THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWANGUSYA; MWONDHA; MUGAMBA; JJ.S.C

CRIMINAL APPEAL NO. 50 OF 2015

1. OSHERURA OWEN
2. TUMWESIGYE FRANK ::APPELLANTS

VERSUS

UGANDA :::RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda: Remmy Kasule, Richard Buteera, F.M.S Egonda Ntende, JJA in Criminal Appeal No. 175 of 2012 dated 20th April 2015)

JUDGMENT OF THE COURT

This is an appeal against the decision of the Court of Appeal which dismissed the appellants' appeals against their sentences and upheld the sentences of 25 years imprisonment imposed by the High Court.

The background to this case as was rightly summarized by the Court of Appeal is that on the 22nd of February 2009 at about 8:00pm the deceased was in a bar in Kibwera Trading Centre selling local brews "*tonto*" and "*waragi*". A white saloon car with four occupants arrived and parked outside. One occupant went to the bar, bought "*tonto*" and returned to the car with it. The car drove away towards Isingiro Town. At about 9:30pm the same car returned and parked next to the bar. Two of the passengers got out of the car, entered the bar and bought "*tonto.*" However soon after they pulled Sanyu Provia (the deceased) outside and assaulted her with a panga. The deceased made an alarm

which was answered by her husband and daughter who were both in the room adjoining the bar. That room served as a bedroom. Both found the deceased lying in a pool of blood unconscious, with deep cut wounds on her head, legs and shoulders. She died on the way to Mbarara Hospital that same night.

The assailants drove off in the aforesaid white saloon car whose registration number was UAK 614M. Later investigations revealed that the car belonged to a one Begumisa of Kisiizi in Rukungiri District and that on the 22nd of February 2009 the car had been hired out to Owen Osherura (1stappellant) by Akampurira Alex (PW5).

Owen Osherura, the 1st appellant, was arrested. He made a charge and caution statement to police admitting participation in the murder of the deceased. In the statement he implicated others. Tumwesigye Frank, the 2nd appellant, was also arrested. He too made a charge and caution statement to police admitting he participated in the murder but he claimed to have merely accompanied the 1st appellant and others to the scene. He said he did not know of the plan to kill the deceased. Eventually both appellants were tried by the High Court and convicted. They were sentenced to 25 years imprisonment each.

The appellants appealed to the Court of Appeal. They challenged only the sentence of 25 years imprisonment imposed by the trial Judge. They were unsuccessful. Hence this second appeal to this court.
They filed a joint Memorandum of Appeal with two grounds framed as follows:

1. *THAT the learned Justices of Appeal erred in law when they failed to properly re-evaluate the procedure taken in recording a confession and come up with their own conclusion.*
2. *THAT the learned Justices of Appeal erred in law when they upheld a harsh, illegal and excessive sentence of the lower Court which did not take into account all mitigating factors.*

Representation

Ms. Wakabala Susan represented the Appellants on a State brief. Ms. Akello Florence, Principal State Attorney, appeared for the Respondent. The Appellants were present in Court.

Arguments

Both Appellants and Respondent filed written submissions which both sides adopted for consideration in this Appeal.

Ground 1

In her submissions on ground one, appellants' counsel faulted the Court of Appeal for failing in its duty to adequately re-evaluate the evidence relating to the admissibility of the confessions of the appellants. Appellants' Counsel's argument on this ground was that the evidence as to the recording of confessions is marred with contradictions that go to the root of the matter.

The Learned Counsel went on to fault the trial Judge for basing his ruling during the trial within a trial on his opinion and not the law governing the recording of confessions, saying that the Judge was

wrong to have based his convictions solely on the confession when it lacked corroboration.

Counsel however admitted that this ground was neither advanced nor considered in the Court of Appeal but asked this court to consider it because it raises an important legal issue. She said she relied on **Euchu Michael v Uganda, SCCA No. 54/2000** where this court allowed a ground not considered in the Court of Appeal to be argued because it raised an important legal issue.

In response, it was submitted for the respondent that ground one was never raised before the Court of Appeal and that the appellants were therefore barred from bringing new grounds not raised before the first appellate court. Counsel cited Section 11 of the Judicature Act saying that the appellants waived their right of appeal on this ground when they chose not to bring it before the Court of Appeal. Counsel stated also that there was no issue of legal importance raised by the appellant for this court to determine.

Analysis and resolution

We have considered the arguments raised by both counsel in their submissions and will resolve the preliminary issue of the appellant seeking to argue ground one of appeal in this court when it was not raised before the Court of Appeal.

In the appellants' submissions counsel kicks off by stating that the Court of Appeal failed in its duty to adequately re-evaluate the

evidence relating to the admissibility of the confessions of the appellants.

Clearly the single ground of appeal before the Court of Appeal read as follows:

'The sentence of 25 years imprisonment passed by the trial judge on each of the appellant was harsh in the circumstances of the case considering the appellants ages at the time of their sentencing and other mitigating factors'.

This was the ground that was entertained and resolved by the Justices of the Court of Appeal.

This court has previously found that it is erroneous to fault the learned Justices of Appeal as having erred when the complaint was not raised before them for consideration. See **Twinomugisha Alex Alias Twine, Patrick Kwezi and John Sanyu Katuramu v Uganda, Criminal Appeal No. 35 of 2002**

In the recent decision of **Bogere Assimwe Moses and Senyonga Sunday v Uganda, Supreme Court Criminal Appeal No.39 of 2016,** this court dismissed a ground of appeal not raised before the Court of Appeal. It held that the Court of Appeal justices never had opportunity to handle the issue of conviction, which the appellants were then raising, when they heard the appeal. The Court of Appeal could not therefore be faulted on a matter which was never raised before them.

We associate with the above decision and consider it an error for counsel to have levelled criticism on the Justices of the Court of Appeal on a matter which was not availed to them to entertain.

Rule 98 (a) of the Supreme Court Rules provides:

> *'At the hearing of an appeal –*
>
> *no party shall, without the leave of the court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 88 of these Rules.'*

In the instant case, counsel for the appellant admitted that this ground was neither advanced nor considered in the Court of Appeal. However Counsel sought this court to consider it saying it raised an important legal issue. No leave was sought by the appellants pursuant to rule 98(a) of the Rules of this Court.

Definitely we have no basis to consider the matter as it was never canvassed before the Court of Appeal. The preliminary objection is upheld.

The above notwithstanding, we perused the record of appeal and complaints in that regard. We are satisfied the learned Justices of Appeal properly re-evaluated the evidence on record to come to the conclusion they did.

Ground 2

The complaint in ground 2 is that the learned Justices of Appeal erred in law when they upheld a harsh, illegal and excessive sentence of the lower Court, which did not take into account all mitigating factors.

Counsel for the appellant submitted that the learned trial Judge as well as the learned Justices of Appeal did not take into account the period the appellant spent on remand by applying the arithmetic way as enunciated in **Rwabugande Moses v Uganda SCCA 25/2014.** He argued that in **Rwabugande Moses** (supra) Court applied the arithmetic deduction and set aside the 35 years sentence. Counsel said court had substituted the sentence with a 21 years sentence after deducting the one year the appellant was on remand. He asked court to set aside the 25 years sentence and substitute it with a more lenient sentence.

For the respondent, counsel supported the sentence of 25 years and submitted that all the mitigating factors were considered before sentence was passed. He added that a sentence of 25 years imprisonment is not excessive and is in accordance with the law. Counsel concluded that the sentence was rightly confirmed.

This Court should be hesitant to alter a sentence imposed by a trial court. Indeed in **Kiwalabye Bernard v Uganda, Criminal Appeal No. 143 of 2001**, this Court had this to say:

`The 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 being 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 important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.'

This appeal is against a sentence of 25 years meted out by the High Court. The Court of Appeal upheld that same sentence.

Article 23 (8) of the Constitution provides:

> **`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 appellants are relying on the authority of **Rwabugande Moses v Uganda (supra),** which is to the same effect that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory Constitutional provision.

In **Rwabugande Moses v Uganda (supra)** this court stated:

'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.'

That authority calibrated the provisions of Article 23(8) of the Constitution in a language that leaves nothing to speculation. The decision is vital in our jurisprudence. As observed earlier by Mulenga JSC (of good memory) in **Attorney General v Uganda Law Society, Constitutional Appeal No. 1 of 2006:**

' Under the doctrine of stare decisis which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at per incuriam without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances a panel of an appellate court is bound by previous decisions of other panels of the same court.'

We note also that the appellants in this appeal were convicted and sentenced on 26th April 2012. The court of Appeal rendered its decision on 20th April 2015. Needless to say it would be moot to suggest as the appellants appear to intimate that either the High Court or the Court of Appeal could possibly have taken cognizance of **Rwabugande Moses v Uganda (supra)** a decision rendered in 2017. Suffice it to say that the decisions of the two lower courts did not depart from the provisions of the Constitution.

We agree with counsel for the appellant regarding what ought to be

done pursuant to Article 23(8) of the Constitution. The sentencing Judge when handing down the sentence stated as follows:

> **'I have taken into account the period the convicts have spent on remand in arriving at the sentence. All factors taken into account in light of the circumstances of this case, I sentence the convicts as follows:-**
>
> **Convict (A1) is sentenced to TWENTY- FIVE years' imprisonment.**
>
> **Convict (A2) is sentenced to TWENTY- FIVE years' imprisonment.'** Emphasis added.

The Court of Appeal in upholding the above sentences stated:

> **'The trial Judge took into account the period the applicants spent on remand as well as both the mitigating and aggravating factors. We find that the sentence imposed upon each appellant is legal and cannot be said to be harsh or manifestly excessive or based on a wrong principle. Therefore we do not find a convincing reason to interfere with the sentence.'**

The trial Judge clearly stated that he had taken into account the period the appellants spent on remand prior to passing the respective sentences of 25 years. Like the Court of Appeal found, we too consider this sentence legal and in no way harsh or manifestly excessive. Considering that the maximum penalty for the offence of murder, which the Appellants were convicted of, is death we find a sentence of 25 years imprisonment not harsh.

Verdict

In the result we find no ground to alter the sentences handed down by the trial court. We dismiss this appeal and uphold the decisions of the High Court and the Court of Appeal.

Dated at Kampala this 14th day of June 2018.

HON. JUSTICE BART KATUREEBE
CHIEF JUSTICE

HON. LADY JUSTICE ARACH -AMOKO
JUSTICE OF THE SUPREME COURT

HON. JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT

HON. LADY JUSTICE FAITH MWONDHA
JUSTICE OF THE SUPREME COURT

HON. JUSTICE PAUL K. MUGAMBA
JUSTICE OF THE SUPREME COURT