

REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

5 (CORAM: MWANGUSYA; OPIO-AWERI; MWONDHA;
BUTEERA. JJ.S.C, TUMWESIGYE; AG. JSC)

CRIMINAL APPEAL NO: 58 OF 2016

BETWEEN

10 **1. SEBUNYA ROBERT**
2. KAKUMA TONNY :::::::::::::::::::::::::::::::
APPELLANTS

AND

15 **UGANDA** :::::::::::::::::::::::::::::::::::::::
RESPONDENT

20 [Appeal from the decision of the Court of Appeal at Kampala (Nshimye,
Mwondha and Kakuru, JJ.A) in Criminal Appeal No. 71 of 2013 dated 20th
December 2016]

25 **JUDGMENT OF THE COURT**

The appellants were convicted by the High Court (Byabakama Mugenyi, J) (as he then was) on two counts of Aggravated Robbery and Murder. They were both sentenced to 30 years' imprisonment each on each count. The two sentences were to run
5 concurrently. The appellants appealed to the Court of Appeal only against sentence and their appeal was dismissed.

Their appeal to this court is based on only one ground which they framed as follows:

**That the learned Justices of Appeal erred in law when
10 they confirmed an illegal concurrent sentence of 30 years' imprisonment for each of the appellants.**

The appellants prayed this court to allow the appeal and reduce the sentence to what the court would consider to be appropriate.

At the hearing of this appeal, Mr. Henry Kunya represented the
15 appellants while Mr. Henry Ndamurani Ateenyi, Senior Assistant Director of Public Prosecutions, represented the respondent. Both counsel filed written submissions which they adopted at the hearing.

Learned counsel for the appellants submitted that the issue of an
20 illegal sentence was being raised for the first time as it had not been raised and addressed by the learned Justices of Appeal, and he was aware of the rule that an appellate court will not entertain and consider an argument raised for the first time on appeal. However, it was his contention that this was a special case which

warranted a departure from the general rule as it concerned the fundamental right of a convict guaranteed by Article 28(3) of the Constitution.

5 On the appellants' ground of appeal as framed, counsel argued that it was now settled law that a sentence arrived at without taking into account the period a convict has spent on remand is illegal for failure to comply with Article 23(8) of the Constitution.

10 Counsel contended that the sentence of 30 years' imprisonment is illegal as both the learned trial judge and the Court of Appeal did not take into account the 4 years and 6 months period which the appellants had spent on remand though the trial judge had alluded to it in his judgment.

15 Learned counsel conceded that by the time the two courts below made their decisions, the law was that taking into account did not mean an arithmetical exercise. Nevertheless, he argued that the trial judge should have "practically" deducted the period of 4 years and 6 months spent on remand from the 30 years imprisonment which would have made it 25 years and 6 months imprisonment.

20 He cited the case of **Rwabugande Moses vs. Uganda**, SCCA No. 25 of 2014 to bolster his argument. Counsel concluded his arguments by inviting the court to reduce the appellants' sentence to what the court considered appropriate.

Learned counsel for the respondent, on his part, argued that the issue of an illegal sentence of 30 years was not raised in the Court of Appeal and was, therefore, not subject to their adjudication and that this was conceded by counsel for the appellants. He, therefore, invited the court to follow the rule which provides that an appellate court will not consider an argument raised for the first time on a second appeal, and strike out the appeal.

In the alternative, counsel argued that the trial court was alive to Article 23(8) of the Constitution which imposes a duty upon every trial court to take into account the period a convict has spent in lawful custody in imposing an appropriate term of imprisonment and the trial court had stated so in sentencing the appellants to a term of 30 years' imprisonment each.

Learned counsel further argued that the appellants were convicted and sentenced by the trial court on 7th June 2013 before the appeal in **Rwabugande vs. Uganda**, SCCA No. 25 of 2014 was decided by this court, so the trial court cannot be faulted for not having "practically" deducted the period spent on remand. Before **Rwabugande** the law was that "taking into account did not mean an arithmetical exercise", counsel argued.

In conclusion, counsel submitted that the sentences which were passed against the appellants were not illegal, and he invited the court to uphold the sentences which were handed down by the trial court against the appellants and confirmed by the Court of Appeal.

Consideration of the appeal

The claim that the trial court passed an illegal sentence against the appellants was not raised as a ground of appeal by the appellants in the Court of Appeal nor was it raised by their
5 counsel in his submissions in that court. So it is being raised in this court for the first time.

This much was conceded by learned counsel for the appellants in his submissions. However, it was counsel's argument that this case warrants a departure from the general rule because it
10 involves a fundamental right of a convict as provided in Article 23(8) of the Constitution.

It has been held in several decisions of this court that this court will not allow for consideration an issue which was not raised in the Court of Appeal to be raised for the first time in this court. For
15 this principle see **Interfreight Forwarders (U) Ltd vs. East African Development Bank**, SCCA No. 33 of 1992, **The Attorney General vs. Paul Ssemogerere & Another**, Constitutional Appeal No. 3 of 2004, and **Ms Fang Min vs. Belex Tours and Travel Ltd**, SCCA No. 5 of 2013.

20 However, it was also held in **Makula International Ltd vs. Cardinal Emmanuel Nsubuga & Others**, SCCA No. 4 of 1981 and **National Social Security Fund & Others vs. Alcon International**, No. 149 of 2011 that illegality as an issue can be raised at any time as a court of law cannot sanction that which is
25 illegal. In criminal matters where the freedom of a citizen is of utmost importance, it is even more compelling for the court to

find out whether there was indeed an illegality that tainted the sentencing of a convict. The important thing is that when the issue of illegality is brought to the attention of the court, the parties are given an opportunity to be heard on it.

- 5 We shall, therefore, consider the appellants' ground of appeal even though it was not raised in and adjudicated upon by the Court of Appeal.

The issue of illegality raised in the appellants' ground of appeal is that the learned Justices of Appeal confirmed an illegal sentence
10 of 30 years' imprisonment for each of the appellants.

Section 5 of the Judicature Act gives this court power to consider an appeal against sentence if the sentence was contrary to the law or illegal. The alleged illegality in this appeal is that the trial court did not comply with Article 23(8) of the Constitution which
15 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
20 into account in imposing the term of imprisonment.**

It is the appellants' contention that the sentence of 30 years imprisonment imposed by the trial court on the appellants is illegal because it did not take into account the 4 years and 6 months period the appellants had spent on remand.

In sentencing the two appellants the learned trial judge stated:

5 **Sebunya (A2) is sentenced to 30 years' (thirty) imprisonment on count 1 and the same period (30 years) in count II, taking into account the period spent on remand. Both sentences are to run concurrently.**

And in respect of Kakuma the learned trial judge stated:

10 **Kakuma (A3) is sentenced to thirty years' (30 years) imprisonment on count 1 and the same period (30 years) in count II, taking into account the period spent on remand. The sentences are to run concurrently.**

15 Learned counsel for the appellants conceded in his submissions that the learned trial judge alluded to the period the appellants had spent on remand and that according to the law that applied at the time of passing the sentence, to take into account does not mean engaging in an arithmetical exercise.

20 In **Rwabugande Moses vs. Uganda** (supra) this court cited Sentencing Guidelines for Courts of Judicature Practice Directions, 2013 where it is stated: -

- (1) The court shall take into account any period spent on remand in determining an appropriate sentence.

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all the factors have been taken into account.

Following the above cited Sentencing Guidelines, and the holding of this court in **Rwabugande** (supra) that a trial court must calculate the period a convict has spent on remand and subtract it from the term of imprisonment the court has imposed, it would no longer be sufficient or lawful for a trial court to merely state when sentencing that it has taken into account the period the convict has spent on remand, following this court's decisions in such cases as **Kizito Senkula vs. Uganda**, SCCA No. 24 of 2001, **Kabuye Senvawo vs. Uganda**, SCCA 2 of 2002 and others.

However, in respect of this appeal, it is important to note that the appellants were sentenced by the trial court on 7th June, 2013, and their sentences were confirmed by the Court of Appeal on 20th December, 2016, before our decision in **Rwabugande** which was delivered on 3rd March, 2017.

Rwabugande does not have any retrospective effect on sentences which were passed before it by courts "taking into account the periods [a convict] spends in lawful custody". Accordingly, we find no justifiable reason to fault the High Court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences were in conformity with the law that applied at the time the sentences were passed.

We, therefore, find no merit in this appeal which is accordingly dismissed.

Dated at Kampala this2nd.....day of July, 2018

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Hon. Justice Eldad Mwangusya
JUSTICE OF THE SUPREME COURT

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Hon. Justice Opiyo-Aweri
JUSTICE OF THE SUPREME COURT

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Hon. Justice Faith Mwendha
JUSTICE OF THE SUPREME COURT

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Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

Hon. Justice Jotham Tumwesigye

AG. JUSTICE OF THE SUPREME COURT