

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

**(CORAM: MWANGUSYA; OPIO-AWERI; MUGAMBA; BUTEERA; JJ.S.C
TUMWESIGYE; AG. J.S.C;)**

CRIMINAL APPEAL NO: 74 OF 2007

WAMUTABANEWE JAMIRU ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the Judgment of the Court of Appeal in Kampala (S. B. K. Kavuma, A. S. Nshimye and Remmy Kasule JJA)dated 27th April 2011 in Criminal Appeal No. 74 OF 2007)

JUDGMENT OF THE COURT

Background

On 27th April 2011 the Court of Appeal panel comprising S. B. K. Kavuma, A. S. Nshimye and Remmy Kasule JJA reduced the death sentence earlier handed down to the Appellant by the High Court. Instead a penalty of 35 years imprisonment without remission was imposed. The Appellant now appeals against the sentence imposed by the Court of Appeal and the single ground of appeal reads:

‘1. THAT the learned Justices of Appeal erred in law when they imposed an illegal sentence on the Appellant’.

Representation

Mr Henry Kunya represented the Appellant in this Appeal. It was a State brief. Ms. Angutoko Immaculate, Senior State Attorney, appeared for the Respondent.

Arguments

Both for the Appellant and for the Respondent written submissions were filed and both sides adopted their written submissions for consideration in this Appeal.

In his submission, Counsel for the Appellant indicated that the ground of appeal was double pronged and proceeded to argue the prongs separately.

First he argued that the Court of Appeal meted out a sentence which was illegal when it imposed a sentence of 35 years imprisonment without remission. It was argued that the Appellant had thus been deprived of his right to remission, a statutory gift. Further it was contended on behalf of the Appellant that the sentence did not take into account the period the Appellant had spent on remand. To drive the point home he pointed to sections 84 and 85 of the Prisons Act concerning remission and **Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014** with the proposition that the Court of Appeal had gone counter to Article 23(8) of the Constitution when it had not taken into account the years the Appellant spent on remand.

In response the Respondent opposed the Appeal and sought for its dismissal. Regarding the 35 years imprisonment without remission counsel argued that the sentence is not illegal given that it is within the law. She

noted that the maximum sentence available for the offence of murder, the offence the Appellant had been convicted of, was the death penalty. She argued further that the Prisons Act pertains to Uganda Prisons administration of the sentence and has no bearing on Courts when they hand out sentences. She added that remission cannot be regarded as a right to be claimed by the Appellant at the time of sentence. She contended that no miscarriage of justice had been occasioned in the circumstances.

Concerning the argument that the Court of Appeal had not taken into consideration the period the Appellant had spent on remand, counsel for the Respondent submitted that the Court had indeed taken the period into account and had stated so in its judgment.

Analysis and resolution

We have painstakingly looked at the judgment of the Court of Appeal with specific attention to the sentence it handed down. We have considered also the legal provisions relating to the

impugned sentence. Needless to say, we are alive to the provision of section 7 of the Judicature Act which states:

‘For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers; authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated’.

While the provision bestows those powers on this Court, the powers are to be exercised advisedly and for good cause. It is not a carte blanche and on several occasions this court has clearly stated so. In **Kamya Johnson Wavamunno vs Uganda, Criminal Appeal No. 16 of 2000** it was reiterated that an appellate court will not interfere with the sentence of a trial court unless there has been a failure to exercise discretion or failure to take into account a material consideration or where an error in principle was made by the trial court. **Kiwalabye vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001** almost word for word agreed with **Kamya Johnson Wavamunno (Supra)**. It was held:

‘The Appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a 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.’

The emphasis above is added.

This appeal is against the sentence of 35 years imprisonment without remission. The sentence was handed down on appeal by the Court of Appeal. For the record, the Appellant had initially been sentenced by the High Court to death. Nevertheless the Appellant contends that the sentence imposed by the Court of Appeal is illegal because it deprives him of his right to remission which he argues is his entitlement under the Prisons Act.

This Court has been categorical on arguments based on provisions of the Prisons Act. It has held:

‘The Prisons Act and Rules made there under are meant to assist the Prison authorities in administering prisons and in particular sentences imposed by the Courts. The Prisons Act does not prescribe sentences to be imposed for defined offences. The sentences are contained in the Penal Code and other Penal statutes and the sentencing

powers of courts are contained in the Magistrates Courts Act and the Trial on Indictment Act, and other Acts prescribing jurisdiction of Courts’.

Tigo Stephen vs Uganda, Supreme Court Criminal Appeal No. 08 of 2009, {2011} UGSC 7.

Sections 84 and 85 of the Prisons Act relate to remission. Suffice it to say that remission is a function of the penal institution to which a sentenced convict has been committed and it is exercised in tandem with the sentence meted out by court.

We note that the maximum penalty for the offence of murder, which the Appellant was convicted of, is death and that the sentence he is appealing is less severe than the death penalty he had earlier been handed. Nevertheless, given that remission is a function of the penal institution which has to exercise it in accordance with the Prisons Act we find it illogical for any court, let alone the Court of Appeal in the instant matter, to ordain that the Appellant shall serve his sentence without remission.

Respectfully this is a fallacy because deprivation of penal remission is none of the penalties available to court to hand down. While we find no reason to fault the 35 year imprisonment as a sentence per se, we agree with the Appellant that the Court erred when it included the sanction that Appellant was entitled to no remission. He is not to be denied remission where it is applicable.

The Appellant advances a further argument that the period he spent on remand was not considered when the Court of Appeal passed sentence and that the sentence was thus rendered illegal. In this connection he cited Article 23(8) of the Constitution as well as this Court’s decision in **Rwabugande Moses v Uganda, (Supra).**

Article 23 (8) of the Constitution reads:

‘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’.

Indeed in **Rwabugande Moses v Uganda**,(Supra), this court stated that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. In this connection it is worthwhile to look at the judgment of the Court of Appeal, genesis of this Appeal. At page 4 of the judgment the following appears:

'The appellant has now been in custody for a total eight (8) years. He was on remand for four (4) years before he was sentenced. We, are

also conscious of the fact that, tragic as it is, the deceased was the biological father of the appellant. To sentence the appellant to suffer death is, therefore, in a way, to add to the suffering of the families of the deceased, and the appellant, by adding another death of a family member. While, the appellant deserves least sympathy for having brutally killed his father, the deceased, we find, having considered the above considerations and all the circumstances pertaining to this case and the fact that the appellant has been in custody for eight (8) years now, that a sentence of thirty five (35) years without any remission, is the most appropriate for the appellant'.

It is clear that the Court of Appeal took into account the four years it deemed the Appellant had spent on remand, amongst the considerations, before it passed sentence. Our perusal of the record reveals that the Appellant was arrested on the night of the offence on 4th April 2002 and was handed over to police. Eventually he was taken to court and charged. He was convicted and sentenced by the High Court on 8th August 2007.

Clearly there is a span of five years between arrest and conviction. All that while, between arrest and conviction, the Appellant was in lawful custody. We do not agree with the finding of the Court of Appeal that the period the Appellant spent on remand was four years. It was five years; one year more. That extra year should have been considered by the Court of Appeal when it passed sentence. Needless to say, the sentence imposed by the Court of Appeal ought to be varied.

Decision

For the reasons given above we set aside the sentence passed by the Court of Appeal and substitute it with a sentence of imprisonment of 34 years effective from the date the Appellant was first convicted.

Dated at Kampala this ...12th ... day of ...April.....2018.

HON. JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT

HON. JUSTICE OPIO-AWERI
JUSTICE OF THE SUPREME COURT

HON. JUSTICE PAUL K. MUGAMBA
JUSTICE OF THE SUPREME COURT

HON. JUSTICE RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT

HON. JUSTICE JOTHAM TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT