THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.31 OF 2017

Coram: [Opio-Aweri; Mwondha; Buteera; JJ.S.C, Nshimye, Tumwesigye, A.g. JJ.S.C]

BETWEEN

LATIF BUULO :::APPELLANT

AND

UGANDA::: RESPONDENT

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.323 of 2014 decided by ELIZABETH MUSOKE, BARISHAKI CHEBORION and PAUL K. MUGAMBA, JJA dated the 21st day of August 2017)

JUDGMENT OF THE COURT

This is a second appeal arising from a decision of the High Court delivered by Hon. J.B.A Katutsi, J, at Mbale on 19th July 2005 in HCT-04-CR-SC-0028-2005.

Background

On 17th August 2004, at Namabwa Village, Namanyonyi Sub-County in Mbale District, the appellant went to the home of Ahamad Lubale (the deceased) to pick up his wife who had eloped with the deceased. At about 10:00pm, the appellant entered the deceased's house through the rear door. Using a handheld torch light, he saw a panga in the bedroom which he picked up and used to cut Ahamad Lubale to death. The appellant was arrested on 18th August 2004 and charged with the offence of murder on 21st August 2004. He was tried, convicted and was sentenced on 19/07/2005 to suffer death.

As a result of the Court's decision in ***Constitutional Appeal No.03 of 2006, Susan Kigula and 417 others vs. Attorney General***, the appellant's case was

placed before a High Court Judge for mitigation of the sentence. The mitigation Judge substituted the death sentence with a sentence 30 years imprisonment.

Aggrieved by the decision of the mitigation Judge, the appellant appealed to the Court of Appeal which reduced the sentence of 30 years imprisonment to 25 years imprisonment.

Being dissatisfied with the decision of the Court of Appeal, the appellants lodged an appeal to this Court challenging the reduction to 25 years as still harsh.

The ground of appeal before this Court states:-

The learned Justices of Appeal erred in law when they illegally sentenced the appellant to 25 years imprisonment without considering the period spent on remand.

Representation

At the hearing of the appeal the appellant was represented by learned counsel, Mr. Albert Mooli, on state brief, while the respondent was represented by Ms. Barbra Masinde, a senior State Attorney.

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

Submissions

Counsel for the appellant submitted that the learned Justices of Appeal erred in law when they sentenced the appellant to 25 years imprisonment which was harsh and excessive without considering the period spent on remand.

Counsel referred to the case of ***Tukamuhebwa David Junior & Anor vs. Uganda, S.C.C.A No.59 of 2016,*** where the appellants were convicted of the offences of Aggravated robbery and rape and sentenced to 20 years imprisonment for Aggravated robbery and 10 years imprisonment for rape. On appeal, their sentences were reduced to 20 years imprisonment and when the period of 3 years and 7 months spent on remand was deducted, court reduced the sentence to 16 years and 5 months.

He added that in the case of ***Rwabugande Moses vs. Uganda, S.C.C.A N0.25 of 2014,*** the appellant was convicted of murder and sentenced to 23 years imprisonment. On appeal, the sentence was reduced to 21 years imprisonment having considered the 1 year the appellant had spent on remand.

Counsel submitted that although the learned Justices of Appeal stated that the High Court took into account the 9 years the appellant spent on remand, they do not show how the High Court arithmetically deducted that period from the 30 years that it considered appropriate.

According to counsel, failure by the learned Justices of Appeal to deduct the period spent on remand by the appellant from the 30 years imprisonment sentence amounted to passing a sentence which is inconsistent with the cases of ***Tukamuhebwa*** and ***Rwabugande*** *(Supra).*

Counsel prayed that the appeal be allowed.

On the other hand, counsel for the respondent opposed the appeal and supported the decision of the learned Justices of Appeal.

Counsel argued that the issue of not mathematically reducing the remand period was not raised as a ground of appeal before the 1st appellate Court. According to counsel, there is no merit in this ground of appeal because the appellant would be criticizing the Court of appeal on a matter upon which it did not have the

opportunity to pronounce itself on. Counsel relied on ***Twinomugisha Alex & 2 Ors vs. Uganda, S.C.C.A No.35 of 2002.***

Counsel contended without prejudice to the above submissions that Court may not be required to deduct the period spent on remand but rather demonstrate that has taken into account while imposing the term of imprisonment. See: ***Abelle Assuman vs. Uganda, S.S.C.A No.66 of 2016.***

Counsel submitted that the appellant was sentenced by the Court of Appeal having noted that the period the appellant spent on remand had been taken into account by the re-sentencing Judge on 22nd November 2013. According to counsel, it was sufficient for the learned Justices to show that that they had taken into account the period spent on remand while sentencing as this was the requirement in ***Kizito Senkula vs. Uganda, S.S.C.A No.24 of 2001*** where court stated that *"taking into account the period spent on remand does not mean an arithmetical exercise".*

She argued that **Article 23(8)** of the **Constitution of Uganda** does not require the Court to arithmetically deduct the period spent on remand.

Counsel further submitted that the decisions in the cases of ***Tukamuhebwa*** and ***Rwabugande*** *(supra),* as cited by the appellant in support of the appeal have since been departed from by the Supreme Court and that this Court now reverted to the position in ***Kizito Senkula*** *(supra).* She added that this Court cannot be required to apply a precedent that is no longer in existence.

On whether the sentence was harsh and excessive counsel argued that an appeal cannot lie to this Court on a matter of severity of sentence as seen in ***Abelle*** *(supra)* and **s.5 (3)** of the **Judicature Act**.

Counsel accordingly prayed that the appeal be dismissed and the sentence of the 1st appellate court upheld.

Consideration of Court

The issue for this Court's determination is whether the learned Justices of the Court of Appeal erred in law and fact when they sentenced the appellant to 25 years imprisonment without considering the period spent on remand

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: ***Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No.17 of 1993*** and ***Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995.***

It was the appellant's contention that the Justices of the Court of Appeal did not arithmetically deduct the 9 years that the appellant spent on remand from the 25 years imprisonment sentence following the decision in ***Rwabugande*** *(supra).*

On the other hand, counsel for the respondent argues that the issue of the period spent on remand was not raised before the Learned Justices of Appeal.

We have read the Court of Appeal Judgment and found that the appellant, in his submissions, did raise the issue that the period spent on remand was not given due consideration by the mitigation Judge. It is therefore not a new issue being raised before this Court.

First, we wish to point out that the appellant did not spend 9 years on remand but rather only 1 year. It is evident from the record that the appellant was arrested on 18th August 2004. The charge sheet on record shows that the appellant was charged on 21st August 2004. He was sentenced to suffer death by the trial Judge on 19th July 2005. Therefore, the appellant only spent 1 year on remand rather than the 9 years mentioned by the trial Judge, the Court of Appeal Justices and

counsel for the appellant. The period the appellant spent in prison after conviction is not remand time since that is post trial time. Remand is time spent in prison before completion of trial.

Section 23 (8) of the **Constitution of the republic of Uganda** provides:

> **"(8). Where a person is convicted and sentenced to a term of imprisonment for an offence, <u>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</u>."**
>
> (Underlining ours for emphasis)

It is therefore the period that the appellant spent in lawful custody before the completion of his trial that should have been taken into account while imposing the term of imprisonment i.e. from **18th August 2004** when he was arrested, to **19th July 2005** when he was convicted by the trial Judge. The period was one year.

Counsel for the respondent also contended that the period spent on remand was considered by both the learned Justices and the mitigation Judge when they stated that they had taken into account the period spent on remand. According to counsel, Court cannot follow the decision of ***Rwabugande*** *(Supra)* to arithmetically subtract the remand period as this Court departed from the ***Rwabugande*** decision in the case of ***Abelle*** *(supra).*

We note that counsel for the respondent clearly misinterpreted this Court's decision in both ***Rwabugande*** and ***Abelle*** (supra).

In the case of ***Rwabugande*** *(supra),* Court made it clear that it was departing from its earlier decisions in ***Kizito Senkula vs. Uganda, S.C.C.A No.24/2001; Kabuye Senvawo vs. Uganda, S.C.C.A No.2 of 2002; Katende Ahamed vs. Uganda***

S.C.C.A No.6 of 2004 and ***Bukenya Joseph vs. Uganda, S.C.C.A 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."*** Court then held:

> ***"We have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.***
>
> ***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."***
>
> (Underlining ours for emphasis)

In ***Abelle*** (supra) this Court held:

> ***"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, S.C.C.A No.2 of 2002; Katende Ahamed vs. Uganda, S.C.C.A No.6 of 2004 and Bukenya Joseph vs. Uganda, S.C.C.A 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).

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."

(Underlining ours for emphasis)

The Courts decision in ***Abelle*** above, is to the effect that this Court and the Courts below have to follow the position of the law as stated in ***Rwabugande*** *(Supra)* for only those cases decided after the Courts decision in ***Rwabugande,*** i.e. **3rd of March 2017.** For the cases decided before Rwabugande, it was sufficient for the sentencing Judge to demonstrate that the period spent on remand was taken into account while sentencing as this was the position of the law before this Court departed from its earlier decisions.

The appellant in the instant case was sentenced to 30 years imprisonment by the mitigation Judge on 22nd November 2013 having taken into account the period spent on remand. This was before this Court's decision of ***Rwabugande*** *(supra)*.

The Court of Appeal Justices found that the sentence of 30 years imprisonment was on a high side and reduced it to 25 years imprisonment. On the period spent on remand, the Justices stated:

> ***"Since the High Court took the years the appellant spent on remand into account before it handed down sentence, we sentence the appellant to 25 years imprisonment, taking effect from 19th July 2005, the day the appellant was convicted."***

The Court reduced the sentence of 30 years imprisonment to 25 years having considered the fact that the trial Judge had already taken into consideration the period spent on remand.

We find that the mitigation Judge took into account the period spent on remand when sentencing the appellant. The Court of Appeal Justices took that into account when they reduced the sentence from 30 to 25 years imprisonment. We do not find reason to fault the Court of Appeal on that decision. They acted in accordance with the law then.

We therefore uphold the sentence and dismiss the appeal.

Dated at Kampala this day 5th of December 2019.

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Justice Ruby Opio-Aweri
JUSTICE OF THE SUPREME COURT

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Justice Faith Mwondha
JUSTICE OF THE SUPREME COURT

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Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

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Justice Augustine Nshimye
JUSTICE OF THE SUPREME COURT

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Justice Jotham Tumwesigye
AG. JUSTICE OF THE SUPREME COURT