THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.59 OF 2016.

[CORAM: MWANGUSYA, OPIO-AWERI, MWONDHA, BUTEERA, JJ,SC. NSHIMYE, AG JSC]

BETWEEN

1. **TUKAMUHEBWA DAVID JUNIOR ::::::::::::::::::APPELLANTS**
2. **MULODO YUBU**

VERSUS

UGANDA:: RESPONDENT

[Appeal *from the decision of the Hon. Geoffrey Kiryabwire, Paul . K Mugamba and Lady Justice C. Bamugemerire JJA, Criminal Appeal No. 116 of 2010 dated 15th December, 2016]*

JUDGMENT OF THE COURT

Both appellants appealed against sentence only. Their main contention was that the Court of Appeal while substituting the sentence passed by the trial Court did not deduct the exact period of 3years and 7 months they spent on remand.

The other contention regarding appellant No 1 alone was that, it was illegal to have sentenced him to a custodial sentence when he was a juvenile at the time he committed the offence.

This appeal therefore is based on legality of the sentences handed down to the appellants.

Background:

The appellants were tried and convicted by the Hon Y. Bamwine J

(as he then was) in Mbarara High Court, of the offences of Aggravated Robbery and Rape contrary to sections 185, 286 and 124 of the Penal Code Act respectively.

They were each sentenced to 20 years imprisonment for aggravated robbery and 10 years for rape and both sentences were to be served concurrently. The appellants were not satisfied with the sentences.

They appealed to the Court of Appeal on the ground that the learned trial Judge did not deduct the period they had spent on remand as required by the Constitution. (*See Article 23(8) of the Constitution*).

While sentencing them, the learned trial Judge stated:

> ***"I have considered the period spent on remand. I am inclined to pass a death sentence but since they are first offenders, I hope they will learn from a custodial sentence, however long, so that on release they respect people's life and property"*** **"Sic".**

They appealed to the Court of Appeal on the ground that, the learned trial Judge had not demonstrated by mentioning the period he had considered as having been spent on remand.

The Court of Appeal while allowing the appeal observed that:

> ***"In the instant case the trial judge simply acknowledged that he had considered the period spent on remand. We find this fell short of complying with Art (23(8) of the Constitution. It is unclear therefore whether the remand period was deducted from the sentences imposed. We further agree that the application of Art.28 (8)(sic) is not an arithmetical exercise so we shall consider that when exercising our powers under section 11 of the Judicature Act". (Emphasis ours)***

The Court of Appeal allowed the appeal and substituted a sentence of 18 years for Robbery and maintained that of 10 years for rape, sentences to run concurrently.

On appeal to this court, the Appellants are faulting the honourable justices of the Court of Appeal for substituting what they called an illegal sentence of 20years on ground 1 of robbery with another illegal and ambiguous sentence of 18 years and also for maintaining the sentence of 10 years of imprisonment for rape without deducting the exact period the appellants had spent on remand.

Both Counsel Joyce Nalunga Birimumaso for the appellants on state brief and Faith Turumanya, a Principal State Attorney for the respondent filed prior written submissions which they adopted during the time of hearing the appeal.

In the said written submissions, Counsel for the appellants, contended that her clients having been sentenced to 20years by the trial court on the count of robbery, it was erroneous for the Court of Appeal to have substituted a sentence of 18years when it was a fact that they had been on remand for 3 years and 7 months before they were sentenced. The court should, according to counsel, have substituted a sentence of 16years and 5months.

Consequently, counsel argued that the Justices of the Court of Appeal did not comply with the command in Article 23(8) which 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***".

In her written reply to this ground, counsel for the respondent conceded and faulted the Justices of Court of Appeal for not deducting 3 years and 7 months, the exact period they had spent on remand. That would have resulted in the appellants sentence being reduced to 16 years and 5 months and not 18 years for robbery. She relied on the recent authority of this Court ***Rwabugande Moses vs Uganda Criminal Appeal No 25/2014.*** However, during the hearing of the appeal she appreciated that Rwabugande's authority that requires the trial court to actually deduct the remand period could not be applied retrospectively and there withdrew her earlier written concession.

On the issue of the age of the 1st appellant, counsel for the Respondent asserted that it was not raised in the memorandum of appeal as it is required by the rules of this court.

Nevertheless, counsel argued that the court record right from charge sheet to the trial and during the appeal in the Court of Appeal, the age of appellant No.1 was not raised as an issue.

Decision of the Court:

Article 23(8) of the Constitution earlier quoted in our judgment requires court to ***take into account*** the period the person has spent on remand. To take into account is to bear in mind or consider or be alive of the remand period before imposing a sentence There is no doubt that the Court of Appeal was alive to the obligation of the trial court to take into account the remand period.

In the Court of Appeal's observation earlier quoted, it was observed:

> ***"It is unclear therefore whether the remand period was deducted from the sentence imposed".***

However, while exercising their powers under section 11 of the Judicature Act to impose a new sentence, the Justices of the Court of Appeal substituted a sentence of 18 years on count one without mentioning that they had taken into account the actual period of 3years and 7months the appellant had been on remand. With due respect, they fell in the same error as the trial Judge whom they faulted.

Had they stated that they had considered the period of 3years and 7months the appellants had spent on remand and sentenced them to 18years, there would have been no fault. That was the correct sentencing regime before the authority of ***Rwabugande Moses vs Uganda (Supra) which*** both counsel mistakenly thought applied to this case See: ***Kabuye Senvewo Vs Uganda SCCA No.2 of 2007*** & ***Katende Ahamad vs Uganda SCCA No.6 of 2004 among others.***

Having faulted the Court of Appeal for having imposed an illegal substituted sentence, when they failed to mention that they had complied with Article 23(8) of the Constitution, we set aside the sentence of 18years.

Considering the circumstances of the case and all the evidence that was adduced on record, we consider a sentence of 20 years imprisonment appropriate in respect of count 1 of robbery. However, taking into account the 3years and 7 months the appellants spent on remand, we order that they will serve 16years and 5months from the day they were sentenced.

The sentences of 10 years on count 2 of rape are upheld and are to run concurrently with the sentences on count 1.

On the issue of age of appellant No.1, we uphold the objection by counsel for the respondent that the age was not an issue throughout the trial.

We have perused and verified from the court record that from day one throughout his trial and during his defence, the 1st Appellant did not complain that he was juvenile. The argument of counsel for the appellant No 1 on age is therefore an afterthought and unsustainable. It is rejected.

In the result, we partly allow the appeal on sentence as indicated above and dismiss the appeal in respect of ground 2 dealing with the disputed age of appellant No 1.

Dated at Kampala this …9th…. day of April...2018.

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HON. JUSTICE ELDAD MWANGUSYA,
JUSTICE OF THE SUPREME COURT.

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HON JUSTICE RUBBY OPIO -AWERI

JUSTICE OF THE SUPREME COURT

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HON. JUSTICE FAITH MWONDHA,
JUSTICE OF THE SUPREME COURT.

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HON JUSTICE RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE AUGUSTINE NSHIMYE,
A.G. JUSTICE OF THE SUPREME COURT.