THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.21 OF 2017

(CORAM: ARACH-AMOKO; OPIO-AWERI; MWONDHA; TUHAISE; CHIBITA, JJ. S.C)

BETWEEN

BYAMUKAMA HERBERT::::::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.0194 of 2013, Kenneth Kakuru, Simon Mugenyi Byamukama, and Alfonse C. Owiny-Dollo, JJA).

JUDGMENT OF THE COURT

Introduction

This is a second appeal brought against the decision of the Court of Appeal where, Byamukama Herbert, hereinafter the appellant was indicted of murder contrary to sections 188 and 189 of the Penal Code Act by the High Court sitting at Mbarara. Upon trial, Mugamba Paul J (as he

then was), found the appellant guilty, convicted him and sentenced him to death. However, in a re-sentencing ruling following the Supreme Court directive in **Supreme Court Constitutional Appeal No.03 of 2006, Attorney General versus Susan Kigula**, he reversed the sentence and instead sentenced the appellant to 30 years in prison.

Background

The background to this appeal is that the deceased and the accused both lived at Katooma village, Ntugamo district. On 29th July, 2004, Tindyera Joy (the deceased) was found dead in her house. The appellant was suspected to have strangled the deceased to death after sexually molesting her. Consequently, the appellant was arrested and on interrogation by Police, he admitted to have participated in causing the death of the deceased. On further interrogation, the appellant described to the Police where he had hidden the deceased's blanket. He led the Police to the spot where the blanket was hidden, whereby the same was recovered and exhibited at trial. At the conclusion of the trial, the appellant was found guilty, convicted and was initially sentenced to death but the sentence was substituted to 30 years imprisonment by the trial Judge after a mitigation hearing as a result of the Kigula decision. He appealed to the Court of Appeal

against both the conviction and sentence on two grounds. The Court of Appeal upheld the conviction but reduced the sentence to 25 years imprisonment.

Dissatisfied with the decision of the Court of Appeal, the appellant now appeals to this Court on a single ground to wit:

1. The learned Justices of Appeal erred in Law when they sentenced the appellant to an illegal sentence.

The appellant prayed that this Court sets aside the illegal sentence and substitutes it with a legal sentence.

Representation

At the hearing of the appeal, Mr. Ayorekire Arthur represented the appellant on state brief while Mr. Badru Mulindwa, Assistant Director of Public Prosecutions represented the respondent. The parties filed written submissions which they adopted. In determining this appeal, the Court shall consider the submissions as filed by counsel for the respective parties.

Submissions

Arguments for the Appellant

It was the argument of counsel for the appellant that the sentence passed by the learned Justices of the Court of

Appeal was illegal because it did not show that the Court of Appeal had taken into account the four years period that the appellant spent on remand by subtracting it from the final sentence. Citing the decision of this Court **Rwabugande Moses versus Uganda, SCCA No.25 of 2014,** counsel further submitted that the failure by the Justices of the Court of Appeal in deducting the remand period spent by the appellant on remand at the time of sentencing using an arithmetical formula was a violation of article 23(8) of the Constitution. The appellant thus invited this Court to find that the sentence imposed by the Court of Appeal was illegal and proposed that a sentence of 25 years be imposed on him instead, from the date of conviction and that the remand period of 4 years be subtracted from that sentence.

Respondent's Arguments

The respondent opposed the appeal and supported the sentence passed by the Court of Appeal arguing that the issue of illegality of sentence raised by the appellant is new as the same was never raised at the Court of Appeal. Counsel for the respondent submitted that the appellant had only appealed against the sentence of 30 years which he claimed was harsh and excessive. The respondent's counsel further submitted that the High Court took into

account the remand period spent by the appellant on remand at the time of sentencing, when it sentenced the appellant to 30 years imprisonment. That given that the appeal at the Court of Appeal was only challenging the excessiveness and harshness of the sentence, the Court of Appeal had no duty to take into account the four years the appellant spent on remand, although it alluded to it as having been taken into account in the sentence of 30years.

Counsel for the respondent maintained the line of argument that the Court of Appeal had properly addressed the issue of excessiveness and harshness of sentence when it reduced the sentence from 30 to 25 years and as a consequence, the question of illegality of sentence does not arise. Making reference to article 23(8) of the Constitution, counsel submitted that the sentencing court is required to take into account the period spent on remand but does not require that taking into account has to be done arithmetically. The respondent cited the case of **Abelle Asuman versus Uganda, SCCA No. 66 of 2016** in support of this argument.

Counsel further argued that as per the decision of **Abelle Asuman (supra),** the case of **Rwabugande Moses** cited by counsel for the appellant which brought into practice the application of the arithmetical formula does not apply to

the appellant's appeal as it was decided on 3rd March, 2017 whereas the appellant was convicted on 7th December, 2016. He insisted that for a precedent to apply, it has to be in existence before it is followed.

The respondent concluded his submissions by inviting this Court to find that the instant appeal has no merit and ~~that~~ the same should be dismissed and the sentence imposed the Court of Appeal upheld.

Analysis and Resolution

This is a second appeal and this Court is mindful of its duty to decide whether the first appellate court failed in its duty to re-evaluate the evidence presented before the trial court before reaching its own conclusion. **See. Kifamunte Henry versus Uganda (1997) LLR 72 (SCU) and D.R Pandya versus R (1957) E.A, 36.**

Taking cognisant of the above legal principle, this court will only interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as a first appellate court, the Court of Appeal failed to re-evaluate the evidence as a whole.

The appellant faulted the learned Justices of Appeal for passing what he termed an illegal sentence. The appellant contended that the learned Justices of Appeal did not take

into account the period spent on remand by subtracting it from the final sentence it imposed upon him. The respondent on the other hand argued that the appellant did not raise the issue of the illegality of sentence at the Court of Appeal and cannot raise the same on second appeal.

Rule 70(1)(a) of the Rules of this Court precludes the appellant from arguing any ground not specified in the Memorandum of Appeal before this Court. The appellant's appeal before this court is premised on one ground which is;

1. The learned Justices of appeal erred in Law when they sentenced the appellant to an illegal sentence.

The appellant's complaint regards the failure by the Court of Appeal to consider the remand period at the time of imposing the sentence of 25 years.

Article 23(8) of the Constitution 1995 is the guiding law in addressing the question when considering the period spent on remand by a convict; at the time of sentencing by any court. It provides thus:

Art.23(8);

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.* (Bold and underlining for emphasis purposes)

This court has previously guided that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. **See. Abelle Asuman versus Uganda (Supra)**.

We have had the benefit of perusing the record of appeal and at page 41, the trial court at the time of sentencing made the following observation;

".....I take into account ***the period of years he has been on remand and deduct*** *them from the sentence I would otherwise have handed down. The convict is sentenced to 30 year's imprisonment".*

The Court of Appeal in its decision took cognisance of the fact that the trial court had taken into account the principles governing sentencing at the time it handed down the 30 years imprisonment against the appellant. Specifically, the Court of Appeal observed,

"..... accordingly, then, we find that taking into account all the factors, which the trial judge rightly did, and more particularly that the appellant was relatively young, was remorseful, and had spent up to four years on remand before being convicted, we reduce the sentence from 30 (thirty) years imposed by the trial judge to 25 (twenty-five) years instead". (Underlining for emphasis purposes).

It is clear from the above record that the trial judge while sentencing the appellant to 30 years did consider the period the appellant had spent on remand. So, the appeal to the Court of Appeal was not focused on the period spent on remand. It was about harshness and excessive sentence of 30 years in prison without considering mitigating factors. The Court of Appeal agreed and found that by taking into consideration mitigating factors particularly that the appellant was relatively young, was remorseful and had spent up to 4 years on remand before being convicted. Based on the above factors, the Court of Appeal reduced the sentence from 30 years to 25 years imprisonment. Therefore, the 25 years imprisonment imposed by the Court of Appeal could not be subject of another reduction of the period spent on remand because it had already been deducted by the trial court.

Counsel for the appellant cited the decision of **Rwabugande** (Supra) in an attempt to sustain the argument that the Court of Appeal had not taken into account the remand period when imposing the 25 years imprisonment against the appellant. We note that the Rwabugande decision does not apply in the circumstances of the instant appeal as the same was decided in March 2017 whereas the appellant was convicted in December, 2016. For a case to be cited as a precedent, it ought to have been decided earlier before the matter at hand. The Rwabugande decision thus does not serve that purpose in the instant appeal.

In the premises therefore, we find no merit in the appeal and accordingly dismiss it. Overall, we find that the sentence of 25 years imprisonment imposed by the Court of Appeal was lawful and we uphold the same.

Dated at Kampala this.....5th.....day of ...October.....2021

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

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

Delivered by the Registrar
5th October 2021

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HON. LADY JUSTICE FAITH MWONDHA
JUSTICE OF THE SUPREME COURT

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HON. JUSTICE PERCY NIGHT TUHAISE
JUSTICE OF THE SUPREME COURT

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HON. JUSTICE MIKE CHIBITA
JUSTICE OF THE SUPREME COURT

Delivered by the Registrar 5th

Oct 2021

Reg.