THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 54 OF 2016

(***Coram***: *Mwondha, Mugamba, Buteera; JSC, Nshimye, Tumwesigye Ag. JJSC)*

Between

1. Abaasa Johnson
2. Muhwezi Siriri } ..... Appellants

And

Uganda ..... Respondent

[An appeal arising from the judgment delivered by the Court of Appeal, at Kampala on the 7th December, 2016 by Kakuru, Mugenyi Byabakama, and Owiny Dollo JJA]

JUDGMENT OF THE COURT

The two appellants being dissatisfied with the decision of the Court of Appeal, appealed to this Court against sentence only.

The memorandum of appeal had one ground which read, as follows: **(Appellants having been sentenced to life imprisonment (20 years imprisonment in 2010 before the decision in Tigo Stephen v. Uganda [2011], it was illegal for the learned Justices of Appeal to sentence them to 35 years**

imprisonment thereby enhancing their sentence which decision occasioned a miscarriage of Justice.)

They prayed that the appeal be allowed and the sentence set aside.

Before we state the background of the appeal we express our concern about the growing trend of Counsel failing to abide by the rules of this Court when drawing pleadings or memorandums of appeal.

Rule 66 (2) of this Court's Rules is very clear. It provides among other things that **the memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative the grounds of objection** ....

Counsel for the appellants made an argument/ submission instead of setting out a concise ground of appeal.

The appellants appealed against sentence, and the citing of the **Tigo case** in the memorandum of appeal was neither necessary nor material.

Background:-

The appellants were indicted initially on 6 counts as follows:- Count 1 was of murder C/s 188 and 189 of the Penal Code Act. It was alleged that the appellants on the 4th day of November, 2004 at Akayanja, along Rushere-Kashongi Road in Nyabushozi County, Kiruhura District murdered Private Akoragye Arthur. In counts 2, 3, 4, 5 and 6 both appellants were indicted for robbery contrary to Sections 285 and 286 (2) of the Penal Code.

The trial Court found that the prosecution had not made out a prima facie case against the appellants on Counts 2 and 6 so they were accordingly acquitted on a no case to answer. The trial proceeded on Counts 1, 3, 4, and 5 against them. They were convicted on the 1st count of murder and also convicted on the 3rd, 4th and 5th counts of aggravated robbery.

The trial Judge passed a sentence of life imprisonment on Count I of murder. On the three counts of aggravated robbery he sentenced them each to a term of 15 years imprisonment the sentences to run concurrently.

The appellants were dissatisfied with the sentence on murder which was life imprisonment to run concurrently with other sentences.

The Court of Appeal, after giving allowance for the five years the appellants had spent on remand before conviction, reduced the sentence on count I to a term of 35 years in prison to run from the date of conviction. The sentences of 15 years imprisonment for count 3, 4 and 5 were to run concurrently from the date of conviction were sustained. The appellants appealed to this Court against the substituted sentence of 35 years imprisonment on count I.

Representation:-

Mr. Andrew Sebugwawo represented the appellants on state brief. Ms. Lilian Omara, Senior State Attorney, represented the respondent.

Submissions:-

Counsel for the appellants submitted that the Supreme Court clarified the position when it decided in **Tigo Stephen v. Uganda, Criminal Appeal No. 8 of 2009** and among other things, held that life imprisonment meant imprisonment for the rest of the natural life time of a convict, though the actual period may stand reduced on account of remission earned.

He contended that in light of that, those who were sentenced to life imprisonment before the decision in **Tigo Stephen** (Supra) had to serve 20 years imprisonment as had been the practice that life imprisonment meant 20 years. He relied on the cases of **Kansiime Brazio and Kabalikola Molly v. Uganda Court of Appeal Criminal Appeal No. 12 of 2008 and 39 of 2009.** He argued that the Court of Appeal relied on the **Tigo case** Supra and stated **in 2008 before the decision of the Supreme Court, the thinking and belief at that time was that imprisonment for life or life imprisonment meant 20 years in prison. It is our view that when the learned trial judge sentenced both appellants to a term of imprisonment for life (on 30th March, 2010) he had in mind 20 years in prison and not for the rest of their lives**. He also relied on **Kamugisha Amon v. Uganda Court of Appeal Criminal Appeal No. 250 of 2009** when the appellant was indicted for murder. He was convicted and sentenced to life imprisonment by the High Court in April 2009. Both conviction and sentence were confirmed by the Court of Appeal on 30th September 2015. The Court of Appeal nonetheless held that the convict was to serve 20 years in prison

instead of the whole of his natural life because at the time he was sentenced to life imprisonment it meant20 years.

Counsel therefore submitted that considering the precedents above, this Court finds that life imprisonment imposed by the trial Court on the 30th of March 2010 meant the appellants to serve 20 years in prison. That therefore the Court of Appeal substituting the same with a sentence of 35 years imprisonment amounted to enhancement of sentence which was illegal as the Court of Appeal lacks power to enhance a sentence. Counsel butterest his submission by citing Section **132** of the Trial on Indictments Act, Section **34** of the Criminal Procedure Code, and rule 32 (I) of the Judicature Court of Appeal rules,. All these, he argued, gives power to the Court to confirm or vary sentence but do not give it power to enhance sentence. He relied on the case of **Mugasa v. Uganda Supreme Court Criminal Appeal No. 10 of 2010** in which it was held that the Court of Appeal can enhance sentence if there is a cross appeal and if the respondent asks for enhancement of sentence during submissions. He further argued that there was no cross appeal but the Court on its own volition enhanced the sentence without following proper procedure laid down in the above case. He also relied on the case of **Busiku v. Uganda Criminal Appeal No 33 of 2011** where the Court of Appeal did not give advance warning to the appellant that it was likely to enhance the sentence and the appellant seemed to have been taken by surprise. The Court stated that it was important that proper opportunity be accorded to the

appellants to adequately prepare their defences and it was in the interest of justice to do so.

The respondent's Counsel on the other hand submitted that much as it was true that the Prisons Act and Rules are meant to assist the Prison authorities in the execution of sentences imposed by the Courts as held in the **Tigo case** (Supra), it does not prescribe sentence to be imposed for defined offences. The sentences are prescribed in the Penal Code Act and other Penal Statutes. Sentencing powers are in the Trial on Indictments Act and Magistrates Courts Act and other Acts prescribing the jurisdiction of Courts.

Counsel submitted further that the learned Justices of the Court of Appeal considered the legality and harshness of the sentence and referred to a host of cases decided. They also quoted the circumstances under which the Court of Appeal or Supreme Court reduced sentences which they deemed harsh and excessive or illegal. The Justices noted, **in the instant case before us, in sentencing the appellants to life imprisonment, the trial judge did not comply with the provisions of Clause (8) of Article 23 of the Constitution, to take into account the period the appellants had taken in lawful custody before conviction we believe the learned trial judge was right in doing so. He had already decided to sentence the appellants to life imprisonment; hence, it would be to no avail to take into account whatever period they had spent on remand since it would not affect the life sentence anyway.**

He argued among other things that, it shows that the Justices had life imprisonment for the rest of their lives in their mind. They found the sentence of life imprisonment harsh and manifestly excessive in the circumstances of the murder and set the sentence aside. They reduced it to a term of 35 years imprisonment.

Counsel submitted also that the sentence was neither illegal nor excessive and the **Tigo case** does not make it so.

Consideration of the Appeal:-

This is a second appeal by the appellants. There was only one ground of appeal. It was to the effect that the appellants having been sentenced to life imprisonment (20 years imprisonment) in 2010 it was illegal for the learned Justices of Appeal to sentence then to 35 years imprisonment thereby enhancing their sentence which decision occasioned a miscarriage of justice.

From the above it is clear that there are two questions to be determined to facilitate the dissolution of the appeal.

(1) Whether the sentence of life imprisonment is 20 years for those convicts sentenced before the **Tigo Stephen case**.

(2) Whether the sentence to a term of 35 years by the Court of Appeal was illegal.

Counsel for the appellants relied on the **Tigo Stephen case** supra and misdirected himself by submitting that according to **Tigo Stephen case** the convicts sentenced to life imprisonment on March 2010 before the Supreme Court clarified in that case,

life imprisonment should be taken to be 20 years and not imprisonment for the whole of their natural life. He also misdirected himself when he submitted that for those convicted and sentenced before **Tigo's case** were therefore to serve 20 years.

We have studied the **Tigo Stephen case** and we considered both learned Counsel's submissions on the matter. It was clear to us that **Tigo Stephen case** did not at any one point state what Counsel submitted. It has to be borne in mind that **Tigo Stephen case** did not stand in a vacuum. It came as a result of the Constitutional Appeal of **Attorney General v. Susan Kigula & 417 Others Constitutional Appeal No 03 of 2006** (decided in 2009).

This Court confirmed the Constitutional Court declarations as follows:- "**that the provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21, 22 (I), 24, 28, 44 (a) of the Constitution and therefore are unconstitutional."**

This Court modified the order made by the Constitutional Court as hereunder **(I) for those respondents whose sentences were already confirmed by the highest appellate Court, their petitions for mercy under Article 121 of the Constitution must be processed and determined within three years from the date of determination of the sentence. Where after three years no decision has been made by the Executive the death**

sentence shall be deemed commuted to imprisonment for life without remission.

(2) For those respondents whose sentences arose from the mandatory sentence and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence as it deems fit under the law.

Reading the **Tigo Stephen** case, it is very clear that this Court endeavoured to clarify the meaning of life imprisonment having regard to the provisions of S. 47 (6) of the Prisons Act in light of the above Constitutional provisions. The Appeal in **Tigo Stephen** (Supra) raised a substantial point of law in regard to what amounts to life imprisonment following the decision in the **Attorney General v. Susan Kigula and 417 others** (supra) the Court noted. The importance of that case is that it confirmed the Constitutional Court declaration that the death penalty was discretionary not mandatory. Indeed in the case of **Attorney General v. Susan Kigula and 417 others**, this Court stated that life imprisonment is the most severe punishment save for the death penalty.

It was pointed out in the **Tigo Stephen case**, quote **the provisions of section 47(6) of the Prisons Act have sometimes been cited as authority for holding that imprisonment for life in Uganda means a sentence of imprisonment for 20 years. However, there is no basis for so holding. The Prisons Act and Rules made there under are**

meant to assist the Prisons Authorities in administering prisons and in particular sentences imposed by the Courts.

We concur with the judgment in **Tigo Stephen** where among other things it was stated **the most severe sentence known to the Penal System include death penalty, imprisonment for life which is the second graviest punishment next only to death sentence and imprisonment for a term of years. Life imprisonment is not defined in the statute prescribing it.**

In the **Tigo case** this Court relied on various authorities worldwide, especially India. It found the authorities persuasive as they were based on Statutes similar to Uganda laws. The Court stated **"We hold that life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned."**

It is clear to us that since 2009 when this Court decided the appeal in **Attorney General v. Susan Kigula and 417 others** the sentence of life imprisonment with or without remission started to operate. The sentencing guidelines were made thereafter. It therefore clears the air that life imprisonment is for the rest of the convict's remaining natural life as long as a convict was sentenced after January 2009. This Court has a discretion to impose a life sentence in offences where the maximum penalty is death. It can equally choose to hand down a sentence of a specific long term of imprisonment. It is absurd or strange to suggest that the second most severe sentence can be only 20

years imprisonment. The scale of 20 years is for remission purposes by the Prison Authorities and this was before the **Attorney General v. Susan Kigula & 417 others** which was dealing with a capital offence only punishable by death.

From the above it is clear that life imprisonment means the rest of the natural life of a convict. It is not correct to say that the Court of Appeal enhanced the sentence. On the contrary, the Court reduced it to a long term of imprisonment. It had said the following among other things:

"the statement by the trial Judge that the appellants murdered the late Akoragye at Rwakitura and therefore they were dangerous convicts for if they can go as far as killing a guard at Rwakitura they sure enough place their fingers in the mouth of the lion...was not borne out of the evidence adduced in Court."

As seen from the Court of Appeal judgment it believed that "a lesser but long custodial sentence commensurate with the gravity of the offence will serve as deterrent sentence..... After giving allowance for the five years the appellants had spent on remand before the time of their conviction, they reduced the five years from each of the sentences for murder to a term of 35 years imprisonment running from the date of their conviction. We agree with the proposition that the sentence of life imprisonment for the rest of natural life of a convict started to operate after the decision in Attorney **General v. Susan Kigula and 417 others case**.

We accept Counsel for the respondent's submission that the sentence passed by the Court of Appeal was neither illegal nor harsh and excessive.

It is trite law that an appellate Court can only interfere with the discretion exercised by the trial Court in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive. See **R v. Mohamed Jamal [1949] 15 EACA 126 [1948] 15 EACA**. The same principle was upheld in **Pandya v. R. [1957] EA 336**

In the present appeal none of the above factors were present. We are unable to fault the Court of Appeal. Both questions one and two are resolved in the negative.

Before we take leave of this appeal, we must express our views on an excerpt from the judgment of the Court of Appeal reproduced below:-

"in sentencing the appellants to life imprisonment, the trial Judge did not comply with the provisions of clause (8)of Article 23 of the Constitution to take into account the period the appellants had taken in lawful custody before conviction. We believe the learned trial judge was right in doing so. He had already decided to sentence the appellants to life imprisonment hence it would be to no avail to take into account whatever period they had spent on remand since it would not affect the life sentence anyway. "

Our view is that since the decision in the **Attorney General v. Susan Kigula and 417** others (Supra) which declared the death penalty not mandatory but discretional, it is imperative therefore for Court to take into account the period spent on remand together with the other mitigating and aggravating factors to justify the sentence to be imposed.

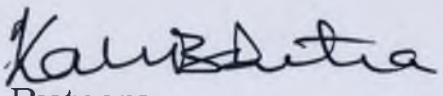
We are of the view that imposition of life imprisonment does not take away the Courts mandatory duty to comply with Article 23 (8) of the Constitution. It is clear that the death penalty is the maximum sentence which is imposed in the rarest of the rare cases. Life imprisonment being the next severe, complying with Article 23(8) of the Constitution would facilitate the imposing of the maximum penalty of the death sentence or reduction to life imprisonment or specific term of imprisonment, as the Court judicially exercises its discretion as it deems fit.

Be that as it may, as already stated in this judgment, the appeal fails and it is dismissed. The appellants should serve their sentences as varied and imposed for the charge of murder and as imposed for the three Counts of Aggravated Robbery.

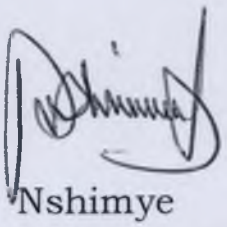
Dated at Kampala this ..... day of 2018

Mwondha
Justice of the Supreme Court

Mugamba
Justice of the Supreme Court



Buteera
Justice of the Supreme Court



Nshimye
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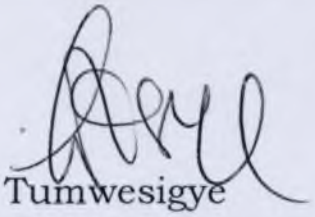

Tumwesigye
Justice of the Supreme Court