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**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT GULU  
CRIMINAL APPEAL NO. 0316 OF 2014**

(CORAM: Kenneth Kakuru JA, F.M.S Egonda-Ntende JA and Hellen Obura, JA.)

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**CHOTHEMBO JOSEPH:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

*(Appeal from the decision of Hon. Lady Justice E. K. Kabanda holden at Kampala High Court  
Criminal Session Case No. 0227 of 2013 delivered on 21/11/2013)*

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**JUDGMENT OF THE COURT**

This is an appeal against sentence of 35 years imprisonment imposed during re-sentencing by Hon. Lady Justice E. K Kabanda on 21<sup>st</sup> November, 2013 for the offence of murder contrary to sections 188 and 189 of the Penal Code Act.

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**Background to the Appeal**

The facts giving rise to this appeal in so far as we could ascertain from the court record are that on 27<sup>th</sup> July, 2002, the appellant aged 25 years at the time, beat his mother the deceased, Ngamite Isafia to death when he kicked her and fractured her ribs. The deceased died due to fractured ribs and abdominal distension to haemorrhagic shock and cardio-respiratory arrest.

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In the course of committing the offence the appellant threatened the people who attempted to rescue the deceased. The appellant was arrested on 27/7/2002 and indicted with the offence of murder. He was tried, convicted and sentenced to death.

- 5 Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing. Having heard the submissions of both counsel in the mitigation proceedings, the re-sentencing Judge sentenced the appellant to 35 years imprisonment.
- 10 Being dissatisfied with the decision of the re-sentencing Judge, the appellant appealed to this Court against sentence alone on the following two grounds that were set out in the memorandum of appeal;
1. *The learned trial Judge erred in law and fact when she failed to properly exercise her discretion on factors mitigating the sentence, thereby occasioning a gross miscarriage of justice.*
  - 15 2. *The learned trial Judge erred in law when she passed a harsh and excessive sentence, thereby occasioning a gross miscarriage of justice."*

### **Representations**

At the hearing of this appeal, Mr. Olwoch Daniel Evans represented the appellant on state  
20 brief while Mr. Martin Rukundo, the learned Principal State Attorney from the Office of the Director Public Prosecutions represented the respondent.

### **Case for the Appellant**

Counsel for the appellant sought leave for extension of time, to appeal against sentence only and to amend the memorandum of appeal by inserting another ground on illegality of  
25 sentence. He was granted leave and the memorandum of appeal that was filed out of time was validated. Leave was also granted for the appellant to appeal against sentence only and the amendment was also allowed. The additional ground of appeal was stated as follows:

5            "The learned trial Judge erred in law when she passed an illegal sentence by failing to comply with the provisions of Article 23 (8) of the Constitution thereby rendering the sentence a nullity."

10           Counsel argued this additional ground first. He submitted that the re-sentencing Judge did not comply with Article 23 (8) while passing the sentence as she did not deduct the period the appellant had spent in pre-trial detention. He pointed out that during re-sentencing of the appellant at page 8, in the last paragraph of the ruling, the re-sentencing Judge only stated that she had taken into account the period of 4½ years which the appellant had spent on remand but she did not deduct it from the sentence of 35 years she imposed thus rendering  
15           the sentence illegal. He prayed that this Court sets aside the sentence of 35 years and sentences the appellant to a period of 18 years from which the period the appellant spent on remand should be deducted.

#### **The Respondent's reply**

20           Counsel conceded to ground 1 in view of the decision in *Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014* and implored this Court to exercise its jurisdiction and powers under section 11 of the Judicature Act which permits this Court to exercise the power of the trial court to impose an appropriate sentence. He proposed a sentence of 35 years imprisonment which according to him is within the range of sentences passed by this Court. He cited the decision of this Court in *Semanda Christopher and anor*  
25           *vs Uganda, CACA No. 77 of 2010* where a sentence of 35 years imprisonment was upheld.

#### **Resolution by the Court**

We have heard the submissions of both counsel and carefully perused the court record especially the re-sentencing proceedings. We have also considered the decision in

5 **Rwabugande Moses vs Uganda (supra)** and Article 23 (8) of the Constitution which enjoins the sentencing courts to take into account the period a convict spends in lawful custody prior to his or her conviction.

We note that the re-sentencing Judge while passing the sentence stated thus;

10 *"In the above premise, taking into account all the aforementioned, aggravating and mitigating factors and the period of 4 1/2 yrs which the convict had spent on remand, I sentence Chethembo Joseph the convict to 35 (Thirty five) years in prison from 6<sup>th</sup> February 2007 the date of conviction."*

The trial Judge took into account the period the appellant had spent on remand following the  
15 guidance given by the Supreme Court in their earlier decisions in **Kabwiso Issa vs Uganda SCCA No. 7 of 2002 and Katende Ahamad vs Uganda SCCA No. 6 of 2004** that the trial Judge or Magistrate when sentencing a person to imprisonment should say;

*"Taking into account the period of.....years (months or weeks whichever is applicable) which the accused has already spent in remand, I now sentence the*  
20 *accused to a term of....., years (months or weeks, as the case maybe)"*

However, the Supreme Court departed from that position in its recent decision in **Rwabugande Moses vs Uganda (supra)** where it stated;

25 *"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody must be specifically credited to the accused. We must emphasize that a sentence couched in general terms that the court has taken into account the time the*

5 accused has spent on remand is ambiguous. *In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period when it arrived at the final sentence.*"

We therefore find that the sentence of 35 years imposed on the appellant is illegal for failure to comply with a mandatory constitutional provision and we accordingly set it aside. We now  
10 invoke **Section 11 of the Judicature Act** which gives this Court the power, authority and jurisdiction as that of the trial court to impose a sentence of its own it considers appropriate. In arriving at an appropriate sentence, we shall consider the aggravating and the mitigating factors and we shall also be guided by the sentencing range in cases of a similar nature.

On aggravating factors we note that murder is a grave offence which carries a maximum  
15 penalty of death and in this case, violence was used during the commission of the offence. However, we also note these mitigating factors which are in favour of the appellant; he was a first offender, he lost his father prior to the commission of the offence which put him under a lot of pressure from the family, he is remorseful and ready to re-integrate into the community. On range of sentences, in **Latif Buulo vs Uganda, Court of Appeal Criminal Appeal No.**  
20 **0323 of 2014**, the appellant was convicted of murder and sentenced to death. Following the decision in **Attorney General vs Susan Kigula and 417 ors (supra)**, the High Court at Kampala re-sentenced the appellant to 30 years imprisonment. He appealed to this Court and his sentence was reduced to 25 years imprisonment.

25 In **Tumwesigye Anthony vs Uganda, Court of Appeal Criminal Appeal No. 046 of 2012**, the appellant had been convicted of murder and sentenced to 32 years. The Court of Appeal sitting at Mbarara set aside the sentence and substituted it with 20 years.

5 In *Emeju Juventine vs Uganda, Court of Appeal Criminal Appeal No. 095 of 2014*, the appellant was convicted of the offence of murder and sentenced to 23 years imprisonment. On appeal, this Court reduced the sentence to 18 years imprisonment.

Taking into consideration the sentencing range in the cases cited above and those not cited and the aggravating and mitigating factors, we are of the considered view that the ends of  
10 justice will be met by sentencing the appellant to 20 years imprisonment in the circumstances of this case. We deduct the period of 4<sup>1</sup>/<sub>2</sub> years the appellant had spent in lawful custody and sentence him to a period of 15<sup>1</sup>/<sub>2</sub> years imprisonment which he shall serve from the date of conviction, which is 06/02/2007.

We so order.

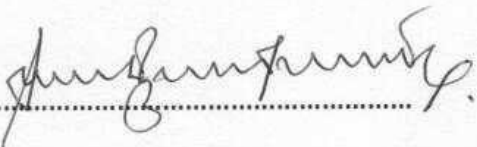
15 Dated at Gulu this <sup>JH</sup>.....day of *November*.....2017



Hon. Mr. Justice Kenneth Kakuru

**JUSTICE OF APPEAL**

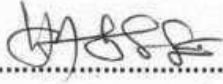
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Hon. Mr. Justice F.M.S Egonda-Ntende

**JUSTICE OF APPEAL**





Handwritten signature of Hellen Obura, consisting of stylized initials and a surname, positioned above a dotted line.

Hon. Lady Justice Hellen Obura

**JUSTICE OF APPEAL**