THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.10 OF 2017

{Coram: Kisaakye, Arach-Amoko, Mwondha, Mugamba, Buteera.JJSC.}

BALUKU FRED ::APPELLANT

VERSUS

UGANDA :: RESPONDENT

[***Appeal from the judgment of the Court of Appeal at Kampala (Remmy K. Kasule, Solome Balungi Bossa and Hellen Obura JJA.) dated 30th December,2016 in Criminal Appeal No.145 of 2010***]

JUDGMENT OF THE COURT

This is a second appeal. Akiiki Kiiza J tried this case in the High Court sitting at Fort Portal and delivered judgment on 17th July 2010.The appellant was not satisfied with the judgment and appealed it to the Court of Appeal. The Court of Appeal upheld the decision of the trial court. Hence this appeal.

Background:

The background to this case can be properly gathered in the summary by the Court of Appeal. We adopt it unalloyed.

The appellant was indicted in the High Court at Fort Portal for aggravated robbery contrary to Sections 285 and 286(2) of the

Penal Code Act. The particulars of the offence were that on the 9th day of December, 2004 in Kajambura Zone, Bundibugyo Town Council, Bundibugyo District the appellant robbed one Maria Mutooro alias Tusiime Agnes of one mobile phone(Nokia) 5110, one radio and cash of Shs 90,000/= (shillings ninety thousand) and that during the robbery he used a deadly weapon, to wit a panga and caused grievous harm to her. At the conclusion of the trial, the appellant was convicted of aggravated robbery and was sentenced to imprisonment for 22 years.

The appellant appealed to the Court of Appeal and eventually to this Court. His ground of appeal to this court reads:

1. **'That the Learned Justices of Appeal erred in law when they illegally confirmed the sentence of 22 years imprisonment given by the Trial judge.'**

Representation

At the hearing of this appeal the appellant was represented by Mr. Joel Mutumba on a State brief. Ms. Anne Kabajungu, Senior State Attorney, appeared for the respondent.

Submissions

Both counsel respectively filed written submissions buttressed by authorities. They adopted those submissions. In addition, they highlighted issues they deemed salient.

Counsel for the appellant in his argument stated that at the time of sentencing the trial court had broadly stated that it had taken into account the period the appellant had spent on remand, without subtracting that period specifically from the sentence court eventually handed down. He cited **Rwabugande Moses vs Uganda, SCCA No.25 of 2014** to illustrate that the court had erred in this respect. Counsel added that another consideration Court ought to have borne in mind was that whereas the appellant had actually spent about 3 years on remand, Court had erroneously deemed the period to have been 5 years. He posited that as such the sentence imposed was illegal.

Further, counsel castigated both the High Court and the Court of Appeal for not exercising discretion in the sentence meted out given that the offence the appellant was convicted of did not amount to murder. In this connection he cited **Attorney General vs Susan Kigula, Constitutional Appeal No.3 of 2006** and **Akbar Hussein Godi vs Uganda, SCCA No.3 of 2013.** He proposed 15 years imprisonment as a fitting sentence in the circumstances.

In response the learned Senior State Attorney invoked Section 5(3) of the Judicature Act stating that if an appeal is to be entertained it should be against the sentence or order on a matter of law rather than on the severity of the sentence. She

added that the ground of appeal does not indicate whether the appeal concerns illegality of sentence and that as such it is bad in law and should be dismissed. Regarding the period the appellant spent on remand the learned Senior State Attorney submitted that it was manifest from the record of appeal that the trial judge on sentencing had expressly noted that he had taken the period spent on remand into consideration as required by Article 23(8) of the Constitution. She hastened to add that the Court of Appeal did indeed take this into consideration and approved. She added that prior to the decision in **Rwabugande Moses vs Uganda, (supra)** it was not necessary for sentencing courts to treat the period spent on remand with mathematical precision. She stated that so long as such court acknowledged that it had taken the period spent on remand into account the requirement of Article 23(8) of the Constitution would have been met. To this effect she cited several cases. She argued that in any case **Rwabugande Moses vs Uganda, (supra),** was decided later in time than the sentencing date and the date the first appeal was decided and that as such the case could not have served as precedent in either instance. Turning to the discrepancy in the actual period spent on remand she stated that such discrepancy was not fatal particularly where as in this case the appellant had been favoured by the error of calculating the period spent on remand.

Consideration by the court

We have appraised the written submissions tendered before us as well as the authorities available. We have looked also at the record and given consideration to the brief oral submissions made for emphasis, before arriving at our decision.

Article 23(8) of the Constitution provides:

> **"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."**

On 17th July 2010, having convicted the appellant, the trial court proceeded to mete out sentence. It noted:

"Accused is allegedly a first offender. He has been on remand for about 5 years. I take this period into consideration, while assessing an appropriate sentence to impose on him. He has prayed for leniency and mercy. He appears remorseful and he is a young man of 30 years. However, the accused committed a serious offence. Robbery attracts a death sentence as the maximum penalty. Hence the law, takes a serious view of convicted robbers.

In this particular case, the accused wantonly and savagely attacked his own step mother who had been looking after him. Even the victim said that she was also taking care of one of the accused's children. The manner in which the accused inflicted injuries on his step mother showed that, he was out to cause maximum damage to her. The victim says she sustained a total of 23 cuts. Her hand is maimed. She underwent 7 surgeries. She has an iron rod in her right hand. All this in my view calls for a stiff sentence on the accused person. Putting everything into consideration I sentence the accused person to 22 (twenty-two) years imprisonment"

The emphasis above is added.

The appellant was dissatisfied with the sentence imposed on him and appealed to the Court of Appeal. His sole ground of appeal read:

> **"The Learned trial Judge erred in law and fact when he sentenced the appellant to imprisonment for 22 years which is manifestly harsh and excessive"**

The appeal was duly considered after the Court of Appeal granted the appellant leave to appeal only against sentence. Relevantly the Court stated:

"The trial Judge when passing sentence considered the fact that the appellant was a first offender, had been on remand for about 5 years, was a young man of about 30 years and that he had prayed for leniency and mercy and appeared remorseful these were the mitigating factors.

.....

.....

Accordingly having carefully studied the sentencing proceedings of the trial court and having carefully considered and taken into account both the relevant case and statutory law and having carefully analysed the submissions of counsel for the appellant and the respondent we come to the conclusion that the trial judge rightly approached and properly exercised his judicial discretion when he sentenced the appellant to 22 years imprisonment. We see no cause to interfere with the sentence that he imposed.

.....".

The emphasis above is added.

Rwabugande Moses vs Uganda, (supra) is the case the appellant invokes in this appeal. Certainly it is gainful to lay out that part of the holding relevant to this appeal. It reads:

"But in arriving at an appropriate sentence, we find it pertinent to re-visit the Court's decisions on the meaning of the phrase in Article 23(8) of the Constitution that in imposing a term of imprisonment on a convicted person '*any period he or she spends in lawful custody shall be taken into account in imposing the term of imprisonment*'

The principle enunciated by the Supreme Court in Kizito Senkula vs Uganda SCCA No.24 of 2001, Kabuye Senvewo 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 is to the effect that words '*to take into account*' does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court. The principle of *stare decisis et non quieta movera*, which is applicable in our judicial system, obliges the Supreme Court to abide or adhere to its previous decisions. However Article 132(4) of the Constitution creates an exception and states that 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.

We have found it right to depart from the Court's earlier decision mentioned above in which it held that consideration of time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

.....".

For the record, the decision in **Rwabugande Moses vs Uganda, (supra)** was pronounced on 3rd March 2017, long after the verdicts in both the trial court and the Court of Appeal. Needless to say, the two courts followed the precedents obtaining in the day. No fault can thus be elicited for not anticipating the holding in **Rwabugande Moses vs Uganda, (supra)**. In **Abelle Asuman vs Uganda SCCA No.66 of 2016,** this court resolved a similar situation when it stated:

"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."

Consequently, we are satisfied that in the circumstances the period spent on remand was taken into account.

It was further argued by the appellant that both the trial court and the Court of Appeal erred when they stated the period spent on remand to be 5 years when in fact it was 3 years and 11 months. Suffice to state that as noted above prior to the advent of **Rwabugande Moses vs Uganda, (supra)** for a court to take into consideration the period spent on remand it was not necessary to make an exacting arithmetical deduction as is required now, post that decision. Needless to say, the trial judge erred when he referred to an incorrect period in reference to the time spent on remand. This has no effect on the merits of this appeal, however, given that arithmetical precision was not mandatory then.

Furthermore, the appellant cannot argue in earnest that the sentence handed down to him should be altered because of illegality. This court in **Kyalimpa Edward vs Uganda, SCCA**

No.10 of 1995 related to this matter and cited with approval the English case of **R vs Haviland (1983) 5 Cr. App. R 109**. The Court went on to state:

"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice. Ogalo Owuora vs R (1954) 21 E.A.C.A 126 and R vs. Mohamedali Jamal (1948) 15 E.A.C.A 126".

Later on in **Kamya Johnson Wavamunno vs Uganda, SCCA No. 16 of 2000**, this court noted

"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion or a failure to take into account a material consideration, or taking into account immaterial consideration or an error in principle was made. It is not sufficient that members of court would have exercised this discretion differently"

We are in agreement with the learned Justices of the Court of Appeal that the learned trial Judge properly exercised his discretion and passed a legal sentence. Accordingly, the sentence of 22 years imprisonment is confirmed with effect from the date of the appellant's conviction.

This appeal lacks merit. It is accordingly dismissed.

Dated this ....16th....day of ....October....2020

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Hon. Lady Justice Dr. Esther K. Kisaakye, JSC
Justice of the Supreme Court

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Hon. Lady Justice Stella Arach-Amoko, JSC
Justice of the Supreme Court

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Hon. Lady Justice Faith Mwondha, JSC
Justice of the Supreme Court

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Hon. Justice Paul Mugamba, JSC
Justice of the Supreme Court

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Hon. Justice Richard Buteera, JSC
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 10 OF 2017

[Coram: Kisaakye; Arach-Amoko; Mwondha; Mugamba; Buteera; JJSC]

BALUKU FRED :: APPELLANT

VERSUS

UGANDA :: DEFENDANT

(Appeal from the Judgement of the Court of Appeal (Kasule, Bossa, Obura, JJA,) in Criminal Appeal No. 145 of 2010, dated 30th December 2016)

JUDGMENT OF JUSTICE DR. KISAAKYE, JSC (DISSENTING)

I have had the benefit of reading in draft the majority Judgment of this Court dismissing this Appeal. In so doing, the majority Justices have upheld the Judgment of the Court of Appeal and held that the appellant's sentence of 22 years imprisonment, which was passed after the trial Judge took into account a longer period than the appellant had actually spent on remand period, is a legal sentence. The majority have also confirmed the appellant's sentence when no order for compensation to the victim of the appellant's crime was made by the trial Court and the Court of Appeal.

With all due respect to my colleagues, I disagree with their decision to dismiss this appeal. For reasons that I will give in this Judgment,

I would uphold the appellant's conviction but nevertheless allow the appeal and set aside the appellant's sentence.

Before I delve into the merits of this appeal, it is necessary to give a brief background.

On 9th December 2004, in Bundibugyo Township, Bundibugyo District, the appellant robbed his step mother, Mrs Maria Mutooro Alias Tusiime Agnes (hereinafter referred to as the victim) of her mobile phone (Nokia) 5110, a radio and Ninety thousand shillings (90,000/=). The appellant used a deadly weapon to wit a panga at the time of the robbery, and caused grievous harm to his step mother.

The appellant was subsequently charged with aggravated robbery contrary to Sections 285 and 286(2) of the Penal Code Act on 6th September 2006. He was convicted and sentenced to 22 years imprisonment on 17th July 2010. While sentencing him, the trial Judge noted as follows:

> ***"Accused is legally a first offender. He has been on remand for 5 years. I take this period into consideration, while assessing an appropriate sentence to impose on him."***

The appellant's appeal was dismissed by the Court of Appeal. Dissatisfied with that decision, the appellant lodged his appeal to this Court on the following ground.

> ***"The learned Justices of Appeal erred in law when they illegally confirmed the sentence of 22 years imprisonment given by the trial Judge."***

He prayed to the Court to allow his appeal, set aside the Judgement of the Court of Appeal and reduce his sentence.

I noted from the way the appellant framed his ground of appeal that he seemed to be challenging the power of the Court of Appeal to confirm his sentence. However, after reviewing his submissions, it is apparent that he was not challenging the Court's powers which are provided for in the Constitution and the Judicature Act, but rather the legality of the sentence that was imposed on him. In light of this, I have reframed the appellant's ground of appeal to read as follows:

> ***"The learned Justices of Appeal erred in law when they confirmed an illegal sentence of 22 years imprisonment given by the trial Judge."***

It should be noted from the onset that the appellant did not contest his conviction. The appellant's issue is with the following holding of the Court of Appeal with respect to the legality of the way the trial Judge arrived at his sentence of 22 years imprisonment.

> ***"Accordingly having carefully studied the sentencing proceedings of the trial Court and having carefully considered and taken into account both the relevant cases and statutory law and having carefully analyzed the submissions of counsel for the appellant and the respondent we come to the conclusion that the trial Judge rightly approached and properly exercised his judicial discretion when he sentenced the appellant to 22 years***

imprisonment. We see no cause to interfere with the sentence that he imposed."

Parties' submissions

Relying on this Court's decisions in ***Latif Buulo v Uganda, Supreme Court Criminal Appeal No. 31 of 2017; Rwabugande Moses v Uganda, Supreme Court Criminal Appeal No. 25 of 2014;*** and ***Akbar Hussein Godi v Uganda SCCA No. 03 of 2013***, counsel for the appellant contended that the Court of Appeal illegally confirmed the appellant's sentence of 22 years. He submitted that this was because the trial Court and Court of Appeal failed to consider the exact period the appellant had spent on remand.

Counsel for appellant submitted that the appellant was arrested on 28th August 2006, charged on 6th September 2006, and eventually sentenced on 17th July 2010. The appellant further submitted that the actual period which the appellant spent on remand was 3 years and 11 months, and not the 5 years that the trial Judge took into account.

Counsel contended that discretion to pass sentences against the convicts must be exercised judicially by taking into consideration all the factors, circumstances of the case and precedents set by Court and the lower Courts omitted to do this.

The appellant prayed that this Court sets aside this illegal sentence and passes an appropriate and lenient sentence.

Submitting in response, counsel for the respondent submitted that the appellant's appeal was decided on 30th December 2016, while this

Court's decision in ***Rwabugande*** (supra), was made on 3rd March 2017. Relying on our decision in ***Abelle Asuman v Uganda, Supreme Court Criminal Appeal No. 66 of 2016***, counsel for the respondent further submitted that this Court had clarified on the application of ***Rwabugande*** (supra) where "taking into account" was interpreted not to require consideration of the period the applicant spent on remand to be done in an arithmetical way. Counsel submitted that because the appellant's case was decided in 2010, the lower Courts' mistake in not taking into account the exact period the appellant had spent on remand, was not fatal.

Submitting in rejoinder, counsel for the appellant contended that where the procedure used to confirm a sentence was illegal, then everything that comes out of it becomes is also illegal and a Court of law cannot sanction it.

Consideration of the Appeal

The right to deduct the period spent on remand from the sentence of a term of imprisonment imposed by a Court on a person who has been convicted of a criminal offence, is a creature of our Constitution. This right is clearly provided for in Article 23(8) of the Constitution, which 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."***

This provision mandates the sentencing Judge while imposing a term of imprisonment to take into account the period which the convicted person spent in lawful custody prior to the completion of his or her trial.

The majority Justices in this appeal have agreed with the appellant that the trial Judge took into consideration a longer period than the period the appellant had actually spent on remand. In spite of this, the majority Justices have opted to ignore this error on the part of both the trial Judge and the Court of Appeal.

With all due respect to colleagues, I am unable to agree with their reasoning that we should ignore this error on the part of the trial Judge and the Court of Appeal because at the time the appellant was sentenced, the requirement that the deduction much be precise was not mandatory. The dictates of ***Article 23(8) of the Constitution*** require the sentencing Judge to takes into account the period which the appellant spent on remand. Nothing more, nothing less.

In the instant case, the sentence passed by the trial Court was illegal because while the appellant had only spent 3 years, 11 months and a few days on remand, and yet the trial Judge took into consideration a longer period of 5 years.

I am aware of and agree that by the time the appellant was sentenced by the trial court, this Court had not yet rendered its decision in Rwabugande. This is the decision where we changed from the position where a sentencing Judge did not have to make a mathematical deduction of the period spent on remand, as long as

the Judge indicated that he or she had taken the remand period into account.

It is however my view that even though the trial Judge and the Court of Appeal were following the pre-*Rwabugande* legal regime with respect to the period spent on remand, Article 22(8) of the Constitution which I reproduced above was already in effect. I am of the firm view that no trial or appellate Court has the discretion to gift a convict with a longer period than the actual period he or she has spent on remand. Just like a sentence imposed when the Court has either not taken into account or taken into account a lesser period spent on remand cannot stand in law, similarly a sentence passed when the Court has taken into account a longer period than the one actually spent by a convicted person on remand cannot stand as well.

In ***Rwabugande*** (supra), we declared the sentence passed by the lower Court illegal for non-conformity with this provision of the Constitution as follows:

"The record of both the trial court and the first appellate court reveals that in arriving at the sentence of 35 years, neither court took the period spent on remand by the appellant into consideration. And yet Article 23(8) of the Constitution provides ...

A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

We therefore find that in re-evaluating the sentence, the learned Justices of Appeal erred in failing to take into account the period the appellant had spent on remand and instead upheld an illegal sentence."

In my view, a Court, whether trial or appellate that ignores fully complying with the mandatory provisions of ***Article 23(8) of the Constitution*** while sentencing a convict, would be exercising judicial power in a way that not in conformity with the Constitution. It also follows that a sentence which is not in conformity with the Constitution, is illegal and should not be left to stand. I am therefore not convinced by the respondent's argument, which the majority Justices have adopted, that this error was not fatal because it occurred before this Court decided in the ***Rwabugande*** (supra). I find this reasoning speculative and not backed by any evidence. Since the Constitution requires that the period spent on remand be taken into account, it is very unlikely that even before ***Rwabugande***, a trial Judge who took into account a period of 5 years on remand would give the same sentence in a case where the convict has spent a lesser period of 3 years and 11 months. Since we have no evidence to support the contentions that the error did not have effect on the appellant's sentence, it would instead be safer for the Court to recognize the error and take the position that the error had an effect on the result than to assume that it did not.

The second reason why I would allow this appeal is in respect to the error of law with respect to the omission by both the trial Judge and

the Court of Appeal to make an order for compensation to the victim of the appellant's crime.

The laws of Uganda provide for the order of compensation to a victim of the crime under Article 126(2)(c) of the Constitution, Section 286(4) of the Penal Code Act, and section 126(1) of the Trial on Indictments Act.

Article 126(2)(c) of the Constitution provides as follows:

> ***"126. Exercise of Judicial Power.***
>
> ***(2) In adjudicating cases of both a civil and criminal nature, the Courts shall subject to the law, apply the following principles-***
>
> ...
>
> ***(c) adequate compensation shall be awarded to victims of wrongs;"***

This Article requires Courts to award adequate compensation to the victims of wrongs.

Furthermore, section 286(4) of the Penal Code Act also provides for compensation as follows:

> ***"286. Punishment for robbery.***
>
> ...
>
> ***(4) Notwithstanding section 126 of the Trial on Indictment Act, where a person is convicted of the felony of robbery the Court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by***

way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the Court is just, having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be executed in the manner provided by the Civil Procedure Act"

This section requires any person who has been convicted of robbery but not sentenced to death, to pay compensation to the victim of the crime. While the section makes it mandatory for Courts to make the Order for compensation, the Court is given power to decide the amount of compensation to be awarded, having regard to the injury or loss suffered by the victim of the crime.

The third provision of the law which permits Courts to make an Order for compensation to a victim of crime, is section 126(1) of the Trial on Indictment Act. It provides as follows:

"126. Compensation

(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the Court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."

This section of the law makes the order of compensation discretional to Court to be awarded against the convict, in addition to any other lawful punishment as Court deems fair and reasonable. Unlike section 286(4) of the Penal Code Act where the word "shall" is used, section 126(1) of the Trial on Indictment Act uses the word "may".

In ***Sowedi Serinyina v Uganda*** (supra), I discussed my opinion on the use of the terms "shall" and "may" as follows:

> ***"A reading of the two sections shows that while section 126 of the Trial on Indictment Act uses the term "may", section 286(4) of the Penal Code Act on the other hand uses the word "shall". This therefore means that while under section 126 of the Trial on Indictments Act, it is discretional for a Judge to award compensation to a person who has either suffered material loss or personal injury, section 286(4) of the Penal Code Act makes it mandatory for the trial Judge to order compensation, except in cases where the offender has been sentenced to death."***

I still hold the same opinion.

In ***Capt. Munyangondo Chris v Uganda, Supreme Court Criminal Appeal No. 05 of 2011,*** this Court held as follows:

> ***"According to section 286(4) of the Penal Code Act, the award of compensation by a court is mandatory where the offender is convicted of robbery contrary to sections 285 and 286(1) of the Penal Code Act and is not sentenced to***

death, as the appellant. The compensation is payable to any person who has suffered loss or injury as a result of the robbery. The order is deemed to be a court decree, which can be executed under the Civil Procedure Act. There is no limit to the amount of compensation which the court can award, but the sum has to be just, according to the circumstances of the case. (See: Benjamin Odoki: A Guide to Criminal Procedure in Uganda at page 243-4).”

I have noted with concern that the majority have neither referred to nor distinguished this decision which is otherwise binding on us.

Turning to the present case, it is clear from his Judgment that the trial Judge was alive not only to the injury suffered by the victim, but also the surgeries she underwent and long lasting effects on her, which he described in great detail as follows:

“... the accused wantonly savagely attacked his own step mother who had been looking after him. Even the victim said that she was also taking care of one of the accused’s children. The manner in which the accused inflicted injuries on his stepmother showed that, he was out to cause maximum damage to her. The victim says she sustained a total of 23 cuts. Her hand is maimed. She underwent 7 surgeries. She has an iron rod in her right hand. All this in my view calls for a stiff sentence on the accused person. Putting everything into consideration I sentence the accused person to 22(twenty two) years imprisonment.”

Having taken cognizance of the victim's injuries and their long standing effect on her, it is unfortunate that the trial Judge omitted to make an order for compensation as he was required to do so by the Constitution and the Penal Code, as already discussed.

In the same vein, the Court of Appeal failed to identify and correct this error of law. The majority Justices in this appeal have followed suit. With due respect to my colleagues, again I am unable to agree with their decision to uphold the Court of Judgment with respect to the appellant's sentence. The appellant's sentence cannot be left to stand in light of the two lower Court's non-compliance with the Constitution and law.

Unlike in the present case where no compensation was awarded to the victim, in ***Sowedi Serinyina v Uganda, Supreme Court Criminal Appeal No. 01 of 2017,*** the lower Court had made a compensation Order covering only a refund of the money that had been stolen from the victim only. It was my finding that the "compensation" ordered fell short of meeting the adequate compensation to the victim of the crime threshold set by the Constitution and the laws discussed. As I noted, it is incumbent on the Courts to:

> ***"... ensure that the compensation Orders we make are 'adequate, just, fair and reasonable.' These are the standards clearly set out in our Constitution, the Penal Code and the Trial on Indictment Act respectively. While the question of what is fair, just and reasonable will always be posed in such cases and Courts will have to***

confront this issue in cases before them, I have no doubt in my mind that a compensation order that is 'adequate, just, fair and reasonable' should certainly go beyond a refund of what a victim of crime lost at the time the offence was committed and seek to put the victim of crime, in as far as possible, back in the position he or she would have been in, if the crime had not been committed against them."

I still stand by these views.

In reaching the findings I have reached, I am aware of the option in the law, which allows the victim to seek compensation from the convict in a civil suit. However, this sub section does not permit Court to ignore the dictates of section 286(4) of the Penal Code Act. It is available to a Court before which civil proceedings have been brought by a victim in the criminal proceedings.

In ***Mutesasira Musoke v Uganda, Supreme Court Criminal Appeal No. 17 of 2009,*** counsel for the appellant had only submitted on the legality of the sentence of life imprisonment passed by the Court of Appeal on the basis of Attorney General v Susan Kigula & 417 others, Constitutional Appeal No. 3 of 2006, but had not submitted in mitigation of the sentence apart from merely stating that it was excessive. After holding that the appeal succeeded in part, the Court gave the appellant a chance to hear his submissions in mitigation before deciding on the sentence. It stated:

"This court will, therefore, have to hear the

submission of the appellant in mitigation first before deciding on the sentence relating to his conviction for robbery contrary to sections 285 and 286(1)(b) of the Penal Code Act."

Similarly, in ***Nandudu Grace, Nakiwolo Florence v Uganda, Supreme Court Criminal Appeal No.4 of 2009,*** Court made a finding that the lower Courts had misdirected themselves on ingredients of malice aforethought, quashed the appellants' conviction of murder and convicted them for manslaughter. The parties were called back to make their submissions in mitigation as follows:

"We are satisfied that had the learned trial judge and the learned justices considered the provisions of S.191 (former S.186) of the Penal Code Act, they would probably not have convicted the appellants of the murder.

Consequently, we quash the conviction for murder and acquit the two appellants of the offence of murder. We convict each of them of manslaughter C/S 187 and 190 of the Penal Code Act. We shall hear submissions in mitigation before passing sentences."

What was done in the above two appeals can also done in the present appeal. The Court can summon the parties back for them to make submissions on the issue of compensation.

The third reason why I would also allow this appeal relates to another

error of law that was made by both the trial Court and the Court of Appeal when they failed to order that the appellant be supervised by the Police upon the completion of his sentence.

Section 124(1) of the Trial on Indictment Act provides as follows:

> ***"124. Police supervision***
>
> ***(1) Where any person to whom this section applies is sentenced to imprisonment for a term less than life, the High Court shall, at the time of passing sentence, order that he or she shall be subject to police supervision as hereafter provided for a period not exceeding five years from the date of the expiration of the sentence."***

Sub section (5) of this section provides:

> ***"(5) This section applies to—***
>
> ***(a) any person convicted of robbery contrary to section 285 of the Penal Code Act;"***

This provision is self-explanatory. Although this issue was not canvassed by the parties at the hearing of this appeal, the Court is bound by the Constitution to follow the law. So we do not have the luxury of selectively enforcing sections of the law while totally ignoring some other provisions of the same law.

For all the reasons given in this Judgment, I would uphold the conviction of the appellant but make the following orders:

1. That the appellant's illegal sentence of 22 years imprisonment be set aside.

2. That the Court summons the parties back, including the victim, to enable them to make their respective submissions on compensation and thereafter resentence the appellant for a term of imprisonment after deducting the correct period of 3 years, 11 months and days he spent on remand;

3. That the Court also make an Order for compensation of the victim of the appellant's crime in accordance with the law;

4. That the appellant will be subjected to a Police Supervision Order for 5 years after he completes serving his sentence.

Dated this ...16th... day of ...October... 2020.

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Justice Dr. Esther Kitimbo Kisaakye
Justice of the Supreme Court