THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.66 of 2016

[CORAM: KATUREEBE, ARACH-AMOKO, MWONDHA, BUTEERA, NSHIMYE, JJSC]

ABELLE ASUMAN.....APPELLANT

V E R S U S

UGANDA .....RESPONDENT

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.32 of 2010 decided by GEOFFREY KIRYABWIRE, JA, PAUL MUGAMBA, JA and CATHERINE BAMUGEMEREIRE, JA dated the 15th day of December 2016)

THE JUDGMENT OF THE COURT

This is a second appeal from a decision of the High Court presided over by Steven Musota, J on 30th November 2010 at Tororo.

The background facts:

The appellant was indicted, tried and convicted of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. He was sentenced to life imprisonment by the High Court. On appeal, the Court of Appeal substituted the sentence with one of imprisonment for 18 years. Dissatisfied with the decision of the Court of appeal, the appellant has appealed to this Court.

The appeal is based on one ground as follows:-

> **"The learned Justices of Appeal erred in law when they sentenced him to 18 years imprisonment which sentence is harsh, illegal and excessive in the circumstances of the case."**

The appellant prayed this Court sets aside the sentence and substitutes it with a lenient sentence.

On appeal learned counsel, Ms. Susan Wakabala, represented the appellant on state brief. Mr. David Ndamulani, a Senior Assistant Director of Public Prosecutions represented the State/respondent.

Both counsel had filed brief written submissions which they adopted at the hearing.

Counsel for the appellant submitted that when sentencing the appellant the Justices of Appeal did not take into consideration arithmetically the period they spent on remand following the Supreme Court decision in the case of **Rwabugande Moses versus Uganda SCCA 25/2014**.

According to counsel, the Court of Appeal in the instant case substituted the High Court sentence of life imprisonment with one of 18 years without deducting 2 years spent on remand and the sentence that the Court of Appeal imposed was harsh, illegal and excessive in the circumstances.

Counsel for the respondent opposed the appeal. He submitted that the Court of Appeal quashed and set aside the sentence of life imprisonment handed down to the appellant by the trial Court for the singular reason that the latter had not taken into account the period spent on remand in the computation of sentence. According to counsel, the Justices of the Court of Appeal took into account the two years the appellant spent on remand and deducted it from twenty years which is what life imprisonment means under the Prisons Act. He maintained that the sentence imposed by the Court of Appeal was lawful and should be upheld.

The issue for this Court's determination is whether the Court of Appeal complied with the provisions of **Article 23(8) of the Constitution** when it sentenced the appellant to 18 years.

We find it appropriate to quote the relevant portion of the Judgment for clarity as to what the Court of Appeal considered:-

"We note that the learned trial Judge recorded the sentence and reasons for it. Essentially he noted:

> **'The convict is a first time offender. The offence he is convicted of is a grave one. The objective of sentence will be considered. The offence is rampant. This offence was committed under terror of innocent people. Taking into account the respective submissions by respective counsel and the apparent remorsefulness of the convict, I will sentence him to life imprisonment.'**

From the above it is clear to us that Court had in mind the fact that the appellant was a first offender and that he was remorseful. What is not clear is whether the period spent on remand was borne in mind. Article 23(8) of the Constitution provides:

> **'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.'**

The maximum sentence provided by the law for the offence for which the appellant was convicted is the death sentence. The appellant was not given the ultimate sentence despite the offence being grave and rampant. Besides the fact that the appellant had no previous record of conviction, appellant was found to be remorseful. In the circumstances of this case the period spent on remand should have been taken into account. There is no indication as to why court did not do so. Yet it was not contested that appellant was arrested in 2006 and released on bail a year later. The bail was cancelled in 2009. His conviction came about a year ahead in 2010. Appellant was on remand for about two years. That period ought to have been taken into account.

An appellate court will only interfere with the sentence passed by the trial court if it appears that the court acted on wrong principle or overlooked some material facts or the sentence is illegal, or manifestly excessive as to amount to a miscarriage of justice. In the instant case, the trial court did consider mitigating factors but did not include amongst them the period spent on remand, which is a Constitutional requirement. We believe there is cause for us to alter the sentence imposed by the trial court.

The appeal succeeds. The sentence of life imprisonment is set aside. A sentence of 18 (eighteen) years' imprisonment is hereby ordered in substitution therefore. The substituted sentence is to run from the date of initial sentence in the High Court."

It is clear from the Judgment that the Justices of appeal were aware of the provisions of **Article 23(8) of the Constitution**. The Court of Appeal set aside the sentence of life imprisonment imposed by the trial Court for the singular reason that the trial Court had not considered the period spent on remand by the appellant. They imposed a sentence of 18 years imprisonment in substitution.

Article 23(8) provides:-

"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."

The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in **Article 23(8) of the Constitution** is for the Court to take into account the period spent on remand.

Our understanding of the Court of Appeal decision is that the Justices quashed the High Court decision for failure of the trial Court to take into account the period spent on remand by the appellant. They themselves took into account the period spent on remand and substituted the life imprisonment sentence with one of 18 years imprisonment.

Counsel for the respondent argued that the Justices of Appeal deducted the period of 2 years that the appellant spent on remand from a twenty years prison sentence since the Prisons Act, (Cap 304) defines life sentence to be twenty years.

We find this argument of counsel for the respondent speculative and not arising from the record of proceedings or Judgment of the Court of Appeal. The Justices simply imposed a sentence of 18 years in substitution to one of life imprisonment after taking into account the period spent on remand. They made no reference to the Prisons Act.

According to the preamble to the Prisons Act, it was enacted as **"An Act to consolidate the Law relating to prisons, and to provide for organisation, powers and duties of Prison Officers and for matters incidental thereto."**

We do not find that the Prisons Act was legislation intended for guiding of Judicial Officers in the exercise of sentencing offenders. The Court of Appeal Justices correctly made no reference to it while sentencing the appellant. It is preposterous for counsel for the respondent to assume they did.

We find that this appeal was premised on a misunderstanding of the decision of this Court in **Rwabugande Moses versus Uganda** (supra).
The facts in that Appeal were that both the High Court and the Court of Appeal had not considered the period spent on remand by the convict when he was being sentenced. This Court made a finding that the two Courts had not complied with Article 23(8) of the Constitution. It went ahead and determined that the period spent on remand ought to have been considered and should have been deducted from the sentence to be imposed. The Court held:-

> **"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 prior to the trial must be specifically credited to an accused"

What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.

We find also that this appeal is premised on a misapplication of the decision of this Court in the case of **Rwabugande** (supra) which was decided on 3rd March 2017.

In its Judgment this Court made it clear that it was departing from its earlier decisions in **Kizito Senkula vs. Uganda SCCA No.24/2001; Kabuye Senvawo vs. Uganda SCCA No.2 of 2002; Katende Ahamed vs. Uganda SCCA No.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No.17 of 2010** which held that **"taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula."**

This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then.

After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).**

This is in accordance with the principle of precedent. We cite **Black's Law Dictionary**, 18th Edition page 1214:

> **"In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law."**

A precedent has to be in existence for it to be followed. The instant appeal is on a Court of Appeal decision of 20th December 2016.

The Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 coming about four months after its decision. The case of **Rwabugande (supra)** would not bind Courts for cases decided before the 3rd of March 2017.

We find in the instant Appeal, that the Court of Appeal Justices complied with provisions of **Article 23(8) of the Constitution** and that the sentence of 18 years that they imposed was lawful.

This appeal, according to the Memorandum of Appeal was also on the ground that the sentence of 18 years imposed on the appellant was harsh and excessive.

The sentence being harsh and excessive are matters that raise the severity of the sentence.

This Court held in **Criminal Appeal No.34 of 2014, Okello Geoffrey vs. Uganda** as follows:

> **"....Section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence. It only allows him or her to appeal against sentence only on a matter of law."**

Accordingly we shall not consider issues of the sentence being harsh or excessive since that goes to severity of sentence. The appellant has no right of appeal on severity of sentence.

We dismiss this appeal for the reasons stated above.

In the result, we find that the sentence of 18 years imprisonment imposed by the Court of Appeal was a lawful sentence and we uphold the same. The appellant should continue to serve the sentence.

Dated at this day.....19th .....of .....April.....2018.

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Hon. Justice Katureebe

CHIEF JUSTICE

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Hon. Lady Justice Arach-Amoko

JUSTICE OF THE SUPREME COURT

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Hon. Lady Justice Mwondha

JUSTICE OF THE SUPREME COURT

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Hon. Justice Buteera

JUSTICE OF THE SUPREME COURT

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Hon. Justice Nshimye

JUSTICE OF THE SUPREME COURT