

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NUMBER 0203 OF 2009

KWAMUSI JACOB.....APPELLANT

VERSUS

**UGANDA
RESPONDENT**

CORAM: HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA

*[Appeal from a conviction and sentence of the high court of Uganda
Holden at Kampala before His Lordship E.S Lugayizi given on
09/07/009 in criminal case no. 1343 of 2007]*

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court of Uganda at Kampala by His Lordship E.S Lugayizi J, delivered on 09 July 2009 in Criminal Case No. 1343 of 2007.

The appellant was convicted on his own plea of guilt to the charge of manslaughter and sentenced to 10 years imprisonment.

Initially the appellant had appealed against both sentence and conviction. However, when this appeal came up for hearing learned counsel Ms. Esther Nakamatte who appeared for the

appellant on state brief sought and was granted leave to appeal against sentence only.

Leave was dully granted.

This appeal therefore is premised on one ground of appeal, set
5 out as follows;-

“the learned trial Judge erred in law when he did not take into account the time spent on remand by the appellant when he passed the sentence”

Learned Counsel for the appellant clarified that the appeal is not
10 against the severity of sentence but rather on its legality.

Learned Counsel Ms. Nakamatte submitted for the appellant that the sentence of 10 years imprisonment imposed upon the respondent was a nullity as the learned Judge failed to take into account the provisions of **Article 23 (8)** of the Constitution, when
15 passing the sentence.

Learned Counsel Ms. Nakamatte submitted further that the consequence of failure to comply with **Article 23 (8)** renders the sentence a nullity. She implored this court to reduce the sentence by the period the appellant had spent on remand.

20 Ms. Ainebyoona learned counsel for the respondent conceded that the learned trial Judge did not mention that he had taken into account the period the appellant had spent on remand.

She submitted that the above notwithstanding the Judge had taken into account the aggravating and mitigating factors and that he had in fact given a very lenient sentence.

She prayed for the appeal to be dismissed.

- 5 We have listened carefully to the submissions of both counsel and we have also carefully perused the court record.

While passing the sentence the learned trial Judge stated as follows;-

“SENTENCE: IN RESPECT OF COUNT 1:

10 ***Court has had time to reflect on the submissions of counsel in respect of sentence and has this to say: The offence that the accused committed under Count 1 of the amended indictment is a very serious offence, which resulted in the death of a person i.e a one Nalubega Sande. For that reason Court takes a very serious view of what happened on the day in question. However, in passing sentence against the accused court will not lose sight of the fact that the accused is a young man; and a 1st offender. He readily pleaded guilty to the amended charge of***

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manslaughter, thus saving court's time. Consequently, taking into account all, court thinks that a sentence of 10 years imprisonment is the proper sentence to give the accused. It is so ordered."



It is clear that the learned trial Judge did not specifically state that he had taken into account the period the appellant has spent on remand.

10 Although the learned trial Judge stated that he had taken into account all, meaning, all mitigating and aggravating factors before passing sentence, we do not think this was sufficient to cover the requirement of **Article 23 (8)** of the Constitution.

15 The Supreme Court while considering **Article 23(8)** of the Constitution in the case of ***Kizito Senkula vs Uganda Supreme Court (Civil Appeal No. 24 of 2001)*** (Unreported) observed as follows at P.8 of the Judgment of the court ;-

20 ***"As we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to***

his/her conviction. Taking into account does not mean an arithmetical exercise.”

Therefore, we do not agree with learned counsel Ms. Nakamatte
5 that the learned trial Judge was required to reduce the sentence
by the period the appellant had spent on remand neither are
we required to do so. All that the Constitution requires of the
court is to take the remand period into account before passing
sentence of imprisonment. We must add here that a trial Judge
10 ought to clearly state that the period of remand has been taken
into account before passing sentence of imprisonment. In this
case he did not.

The fact that the learned trial Judge did not take into account the
period of remand while passing sentence was conceded by the
15 respondents' counsel.

We accordingly find that the learned trial Judge erred when he
sentenced the appellant to 10 years imprisonment without taking
into account the period he had spent on remand as required
under **Article 23 (8)** of the Constitution. The sentence is
20 therefore illegal and a nullity. We hereby set it aside.

This appeal therefore succeeds to that extent.

Having set aside the sentence, this court has a duty to impose a
sentence of its own as if it were the trial court. Section 11 of the
Judicature Act (Cap 13) state as follows;-

5 ***“COURT OF APPEAL TO HAVE POWERS OF THE COURT OF ORIGINAL JURISDICTION***

10 ***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.”***

15 The appellant had been indicated with offence of murder. The prosecution reduced the charge to that of manslaughter just before the trial. He pleaded guilty to the charge. The facts to which gave rise to the indictment were set out at the trial as follows;-

“Facts of the case:

20 ***On 11/11/07 one Sebang Stephen reported to Lungujja Police Post a case of assaults by one Kimera Henry. Assault had originated from a land dispute. Accused and another ASPC, Muyingo Charles proceeded to arrest suspect at Kitunzi Zone 5. They got resistance from the villagers. One Kimera Henry***

was caught at scene and he agreed to Police by himself on condition that he goes to his house to bring evidence of a case of malicious damage, he reported against Sebang Stephen. (sic)

5 **Another SPC (Male) escorted Kimera to get the document from his residence. When Kimera and SPC Male had left the police post, the youth started mocking and abusing accused and asked whether he had powers to arrest. They pushed him around and he**
10 **lost his temper and fired one bullet, which hit Segawa Faisal in the left thigh. The same bullet went and hit Nalubega Sauda who stood hereby, later died of a gunshot wound. The youth descended on accused**
15 **assaulted him to a state of unconsciousness. He was rescued by police from Lungujja and rashed to hospital, where he was admitted for treatment. Accused was arrested on discharge from hospital and**
20 **detained at Old Kampala Police Station. He was produced and charged at Mwanga II Court and then remanded”.**

From the above facts we note that the appellant was a first offender.

25 He was 22 years old at the time the offence was committed. He was a Police officer on duty who acted in the heat of the moment. He was on remand for a period of 1¹/₂ years.

Loss of an innocent life is always a very serious matter. Persons entrusted with firearms must take all necessary precaution and restraint in order to safeguard life. The appellant failed to do so.

The conduct of the appellant must be punished appropriately.

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Taking all the above into account and the fact that the appellant had been on remand for a period of 1^{1/2} years before conviction, we think that a sentence of 12 years would meet the ends of justice.

10 We accordingly set aside the sentence imposed by the trial court and substitute it with a sentence of 12 years imprisonment to run from the date of conviction.

We so order.

Dated at Kampala this **24th** day of **November** 2014.

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HON. MR. JUSTICE RUBBY AWERI OPIO, JA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU, JA
JUSTICE OF APPEAL

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HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA
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