THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Mwangusya; Opio Aweri; Mugamba; Buteera; J.J.S.C Nshimye; A.G. J.J.S.C

CRIMINAL APPEAL NO.02 OF 2017

BETWEEN

BAKABULINDI ALI:::APPELLANT

AND

UGANDA::: RESPONDENT

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.21 of 2015 decided by REMMY K. KASULE, SOLOMY B. BOSSA and HELLEN OBURA, JJA dated the 30th day of December 2016)

JUDGMENT OF COURT

This is a second appeal arising from a decision of the High Court delivered by Hon. Rugadya Atwooki, J at Kampala on 9th January 2015 in HCT-CR-SS-0225-2012.

The background facts

On 11th December 2011, the appellant and another robbed a one Mwanje Stephen of a motorcycle and inflicted grievous harm on the victim leaving him unconscious. The appellant was charged with the offence of aggravated robbery. He was tried, convicted and sentenced to 15 years imprisonment on 9th

January 2015. He was also ordered to pay shillings 2,500,000/= to the complainant (Mwanje Stephen) as compensation for the stolen motorcycle.

Aggrieved by that decision, the appellant appealed to the Court of Appeal which confirmed the sentence of 15 years imprisonment.

Being dissatisfied with the decision of the Court of Appeal Justices, the appellant appealed to this Court against sentence.

The appeal is based on one ground which reads as follows:-

> **"That the learned Justices of the Court of Appeal erred in law and fact when they confirmed a sentence of fifteen years imprisonment without considering the period spent on remand and the mitigating factors thereby occasioning a miscarriage of Justice."**

Representation

At the hearing of the appeal the appellant was represented by learned counsel Mr. Ssebugwawo Andrew, on state brief, while the respondent was represented by Ms. Tumwikirize Joanita, a State Attorney.

Both counsel filed and adopted their written submissions which we have studied together with the lower Courts records, Judgments and relevant authorities to this appeal. We have used all those in resolution of the appeal.

Submissions of counsel for the Appellant

Counsel for the appellant submitted that the Justices of Appeal did not consider all the mitigating factors before confirming the sentence of 15 years imprisonment imposed on the appellant by the trial Judge. He contended that during the trial, various mitigating factors were raised. He said these included the fact that he was on remand for 3 years, that he is a first time offender and that he is a youthful offender of 34 years who still has more years of service to his country. He added that the appellant contributed towards the victim's treatment, that he has two children depending on him, that he is a chairman of a bodaboda stage and that the victim's injuries have now healed. Counsel submitted also that the appellant is the care taker of his elderly mother and would upon getting a lenient sentence proceed to be of service and then sensitise the youth out there to behave well. Nevertheless, counsel noted with concern that among all the mitigating factors raised, only four were considered by the trial Judge.

Counsel submitted that this Court has held that all mitigating factors raised should be considered. He relied on **Aharikundira Yustina vs Uganda, Supreme Court Criminal Appeal No.27 of 2015** where Court held that before a convict can be sentenced, the trial Court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, Statutes and Practice Directions together with general principles of sentencing as guided by case law.

He also cited the case of **Muhwezi Alex and anor vs Uganda, Supreme Court Criminal Appeal No.12 of 2005** where the accused was convicted of aggravated robbery and sentenced to 12 years imprisonment.

He prayed that all the mitigating factors should be considered and the 15 years sentence should be set aside and replaced with that of 10 years.

Submissions of counsel for the Respondent

Counsel for the respondent submitted that indeed the appellant raised a number of mitigating factors at the trial and the trial Judge had considered all the mitigating factors as raised by the appellant. Counsel added that the trial Judge also illustrated in his Judgment that he was aware of the Constitutional instruction to deduct the period spent on remand.

Counsel emphasised that the trial Judge was alive to the law and considered all the mitigating factors including the period spent on remand before giving the appellant a sentence of imprisonment of 15 years.

Counsel submitted further that the sentence was not excessive or harsh considering the aggravating factors involved. She said that the victim got grave injuries, had a fractured skull and was unconscious for a long time after the crime and as a result, his speech was affected permanently so that he can no longer speak fluently.

She submitted that the law provides the maximum sentence as death for the offence of aggravated robbery and argued that the trial Judge was very lenient when he sentenced the appellant to a sentence of imprisonment of 15 years.

She submitted that Court should find no reason to interfere with the sentence and dismiss the appeal.

Consideration of Court

The issue to resolve in the instant case is whether the learned Justices of the Court of Appeal erred in law and fact when they confirmed a sentence of 15 years imprisonment and whether they did not consider the period spent on remand and the other mitigating factors.

In resolving the issues raised in this appeal we are guided by what was held by this Court in ***Kifamunte Henry vs. Uganda SCCA No. 10 of 1997***:-

> ***"on a second appeal, a second appellate court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law."***

It is well settled law that the appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is illegal or the appellate Court is satisfied that in the exercise of the discretion the trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly so excessive or low as to amount to an injustice. See also: **Kiwalabye vs. Uganda Supreme Court Criminal Appeal No. 143 of 2001.**

We shall now proceed to resolve the issues in this appeal.

It was the appellant's contention that the Justices of the Court of Appeal did not consider the period spent on remand and the mitigating factors when they confirmed the sentence of fifteen years imprisonment.

We have perused the record of the Court of Appeal and found that the Court of Appeal Justices studied the trial Court record and found that the trial Judge had taken into consideration all the aggravating and mitigating factors including the 3 years period the appellant spent on remand before he handed down sentence. The learned Justices therefore found no reason to interfere. It was for that reason they confirmed the 15 years sentence of imprisonment.

Counsel for the appellant argued that the period the appellant spent on remand should have been deducted following the decision in **Rwabugande Moses vs. Uganda (SCCA No.25 of 2014),** where this Court held:-

> ***"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."***

According to counsel for the appellant, this Court is required to follow the above position of law in accordance with the principle of precedent.

However, the instant case was decided before the decision in **Rwabugande** (*supra*) and could therefore not be bound by it.

This Court has had occasion to handle a similar matter in **Abelle Asuman vs. Uganda (SCCA No.66 of 2016)** Court held:-

> ***"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).

This is in accordance with the principle of precedent. We cite Black's Law Dictionary, 18th Edition page 1214:

"In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law."

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.

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."

Similarly in the instant case, the Court of Appeal decision was made on **30th December 2016**. This was before the decision in **Rwabugande** (*supra*) which was made on **03rd March 2017**.

Following **Abelle** (*supra*), the Court of Appeal could not be bound to follow the Supreme Court of Rwabugande of 03rd March 2017 which was made after its decision.

It was sufficient for cases decided before **Rwabugande** if in the Judgment, the trial Judge demonstrated that the period spent on remand was taken into account before sentencing as this was the position of the law before this Court departed from its earlier decisions. We refer to **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."***

We find that the Court of Appeal Justices considered the Judgement of the trial Judge. They found that the trial Judge during sentencing was alive to the law and clearly demonstrated that he considered the period the appellant spent on remand before sentencing him to 15 years imprisonment and therefore found no compelling reason to interfere with the sentence given by the trial Judge.

We agree with the Justices of the Court of Appeal and we too find no reason to interfere with the 15 years imprisonment sentence as confirmed by the Court of Appeal Justices.

We dismiss this appeal for the reasons stated above.

The appellant should continue to serve the sentence of 15 years imposed upon him and also comply with the Court order to pay compensation of shillings 2,500,000/= to the complainant.

We so hold.

Dated at this day.....18th.....of.....July.....2019.

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Hon. Justice Eldad Mwangusya
JUSTICE OF THE SUPREME COURT

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Hon. Justice Ruby Opio-Aweri
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
AG. JUSTICE OF THE SUPREME COURT