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**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT MBARARA  
CRIMINAL APPEAL No. 097 OF 2013**

**MUHOOZI YESSE ::::::::::::::::::::::::::::::::::: APPELLANT  
VERSUS**

10 **UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT**

*(An appeal from the decision of the High Court of Uganda at Mbarara before His Lordship Mr. Justice Bashaija K Andrew in High Court Criminal Session case No. 098 of 2013 delivered on 18<sup>th</sup> June, 2013)*

15 **CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA  
HON. MR. JUSTICE BARISHAKI CHEBORION, JA  
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA**

**JUDGMENT OF THE COURT**

20 **Introduction**

This is an appeal from the decision of Bashaija K. Andrew, J in High Court Criminal Session Case No. 098 of 2013 at Mbarara wherein the appellant was convicted of the offence of Murder contrary to Section 188 and 189 of the Penal Code Act, Cap 120 and sentenced to 25 years imprisonment on 18<sup>th</sup> June, 2013.

**Background to the appeal**

30 The particulars of the offence were that on 19<sup>th</sup> November, 2012, the appellant had a quarrel with his wife, *Nayebare Justine* at their home in Kashambya village in Kiruhura District. He assaulted her and their son, called the neighbour, *Tumwine Jovanita* who came and found the appellant beating the deceased. She managed to cool them down and returned to her home where she heard the deceased crying out for help. She called another person and they went to the appellant's home and

found him carrying the deceased back into the house. They advised the  
35 appellant to stop beating the deceased and returned home. The  
following morning, the deceased was pronounced dead and all the  
neighbours who had heard her crying for help suspected the appellant  
whom they arrested and took to Police. He was charged, convicted and  
sentenced to 25 years imprisonment following his own plea of guilt.

40 The appellant with leave of Court under Section 132(b) of the Trial on  
Indictments Act Cap 23, appeals against sentence only. The appellant  
sets forth two grounds of appeal as follows:-

- 45 *1. The trial Judge erred in law when he sentenced the  
appellant to 25 years without considering the time spent  
on remand rendering the whole sentence illegal.*
- 2. The learned trial Judge erred in law and fact when he  
passed a severe and harsh sentence of 25 years and  
occasioned a failure of justice.*

### **Representations**

50 At the hearing of this appeal, Mr. Emmanuel Tumwebaze, , learned  
Counsel holding brief for Mr. Ampurirwe Henry appeared for the  
appellant on State Brief, while Mr. David Ndamurani Ateenyi, Senior  
Assistant Director of Public Prosecutions represented the respondent.  
The appellant was present.

### 55 **Case for the appellant**

On ground 1, Counsel for the appellant submitted that in passing the  
sentence, the learned trial Judge did not consider the period the  
appellant had spent on remand. He merely listed it as one of the factors  
he had considered but did not arithmetically deduct it as required in



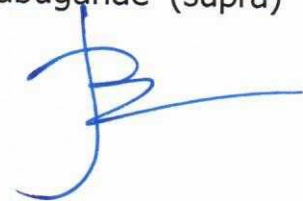
60 **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal  
No. 025 of 2014.** This, in Counsel's view, made the sentence illegal.

In the alternative Counsel submitted that from the record, the appellant was aged 38 years at the time of commission of the offence and a custodial sentence of 25 years meant that he would leave prison aged  
65 63 years. This would not give him any chance to reform in the circumstances. Further, that the appellant was remorseful because he readily pleaded guilty and as such a sentence of 25 years was harsh and excessive at the same time. Counsel also asked Court to consider that the appellant was a first offender who had three children at the time of  
70 commission of the offence, and he was a sole bread winner.

Counsel invited this Court to invoke its powers under **Section 11 of the Judicature Act Cap 13**, set aside the sentence for being illegal and sentence the appellant to a legal and lenient sentence which in his opinion was 15 years imprisonment in the circumstances of this case

75 **Case for the respondent**

In reply, Counsel for the respondent submitted that the learned trial Judge considered the period spent on remand as well as the aggravating and mitigating factors in this case. Counsel submitted that the case of **Rwabugande Moses vs. Uganda (Supra)** was wrongly relied upon  
80 by Counsel for the appellant since it was decided on the 3<sup>rd</sup> of March 2017, while the Judgment in the present case was passed on the 18<sup>th</sup> day of June 2013; 4 years before the case of Rwabugande (supra) became a precedent.

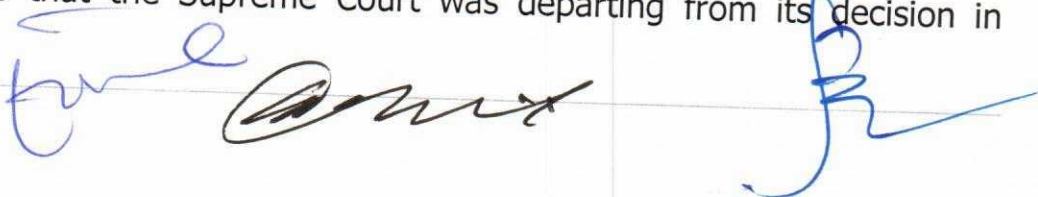


85 Counsel referred Court to **Abelle Asuman vs. Uganda, Criminal Appeal No. 066 of 2016**, where the Supreme Court Justices discussed the case of Rwabugande and stated that before it became a precedent, this court and the courts below were following the law as it was in the previous decisions to the effect that taking into consideration the time  
90 spent on remand did not necessitate a sentencing court to apply a mathematical formula. Counsel argued that it would be erroneous to fault the learned trial Judge for not applying the Rwabugande case which was not yet decided.

Counsel further referred Court to **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 024 of 2001**, for the  
95 proposition that the appellate court should not to interfere with sentence imposed by a trial court which had exercised its discretion on sentence unless the exercise of discretion was such that the trial court ignored to consider an important matter or circumstance which ought to be  
100 considered when passing sentence.

Counsel contended that according to the 3<sup>rd</sup> schedule of the sentencing guidelines, the offence for which the appellant was convicted carried a maximum sentence of death with a sentencing range from 30 years up to death, and as such a term of 25 years was within the said range. In  
105 his view, the learned trial Judge was very lenient in sparing the appellant the death penalty and as such the sentence of 25 years was neither harsh nor excessive, and it ought to be upheld.

In rejoinder, Counsel for the appellant submitted that the authority of **Abelle Asuman (supra)** relied upon by Counsel for the respondent did  
110 not state that the Supreme Court was departing from its decision in



*Rwabugande (supra)*, and if the Supreme Court wanted to depart from its earlier decision it would have stated so.

Counsel further rejoined that this Court could not sit back and let an illegality go unchecked. Counsel concluded that the time the appellant spent on remand should be deducted from the final sentence since it was not done in this the case.

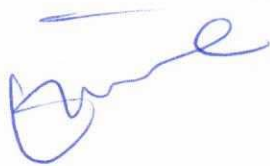
### **Decision of the Court**

We have listened to the submissions of learned counsel on either side and carefully studied the record. We have also reviewed the law and authorities relied upon.

This court, as an appellate Court, can only interfere with the sentence of the trial Court if that sentence is illegal or is based on a wrong principle or the court has overlooked a material factor, or where the sentence is manifestly excessive or so low as to amount to a miscarriage of Justice.

**See James vs. R [1950] 18 EACA 147 and Kizito Senkula vs. Uganda Criminal Appeal No. 24/2001.**

Mr. Tumwebaze, learned Counsel for the appellant submitted that the sentence of 25 years' imprisonment imposed was harsh and excessive yet the appellant had readily pleaded guilty. Further that the period which the appellant had spent on remand ought to have been reduced arithmetically. Mr. Ndamurani, learned counsel for the State submitted that the period of remand was considered by the learned Judge and the sentence should be upheld.



135 In this case, both the legality and severity of the sentence are in issue.  
From the perusal of the record, the learned trial Judge had this to say:-

*"In arriving at sentence, the following are the major considerations:-*

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- i. *Murder is a very grave offence.*
  - 145 ii. *The convict committed the offence in a very brutal manner.*
  - iii. *There is need for deterrence and punishment.*
  - iv. *The convict has readily pleaded guilty and appears remorseful.*
  - v. *The time convict has spent on remand.*

150 *All factors taken together; the convict is sentenced to TWENTY FIVE years imprisonment."*

The Supreme Court decisions of **Abelle Asuman vs. Uganda, Supreme Court Criminal Appeal No. 066 of 2016, Rwabugande Moses vs. Uganda, Supreme Court Constitutional Appeal No.025 of 2014** and **Oshurera Owen vs. Uganda, Supreme Court criminal Appeal No. 050 of 2015** (unreported) were considered in the case of **Muyitira Sande versus Uganda, Court of Appeal Criminal Appeal No. 126 of 2013** where the learned Justices of Appeal stated:-

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160 *"... It appears to us that the Supreme Court in Abelle Asuman (supra) has in effect reversed itself in Rwabugande and accepted the position as previously understood prior to Rwabugande and in the cases the Supreme Court had said it was departing from in Rwabugande...*

165 *Given these 3 decisions of the Supreme Court, it appears now that the position is that a sentencing Court can either take into account the period spent on remand and apply the non-mathematical formula as per Kabwisso Issa vs. Uganda Supreme court criminal Appeal No. 007 of 2002; it can deduct the period spent on remand from the appropriate sentence (apply a mathematical formula as per Rwabugande vs Uganda (supra)).*

***Either option will be found to comply with Article 23(8) of the Constitution. Whatever the merits of this situation our duty is to comply with the Supreme Court decisions."***

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Looking at the sentencing order by the trial Court, it is clear that the trial Court in arriving at its conclusion took into account the period spent on remand though it did not state that the period had been deducted. In light of Abelle (supra), we find that the trial Judge complied with provisions of Article 23(8) of the Constitution. Ground 1, therefore, fails.

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Turning to ground 2, the court is enjoined to take into account not only the remand period but also the aggravating and mitigating factors, and in so doing we take into account the gravity of the offence so as to pass the appropriate sentence. The appellant was convicted of a serious offence. He murdered his own wife in a domestic violence scuffle. The appellant is a first time offender with no previous record of conviction. He was remorseful. He readily pleaded guilty and pleaded for leniency. He also had 3 children who were orphaned and he was the sole bread winner.

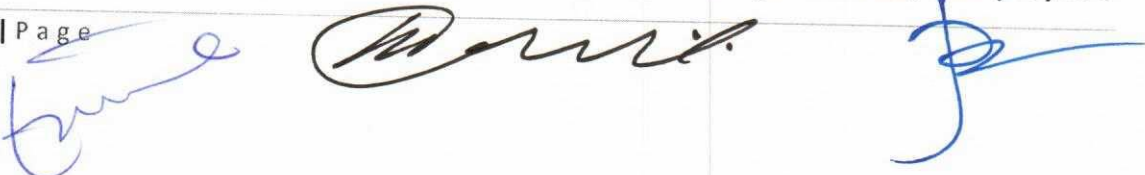
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In **Emeju Juventine vs. Uganda, Court of Appeal Criminal Appeal No. 095 of 2014**, the appellant was convicted of murder on his own plea of guilty. He had murdered his wife with an axe. The sentence of 23 years imprisonment imposed on him was reduced by this court to 18 years after deducting 2 years spent on remand.

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In **Tumwesigye Anthony versus Uganda, Criminal Appeal No. 046 of 2012**, the Court of Appeal sitting at Mbarara set aside the sentence of 32 years imprisonment and substituted it with one of 20 years. The appellant in that case had been convicted of murder. The deceased had reported him for stealing his (deceased) employer's

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195 chicken. The appellant killed him by crushing his head after which he buried the body in a sandpit.

In **Anguyo Robert versus Uganda, Criminal Appeal No. 048 of 2009**, the Court of Appeal sitting at Arua set aside the sentence of 20 years imprisonment and substituted it with imprisonment for 18 years. 200 The appellant in that case was convicted of murder. He assaulted his uncle on the head using a hammer. He was a first offender who readily pleaded guilty.

In **Mattaka versus Republic [1971] E.A 495**, it was stated that a plea of guilty springing from genuine repentance may be treated as a 205 mitigating factor.

In light of the above authorities, we find reason to interfere with the sentence imposed by the learned trial judge on the ground that the sentence was manifestly harsh and excessive in the circumstances of this case. The learned trial Judge considered the period spent on 210 remand and the plea of guilty but did not consider all the other mitigating factors in this case. Ground 2 succeeds and we hereby set aside the sentence.

Having set aside the said sentence, this court has a duty to impose a sentence of its own as if it were the trial court. **Section 11 of the 215 Judicature Act, Cap 13**, also rule 32(1) Court of Appeal Rules provides that:-

220 *“For the purpose of hearing and determining an appeal, the Court of Appeal 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.”*



In view of the foregoing and considering that the appellant was on remand for 10 months before conviction, we consider a term of 18 years imprisonment to be commensurate with the gravity of the offence. From that sentence we deduct the period of 10 months which the appellant spent on remand. The appellant shall, therefore, serve a term of 17 years and 2 months in prison. The sentence shall run from 18<sup>th</sup> June 2013, the date of conviction.

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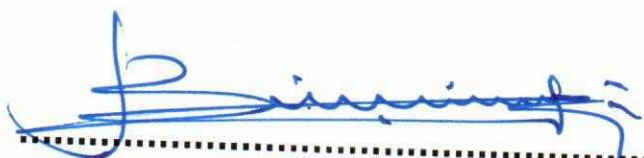
**We so order.**

**Dated at Mbarara** this 2nd day of October 2018

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**Hon. Lady Justice Elizabeth Musoke**  
JUSTICE OF APPEAL

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**Hon. Mr. Justice Cheborion Barishaki**  
JUSTICE OF APPEAL

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**Hon. Mr. Justice Christopher Madrama**  
JUSTICE OF APPEAL