

5
THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.43 OF 2016.

10 **[CORAM: ARACH-AMOKO, MWANGUSYA, MUGAMBA, BUTEERA,
JJ,SC. NSHIMYE, AG JSC].**

BETWEEN

TWESIGYE FRED:.....APPELLANT

VERSUS

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

[Appeal from the decision of Court of Appeal in Criminal Appeal No 461 of 2014, Twesigye Fred vs Uganda before Hon K. Kakuru, Byabakama Mugenyi S, A.C Owiny- Dollo JJA]

20 **JUDGMENT OF THE COURT**

25 When this appeal came before us for hearing, the appellant complained in a single ground of appeal, that the Court of Appeal had imposed on him a sentence of 30years imprisonment, which was illegal and sought our intervention.

He contended that the sentence was illegal because their Lordships, the Justices of Court of Appeal were oblivious to stipulation of the Constitution under Article 23 (8). While sentencing the appellant the court did not consider

5 the period of 4 years he had spent on remand, before he was first sentenced by the trial court.

Background of the Appeal:

10 The appellant was charged, tried and convicted of murder contrary to sections 188 and 189 of the Penal Code Act after killing his half brother.

It was the case for the prosecution in the High Court that on 11th of March 2003 at Kahenda village in Mbarara District the appellant (then accused) murdered Byarugaba Henry.

15 According to PW3 the wife of the appellant, she was in the kitchen at around 9pm when she heard a big bang in the house where the appellant was with the deceased. On hearing a second bang, she went to the house and found the appellant wielding an axe. The deceased lay on
20 the floor in a pool of blood gasping in pain. PW3 said that the appellant proceeded to pull the deceased and dropped him in a pit near his house. She added that later the appellant covered over the deceased with soil while the deceased gasped for breath.

5 PW3 testified that the following day the appellant asked his younger brother to level the ground and plant there a banana sucker to disguise the grave and to destroy evidence.

10 PW3 said that she was threatened with death if she dared tell anyone what happened. She added that she was scared and after sometime she got an opportunity to run away. She said she left her telephone contact with the relatives of the deceased.

15 After 1 year and half, following investigations and upon disclosure to the relatives by PW3 of what had happened the appellant was arrested. PW3 was traced by police and she led them to the spot near the house where the body was exhumed and identified as that of the deceased. The appellant was subsequently charged and tried by the
20 High Court.

Upon conviction on 31/3/2009, the trial judge considered all the circumstances of the case and classified the act of the appellant as one of the most gruesome and callous murders. The appellant was sentenced to death.

25 He appealed to the Court of Appeal. Following the decision of ***Attorney General vs Susan Kigula &***

5 ***Others Constitutional Appeal No. 3 of 2006***, the Court of Appeal sent the case back to the High Court for the trial judge to hear and consider the appellant's plea in mitigation of sentence.

10 The High Court considered the submissions of the appellant and felt that the aggravating factors outweighed the mitigating factors. The Judge found the case to have been exceptional deserving only a death sentence. The death sentence was not altered. The appellant appealed to the Court of Appeal for the second
15 time but this time on severity of sentence.

Allowing the appeal, the Court of Appeal set aside the sentence of death and substituted it with imprisonment for 30 years.

20 It is the above sentence that the appellant is contending was illegal.

During the hearing learned Counsel ***Susan Wakabala*** appeared for the appellant on state brief while a Senior State Attorney ***Samali Wakooli*** appeared for the respondent. Both counsel adopted and relied on their
25 written submission earlier filed in court

5 ***Submissions for the appellant:***

In her written submissions, Counsel Wakabala informed court that the Court of Appeal rightly set aside the death sentence imposed on her client but made an error of not considering the period of 4 years, 5 months and 6 days the appellant had spent on remand. She reproduced the impugned paragraph her client was complaining about which read:

15 ***"In the instant appeal, we have evaluated both the mitigating and aggravating factors, and considering the circumstances of the case, we find that a sentence of death was harsh and manifestly excessive. We accordingly set it aside. We substitute the same with a sentence of 30 (thirty) years imprisonment to be served by the appellant. The sentence is to run from 31.3.2009, the date of conviction of the appellant."***

20 According to counsel, the sentence was illegal and a nullity in that it did not comply with Article 23(8) of the 1995 Constitution
25 which provides:

5 ***"Where a person is convicted and sentenced to a term 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"***.

10 ***(the emphasis above is added)***

Counsel urged us to intervene by allowing the appeal, set aside the illegal sentence and substitute it with another appropriate sentence. She referred to us in the case of ***Susan Kigula vs Uganda HCT 00-CR-115 (Supra)***, where the convict was
15 previously on death row and her death sentence was substituted with a sentence of 20 years imprisonment .

She also referred us to ***Rwabugande vs Uganda SCCA N.25/2014*** where appellant's sentence was reduced from 35 years to 21 years imprisonment.

20 In her final and humble prayer, she suggested that considering mitigating factors and other circumstances of the case, a substituted sentence of 20 years imprisonment would be fair and appropriate.

Submissions of the Respondent:

25 Learned Senior State Attorney ***Samali Wakooli*** opposed the appeal and defended the sentence imposed by the Court of Appeal. According to her, on the authority of this Court, in the case of ***Abelle Asuman vs Uganda Cr. Appeal No,66 of 2016,***

5 the appellate court could not interfere merely because the sentencing judge or justices used different words in the judgment or missed to state that they had deducted the period spent on remand. Counsel read out the relevant passage in that judgment which stated:-

10 ***"Where a sentencing court had 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***
15 ***different words in their judgment or missed to state that they deducted the period on remand. These may be issues of style for which a lower court would not be faulted when in effect court has complied with the Constitutional obligation in Article 28(8) of the***
20 ***Constitution"***.

(The underlining is ours)

After a spirited argument, though misconceived, counsel for the respondent finally conceded that the sentence appealed against was illegal and could not be allowed to stand.

25 **Decision:**

The law is clear. The appellate court will not interfere with a sentence imposed by a lower court in exercise of its discretion unless, it is illegal or manifestly excessive or so low as to amount

5 to a miscarriage of justice or where the sentencing court ignores
to consider an important matter or circumstances which might be
considered while passing the sentence or where the sentence
imposed is wrong in principle. See ***Kiwalabye Bernard vs
Uganda Supreme Court Cr Appeal No.143/2001, Kizito
10 Senkula Vs Uganda Cr Appeal No.24/2001 (SC), Ogalo S/O
Ownora Vs R (1954) 24 EACA.***

The fact that their Lordships the Justices of the Court of Appeal
did not mention that they had complied with the requirement of
Article 23(8) renders the sentence of 30 years which was handed
15 down illegal.

The authority of ***Abelle Asuman*** (supra) cited by counsel in her
argument is distinguishable in that according to that authority,
the appellate court would not interfere when the sentencing court
clearly demonstrates that *it has clearly taken into account the
20 period spent on remand to the credit of the convict.*

Before we take leave of this case on the issue, however, we find
it appropriate to clarify this Court's holding in ***Criminal Appeal
No.66 of 2016 Abelle Asuman versus Uganda.*** In addition
to what counsel for the respondent quoted the court went further
25 to state:-

***"We find also that this appeal is premised on a
misapplication of the decision of this Court in the
case of Rwabugande (supra) which was decided
on 3rd March 2017.***

In its Judgment this Court made it clear that it was departing from its earlier decisions in Kizito Senkula vs. Uganda SCCA No.24/2001; Kabuye Senvawo vs. Uganda SCCA No.2 of 2002; Katende Ahamed vs. Uganda SCCA No.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No.17 of 2010 which held that 'taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula.'

This Court and the Courts below before the decision in *Rwabugande* (supra) were following the law as it was in the previous decisions above quoted since that was the law then.

After the Court's decision in the *Rwabugande* case this Court and the Courts below have to follow the position of the law as stated in *Rwabugande* (supra)."

The Court further held:-

"A precedent has to be in existence for it to be followed. The instant appeal is on a Court of Appeal decision of 20th December 2016.

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10
The Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 coming about four months after its decision. The case of Rwabugande (supra) would not bind Courts for cases decided before the 3rd of March 2017."

15
This Court made it clear in **Abelle Asuman** (supra) that whereas the courts below could not have followed this Court's decision in the **Rwabugande case** before it was delivered, they have a duty to follow it after its delivery.

20
In sentencing any convict to a definite period of imprisonment after the **Rwabugande case**, the sentencing Court has to deduct in an arithmetic manner the period spent on remand from the period of imprisonment to which the convict is sentenced.

25
In the instant case, however, although the Court of Appeal clearly sentenced the appellant before this Court's decision in the **Rwabugande case** there was not even the slightest indication that in the sentencing process the Court of Appeal took into account the period spent on remand. Inevitably we allow the appeal and set aside the illegal sentence of 30 years.

30
Under section 7 of the Judicature Act (Cap 13), the Supreme Court has powers to exercise jurisdiction of the trial court. We have to exercise it by considering an appropriate sentence to be substituted for the one we have set aside.

5 Upon considering the aggravating and mitigating factors and all other circumstances including social and economic circumstances of the case as recorded by the honourable trial judge Yorokamu Bamwine, we consider that a sentence of 34 years imprisonment would be appropriate.

10 However, bearing in mind the constitutional requirement under Article 23(8) of the Constitution, we note that the appellant spent 4 years, 5 months and 6 days (approximately 4 years and 6 months) on remand before he was first sentenced. Accordingly we consider and deduct the said period of 4 years and 6 months
15 from the 34 years we would otherwise have handed down.

As a result, the appellant will serve 29 years and 6 months from the time he was convicted. ***Rwabugande vs Uganda SC Cr Appeal No. 25/2014*** followed.

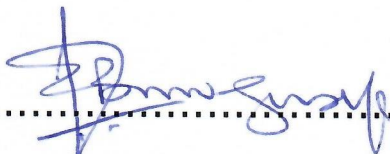
We so order.

20 Dated at Kampala this 13th day of September 2018.



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

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.....
HON JUSTICE ELDAD MWANGUSYA,
JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT.

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HON JUSTICE RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE AUGUSTINE NSHIMYE,
A.G. JUSTICE OF THE SUPREME COURT.

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