THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CRIMINAL APPLICATION NO.11 OF 2018

BETWEEN

MWESIGYE MAIKOLO.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

RULING OF THE COURT

This application was brought by way of Notice of Motion under Articles 2(1) (2) and 132(4) of the Constitution of the Republic of Uganda, Rules 2(2) and 35(1) of the Judicature (Supreme Court Rules) Directions SI 13-11 and Rule 19 (1) of the Judicature (Judicial Review) Rules, 2009.

The applicant sought for orders that:

1. The applicant be heard on the review of the Supreme Court judgment

2. Consequential directions be issued to determine a fair sentence

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

1. That the Supreme Court may, while treating its own previous decision, when it appears to it right to do so, and all other Courts shall be bound to follow the decision of the Supreme Court on questions of law.

2. That the Supreme Court judgment occasioned miscarriage of Justice against the applicant under Articles 28() and 44(c) of the Constitution which guarantees a fair trial.

3. That the Justices of the Supreme Court did not properly re-evaluate the grounds of the applicant's memorandum of appeal submitted for a fair decision in the Supreme Court when they up-held a sentence of 28 years relying upon a confession statement extracted from the applicant under duress.

4. That the applicant is aware that, an appeal lies to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law, which he has exhausted hence this Misc. Application brought under Rules 29(2) and 35(1) of the Judicature (Supreme Court Rules) for a review of the Judgment on sentence only.

5. That the sentence of 28 years imprisonment imposed unto the applicant is not only unreasonable but manifestly harsh for failure by the Supreme Court to intervene to consider the remand period of the applicant which he had spent in lawful custody.

6. That the sentence imposed to the applicant was outside the range of punishment which would be reasonably appropriate.

7. That there has been a serious departure from the sentencing procedure that, the Supreme Court should have intervened even though the appeal process is exhausted

8. That the phrase in the trial Court Judgment that, court has considered the remand period does not amount to deduction of the remand period from the final sentence imposed upon the applicant and upholding the sentence of 28 years, did not have an arithmetical bearing on the sentence.

9. That the applicant will suffer irreparable damage if this application is not granted attention for remedy by this same Court.

10. It is in the best interest of Justice that, this Honourable Court exercises its powers vested in its jurisdiction to review its own judgment from which this application arose.

Representation:

At the hearing of the application, Mr. Henry Kuunya represented the applicant, though he stepped down in court. The applicant represented himself. The respondent was represented by Ms. Barbara Kawuma, a Principal State Attorney.

Applicant's submissions:

The applicant addressed the Court orally. He stated that Court should exercise leniency and reduce the sentence of 28 years imprisonment which was imposed on him and confirmed by this Court in Criminal Appeal No.127/2012. He stated that Court should exercise its discretion and reduce on his sentence because of his poor health and advanced age.

Respondent's submissions:

Counsel for the respondent filed written submissions which she adopted at the hearing of the application. She submitted that the application is brought under the wrong law and therefore should be struck out.

She further submitted that the sentence of 28 years imprisonment was lenient considering the fact that the maximum sentence for murder is death.

In response to the applicant's contention that there was a serious departure from the sentencing procedures and that the Supreme Court should have intervened, Counsel argued that it is erroneous as the decision to increase or reduce a sentence is discretionary. Counsel relied on Section 34(2) of the Criminal Procedure Act, **Kifamunte Henry Vs Uganda SCCA No.10/1997** and **Kiwalabye Vs Uganda SCCA No.143 of 2001** for this position.

She also relied on this Court's decision of **Abelle Asuman Vs Uganda SCCA No.66 of 2016** where it was held that while the Constitution provides that the sentencing Court must take into account the period spent on remand, it does not provide that the taking into account has to be done in an arithmetical way.

Counsel argued that the Court in **Abelle Asuman Vs Uganda (supra)** made reference to the fact that the case of **Rwabugande Moses Vs Uganda SCCA No. 297/2011** 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. Counsel submitted that where the 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 Court missed to state the words that they deducted the period spent on remand.

Counsel further submitted that the sentencing Court took into account all the mitigating and aggravating factors before it arrived at the sentence of 28 years imprisonment and that the Supreme Court Justices were on appeal therefore justified in upholding the same.

She further argued that section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence; it only allows him or her to appeal against only a matter of law. Counsel relied **on Okello Geoffrey Vs Uganda SCCA No. 34/2014** for this position.

Consideration of the Application:-

The application was brought under Articles 2(1) (2) and 132(4) of the Constitution as amended and Rules 2(2) and 35(1) of the Judicature (Supreme Court Rules) Directions SI 13-11 and the Judicature (Judicial Review Rules), 2009 Rule 1 and other enabling laws.

Article 2(1) and (2) of the Constitution provides:-

2. Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

Article 132(4) provides:

The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.

Rule 2(2) of the Supreme Court Rules provides:

Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of this Court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of Justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

Rule 35(1) of this Court Rules provides:-

35. Correction of errors,

(1) A clerical or arithmetical mistake in any judgment of the Court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the Court when Judgment was given.

We have carefully studied the applicant's application and the affidavit in support. We have also carefully studied the respondent's submissions before this Court. We appreciate that the applicant made a lay man's application but there is no way Article 2(1) & (2) of the Constitution was applicable to the facts of this application.

Also reading Rule 35(1) of this Court Rules, it would be too farfetched to consider that the impugned judgment of this Court contained clerical or arithmetical mistake or had an error arising in it from an accidental slip or omission to warrant correction of the same. It is apparent that Rule 35(1) cannot be applicable therefore.

Article 132(4) of the Constitution gives the mandate to this Court to depart from its earlier decisions when it appears right to do so. The pertinent question to pose is whether it appears right to this Court to review the decision in the impugned judgment and make consequential directions to determine a fair sentence.

The applicant who was unrepresented because his lawyer decided to step down at the hearing, had stated in the supporting affidavit that the judgment occasioned miscarriage of justice against him under Article 23(8) and 44(c) of the Constitution which guarantees a fair trial.

It was in that very affidavit, which has been already reproduced in this Ruling where it was deponed, that the 28 years imprisonment imposed was manifestly harsh and excessive because of the failure by the Supreme Court to consider the remand period the applicant had spent in lawful custody.

The applicant failed to demonstrate how the impugned judgment offended Article 23(8) of the Constitution.

In **Orient Bank Vs Frederick Zaabwe Civil Application No. 17 of 2017**, it was observed as follows:

The decision of this Court on any issue of fact or law is final so that the unsuccessful party can not apply for its reversal...under rule 35(1) this Court may correct inter alia any error arising from accidental slip or omission in its judgment, in order to give effect to what was its intention at the time of giving judgment.

It was conceded by the applicant in his affidavit in support of the application in paragraph 5 as follows:-

That the applicant is aware that an appeal lies to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law, which he has exhausted hence this application brought under Rule 2(2) and 35(1) of the Judicature (Supreme Court) Rules for review of the sentence.

Having conceded, it comes out clearly that, the application was merely disguised as third appeal couched in words of review otherwise the 2nd appeal had already been determined.

We find that there was no error that this Court made which needed correction and there was no slip. The applicant failed to demonstrate that the purported error was arising from an accidental slip or omission in order to bring Rule 35(1) of this Court rules into play.

We concur with the observation of this court in **the Orient Bank Vs Fredereick Zaabwe (supra)** and emphasize that the decision of this Court on any issue of fact or law is final so that an unsuccessful party cannot apply for its reversal under rule 35(1) of this Court.

Bearing in mind that exceptional circumstances are founded in the Kyalimpa case (supra) to the effect that the sentence has to be illegal or manifestly excessive in the circumstances. This was not the case in the instant application.

This Court while considering **Obote William Vs Uganda Criminal Application No.1 of 2017** which was on a similar issue, it relied on **Lakhashmi Brothers Ltd Vs Raja & Sons (1996) EA 313** at page 314 which held as follows:-

There is a principle which is of greatest importance in the administration of Justice and that principle is this: it is in the interest of all persons that there should be an end to litigation.

We agree with the above observation and principle. This application fails and 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