

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: - Arach Amoko, Opio Aweri, Mwendha, Mugamba JJSC, Nshimye
Ag. JSC

CRIMINAL REVIEW APPLICATION NO.5 OF 2018

ARISING FROM SUPREME COURT CRIMINAL APPEAL NO.30 OF 2015

BWALATUM FRANCIS.....APPLICANT/APPELLANT

VERSUS

UGANDA.....RESPONDENT

RULING OF THE COURT

This application was brought by way of Notice of Motion under Article 126(2) (e) and 132(4) of the Constitution, Rules 2(2), 35(1) (2), 42(1) and 43(1) of the Judicature (Supreme Court Rules) Directions SI 13-11.

The applicant sought for orders that:

1. The judgment of this Honourable Court dated 21st January 2017 upholding the decision and orders of the Court of Appeal be clarified, corrected and or reviewed so as to give effect to the law which mandates that the period spent on remand before trial and conviction be deducted from the final sentence.
2. Consequently the 1 (one) year and 7 (seven) months sentence that the appellant/applicant spent on remand prior to trial and conviction be and is hereby deducted from the final sentence of 20 years confirmed by this Honourable Court.
3. No order as to costs.

The application was supported by an affidavit deposed by the applicant. The grounds on which the application was based are as follows:

1. That the appellant/ applicant was charged with 2(two) counts of murder and convicted by the High Court which sentenced him to 50 (fifty) years imprisonment on each of the counts.
2. That the High Court however in sentencing the appellant/ applicant, did not deduct the period of 1 (one) year and 7(seven) months that the appellant/ applicant spent on remand prior to the trial and conviction contrary to the express provisions of the law and the pronouncements of this Honourable Court in its previous decisions.
3. That the appellant/ applicant being dissatisfied with the decision of the High Court, appealed to the Court of Appeal which upheld his conviction but reduced the sentence from 50 (fifty) years to 20 (twenty) years on each count running concurrently.
4. That the Court of Appeal however did not also clearly deduct the period of 1 (one) year and 7(seven) months that the appellant/applicant spent on remand prior to his trial and conviction.
5. That the appellant/ applicant again being dissatisfied with the decision of the Court of Appeal appealed to this Honourable Court seeking to quash the entire decision of the Court of Appeal.
6. That on or about the 21st of December 2017, this Honourable Court dismissed the appellant's/ applicant's appeal and upheld the decisions and orders of the Court of Appeal with no changes and or variations to Judgment of the Court of Appeal.
7. That the said Judgment of this Honourable Court being a final decision of the Court did not also deduct the period of 1(one) year and 7(seven) months that the appellant/applicant spent on remand as per the law and as has been the case in pronouncements of this Honourable Court in other decisions.
8. That as a result, it is not clear as to when the appellant's/applicant's sentence is meant to lapse.
9. That the justice of the case requires that this Honourable Court be pleased to clarify, correct and or review its Judgment dated 21st December 2017 so as to give effect to the law which mandates that the period spent on remand before trial and conviction be deducted from the final sentence.

10. That the justice of the case further requires that the 1(one) year and 7 (seven) months that the appellant/ applicant spent on remand prior to trial and conviction be deducted from the final sentence of 20 years confirmed by this Honourable Court.

The respondent opposed the application and filed an affidavit in reply deponed by Mr. Vincent Wagona of the office of the Director of Public Prosecutions as follows:-

1. That it is the contention of the respondent that the Court of Appeal took into account that prior to his trial and conviction, the appellant/applicant had spent one year and seven months on remand.
2. That the Supreme Court found that all legal factors to consider while sentencing were put into consideration by the Court of Appeal, including the period spent on remand.
3. That no justifiable grounds have been deponed or presented by the applicant for the issuance of the orders sought.
4. That it is in the interest of Justice that this application be denied.

Representation

Mr. Ojambo Robert Mageni represented the applicant and Mr. Vincent Wagona, a Senior Assistant DPP represented the respondent.

Applicant's submissions

The applicant through his counsel filed written submissions which he adopted at the hearing of the application.

In his submissions, counsel argued that the basis of the application is the Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013.

He argued that according to Guideline 15(1), the Court should take into account any period spent on remand in determining an appropriate sentence. Counsel conceded that the Court of Appeal took into account the 1 year 7 months period the appellant spent on remand when determining that 20 years was the appropriate sentence. However, counsel submitted that it is not enough for Court to take into account any period spent on remand in determining an appropriate sentence.

He further argued that the period spent on remand should further be deducted from the sentence considered appropriate as provided for under guideline 15(2) of the Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013.

He conceded that the issue whether the remand period should be deducted from the 20 year sentence or not was never argued before the Court of Appeal or the Supreme Court and consequently was not considered and there was no decision on it.

He relied on the case of **Rwabugande Moses Vs Uganda Supreme Court Criminal Appeal No.25 of 2014** where it was held that a period spent on remand should be deducted from the final sentence arithmetically. Counsel further submitted that this Court's decision of **Abelle Asuman Vs Uganda Supreme Court Criminal Appeal No. 66 of 2016** is in conflict with the sentencing guidelines which expressly provide that the period spent on remand shall be deducted from the sentence considered appropriate. Counsel submitted that in the **Abelle Asuman case (supra)**, it was decided that the decision of **Rwabugande Moses Vs Uganda (supra)** does not operate retrospectively.

He concluded by praying that this Court allows the application and order that the one year and 7 months period spent on remand by the applicant be deducted from the sentence of 20 years.

Respondent's submissions:-

Mr. Vincent Wagona, Senior Assistant DPP opposed the application and submitted that the application was misconceived, lacked merit and did not demonstrate any need for clarification, correction or review of the judgment of this Honourable Court of 21st December 2017 in SCCA No.30 of 2015.

He submitted that in terms of Rule 2(2) of the Judicature (Supreme Court) Rules, it has not been demonstrated that there has been an abuse of Court process, or that the said judgment has been proved null and void.

Also, in terms of Rule 35(1), it was not demonstrated that the impugned judgment contained any clerical or arithmetical mistake or error.

Counsel further submitted that the application itself was an abuse of Court process because it raised matters in the case that have already been substantively considered and decided upon by the Court of Appeal, as well as this Court.

He argued that the application was premised on a misunderstanding of the decision of this Court in **Rwabugande Moses Vs Uganda (supra)** and relied on the case of **Abelle Asuman Vs Uganda (supra)**

He submitted that the word “deduct” used in the sentencing Guideline 15(2) should be given the same treatment as in **Rwabugande**, that is, as a Guide, because the word is not used in the Constitution.

He further submitted that the Court of Appeal took into account the period the applicant had spent on remand and complied with the Constitutional obligation in Article 23(8) of the Constitution. Accordingly, this Court was correct in finding that 20 years imprisonment was a fair sentence considering that the offence was murder involving two lives.

He contended that there was nothing to clarify about the prevailing sentence of 20 years. However, should this Honourable Court be inclined to find a need to clarify its Judgment, the only clarification that would be consistent with, and give effect to what was the intention of the Court of Appeal as well as this Court, is to clarify that the period of one year and seven months spent on remand prior to trial and conviction, had already been credited to the applicant in arriving at the sentence of 20 years imprisonment.

Applicant’s submissions in rejoinder:-

In his submissions in rejoinder, counsel for the applicant distinguished the case of **Abelle Asuman Vs Uganda (supra)** from the instant case. Counsel submitted that in the **Abelle case**, the issue was whether the Court of Appeal complied with provisions of Article 23(8) of the Constitution when it sentenced the appellant to 18 years and not whether having determined the appropriate sentence, the period spent on remand is deductible from the sentence.

He conceded that the Court of Appeal complied with Article 23(8) of the Constitution but that what was being sought from this Court was clarification whether the period spent on remand should be deducted from the imposed sentence of 20 years and it was counsel’s contention that it should be deducted based on the Constitutional Sentencing Guidelines.

He argued that the sentencing Guidelines are binding on this Court and all the lower Courts because they were issued by the Chief Justice pursuant to Article 133(b) of the Constitution and consequently have constitutional force like any other constitutional provision.

He reiterated that the period of 1 year and 7 months which the applicant spent on remand should in accordance with the Constitution and Guidelines

made thereunder, be deducted from the sentence of 20 years imposed by the Court of Appeal and confirmed by this Honourable Court.

Consideration of the application:-

We have carefully studied the application with the affidavit in support and affidavit in reply by the respondent. We also considered the submissions of both counsel on the application.

While sentencing the applicant to 20 (twenty) years imprisonment, the Court of Appeal stated as follows:

“The appellant instructed his counsel not to say anything in mitigation and he said a few words himself, affirming his innocence. This was his right. The prosecution did not produce any record of previous convictions if any for the appellant. He must be treated therefore as a first offender. Prior to his trial and conviction, he spent one year and seven months on remand. He is 57 years old now; given at the time he was charged he was 54 years of age. The appellant was convicted of 2 very serious offences involving the loss of 2 lives. The maximum punishment of murder is the death penalty. However, as the appellant is a first offender he will be spared the death penalty.

Taking into account all the foregoing we are satisfied that a sentence of 20 years on each count to be served concurrently will meet the ends of Justice in this case. We so order.” (Emphasis added)

While upholding the above sentence, this Court observed as follows:

“The observations made by the Court of Appeal above are exhaustive and clear of ambiguities. All legal factors to consider while sentencing were put into consideration by Court; the appellant was treated as a first offender, the period spent on remand was considered, the Court took into consideration of the age of the appellant. The Court further considered that this was a grave offence involving loss of two lives and the fact that the maximum penalty of murder was death.

We agree with the Court of Appeal that the sentence imposed was not manifestly excessive or so low as to amount to a miscarriage of Justice.”(Emphasis added)

We do not accept the submission of counsel for the applicant that the Court should have gone further to deduct the remand period from the specific appropriate sentence it passed.

In **Rwabugande Moses Vs Uganda (supra)**, it was decided as follows:

We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. Article 23 (8) of the Constitution (supra) makes it mandatory and not discretionary that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretionary mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision. We note that our reasoning above is in line with provisions of Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

We find nothing in the above decision to suggest that the period spent on remand should be double credited to the accused person. First, in determining an appropriate sentence and secondly, by deducting the same remand period from the appropriate sentence. This Court cannot dictate the kind of language to be used by a trial Judge while sentencing. What was important was compliance with Article 23(8) of the Constitution.

Article 23(8) provides as follows:

“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 the case of **Abelle Asuman Vs Uganda (supra)** as rightly cited by counsel for the respondent, this Court decided as follows:

“What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. The Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

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 their judgment 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. (Emphasis added)

In the Abelle case, the appellant was convicted and sentenced long before the decision in Rwabugande, so is the applicant in the instant application.

It has not appeared to us right to depart from our previous decision. The application is dismissed for lack of merit.

Dated at Kampala this 25th day of October - 2018
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ARACH AMOKO
JUSTICE OF THE SUPREME COURT

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OPIO AWERI
JUSTICE OF THE SUPREME COURT

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MWONDHA
JUSTICE OF THE SUPREME COURT

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MUGAMBA
JUSTICE OF THE SUPREME COURT

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NSHIMYE
AG. JUSTICE OF THE SUPREME COURT