore do not need to re-evaluate the evidence on record in terms of rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions which provides that on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact.

As far as the submission of the appellant's counsel is concerned, she relied on the decision of the Supreme Court in **Rwabugande Moses v Uganda** (supra) for the proposition that taking into account had to be arithmetic and the words used by the trial judge did not show that the period the appellant had spent on remand had been deducted. It is not in dispute that the appellant had spent a period of three years and five months before his conviction and sentence to a term of 15 years' imprisonment.

The record shows that the appellant was sentenced on 4th April 2014. The offence was committed on 22nd November 2010. The record further demonstrates that the appellant was charged around 2nd December 2010. His trial commenced on 4th April 2014 and the court entered a plea of guilty on the same day when the appellant pleaded guilty as charged.

According to the learned principal assistant DPP, the decision in **Rwabugande Moses v Uganda** (supra) had not yet been delivered by 4th April 2014 and could not have been binding on the learned trial judge.

5 While the argument is plausible, it misses the essential point that article
23 (8) of the Constitution of the Republic of Uganda was in existence and
had been promulgated together with the constitution on 8th October 1995.
The decision in **Rwabugande Moses v Uganda** (supra) was an attempt to
interpret the constitutional provision for purposes of its application by
10 the trial courts in taking into account the period that the appellant had
spent on pre-trial detention prior to his conviction and sentence.
Secondly, the decision of the Supreme Court in **Abelle Asuman v Uganda**
(supra) was another attempt to give direction to the trial courts in
arriving at an appropriate sentence of imprisonment for a definite term
15 in terms of article 23 (8) of the Constitution of the Republic of Uganda. At
best the decisions of the Supreme Court cited immediately above dealt
with the method to be applied for taking into account the period a convict
who has been sentenced had spent on pre-trial detention before his
sentence.

20 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.

25 A literal reading of article 23 (8) of the Constitution of the Republic of
Uganda clearly requires that after conviction and where the court intends
to sentence the convict to a term of imprisonment, any period he or she
spent in lawful custody in respect of the offence shall be taken into
account. The controversy is on how it is to be taken into account in
30 imposing the term of imprisonment. Where it is not taken into account,
this sentence would be illegal for violation of article 23 (8) of the
Constitution of the Republic of Uganda and would be set aside for
illegality.

In **Rwabugande Moses v Uganda**; [2017] UGSC 8 the Supreme Court
35 considered how to take into account the period the convict spent on
remand prior to his conviction and stated that:

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

5 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.

The approach in **Rwabugande Moses v Uganda** (supra) requires the computation of the period that the convict spent on pre-trial detention before his conviction and deducting that period from the sentence that the trial judge intends to impose on the convict. This must necessarily be reflected in the judgement. On the other hand, **Abelle Asuman v Uganda; [2018] UGSC 10**, the Supreme Court in a later decision while not departing from **Rwabugande Moses v Uganda** (supra) held that the essence of article 23 (8) of the Constitution of the Republic of Uganda is fulfilled where the trial court demonstrates that the period the appellant had spent in lawful custody had been taken into account. They held that:

20 The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in Article 23 (8) of the Constitution is for the court to take into account the period spent on remand....

25 Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or justices used different words in the Judgement or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the constitutional obligation in Article 23 (8) of the Constitution.

30 The essence of the latter decision of the Supreme Court of Uganda is that there has to be a demonstration that the period the appellant had spent on pre-trial demand had been taken into account before imposing the sentence. On the other hand, it is critical in **Rwabugande Moses versus Uganda** (supra) that a quantitative approach is used so that the definite period is computed and deducted from the sentence the judge intends to impose. Obviously, this was meant to make it clear, in case of any appeal, that indeed the period the appellant or convict had spent on pre-trial detention had been taken into account. Secondly, it ensures that the period spent on remand is applied as a credit to the convict to the extent that it is considered as if this sentence had been partially served and is equivalent to the period spent in lawful custody prior to conviction and sentence.

5 We have considered the wording used by the learned trial judge at page
15 of the record where she stated that:

10 I have considered the fact that you were a youth and still a youth. At the time
you were aged 20 years but going by your explanation about your wives, it
seems you are not yet matured to handle life's issues. It is for this reason that
you need to stay longer in prison and become more disciplined and by the time
you come out you will be very responsible. The prosecution has requested for
a 20-year imprisonment term, the victim said if you are given 15 years
imprisonment, she will at least be satisfied. Your lawyer, Mr. Ntuyo has
requested for 6 (six) years and you have without shame asked for 2 (two) years
15 as if defilement of other people's children is a mere joke. I will consider the
reformatory and rehabilitation principles of sentencing. Hence your youthful
age and the time spent on remand have been underscored.

I therefore hereby sentence you to 15 (fifteen) years imprisonment


20 We have carefully considered the wording used by the learned trial
Judge. When the trial judge stated that that the youthful age and the time
spent on remand have been underscored, it is not clear what is meant.
First of all, in considering the youthful age, the trial judge had ruled that
the appellant had to stay longer in prison because of his youthful age as
he had not yet matured to handle life's issues. She stated that he needed
25 to stay longer in prison and become disciplined and very responsible. She
considered four case scenarios submitted by the parties. These were; a
20 years' imprisonment term, a 15 years' imprisonment term, a 6 years'
imprisonment term and a 2 years' imprisonment term which she
considered was a joke. It is not clear what time of imprisonment she
30 considered appropriate and therefore it is difficult to discern whether she
took into account the three years and five months the appellant had spent
in pre-trial detention it was therefore not clearly demonstrated that that
period had been taken into account.

35 We, in the circumstances, find that it was not demonstrated that the
learned trial judge took into account the period the appellant had spent
in pre-trial detention. The sentence was illegal for violating article 23 (8)
of the Constitution of the Republic of Uganda. We hereby set it aside and
consider that the learned trial judge intended to impose a period of 15
years imprisonment. We do not intend to interfere with the approximate
40 period of 15 years imprisonment. We allow the appeal and deduct the

5 period of 3 years and 5 months from the 15 years imprisonment we deem appropriate to impose in the circumstances.

In the premises, exercising the powers of this court under section 11 of the Judicature Act, we sentence the appellant to 11 years and 7 months imprisonment which sentence shall commence on the date of his
10 conviction and sentence on 4th April 2014

Dated at Kampala the 28th day of July 2022



Catherine Bamugemereire

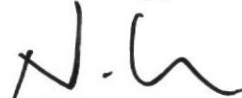
Justice of Appeal

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Christopher Madrama

Justice of Appeal



Eva K. Luswata

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Justice of Appeal