THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA)

CRIMINAL APPEAL NO 143 OF 2011

CHARLES RWITA TUMUHANGIRWE} ..... APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the decision of the High Court at Kampala; the Hon. Mr. Justice Akiiki Dan Kiiza at Mbarara dated 25th May 2011 in Mbarara High Court Criminal Session Case No 091 of 2009)

JUDGMENT OF COURT

The Appellant was charged with the murder contrary to sections 188 and 189 of the Penal Code Act in that it was alleged in the particulars of the offence that the appellant on 13th of August 2008 at Kanyonyozi village in Mbarara district murdered Natamba Ruth. The appellant pleaded guilty to the lesser charge of manslaughter. He stated that he admitted the charge and did not intend to kill the deceased. The appellant was convicted of the lesser offence of manslaughter and was sentenced to 23 years' imprisonment. Being aggrieved by the sentence, the appellant appealed to this court against sentence only on the ground that:

1. The learned trial judge erred in law and fact in imposing a sentence of 23 years' imprisonment, which is deemed illegal, manifestly harsh and excessive in the obtaining circumstances.

The appellant prays that the court allows the appeal and/or in the alternative and without prejudice to declare the sentence illegal, set it aside and substitute it with one deemed appropriate by the court.

At the hearing of the appeal learned counsel Mr. Kumbuga Richard holding brief for Counsel Sarah Awelo represented the appellant and learned counsel Nabisenke Vicky Assistant DPP represented the respondent. The court was addressed in written submissions.

The appellants counsel submitted that the sentence was harsh considering the fact that the appellant pleaded guilty and did not waste the time of court or resources. He admitted his guilt right from the police station and had reported himself to the police post with the bloodstained cutlass. He confessed to the police that he had just killed the deceased. He prayed that the sentence is reduced to 10 years' imprisonment because the appellant had not wasted the time of court or its resources. Secondly, he submitted that the appellant was a first offender and had no previous record of the commission of any offence. He contended that the learned trial judge also failed to take into account the period the appellants spent on pre-trial remand contrary to article 23 (8) of the Constitution of the Republic of Uganda. He submitted that the learned trial judge failed to subtract the period of 2 ½ years that the appellant had spent on pre-trial remand. He relied on **Rwabugande v Uganda; SCCA 24/2014** and **Ederema Tomasi v Uganda; Criminal Appeal No 554 of 2014**. See also **Abelle Asuman v Uganda SCCA No. 66 of 2016**.

On the question of whether the sentence of 23 years' imprisonment was excessive, the appellants counsel submitted that the trial judge ignored to consider one important circumstance. This was the fact that the assault was due to the adultery of the wife which happened on 10th August 2008 but the attack on the deceased occurred on 13th August 2008 and the court found that it cannot be said that the appellant had acted in the heat of passion. The learned trial judge however found that the attack had been provoked by the adultery of the deceased. Counsel pointed out that the deceased and the accused met on 13 August 2008 but did not agree and when quarrelling along the road after a counselling session, is when the appellant picked a cutlass and carried out the offence. He prayed that this court allows the appeal and sentences the appellant to the appropriate penalty.

In reply, the respondent's counsel opposed the appeal on the ground that the trial judge did not disregard the mitigating factor of the plea of guilty. The learned trial judge considered the mitigating factors raised on behalf of the appellant which included the fact that he was a first offender, had pleaded guilty and had saved the time of the court. Secondly, he had been on remand for 2 ½ years and had 6 children who needed care and protection. It was also stated that he was remorseful and had prayed for leniency. He contended that given the extensive consideration of the appellants mitigating factors by the learned trial judge, it cannot be said that he ignored any material or important factor.

Further, the respondent's counsel submitted that the sentence was not illegal for contravention of article 23 (8) of the Constitution of the Republic of Uganda. This is because the period the appellant spent on remand prior to his conviction was considered by the learned trial judge who stated that the appellant had been on remand for 2 ½ years which period he took into account while sentencing him. Counsel further submitted that the decision of the learned trial judge was dated 25th of May, 2011 before the decision in **Rwabugande Moses v Uganda** (supra) and at that time it was sufficient to state that the court had taken into account the period spent on remand. Learned counsel relied on **Latif Buulo v Uganda; Supreme Court Criminal Appeal No 31 of 2017** for the holding of the Supreme Court that courts have to follow the position of the law as stated in **Rwabugande** only for the cases after the decision in **Rwabugande** on 3rd March 2017. For cases before the **Rwabugande** decision, it was sufficient for the sentencing Judge to demonstrate that the period spent on remand was taken into account.

Further on the issue of whether the sentence of 23 years' imprisonment was harsh and excessive, counsel submitted that the appellant was convicted of manslaughter which carries a maximum sentence of life imprisonment. Learned counsel submitted that the court took into account the seriousness of the offence of manslaughter, the maximum sentence of life imprisonment, the fact that the appellant attacked his own wife/lover, the fact that the attack was worthless and a savage one given the nature of

the injuries inflicted on the appellant and the fact that the appellant did not act in the heat of the moment. The excessive/extreme reaction by the appellant given the nature of his disagreement or differences with the deceased. Counsel relied on **Sebuliba Siraj v Uganda; Court of Appeal Criminal Appeal No 319 of 2009** for the proposition that the trial court is free to give the maximum penalty imposed by the law. The respondents counsel further relied on **Bandebaho Benon v Uganda; Criminal Appeal No 319 of 2014** where the Court of Appeal sentenced the appellant who had hacked his wife to death with a cutlass to 30 years' imprisonment although he had been convicted of murder. He submitted that those circumstances were similar to that of the appellant. Lastly **Odoch Sam v Uganda; Court of Appeal Criminal Appeal No 340 of 2010 [2021]**, this court imposed a sentence of 20 years against an appellant who pleaded guilty to manslaughter. He had killed his sister.

Resolution of appeal

We have carefully considered the only ground of appeal, the submissions of counsel and the authorities cited. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and we are required to subject the evidence reproduced in the record of appeal to fresh scrutiny in terms of rule 30 of the Rules of this court which states that this could may reappraise the evidence. While reappraising the evidence, this court should warn itself that it has neither seen nor heard the witnesses testify and make due allowance for that shortcoming (See **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123** and **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**).

The sole ground of appeal of the appellant is against sentence and an appellant court may interfere with a sentence imposed by the trial court if the trial court acted on a wrong principle or misdirected itself or overlooked a material factor. The court may also interfere with a sentence that is manifestly excessive or too low as to amount to an injustice (See **Ogalo s/o Owoura v R (1954) 21 EACA 270, James v. R, (1950) 18 EACA 147).**

In the peculiar facts of this appeal, the appellant's primary complaint is against sentence on two grounds. This that the sentence is deemed illegal and secondly that it is manifestly harsh and excessive in the circumstances.

We shall start with the first leg of the ground of appeal of whether the sentence imposed by the learned trial judge is illegal. The contention that the sentence is illegal is based on article 23 (8) of the Constitution of the Republic of Uganda which 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 record shows that the appellant pleaded guilty and the learned trial judge inter alia stated as follows:

> Accused is said to be a first offender. He has pleaded guilty hence saving court's time. He has been on remand for 2 ½ years which period I take into account while sentencing him.

It is quite clear that the learned trial judge indicated that he took into account the period of 2 ½ years the appellant spent on remand prior to his conviction. The period that the appellant spent on pre-trial detention is not in contention. Secondly, we agree with the respondent that there was no need to mathematically deduct the 2 ½ years period and it was sufficient to demonstrate that it was taken into account. Article 23 (8) of the Constitution was considered by the Supreme Court in **Rwabugande Moses v Uganda; [2017] UGSC 8** where the Supreme Court stated that the deduction had to be arithmetic.

> 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.

This decision was revisited by the Supreme Court in **Abelle Asuman v Uganda; [2018] UGSC 10.** The Supreme Court clarified the law and held that

what was essential was the demonstration by the trial court that the period the Appellant spent in lawful custody was taken into account:

> 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....
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> 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.

Last but not least, Article 23 (8) of the Constitution of the Republic of Uganda has not changed. It has been the law since the promulgation of the Constitution on 8th October 1995. The decisions of the Supreme Court only guided courts on how to apply article 23 (8) of the Constitution. The law therefore could not be different but only interpreted variously. The courts have been guided by the latest decision and we are satisfied that the learned trial judge demonstrated that he took into account the period of 2 ½ years which the appellant spent in pre-trial detention before his conviction while imposing the sentence of 23 years' imprisonment. The sentence imposed was therefore not illegal.

The second leg of the ground of appeal is that the sentence is manifestly harsh and excessive. We have carefully considered the fact that the sentence was imposed on 25th of May 2011. Since that time, the jurisprudence of the Courts in Uganda has developed after the decision of the Constitutional Court in **Susan Kigula and 417 others v Attorney General** which was affirmed by on appeal by the Supreme Court in **Attorney General v Susan Kigula and 417 others; Constitutional Appeal No 3 of 2006 [2009] UGSC 6 (2first January, 2009).** The decision which outlawed the mandatory death penalty for capital offences, it led to a scenario where the High Court was empowered to impose lesser sentences than the penalty of death where it deemed it fit to do so.

This immediately introduced a sentencing problem. Firstly, persons who had been sentenced to death under the mandatory provisions had their sentences set aside and their files sent to the High Court to impose appropriate sentences after a sentencing hearing where aggravating factors and mitigating factors are considered before imposing the appropriate sentence. In the body of authorities which emerged after that, the Supreme Court *inter alia* held that the next gravest penalty to the penalty of death is a sentence of life imprisonment. Thirdly, life imprisonment has been applied as a sentence of 20 years' imprisonment by the prison authorities but has also been variously defined.

The practical result of the definition is that a life imprisonment sentence would be served as a sentence of 20 years' imprisonment less remission calculated by the prison authorities. This also led to another practice, before statutory reform, of imposing periods of imprisonment of above 20 years which may go as high as 45 years' imprisonment that is not in the statute books. Because it is a term of imprisonment, it is considered a lesser punishment than the maximum penalty of death. It is a philosophical question whether a sentence of 45 years' imprisonment meted on a 45-year-old person is not a graver punishment than a sentence of death. We do not need to consider that in this appeal. What we need to consider is that manslaughter traditionally attracted a lighter penalty than the penalty for the offence of murder. It is to be taken as a matter of degree and proportionality with the law deeming manslaughter to be less culpable than murder.

The issues generated by the definition of life imprisonment vis a vis definite terms of imprisonment beyond 20 years stem from the interpretation of courts *inter alia* in **Tigo Stephen v Uganda; Criminal Appeal No 08 of 2009 [2011] UGSC 7 (10th May, 2011)** where the High Court had sentenced the appellant to life imprisonment and the Court of Appeal confirmed the sentence. On further appeal against sentence the Supreme Court *inter alia* 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.

The Supreme Court held that the issue of whether life imprisonment meant 20 years' imprisonment was a matter of administration by Prison Authorities under Section 47 (6) of the Prisons Act which does not define the penalty of life imprisonment under the Penal Code Act. They also held that imprisonment for life was the second gravest penalty after the death Penalty. This was further stated in **Okello Godfrey v Uganda; SCCA No. 34 of 2014** where the Supreme Court held that:

> In terms of severity of punishment in our penal laws, a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.

In **Tigo Stephen v Uganda; S.C.C.A No 8 of 2009 [2011] UGSC 7 (10th May 2011)** the Supreme Court noted the problem of specific terms of imprisonment being more severe than "life imprisonment" and stated that:

> 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.

We do not have anything useful to add to that observation and can conclude without fear of contradiction that a sentence of 23 years' imprisonment would have a more severe impact on the prisoner than a sentence of life imprisonment before amendment of the law. We would set aside the sentence on the ground that it purports to impose a sentence that is more severe than the one operationalised by the prisons authorities for life imprisonment sentences for murder with the practical result that a person sentenced to "life imprisonment" in the year 2011 would end up serving a lesser period of imprisonment than the one sentenced to 23 years' imprisonment.

Having set aside, the sentence of 23 years' imprisonment, we would exercise the jurisdiction of this court under section 11 of the Judicature Act, to impose an appropriate sentence.

The appellant's counsel proposed a sentence of 10 years' imprisonment. On the other hand, the respondent's counsel supported the sentence of 23 years' imprisonment on the ground that it was an appropriate sentence in the circumstances. We do not agree with the respondent.

The facts of this appeal are that the appellant pleaded guilty to the offence of murder. The facts he accepted were that before 13th August 2008, the appellant and the deceased were cohabiting. The deceased had been married but then separated with her husband. The appellant was also married and would sometimes spend the night at the home of the deceased. Before the murder, the deceased wanted to stop her relationship with the appellant. She had a shop with the appellant in Nyaihanga trading centre. The appellant wanted the property in the shop to be shared in case they separated and the deceased objected. This mis-understandings continued and resulted into a fight. The deceased also injured the appellant and he reported the matter at the local police post. Thereafter the deceased requested a lay reader at Nyaihanga Church of Uganda to call the appellant for counselling. They had a meeting on 13th August 2008. However, the parties did not reconcile. The deceased and the appellant left together and went away while quarrelling along the road. When they arrived at the trading centre, the appellant went away and came back with a cutlass and started cutting the deceased on several parts of her body leading to her death. Thereafter he confessed to the police where he had reported himself and handed over the weapon which was bloodstained.

The appellant pleaded guilty and in mitigation it was submitted that he had not wasted the time of the court. The convict had 6 children aged between 12 and 6 years and it was submitted that he was a victim of circumstances. It was also stated that he was provoked by the prior conduct of the deceased who had committed adultery. We however noted that the facts read back which the appellant agreed to upon a plea of guilty being entered included

the fact that on 10th August 2008 at 11:30 PM, the appellant went home and found the front door locked from outside. He went to the behind door and found it locked from inside. He managed to open it and entered. The deceased switched off the light and another man with whom the deceased had had sexual intercourse, departed and ran away. The appellant did not identify the man.

The state indicated that the appellant had no previous record of conviction for any offence and is a first offender, he had been on remand for 2 ½ years. However, it was stated that the deceased was killed in cold blood. We note that manslaughter can only be arrived at where there is provocation or diminished responsibility for killing a person. It means there was no malice aforethought.

The learned trial judge however noted that the appellant had committed a serious offence. The maximum penalty upon conviction is a possible life imprisonment. He noted that the appellant had attacked his own wife or lover "worthlessly" and "savagely". This was revealed by the nature of the injuries he inflicted on her. He further stated that:

> ...this revealed the animal instinct in him rather than that of a human being (See exhibit PE 11).
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> In any case though he is said to have been provoked by the adultery of his wife. This was on 10/8/2008 but the attack on the deceased was on the 13th/8/2008, which is 3 days later which cannot be said he acted in the heat of the moment to attack his wife savagely as he did.
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> In my view what differences he might have had with the deceased, did not match his reaction. In the premises, therefore he deserves no mercy, but merits a stiff sentence though he pleaded guilty to a lesser charge of manslaughter.

We find that the sentence meted out, ought to have been meted out for the offence of murder due to the considerations in sentencing. Yet the appellant pleaded guilty to manslaughter and was not tried. Considering the circumstances, the appellant pleaded guilty to manslaughter and was not tried for murder. He was remorseful and a first offender. There were

circumstances which were not tested but which lead to the inference of a fight between two people. The learned trial judge did not deem it a fit case to impose the maximum penalty of "life imprisonment", we agreed. We find that a sentence of 14 years' imprisonment, which is not the maximum for manslaughter, would be appropriate for the offence of manslaughter. Taking into account the period of 2 ½ years that the appellant spent in pre-trial detention, we would sentence him to 11 years and 6 months' imprisonment which term shall commence from the date of his conviction on 25th of May 2011.

Dated at Kampala the 24th day of March 2021

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal