

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL N0.0511 OF 2014

MBOINEGABA JAMES.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA**

**HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA**

**HON. MR. JUSTICE ALFONSE C.OWINY- DOLLO, JA**

*(Appeal against the sentence of the High Court at Mbarara before his Lordship Hon. Justice Moses Mukiibi dated 2<sup>nd</sup> December 2013)*

## **JUDGMENT OF THE COURT.**

This is an appeal from the sentence of Hon. Mr. Justice Moses Mukiibi in the High Court Criminal Case No. 0256 of 2013 at Kololo dated 2<sup>nd</sup>/12/2013 in which the appellant was re-sentenced to 40 years imprisonment for murder.

### **Background of the case.**

The appellant, on the night of 21<sup>st</sup> /June/2002, attacked the deceased at her home and hacked her to death. As he left the scene, he met Natujuna and Murisa to whom he disclosed he had killed his mother and was going to report himself to Kakijerere police post. The appellant was arrested and charged with murder contrary to sections 188 and 189 of the Penal Code Act. On 21<sup>st</sup> December 2005, he was convicted of murder and sentenced to suffer death by the High Court at Mbarara. The death penalty was the only sentence prescribed by law for any person convicted of murder.

Subsequent to the conviction in 2005, the ***Supreme Court in SUZAN KIGULA AND OTHERS Vs ATTORNEY GENERAL, Constitutional Appeal No. 03 of 2006***, declared the mandatory death penalty as unconstitutional. The Supreme Court in that case ordered that all cases in which persons had at the time been sentenced to mandatory death penalty, be sent back to the High Court for mitigation of sentence.

The appellant appeared before Hon. Mr. Justice Moses Mukiibi for mitigation and sentencing on 2-12-2013. While sentencing him to 40 years imprisonment the learned Judge stated as follows;

***“I now deduct a total of 11 years and 5 months being the combined period the convict has spent in prison both before and after his conviction. This leaves a balance of a term of imprisonment of twenty eight (28) years and seven (7) months to be served by the convict subject to remission”***

The appellant being dissatisfied with the sentence appealed to this Court.

### **Legal Representation**

At the hearing of this appeal, learned Counsel Ngaruye Ruhindi Boniface appeared for the appellant on state brief, while Ms Jacqueline Okui, Senior State Attorney, appeared for the respondent. The appellant was in Court.

### **Appellant's Case**

Counsel for the appellant submitted that there was a misdirection when the sentencing Judge deducted the period spent in prison before and after the conviction of the appellant from the sentence of 40 years. He submitted that the sentence was illegal and it must be set aside.

Counsel prayed that this court invokes section 11 of the Judicature Act and impose an appropriate sentence considering that the appellant is a first offender, he is remorseful and also take into account the period spent on remand. He suggested a period of 20 years imprisonment.

### **Respondent's reply**

Counsel for the respondent conceded that the sentence was illegal. However, she submitted that considering the circumstances in which the offence was committed the appellant should be given a sentence of 30 years imprisonment. Counsel relied on the case of ***UWIHAYIMAANA MOLLY VS UGANDA, Court of Appeal Criminal Appeal No. 103 of 2009*** in which the death sentence was reduced to 30 years imprisonment.

### **Court Resolution.**

The principles upon which an appellate Court should interfere with a sentence were considered by the Supreme Court in the case of ***KYALIMPA EDWARD Vs. UGANDA, Criminal Appeal No. 10 of 1995***, where it referred to the English case of ***R Vs HAVTLAND (1983) 5 Cr. App. R(s) 109***, and held as follows:

***“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 court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice” See: OGALA S/O OWORA Vs. R.(1954) 21 E.A.C.A 270 at 270 and R Vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126.***

**We are also guided by another Supreme Court decision in KAMYA JOHNSON WAVAMUNO VS UGANDA, Court of Appeal Criminal Appeal No. 16 of 2000 in which the Court said:**

***“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 discretion, or failure to take***

*into account a material consideration, or an error in principle was made. It is not sufficient that the members*

***of the Court would have exercised their discretion differently”***

We note that before passing sentence, the sentencing Judge took into account both the mitigating and aggravating factors. The mitigating factors were repeated by counsel for the appellant before this Court. The sentencing Judge then gave reasons for the sentence he was imposing on the appellant and stated as follows:

***“I therefore, hereby sentence Mboneigaba James, the convict, to 40 years imprisonment. I now deduct a total of 11 years and 5 months being he combined period the convict has spent in prison both before and after his conviction. This leaves a balance of a term of imprisonment of twenty eight (28) years and seven (7) months to be served by the convict subject to remission”***

It is thus on record that the Judge was alive to the importance of taking into account the period spent on remand as provided for by

**Article 23 (8) of the Constitution of Uganda, which states;**

***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 the case of *KABWISOISSA VS. UGANDA*, [2001- 2005] HOB 20,

the Supreme Court held that:

***Clause (8) of Article 23 of the Constitution of Uganda is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term to be served.***

We are also alive to the decision of the Supreme Court in *KATENDE AHAMAD VS. UGANDA, Criminal Appeal No.6 of 2004*, where it was held that in *Article 23 (8) of the Constitution*, the 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.

**In BUKENYA JOSEPH VS UGANDA Supreme Court Criminal Appeal No 17 of 2010, the Court held as follows:**

*“It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence that Court would give. But it must be considered and that consideration must be noted in the judgment.”*

**The Supreme Court also held in KIZITO SENKULA V UGANDA, Supreme Court Criminal Appeal No 24 of 2001 that:**

*“taking into account does not mean an arithmetic exercise”*

In light of the above decisions, the sentencing Judge erred when he mathematically subtracted the period the appellant had spent in prison before and after conviction from the 40 years sentence he had passed. Article 23(8) refers only to the pre-trial period. In this case the learned sentencing Judge took into account the post-conviction period which was irregular. In addition, instead of taking into account the pre-trial period spent in lawful custody, he mathematically deducted it. This renders the sentence illegal and it is accordingly set aside.

On the issue of whether the sentence was harsh and manifestly excessive, it is trite that the appellate court is to be guided by principles governing sentencing. These have been spelt out in a number of decisions including, *KIWALABYE BERNARD VERSUS UGANDA, Supreme Court Criminal Appeal No. 143 of 2001 (unreported)* where the Court stated as follows:

*“The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle ”*

This Court, in *TUMWESIGYE ANTHONY VS UGANDA, Cr. Appeal NO. 46/2012*, set aside the sentence of 32 years imprisonment and substituted it with 20 years. The appellant in that case was convicted of murder. The deceased had reported him for stealing his (deceased)

employer's chicken. The appellant killed him by crushing his head after which he buried the body in a sandpit.

In another case before this court, *ATIKU LINO VS UGANDA, Criminal Appeal No. 0041/2009*, the appellant was convicted of murder and sentenced to life imprisonment. The appellant had attacked and cut to death the deceased in the latter's house accusing him of bewitching his son. This Court, citing the case of *TUMWESIGYE* (supra) observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was reduced and substituted with 20 years imprisonment.

In *KISITU MAJAIDIN VS UGANDA, Court of Appeal Criminal Appeal No. 28 of 2010*, this Court confirmed a sentence of 30 years imprisonment. The appellant had been convicted of murder of his own mother.

In *MBUNYA GODFREY VS UGANDA, Criminal Appeal No. 4 of 2011*, the Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment. The appellant had been convicted of murder of his wife.

In the instant case, the appellant killed his own mother. He had been threatening to kill her allegedly for refusing to give him land. He attacked her at her home and hacked her repeatedly with a panga. She sustained multiple cut wounds including amputation of the left upper limb through the elbow joint, deep cut wound on the left neck through the jugular and carotid arteries. There were also multiple cut wounds through the right breast. So severe were the injuries that death was instantaneous.

The sentencing Judge properly considered all aggravating and mitigating factors, save for the error in the sentence as we have highlighted herein.

Having set aside the sentence of 40 years, we now impose a sentence of 30 years imprisonment that we believe will meet the ends of justice in the circumstances of this case. We accordingly sentence the appellant to the said term. The sentence is to run from 21-12-2005 the day the appellant was convicted by the High Court.

We so order.

**Dated at Mbarara this 7<sup>th</sup> day of December 2016**

**HON.KENNETH KAKURU**

**JUSTICE OF APPEAL**

**HON.SIMON BYABAKAMA MUGENYI**

**JUSTICE OF APPEAL**

**HON.ALFONSE C OWINYI-DOLLO**

**JUSTICE OF APPEAL**



3.\*