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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 049 OF 2011

**Coram: (Richard Buteera DCJ, Elizabeth Musoke & Cheborion Barishaki,
 JJA)**

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1. WASSAJA FRED

2. TEBUKYA FRANCIS:.....APPELLANTS

VERSUS

UGANDA:.....RESPONDENT

*(Appeal from the sentence of the High Court of Uganda at Mpigi before
 Faith Mwendha, J dated 31st January, 2011 in High Court Criminal Case
 No.2230 of 2008)*

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JUDGMENT OF THE COURT

The appellants were indicted and convicted of the offence of murder of **Nabitosi** contrary to section 188 and 189 of the Penal Code Act and both were sentenced to 50 years imprisonment each.

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The facts giving rise to the appeal are that the appellants gained access to the deceased's house through the window and used a piece of cloth to cover both her mouth, nose and strangled her to death. The 1st appellant proceeded to the room of the deceased's daughter Nanono Pauline, demanded for money from her

5 and threatened to kill her if she did not produce the money. Pauline gave him the money and thereafter he raped her while slapping her with a knife. After the said acts, the appellants left. They were arrested, charged, tried and convicted of the offence of murder and sentenced to 50 years imprisonment each.

Being dissatisfied with the learned trial Judge's sentence, the appellants sought
10 and were granted leave of court to appeal against sentence only under section 132 (1) (b) of the Trial on Indictments Act. The sole ground of appeal is that;

The learned trial judge erred in law and fact by imposing a manifestly harsh sentence on the appellant.

At the hearing of the appeal, Ms. Awelo Sarah appeared for the appellants while
15 the respondent was represented by Mr. Byansi George William Senior Assistant DPP.

Counsel submitted for the appellants that they were first time offenders and prayed that the sentence of 50 years imprisonment against each be reduced to 10 years so that they can go back to the community reformed.

20 It was submitted for the appellants that the learned trial Judge omitted to take into account the period of 4 years that the appellants had spent on remand and thus the sentence was illegal as it flouted the requirement of article 23(8) of the Constitution. Counsel cited **Abaasa Johnson v Uganda, Court of Appeal Criminal Appeal No. 33 of 2010** for the position of the law that court will only

5 interfere with a sentence imposed by a trial court where it is either illegal or founded on a wrong principle of law.

It was counsel for the appellants' submission that on the commitment warrants of both the appellants, there was no mention of the period that the appellants had spent on remand. Counsel cited **Ederema Tomasi v. Uganda, Court of**
10 **Appeal Criminal Appeal No. 554 of 2014** where court held that taking the remand period into account is not mathematical exercise but it must be considered and that consideration must be noted in the judgement. He further cited **Article 23 (8)** of the Constitution and **Rwabugande Moses v Uganda SCCA**
15 **25/2014** for the proposition that a sentence passed without considering the remand period is illegal.

In reply, it was submitted for the respondents that the sentence of 50 years for each appellant was justified because they murdered a vulnerable woman, raped her and robbed them. That these circumstances justified the sentences and the issue of being first offenders was duly noted and considered by the learned trial
20 Judge.

Counsel further submitted that the learned trial Judge took into account the period the appellants had spent on remand and this was evident on record and if the appellants were not satisfied with the way the sentencing was handled, they ought to have raised a separate ground of appeal on it.

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5 As a first appellate court, it is our duty to re- evaluate the evidence as adduced
and make our own inferences and conclusions on the facts and the law bearing
in mind that it was the trial court which had the opportunity to observe the
demeanour of the witnesses which this court was unable to do. **See Rule 30(1)**
of the Rules of this Court *Fr. Narsensio Begumisa and 3 Others Vs Eric*
10 ***Tibebaga, Supreme Court Civil Appeal No. 17 Of 2002, 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.

The learned trial Judge is faulted for having failed to take into account the
appellants mitigating factors that they were first time offenders and that the
15 period of 4 years they had spent on remand.

An appellate Court is not to interfere with the sentence imposed by a trial Court
which has exercised its discretion unless the exercise of the discretion is such
that it results in the sentence imposed to be manifestly excessive or so low as to
amount to a miscarriage of justice or where a trial Court ignores to consider an
20 important matter or circumstance which ought to be considered while passing
the sentence or where the sentence imposed is wrong in principle. **See**
Kiwalabye Bernard V Uganda, Criminal Appeal No.143 of 2001 and
Abaasa Johnson and another v. Uganda Criminal Appeal No. 33 of 2010.

Article 23(8) of the Constitution provides as follows;



5 *“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.”*

In **Friday Yasin vs. Uganda CACA No.16 of 2021 (unreported)**, this court set
10 aside a sentence imposed by a trial court which had omitted to consider the fact that the appellant was a first time offender during sentencing.

During mitigation in the trial court, it was submitted for the appellants that they were first time offenders, young and capable of reform and that they had been in prison since 2008.

15 In sentencing the appellants, the learned trial judge stated that as follows;

*“The convicts are first time offenders but the offence they committed and have been convicted of carries a maximum sentence of death. They have been on remand since 2008. However, I take note of the fact that this offence is very rampant in this areas. So taking into account all the above into account, they are sentenced to
20 50 years imprisonment each.”*

From the above sentencing decision, it is clear that the learned trial Judge was alive to the appellants` mitigating factors that they were first time offenders who had been on remand since 2008 and she took the same into account before sentencing the appellants to 50 years imprisonment. We find no reason to fault
25 the learned trial Judge in that regard.

5 We are alive to the need for court to adhere to the principle of uniformity and consistency in sentencing persons convicted of similar offences.

The appellant was convicted of murder on the 31/01/2011. Suffice to note, the requirement for a trial court to consider precedents when sentencing was endorsed in the earlier decision of **Livingstone Kakooza vs Uganda, SCCA No. 10 17 of 1993** which was decided on 8th November 1994 where court held that sentences imposed in previous cases of similar nature while not being precedents, do afford material for consideration.

The Supreme Court in **Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011**, emphasized the need to maintain consistency while 15 sentencing persons convicted of similar offences. Court stated that "*We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing.*"

Guideline 6 (c) of the Constitution sentencing guide lines (Practice Directions) 2003 provides that every court shall when sentencing an offender 20 take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.

In **Wamutabanewe Jamiru versus Uganda, SCCA No. 74 of 2007**, the Supreme Court sentenced the appellant to 34 years imprisonment for murder.



5 In **Nkonge Robert v Uganda, CACA 148/2009** court upheld a death sentence imposed upon the appellant who murdered the deceased with a hoe without provocation.

In **Semanda Christopher & another versus Uganda, CACA NO.77 OF 2010**, the deceased was assaulted by the appellant and he later died in hospital. They
10 were sentenced to 35 years imprisonment for murder and on appeal, this Court upheld the sentence.

Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015 the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the
15 trial court and substituted it with a sentence of 30 years imprisonment.

In **Adupa Dickens Vs Uganda, C.A.C.A. No. 267 of 2017**, this court upheld the sentence of 35 years imprisonment and held that it was neither harsh, nor manifestly excessive to warrant the intervention of the Appellate Court.

We are of the view that the sentence of 50 years imprisonment meted out on the
20 appellants was harsh and excessive in the circumstances and we hereby set it aside. Pursuant to section 11 of the judicature Act Cap 13 we shall proceed to impose a fresh sentence.

In **Bakubye Muzamiru and Another versus Uganda, SCCA No. 56 of 2015** cited with **Okello Goeffrey vs Uganda, SCCA No 34 2014** court stated that the
25 sentences of more than 20 years imprisonment for capital offences cannot be

5 said to be illegal because they are less than the maximum sentence which is death. Courts have powers to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law.

Taking into consideration both aggravating and mitigating factors, the period of 4 years the appellants had spent on remand and the principle of uniformity and
10 consistency of sentences, we are of the view that the sentence of 35 years imprisonment for each of the appellants will meet the ends of justice. This shall run from the date of conviction.

We so order.

Delivered at Kampala this 14th day of March 2022.


Richard Buteera

DEPUTY CHIEF JUSTICE


Elizabeth Musoke

JUSTICE OF APPEAL


Cheborion Barishaki

JUSTICE OF APPEAL