

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Gashirabake & Kihika, JJA*]

CRIMINAL APPEAL NO. 244 of 2015

(Arising from High Court Criminal Session Case No.0148 of 2014 at Mbale)

BETWEEN

Namwendi Mutwalibi =====Appellant

AND

Uganda=====Respondent

(An appeal against the Judgement of the High Court of Uganda [Kawesa, J] at Mbale delivered on 16th June 2015)

JUDGMENT OF THE COURT

Introduction

- [1] This is an appeal, with the leave of this court, against sentence only. The appellant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act on the 16th June 2015 by the High Court of Uganda (Kawesa, J.). The particulars of the offence were that on 20th January 2014 at Pallisa Road in Mbale district unlawfully caused the death of Mubedi Robert. He was convicted on his own plea of guilty and sentenced to 15 years' imprisonment.
- [2] Dissatisfied with the decision of the trial court, the appellant appealed against sentence on the sole ground that,



‘That the learned trial judge erred in law and fact when he sentenced the appellant to 15 years’ imprisonment without considering guidelines.

- [3] The respondent opposed the appeal.
- [4] The appellant was represented by Ms. Agnes Kanyango while the respondent was represented by Ms. Immaculate Angutuko, Chief State Attorney, in the Office of the Director of Public Prosecutions. Both Counsel filed written submissions in the matter upon which this court has proceeded to consider this appeal.

Submissions of Counsel

- [5] Ms. Agnes Kanyango submitted that the trial judge sentenced the appellant to 15 years of imprisonment after hearing the plea bargain agreement and did not deduct the time spent on remand. She contended that the sentence imposed by the trial judge is illegal for failure to deduct the period of 1 year and 5 months he had spent on remand.
- [6] Counsel for the appellant submitted that the appellant was arrested on 20th January 2014 and was in pre-trial custody until 16th June 2015 when he was convicted and sentenced to 15 years’ imprisonment. She referred to Article 23 (8) of the 1995 Uganda Constitution and Guideline 15 of the Constitution (Sentencing Guidelines of Court of Judicature) (Practice) Directions, 2013 for her submission that the sentence imposed by the trial court was illegal.
- [7] She relied on Rwabugande Moses v Uganda [2017] UGSC 8, where it was held that the period spent on remand ought to be deducted from the sentence and not just be considered. She prayed that we exercise our powers under Section 11 of the Judicature Act, Cap. 13, quash the sentence of 15 years’ imprisonment imposed against the appellant and substitute it with 13 years and 7 months’ imprisonment. She also prayed that this appeal be allowed.
- [8] In reply, counsel for the respondent submitted that the plea bargain agreement was endorsed and appellant sentenced on 16th June, 2015, before the decision in Rwabugande Moses Vs Uganda [2017] UGSC 8, which requires arithmetic deduction of the period spent on remand, but rather in Kizito Senkulu v Uganda [2002] UGSC 36, where the Supreme Court held that taking into account the period spent on remand does not mean an arithmetical exercise.



- [9] She relied on Nashimolo Paul Kibolo Vs Uganda [2020] UGSC 24, where it was held that the decision of Rwabugande was delivered on 3rd March 2017 and in accordance with the principle of precedent, this court and the courts below have to follow the position of the law from that date, henceforth.
- [10] She contended that arithmetical deduction was not applicable at the time of sentencing the appellant, and the learned trial judge clearly demonstrated that he took into consideration the period the appellant had spent on remand.
- [11] Counsel for the respondent averred that the trial judge and the parties took into consideration the period spent on remand, which was the appropriate thing to do during a regime where arithmetical deduction was not mandatory. She concluded that there was no justification whatsoever for interfering with the sentence. Counsel for the respondent prayed that the sentence be upheld and dismiss the appeal.

Analysis

- [12] This court will only interfere with a sentence imposed by a court where the sentence is illegal or founded upon a wrong principle of the law. It will equally interfere with a sentence where the trial court has not considered a material factor in the case or has imposed a sentence that is harsh and manifestly excessive in the circumstances. See Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported), Livingstone Kakooza v Uganda [1994] UGSC 17, and Bashir Ssali v Uganda [2005] UGSC 21.
- [13] The facts are that on 20th January 2014, at Palisa Road in Mbale District, the deceased and others were contracted to load items on a Fuso truck registration number UAQ 910T that was driven by the appellant. They loaded the truck, and the appellant drove off without paying the loaders. The deceased followed and signaled the appellant to stop, which he did. The appellant ignited the engine and drove as the deceased was crossing the road to demand his money from the appellant. The appellant knocked on the deceased and dragged him under the vehicle, causing him serious injuries that eventually led to his death. The appellant was charged with murdering the deceased, and during trial, a plea bargain agreement was executed and tendered in court. The appellant pleaded guilty to murder; he was convicted on his own plea of guilty and sentenced to 15 years' imprisonment pursuant to a plea bargain agreement.



[14] We shall set out in full the sentencing proceedings in the court below hereunder.

‘Resident State Attorney:

Having considered allocutus we agreed on 15 years.

Counsel: I confirm

Accused: I signed the agreement.

Sentence and reasons

Murder carries maximum of death. Mitigating factors considered are the PG. The fact that is he is a first offender. Fact is he has been on remand for 1 year and 4 months. He is remorseful. However, the aggravating factor is that he acted with a lot of inconsideration and brutality. He needs rehabilitation and reform. Society needs to learn from him. His sentenced to 15 years' imprisonment.

Signed

Judge.’

[15] The appellant was sentenced to 15 years' imprisonment in accordance with the plea bargain agreement. The question before us is whether or not the period agreed upon as the sentence must be subject to article 23 (8) of the Constitution and be deducted from the period agreed upon.

[16] The plea bargain agreement between an accused and the state is based on the waiver of certain constitutional rights by an accused which are set out in the agreement and in Rule 12 of the Judicature (Plea Bargain) Rules, 2016

[17] We shall set out the said rule below.

‘Rule 12

(1) Subject to the procedure prescribed in the Schedule 2, the court shall inform the accused person of his or her rights, and shall satisfy itself that the accused person understands the following—

(a) the right —

(i) to plead not guilty, or having already so pleaded, the effect of that plea;

(ii) to be presumed innocent until proved guilty;

(iii) to remain silent and not to testify during the proceedings;

(iv) not to be compelled to give self-incriminating evidence; (v) to a full trial; and

(vi) to be represented by an advocate of his or her choice at his or her expense or in a case triable by the

High Court, to legal representation at the expense of the State;

(b) that by accepting the plea agreement, he or she is waiving his or her right as provided for under paragraph (a);

(c) the nature of the charge he or she is pleading to;

(d) any maximum possible penalty, including imprisonment, fines, community service order, probation or conditional discharge;

(e) any applicable forfeiture;

(f) the court's authority to order compensation and

(g) that by entering into a plea agreement, he or she is waiving the right to appeal except as to the legality or severity of sentence or if the judge sentences the accused outside the agreement.

(2) The charge shall be read and explained to the accused in a language that he or she understands and the accused shall be invited to take plea.

(3) The prosecution shall lay before the court the factual basis contained in the plea bargain agreement and the court shall determine whether there exists a basis for the agreement.

(4) The accused person shall freely and voluntarily, without threat or use of force, execute the agreement with full understanding of all matters.

(5) A Plea Bargain Confirmation shall be signed by the parties before the presiding Judicial officer in the Form set out in the Schedule 3 and shall become part of the court record and shall be binding on the prosecution and the accused.'

[18] The basis of a plea agreement is the agreement by an accused to waive his constitutional rights that are enumerated in both the rules and the agreement. Among the fundamental rights that an accused waives under the plea bargain agreement the right under article 23 (8) of the Constitution is not one of them. This is clear from rule 12 of the Judicature (Plea Bargain) Rules and the plea bargain agreement that the appellant signed and is part of the record of the trial court.

[19] In our view it would follow that since this fundamental right is not waived away by an accused the sentence agreed upon must be subject to article 23 (8) of the Constitution.

[20] Article 23 (8) of the Constitution provides that,

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‘(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 of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.’

- [21] This provision is mandatory. Court must comply with it while sentencing a convicted person to a term of imprisonment. In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand by deducting the same from an appropriate sentence violates article 23 (8) of the Constitution.
- [22] As counsel for the respondent pointed out the decision appealed from was made prior to the enunciation of the Rwabugande rule. However, the matter is still alive in the court system with the present appeal, filed in 2015, still unresolved.
- [23] In light of Attorney General v Susan Kigula and 417 Others [2009] UGSC 6 and Duke Mabeya v Attorney General [2023] UGCC 104 which held that where there is a new rule of constitutional interpretation in respect of a penal provision that new rule should apply to all existing matters that have not been finally resolved, it would follow that the matter before us, being still alive in the appellate system this rule should apply to it.
- [24] We are aware that the Supreme Court in Nashimolo Paul Kiboko v Uganda [2020] UGSC 24 held that the Rwabugande rule should apply to only those cases that were decided at first instance after the Rwabugande decision was made on 3rd March 2017. This position conflicts with the Supreme Court decision in Attorney General v Susan Kigula and 417 Others (supra) which was a constitutional appeal (with 7 Justices sitting) from a decision of the Constitutional Court which applied the new interpretation to all existing cases that had not been finally resolved. The Supreme Court in Nashimolo Paul Kiboko v Uganda (supra) (a criminal appeal with 5 Justices sitting) did not refer at all to Attorney General v Susan Kigula and 417 others (supra) which in our humble view was the controlling authority on this point, and bound both the Supreme Court, and all courts below.
- [25] In our humble view, we are constrained to follow, Attorney General v Susan Kigula and 417 others (supra) with regard to the application of the

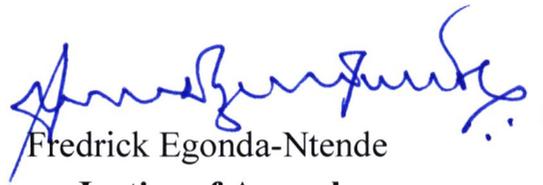


Rwabugande rule, rather than Nashimolo Paul Kiboko v Uganda (supra). It follows that the period spent on remand by the appellant must be deducted arithmetically from the agreed sentence.

Decision

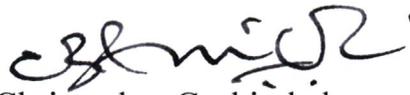
[26] In the result we deduct the period of 1 year and 4 months spent in pre-trial custody from the agreed sentence of 15 years and order the appellant to serve a term of imprisonment of 13 years and 8 months from 15th June 2015, the date of conviction.

Dated, signed, and delivered this 8th day of April 2024



Fredrick Egonda-Ntende

Justice of Appeal



Christopher Gashirabake

Justice of Appeal



Oscar Kihika

Justice of Appeal