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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**

**CRIMINAL APPEAL NO.0093 OF 2011**

**NTIHABOSE BENON:.....APPELLANT**

**VERSUS**

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

*(Appeal from the decision of the High Court of Uganda sitting at Kabale delivered by the Hon. Mr. Justice J.W Kwesiga on 29<sup>th</sup> April, 2011 in Criminal Session Case No.77 of 2010)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**

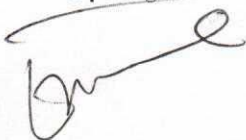
15 **HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**HON. MR. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA**

**JUDGMENT**

This is an appeal from the decision of the High Court sitting at Kabale in Criminal Session Case No.77 of 2010 delivered on 29<sup>th</sup> April, 2011 by J.W  
20 Kwesiga, J in which the appellant, Ntihabose Benon was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act CAP 120 and sentenced to 30 years' imprisonment.

Originally, the appellant had appealed against both conviction and sentence. However, with leave of Court, he abandoned the appeal against conviction and



5 appealed against sentence only. The grounds of appeal as they appeared in the amended Memorandum of Appeal are:

**1. The learned trial Judge erred in law when he did not consider the period the appellant had spent on remand thereby rendering the sentence illegal.**

10 **2. The learned trial Judge erred in law when he imposed a harsh and excessive sentence in the circumstances of the case.**

At the hearing of the appeal, Mr. Nuwagaba Collins appeared for the appellant while Ms. Angutoko Immaculate, Principal State Attorney appeared for the respondent.

15 With leave to appeal against sentence only, counsel for the appellant submitted that the appellant was convicted of murder and sentenced to 30 years imprisonment but the trial Judge did not consider the period of 1 year and 9 months spent on remand while Article 23(8) of the Constitution makes it mandatory to take into account the period spent in lawful custody. Counsel  
20 relied on ***Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014*** to support his submission.

Secondly, counsel faulted the learned trial Judge for imposing a harsh and excessive sentence. He submitted that while sentencing the appellant to 30 years imprisonment, the trial Judge did not consider the mitigating factors as  
25 indicated to him by the defence counsel during trial for example that the appellant was a family man with children below 10 years who should not suffer on behalf of their father's criminal acts. Counsel added that the Judicial



5 Officer ought to state that the sentence was arrived at with both the mitigating and aggravating factors in mind and relied on **Magara Ramathan V Uganda, Supreme Court Criminal Appeal No.01 of 2014** to support his argument.

He invited Court to find that the sentence of 30 years was harsh and excessive in the circumstances and proposed a sentence of 20 years as being  
10 appropriate.

The respondent conceded that the learned trial Judge had erred when he imposed a sentence without taking into consideration the period of 1 year and 9 months that the appellant had spent in lawful custody as required under Article 23(8) of the Constitution.

15 Counsel for the respondent invited Court to maintain a sentence of 30 years because of the aggravating factors and pointed out that the appellant had murdered the deceased in a very brutal manner. He used a panga to cut different parts of the body. She added that the offence attracts a maximum penalty of death and considering all the circumstances of the case, the  
20 sentence of 30 years was appropriate.

It was the prosecution case that the appellant and the deceased were husband and wife and on 25<sup>th</sup> June, 2009 at their home in Kisoro District, Buhozi Village, the appellant, armed with a panga got hold of the deceased, Nsekerabanzi Lydia and cut her several times on the head, arms, chest and  
25 thighs. The deceased made an alarm which attracted people to her rescue and among these were Rukera Ronald, the LC1 Chairman and Kishakiye Kellen who found the appellant cutting his wife. The LC1 Chairman reported the





5 matter to Police and upon the appellant's arrest, the panga was recovered from him by Police and tendered and relied upon in Court as Prosecution evidence.


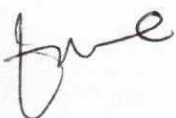
In his Charge and Caution statement, the appellant confessed to have cut his wife, the deceased to death. A post-mortem examination found the cause of  
10 death to be Haemologic shock due to several deep cuts on the head, chest and thighs. The appellant was also examined and found to be of sound mind.

On ground 1 of the appeal, counsel for the appellant faulted the learned trial Judge for not taking into account the period of 1 year and 9 months that the appellant had spent in lawful custody. In her response, counsel for the  
15 respondent conceded to the above submission and submitted that by not taking into account the period spent on remand, the trial Judge erred.

From the record, it is clear that the appellant had been on remand for 1 year and 9 months. However, while sentencing him, the trial Judge was silent on whether he had taken into consideration this period.

20 The trial Judge stated that;

*"The accused person committed murder of his wife in the most cruel manner. He cut her with a panga on several parts of the body. She must have died a painful death. This is a typical example of men who do not value life of their wives as equal partners with equal right to life. I cannot  
25 be lenient as requested by the accused on account of the suffering of the orphans. He is the one who deprived them of their mother and that I will punish. He exhibited total lack of respect for human life and he does not*



5 *deserve to return to society when he is still a strong young man with the excessive energy that he misused. He is said to be 43 years old and I have found it appropriate to sentence him to 30 years imprisonment so that he will return to society as a reformed and exhausted by age not to be a danger to other people.”*

10 An appellate Court, will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal in law or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive or so low as to amount to a miscarriage of justice. See: **Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No.10 of 1995 and**  
15 **Ogalo s/o Owoura V R (1954) 21 EACA 270.**

**Article 23(8)** of the Constitution provides that 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.

20 The Supreme Court in **Kabwiso Issa V Uganda (2001-2005) HCB 20** held that:

25 *“Clause 8 of Article 23 of the Constitution of Uganda is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term to be served.”*



5 A clear reading of the above sentence indicates that the trial Judge did not  
take into account the period the appellant had spent in lawful custody as  
required under **Article 23(8)** of the Constitution. Failure to do so renders the  
sentence illegal as was held by the Supreme Court in **Rwabugande Moses V**  
**Uganda, Supreme Court Criminal Appeal No.25 of 2014** where Court held  
10 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.”*

We therefore, find that the sentence of 30 years imposed upon the appellant  
15 by the trial Judge was illegal and we set it aside.

Having found in ground 1 that the sentence was illegal for failure to meet the  
requirements of **Article 23(8)** of Constitution, we now exercise our discretion  
and invoke the provisions of **section 11 of the Judicature Act** to sentence  
the appellant. The said section grants this Court the same powers as that of  
20 the trial Court to impose a sentence we consider appropriate. The section  
provides;

*“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  
25 of which the appeal originally emanated.”*

The trial Judge is faulted for imposing a harsh and excessive sentence.  
Counsel for the appellant submitted that while sentencing the appellant to 30





5 years, the trial Judge did not consider the mitigating factors presented by the defence counsel for example that the appellant was a family man with children below 10 years who should not suffer on behalf of their father's criminal acts. He proposed a sentence of 20 years imprisonment.

In response, counsel for the respondent invited this Court to maintain a  
10 sentence of 30 years as there existed aggravating factors which required this Court to maintain the said sentence against the appellant. She pointed out that the appellant murdered the deceased in brutal manner as he used a panga to cut the different parts of the body. That the murder was gruesome.

While sentencing the appellant, the trial Judge indicated that he had taken  
15 into consideration both aggravating and mitigating factors. He stated that the appellant murdered his wife with a panga who died a painful death. He also pointed out that the appellant was a family man with children. This is because he stated that he could not be lenient as requested by the accused on account of the suffering of the orphans as he is the one who deprived them of their  
20 mother. He further stated that the appellant was 43 years old and found a sentence of 30 years as appropriate. It is evident that the learned trial Judge considered both the aggravating and mitigating factors before sentencing the appellant.

We have also taken into account the aggravating factors namely the nature of  
25 the weapon used and the fact that the appellant murdered his own wife in a very cruel manner hence causing her severe deep cuts on the head, arms, chest and thighs leading to her death.



5 We further note that there were also some mitigating factors for example the appellant was a 43 year old family man with children and had been on remand for 1 year and 9 months.

In ***Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011***, the Supreme Court set aside the death sentence and imposed a  
10 sentence of 25 years imprisonment. The appellant had been convicted of murder of his wife.

In ***Tumwesigye Anthony V Uganda, Court of Appeal Criminal Appeal No.46 of 2012***, the appellant was convicted of murder and sentenced to 32 years imprisonment. On appeal, this Court reduced the sentence to 20 years.

15 Having taken into account both mitigating and aggravating factors, we now sentence the appellant to 25 years imprisonment. We note that the appellant had spent 1 year and 9 months on remand which we deduct therefrom. He shall serve a sentence of 23 years and 3 months. The said sentence shall run from 29<sup>th</sup> April, 2011, the day the appellant was convicted by the High Court.

20 **We so order.**

Dated at Mbarara this.....<sup>2nd</sup> day of.....<sup>October</sup> 2018

.....  
25 **HON. LADY JUSTICE ELIZABETH MUSOKE**  
**JUSTICE OF APPEAL**

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**HON. JUSTICE BARISHAKI CHEBORION**  
**JUSTICE OF APPEAL**

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**HON. JUSTICE CHRISTOPHER IZAMA MADRAMA**  
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