THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE CJ; MWANGUSYA; OPIO-AWERI; MUGAMBA, BUTEERA, JJ.S.C]

CRIMINAL APPEAL NO.25 OF 2016

(Arising from Court of Appeal Criminal Appeal No. 65 of 2013)

BETWEEN

1. TURYAHABWE REMIGIO
2. MUSIMENTA JASPER
3. BYAMUKAMA ELIAS ::::::::::::::::::::::::::**APPELLANTS**
4. RWAKISETA DONA

AND

UGANDA :: **RESPONDENT**

JUDGMENT OF THE COURT

Introduction

The four Appellants, namely Turyahabwe Remigio, Musimenta Jasper, Byamukama Elias and Rwakiseta Dona were jointly tried and convicted by the High Court at Kabale for the offences of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act in count 1 and attempted murder contrary to sections 204(a) of the Penal Code Act in count 2. They were each sentenced to 7 years imprisonment on each count. The sentences were to run consecutively.

Background

The facts of this case as relied on by both the trial Court and the Court of Appeal are that on 26th September 2010 at 9:30pm at Mukatojo cell, Kabale District, the appellants robbed Twinomuhangi Pastori of Shs. 200,000/=, one US dollar, a mobile phone Nokia 1680, and a wallet containing some identities. The appellants used a panga in the robbery. When the victim raised an alarm, the appellants ran away. The victim recognized his assailants as the appellants because he knew them before. He mentioned their names to those who answered the alarm. A police dog was deployed and it led police to the home of the third appellant who was hiding under his bed. He was arrested and some stolen items were recovered from him. Among the recovered items was a blood stained panga. The recovered items were exhibited at trial. The other appellants were arrested afterwards. All the four appellants were charged, tried, convicted and sentenced as earlier narrated.

On appeal to the Court of Appeal, the learned Justices of Appeal on finding that the learned trial Judge, while sentencing, did not take into consideration the period each of the appellants had spent on remand, contrary to article 23(8) of the Constitution vacated the sentence handed down by the High Court. The Court proceeded to sentence the appellants to sentences similar to those earlier set by

the trial Court. The Court of Appeal also ordered that the sentences were to run consecutively.

The appellants now appeal to this Court against the decision of the Court of Appeal.

Representation

At the hearing of the appeal, Appellant No. 3 Byamukama Elias did not appear. The hearing therefore continued without him. The appeal was heard in respect to the three appellants, namely Turyahabwe Remigio, Musimenta Jasper and Rwakiseta Dona. Counsel Seguya Samuel filed a memorandum of appeal representing all three appellants. However at the hearing of this appeal appellants Turyahabwe Remigio and Rwakiseta Dona opted to represent themselves. Counsel Seguya Samuel therefore represented only Musimenta Jasper. Appearing for the respondent was Mr. Sam Oola, Senior Assistant Director of Public Presecutions.

Grounds of Appeal

Counsel Seguya initially filed a memorandum of appeal with one ground. He later filed a supplementary memorandum of appeal containing a second ground of appeal. Those grounds together appear as below:

1. ***That the learned Justice of the Court of Appeal erred in law in maintaining the seven 7 years sentences in respect***

of both counts of Aggravated robbery and attempted murder for both appellants to run consecutively.

2. ***That the learned Justices of the Court of Appeal erred in law while re-sentencing the appellants to (14) years in respect of both counts, did not practically and specifically adhere to the provisions article 23(8) of the constitution of Uganda to deduct the period spent by the appellants on remand, which rendered their sentence unclear, ambiguous, and unlawful.***

Appellants Turyahabwe Remigo and Rwakiseta Dona filed a memorandum of appeal with one ground of appeal stating that:

That the learned Justices of Appeal erred in law in principle when they imposed a vague sentence which discriminated the appellant's from benefiting the provisions of Article 23(8) of the Constitution.

Submissions

Counsel Seguya in respect to his first ground of appeal submitted that the Justices of Appeal erred in law when they maintained a consecutive sentence which rendered the sentence harsh and manifestly excessive and/or unlawful as it did not have justification.

He added that the Court of Appeal while maintaining the consecutive nature of the sentence of 7 (seven) years for each count onto the

appellants never gave reasons as to why the sentence was to be served consecutively instead of concurrently. He said that the only justification given by their lordships of appeal was that the law under which the trial Judge acted which was section 2(2) of the Trial on Indictments Act allowed for such sentence. He added that no reason was given by the justices of appeal as to why they supported a consecutive sentence instead of a concurrent sentence. It was counsel's view that any sentence without legal justification must be unjustifiable as justice cannot thereby be seen to be done.

For the second ground of appeal, it was counsel's submission that the Court of Appeal set aside and substituted the sentences of the trial Court with its own sentences. He said that the Court failed to take into consideration the period of 2 years and 8 months which the appellants spent on remand. He added that the Court of Appeal failed to specifically and practically demonstrate compliance with Article 23(8) of the Constitution. Counsel contended that this error rendered the sentences illegal and inconsistent with decisions like **Rwabugande Moses vs Uganda, SCCA No. 25 of 2014 and Tukamuhabwa David and anor vs Uganda, SCCA No. 59 of 2016** which give effect to the provisions of Article 23(8) of the Constitution thereby, giving mandate for deduction of the remand period from the proposed sentence.

Counsel further submitted that in light of the **Rwabugande case**, consideration of the remand period meant reducing or subtracting

the period spent on remand from the final sentence and not merely stating that court had taken the period into account. He said that when the Court of Appeal passed sentences the way it did the sentences were unclear and ambiguous. Counsel prayed that the appeal be allowed.

Appellants Turyahabwe Remigio and Rwakiseta Dona in respect to their ground of appeal submitted that the Justices of the Court of Appeal when re-sentencing the appellants to 7 years on each count did not practically apply article 23(8) of the Constitution. It was their submission that the justices should have deducted their remand period of 2 years and 8 months from the 7 years imposed on each count. It was their further submission that the sentence was inconsistent with the decisions of **Umar Sebidde vs Uganda, SCCA No. 23 of 2002, Rwabugande Moses vs Uganda, SCCA No. 25 of 2014 and Tukamuhabwa David and anor vs Uganda, SCCA No. 59 of 2016.** Finally the two appellants also submitted that it was not proper for the justices of appeal to impose a 7 years imprisonment on each count to run consecutively. They contended that since the offences occurred during the same transaction the punishment should have run concurrently.

Finally the two appellants prayed that the appeal be allowed, that appellants' remand period be accordingly deducted and that the sentences be ordered to run concurrently.

In reply, counsel for the respondent supported the sentences passed by the Court of Appeal. He stated that the Justices of the Court of Appeal correctly found that the learned trial judge acted in accordance with section 2(2) of the Trial on Indictments Act when he held that the appellants were to serve their sentences consecutively. Counsel added that the mere fact that the Court of Appeal maintained the consecutive sentences against each of the appellants did not make the sentences harsh or excessive. He argued that there is nothing to show that the sentences were unlawful. He said that the justices of appeal clearly gave their justification that the appellants were convicted of two distinct offences of aggravated robbery and attempted murder and that this justified the sentences given. He added that the justices of appeal considered all the mitigating factors and aggravating factors and principles of the law relating to sentencing and came to the conclusion that an aggregate sentence of 14 years imprisonment for each of the appellants was appropriate in the circumstances. Counsel called to aid **Kaddu Kavulu Lawrence vs Uganda, SCCA Appeal No. 72 of 2018** citing with approval **Kiwalabye Bernard vs Uganda, CACA No. 143 of 2001.** He called on this court not to alter or interfere with the sentences imposed saying basis for such existed.

Consideration of the appeal.

We have looked at the memoranda of appeal and the submissions of counsel and the appellants. We have looked also at the authorities attached. We take them all into consideration in resolving this appeal.

It is trite that in the course of determining an appeal this Court is hesitant to alter a sentence imposed by a sentencing court. Indeed this court in ***Livingstone Kakooza vs Uganda Supreme Court Criminal Appeal No. 17 of 1993 [unreported]*** stated:

> ***'An appellate court will only interfere with a sentence imposed by a trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case'***

We should add that Court will interfere also when the sentence is manifestly inadequate. See **Jackson Zita v Uganda, Criminal Appeal No. 19 of 1995 (SC).**

Both the appellants and counsel for the appellant fault the justices of the Court of Appeal for passing an order that the sentences passed were to run consecutively. It was their argument that no elaboration or justification was given by court for such an order to be made.

Section 2(2) of the **Trial on Indictments Act** should be apposite. It provides:

'<u>Sentencing powers of the High Court'</u>

(1) .....

(2) When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently.

(3) .....'

In **Magala Ramathan vs Uganda, SCCA No. 01 of 2014** this court held:

'We agree with the Court of Appeal's interpretation of Section 2 (supra) that the general rule is for the High court to impose a consecutive sentence and a convict will only concurrently serve sentences arising out of distinct offences if the court so directs.

.....'

It is therefore in the discretion of the judge to impose a consecutive or a concurrent running of sentences, depending on the circumstances of a given case.

When passing its re-sentence, the Court of Appeal stated that:

> ***"... we find it appropriate that we sentence each of the appellants to the same sentence given by the trial Court of seven(7) years on each count and the sentences are to be served consecutively commencing from the 22nd day of May, 2013, the date of their conviction by the High Court."***

In their judgment, the justices of the Court of Appeal at page 22 of the record (page 7 of the Judgment of the Court of Appeal) stated as follows:

'The learned trial Judge sentenced each of the appellants to 7 years imprisonment on each count of aggravated robbery and attempted murder and the sentences were to be served consecutively by each appellant that is one after the other.

The learned trial Judge acted in accordance with Section 2(2) of the Trial on indictments Act. The appellants were convicted of two distinct offences of aggravated robbery and attempted murder and it was only proper in our considered view, that the appellants be so sentenced.'

The reasoning for the justices to opt for a consecutive sentence is apparent on the record. We find no error with the order made on the sentence passed to run consecutively. The argument lacks merit. The ground fails.

It was alleged by both the appellants and counsel for the appellants that during resentencing, the learned Justices of the Court of Appeal did not practically show that they took into account the period that the appellants spent on remand as is mandated by Article 23(8) of the Constitution.

Article 23 (8) of the Constitution 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 into account in imposing the term of imprisonment".**

In their Judgment, the justices of the Court of Appeal at page 22 of the record (page 7 of the Judgment) had this to say:

'...the learned trial Judge did not however, contrary to article 23(8) of the Constitution take into consideration while sentencing the appellants, the period each of the appellants had spent on remand. Such a failure renders the sentence passed to be illegal and a nullity. See Kwamusi Jacob v Uganda, Criminal Appeal No. 0203 of 2009 (COA).
Accordingly this court vacates the sentence passed upon each appellant as the same were illegal and a nullity.'

Having set aside the sentences imposed by the trial Court the Court of Appeal proceeded to consider both the aggravating and mitigating circumstances. Thereafter their lordships stated, at page 8 of the Judgment, that:
'We have considered all the factors above as well as the submissions of Counsel and what each appellant stated to us.

We have also been mindful of the principles of law as relate to sentencing. We have carefully considered the period of remand as well as the period so far spent in prison by each appellant since conviction.'

The emphasis above is added.

Respectfully we should assert the correct position of the law. What is related to as the period so far spent in prison after conviction is not the period required to be taken into consideration by Courts during sentencing in light of Article 23(8) of the constitution. It is strictly the period spent on remand that is taken into consideration.

In **Rwabugande Moses versus Uganda** (supra) this court stated:
'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.'

The position in **Rwabugande (supra),** a case decided on 3rd March 2017 departed 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 were

to the effect that taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula.

In **Abelle Asuman vs Uganda, SCCA No. 66 of 2016** this court observed:

'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."

In the **Abelle case** this Court found that the Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 which came out about four months after its decision. The case of **Rwabugande (supra)** could not bind Courts for cases decided

before the 3rd of March 2017. This is based on the principle that a precedent has to be in existence for it to be followed.

Similarly, in the instant case, the Judgment of the Court of Appeal was on the 28th of October 2016, before the decision in **Rwabugande** came into existence.

The Justices of the Court of Appeal therefore correctly followed the position as it was before the **Rwabugande** decision, where taking into account the period spent on remand did not require showing an arithmetic formula. Certainly the Court of Appeal showed that they took into account the 2 years and 8 months period the appellants spent on remand. The Court of Appeal Justices therefore complied with the provisions of **Article 23(8) of the Constitution** and the sentence they meted out was lawful.

This ground of appeal too should fail.

This appeal lacks merit and is accordingly dismissed.

Dated at Kampala this 27th day of November 2019

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HON. CHIEF JUSTICE BART KATUREEBE,
JUSTICE OF THE SUPREME COURT

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HON. JUSTICE ELDAD MWANGUSYA,
JUSTICE OF THE SUPREME COURT

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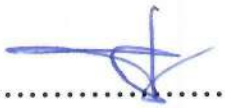
HON. JUSTICE OPIO-AWERI,
JUSTICE OF THE SUPREME COURT



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HON. JUSTICE PAUL.K MUGAMBA,
JUSTICE OF THE SUPREME COURT

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HON. JUSTICE RICHARD BUTEERA,
JUSTICE OF THE SUPREME COURT