

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA SITTING AT MASAKA
CRIMINAL APPEAL NO. 174 OF 2012

KATUREEBE JOHN ALIAS KONGO ::::::::::::::: APPELLANT

VERSUS

UGANDA ::::::::::::::: RESPONDENT

(Arising from the judgment of Justice Moses Mukiibi in Masaka Criminal Session Case No. 84 of 2005)

CORAM: HON. JUSTICE EGONDA NTENDE, JA

HON. JUSTICE, HELLEN OBURA, JA

HON. JUSTICE, STEPHEN MUSOTA JA

JUDGMENT OF COURT

The appellant was indicted, tried and convicted of the offence of Murder C/S 188 and 189 of the Penal Code Act and was sentenced to 30 years imprisonment.

Background

The deceased, Kyomuhangi Edvina, was a wife to the appellant. On 19th March 2005, the deceased went to Kyemamba market where she used to prepare and sell food. At 9:00pm, the deceased went via Mutabazi's home to pay him some money for the goods she had taken from him during the day and thereafter went back home. At 5:00am, the appellant went to the home of Mutabazi and told him to go and see the body of the deceased. On reaching the home of the appellant, Mutabaazi saw the body of the deceased lying on the floor. When he asked the appellant what had happened to the deceased, he said he woke up and found her lying dead. While Mutabazi was still wondering what happened to the deceased, the appellant disappeared and Mutabazi raised an alarm which

attracted neighbors. The appellant had run away to the bush from where he was arrested.

The appellant was sentenced to 30 years imprisonment and being dissatisfied with the sentence, he filed this appeal against sentence
5 only on the following ground;

1. That the trial Court erred in law and fact when it passed a harsh sentence against the appellant thereby occasioning a miscarriage of justice.

Representation

10 At the hearing of the appeal, Mr. Jurugo Isaac appeared for the appellant on state brief while Mr. Bakibinga David Baxter, Senior State Attorney, appeared for the respondent on state brief.

Submissions of the appellant

15 Counsel for the appellant sought leave of court to appeal against sentence only under Sections 132(1) of the Trial on Indictments Act which requires that an appeal against sentence only be lodged with the leave of this court and we granted it.

20 Counsel submitted that in the circumstances of this case, the sentence of 30 years against the appellant was harsh on the ground that the trial court did not consider the fact that the appellant told court that he was remorseful and therefore deserved a lenient sentence.

25 Counsel cited the authority of **Rwabugande Moses vs. Uganda, S.C.C.A No. 25 of 2014** in which the sentence was reduced by the Supreme Court from 35 years' imprisonment to 20 years. He prayed that this court be pleased to reduce the 30 year sentence passed on the appellant to 20 years.

Submissions of the respondent

30 Counsel for the respondent submitted that the sentence imposed on the appellant was appropriate and that the court took into consideration the mitigating and aggravating circumstances. He, however, pointed out that the sentence passed was quite vague as

it did not put into account the period spent on remand and as such, counsel prayed for clarity on the sentence to be passed.

The duty of a first appellate court

5 As a first appellate court, we have a duty to re-evaluate the evidence and come to an independent conclusion on the facts and the law taking into account that we did not see and hear the witnesses (**See Pandya v. R [1957] EA 336; Okeno v R [1972] EA 32; Charles Bitwire v. Uganda SC Cr. App No. 23 of 1985 and Kifamunte Henry v Uganda SC Cr. App No. 10 of 1997. See also R. 30 of the Court of Appeal Rules.**)

Consideration of sentence

15 It is trite law that an appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda, SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda, Criminal Appeal No. 143 of 2001(S.C).**)

20 The appellant's Counsel submitted that the sentence was harsh and excessive in the circumstances.

25 The appellant was found guilty of murder. The maximum penalty for this offence is death. The learned trial Judge considered the mitigating and aggravating factors. He considered the fate of the appellant's innocent children and sentenced him to 30 years' imprisonment. He considered that the circumstances in which the deceased was murdered show that the killing was brutal and that the actions of the appellant after the killing of the deceased when he called the neighbors to see the deceased's body fit very well within the aggravating factors when considering a sentence for one

30 convicted of murder in the **Sentencing Guidelines comprised in Legal Notice No. 8 of 2013**. The aggravating factors therein for a murder conviction include; "*Degree of premeditation, use and nature*

of weapon used, vulnerability of the victim, gratuitous degradation of the victim, or other factors the court deems relevant.”

We therefore do not consider the sentence to be harsh and excessive in the circumstances.

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Both counsel were of the view that the learned sentencing Judge did not take into account the period the appellant had spent on remand which was 7 years and 2 months and that the sentence was vague. Current jurisprudence has established that if a sentencing Judge
10 does not take into account the remand period while determining the sentence, then the sentence that Judge passes is illegal as it is contrary to the mandatory provisions of Article 23(8) of the Constitution. The Article provides that the sentencing Court must take into account the period spent on remand. However, it was
15 held in the Supreme Court decision of **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016** that *“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.”*

20 Although the process is not a mathematical exercise as stated above, a sentencing Judge should clearly indicate the mitigating and aggravating factors he/she has taken into account, particularly the remand period. We find that the learned sentencing Judge duly considered the mitigating and aggravating factors and also took into
25 account the period the appellant had spent on remand. The trial Judge held that;

30 *“I have taken into account all the mitigating factors which have been presented to court. I have also taken into account the period the convict has spent on remand. I have considered the fate of the innocent children. However, the facts of this case calls for a severe punishment.”*

Considering the above, we do not find sufficient reason to interfere with the trial Judge’s sentence to the appellant. We therefore

uphold both the conviction and sentence of the trial court. This appeal is dismissed accordingly.

Dated this ^{30th} Day of ^{July}, 2018

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Signed

Hon. Justice Egonda Ntende, JA

10 **(Egonda-Ntende, JA** has not signed this judgment as he did not agree with it).



Hon. Justice, Hellen Obura, JA

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Hon. Justice, Stephen Musota JA