

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 606 OF 2015

1. OGWAL NELSON
 2. IBEK BONNY
 10 3. ODONG JIMMY
 4. APITA GEOFFREY
 5. OKELLO SIMON PETER.....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

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(Appeal from the decision of the High Court at Lira Holden at Apac before Hon. Lady Justice Dr. Winifred Nyondo Nabisinde dated 15th day of September 2014 in Criminal Session Case No. 039 of 2014 arising from A-No. 07 of 2013 CRB No.110 of 2012)

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CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

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This appeal arises from the Judgment of Hon. Lady Justice Dr. Winifred Nyondo Nabisinde, in High Court Criminal Session Case No. 039 of 2014 arising from A-No. 07 of 2013 CRB No. 110 of 2012 delivered on 15th September 2014.

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The appellants were charged with the offence of aggravated robbery contrary to Sections 285 and 286 (2) of the Penal Code Act (CAP 120). They were convicted and sentenced as follows:-1st appellant sentenced to 35, 2nd appellant sentenced to 25, 3rd appellant sentenced to 30 years imprisonment. The 4th and 5th appellants were each sentenced to imprisonment for the rest of their natural lives.

5 Being dissatisfied with the decision of the trial Court they now appeal to this Court against Sentences only.

At the hearing of this appeal, learned Counsel *Mr. Geoffrey Boris Anyuru* appeared for the appellant on state brief, while *Ms. Rose Tumuheise* learned Counsel from the Office of the Director of Public Prosecutions appeared for
10 the respondent. The appellants were in Court.

Appellant's case

Mr. Anyuru first sought and was granted leave to regularise late filing of the notice of appeal. He also sought and was granted leave to appeal against sentence alone.

15 Counsel submitted that, the learned trial Judge while passing sentence in respect of the 1st three appellants did not take into account the period the appellants had spent on remand as required under *Article 23 (8)* of the Constitution.

Counsel contended that, *Article 23 (8)* of the Constitution requires a
20 mathematical deduction, which the learned trial Judge did not do. For the above proposition he relied on *Aliganyira Richard Vs Uganda, Court of Appeal Criminal Appeal No. 19 of 2005* and *Katende Ahamad Vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004*.

Counsel, further submitted that, the sentences imposed against the 4th and 5th
25 appellants were harsh and manifestly excessive in the circumstances of the case.

He asked Court to set aside the sentences. He proposed 18 years for the 1st appellant, 13 years for the 2nd appellant, 15 years for the 3rd appellant, 20 years imprisonment for the 4th and 5th appellants from which the period each
30 of the appellants spent on remand would be deducted.

5 **The Respondent's reply**

Ms. Tumuheise opposed the appeal and supported the decision of the trial Judge. She submitted that, Article 23 (8) is not applicable to life imprisonment or imprisonment for life. She argued that a term of life imprisonment ends when one dies. However, she asked Court to be guided by the decided cases of
10 *Tigo Stephen Vs Uganda, Supreme Court Criminal Appeal No. 08 of 2009* and *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*.

Resolution of issues

We have carefully listened to both Counsel. We have also perused the Court record and the authorities cited to us and those that were not cited.

15 We have a duty as a first appellate Court to re-appraise all the evidence adduced at the trial and to come up with our inferences on issues of law and fact. See:-*Rule 30(1)* of the Rules of this Court and *Bogere Moses and Another Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997*.

This appeal has two legs. Firstly, the appellants Counsel challenges the legality
20 of the sentences imposed against the 1st, 2nd and 3rd appellants contending that, the trial Judge did not while passing the sentences comply with the provision of *Article 23 (8)* of the Constitution. Secondly, that in respect of the sentences of the 4th and 5th appellants, appellants challenges both their severity and legality.

25 The circumstances under which this Court may interfere with the sentence of a trial court are limited. Before this Court can interfere with a sentence of the trial Court, the factors must exist which were set out by the Supreme Court in *Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2011* as follows:-

5 *"The appellate Court is not to interfere with sentence imposed by a trial*
court which has exercised its discretion on sentence unless the exercise of
the 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
10 *where a trial Court ignores to consider an important matter or*
circumstances which ought to be considered when passing the sentence or
where the sentence imposed is wrong in principle."

The Court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial Court. See: *Ogalo s/o Owoura Vs Republic [1954] 24 EA CA 270.*

15 Before this Court may interfere with the severity of a sentence of the trial Court, that sentence must be legal. In this case the legality of the sentences is being challenged. Counsel for the appellant contends that, while passing sentence the trial Judge did not comply with the provisions of *Article 23 (8)* of the Constitution, rendering the sentence a nullity.

20 *Article 23 (8)* 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."

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

".....this Court has also considered and taken into account from each of the convicts the period they served as pre-remand prisoners before arriving at the final sentences."

5 In *Rwabugande Moses Vs Uganda*, Supreme Court Criminal Appeal No. 25 of
2014, the Supreme Court stated that, taking into account is necessarily an
arithmetical exercise. Therefore, the period the appellants had spent in pre-
trial detention ought to have been deducted from the sentences. Since the trial
10 Judge did not do so, the sentences imposed upon the 1st, 2nd and 3rd appellants
are a nullity

Counsel for the respondent during her submissions argued that *Article 23 (8)*
of the Constitution does not apply to life imprisonment, she asked this Court
to be guided by the Supreme Court decision in the case of *Tigo Stephen Vs*
Uganda (supra), which held as follows;-

15 *"We find these authorities persuasive because they are based on Statutes
similar to our own laws. We hold that life imprisonment means
imprisonment for the natural life term of a convict, though the actual
period of imprisonment may stand reduced on account of remissions
earned.*

20 *We note that in many cases in Uganda, Courts have imposed specific terms
of imprisonment beyond twenty years instead of imposing life
imprisonment. It would be absurd if these terms of imprisonment were
held to be more severe than life imprisonment."*

In light of the above argument, this Court has in the recent decision of *Ogwal*
25 *Alberto Vs Uganda*, Court of Appeal Criminal Appeal No. 46 of 2014, discussed in
depth what life imprisonment is as follows;-

30 *"Is life imprisonment [or imprisonment for life which is the expression
used in the Constitution and statutes] a term of imprisonment? We are
unaware of anything that would suggest that it is not term of
imprisonment. Whether one considers the ordinary meaning of the words*

5 or even contextually, life imprisonment is a term of imprisonment. Does Article 23 (8) of the Constitution apply to life imprisonment? We see nothing in the words of Article 23 (8) which would suggest otherwise. Those provisions apply to all terms of imprisonment including life imprisonment.”

10 Court discussed further as follows;-

“And if life imprisonment is a term of imprisonment to which Article 23 (8) applies, how is the term to be determined in years for a Court to be able to deduct there from the period spent in lawful custody before completion of the trial? This question of the length of a term of life imprisonment was considered by the Supreme Court in the case of Livingstone Kakooza Vs Uganda S C Criminal Appeal No.17 of 1993, (unreported). It stated in part,
15 “We agreed with the learned counsel for the appellant that the sentence of 18 years was harsh and manifestly excessive. The appellant had been on remand in custody for two years and the learned Judge took this factor in passing sentence. In effect the Appellant received a life sentence of twenty years according to section 49 (7) of the Prisons Act Cap 313, which provides,
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“(7) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment.”

25 A similar question was considered by this Court in the case of *Kisembo Patrick Vs Uganda, Court of Appeal Criminal Appeal No. 411 of 2014* (unreported), it stated as follows;-

“28. It is clear that the intention of the legislation (sic) was very clear that a sentence of life imprisonment was to be defined in law as a sentence of
30 20 years imprisonment. If one reads the whole provisions of Section 47 of

5 *the Prisons Act, (formerly Section 49), rather than simply looking at*
 subsection (7) in isolation it would be clear that the legislature had set in
 place a statutory scheme to manage sentences including the provisions of
 remission in respect of all sentences in excess of one month, and in the
10 *process defined what life imprisonment, being a sentence of imprisonment,*
 means.”

For the reasons provided in *Kisembo Patrick Vs Uganda (supra)* we are inclined to follow *Livingstone Kakooza Vs Uganda (supra)* rather than *Tigo Stephen Vs Uganda (supra)*.

Ogwal Alberto Vs Uganda (supra) held as follows;-

15 *“In our view a trial court imposing life imprisonment as a sentence must*
 comply with article 23 (8) of the Constitution and deduct from that
 sentence the period that a convict would have spent in lawful custody
 prior to the completion of his or her trial. Until otherwise defined in law
 life imprisonment would be deemed to be twenty years imprisonment for
20 *the purpose of applying article 23 (8) of the Constitution. In the instant*
 case the trial court failed to do so and therefore the sentence it imposed
 was a nullity.”

Following the above decisions we find that, the sentences imposed upon the appellants were all illegal and a nullity.

25 Having found so, we invoke the provisions of Section 11 of the Judicature Act (CAP 13), which grants this Court the same powers as that of the trial Court in circumstances such as we now find ourselves, to impose a sentence we consider appropriate in the circumstances of this appeal.

The appellants premeditated the robbery. They used a gun, a deadly weapon
30 while committing the offence. These are aggravating factors.

5 However, there are mitigating factors in favour of the appellants. They were
all first offenders. 1st, 2nd and 5th appellants were relatively young aged 38
years, 18 years and 39 years respectively at the time of the commission of the
offence, and 3rd and 4th appellant were aged 48 years and 46 years
respectively. They were all remorseful. The 1st, 3rd, 4th and 5th appellants were
10 all family men with wives and children. The 2nd appellant was a student. They
had each spent 1 year and 6 months on remand.

In *Aliganyira Richard Vs Uganda, Court of Appeal Criminal Appeal No. 19 of
2005*, the appellant was convicted of aggravated robbery and sentenced to
suffer death. On appeal, this Court reduced the sentence to 15 years
15 imprisonment.

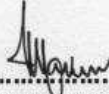
In *Olupot Sharif & another Vs Uganda, Court of Appeal Criminal Appeal No.
0730 of 2014*, the appellant was convicted of the offence of aggravated
robbery and was sentenced to 40 years imprisonment. On appeal, this Court
reduced the sentence to 32 years imprisonment.

20 Having taken all the above factors and decided cases into account, we consider
that a term of 19 years imprisonment for each of the appellants will meet the
ends of justice. We now deduct from each sentence of 19 years, 1 year and 6
months each of the appellants spent in pre-trial detention and order that each
of the appellants 1, 2, 3, 4 and 5 serve 17 years and 6 months imprisonment
25 starting from 15th September, 2014 the day they were convicted.

We so order.

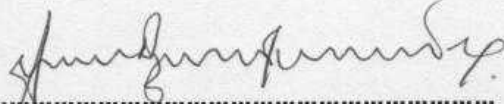
Dated at Gulu this 7th day of November 2017.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL

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