THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 84 OF 2012

(Coram: Egonda – Ntende, Obura & Madrama, JJA)

KULE KALAMAYA} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kasese (Chibita, J) delivered on the 4th day of April 2012 in Criminal Session Case No 56 of 2011)

JUDGMENT OF THE COURT

The appellant was indicted for the offence of Murder contrary to sections 188 and 189 of the Penal Code Act Cap 120 laws of Uganda, was tried, convicted as charged and sentenced to life imprisonment. The facts are that the appellant on 23rd of September 2010 at Kahindi Village Kasese district murdered Kule Isaiah alias Kisodo. The appellant being dissatisfied with the sentence appealed to this court and with the leave of court appealed against sentence only as follows:

> That the sentence of life imprisonment is illegal, harsh and excessive in the circumstances.

The appellant seeks reduction of sentence in this appeal.

Representation

At the hearing of the appeal the learned Senior Assistant Director of Public Prosecutions Mr David Ndamurani Ateenyi appeared for the respondent

while learned counsel Mr Businge Asiimwe Victor appeared for the appellant. The appellant was present in court.

Submissions of the appellant

With leave of court learned counsel for the appellant addressed the court on the appeal against sentence only. He adopted his written submissions and submitted in addition that the period the appellant spent in lawful custody before his conviction was one year and six months.

In the written submissions the appellant's counsel submitted that the sentence of life imprisonment is illegal, harsh and excessive in the circumstances. He submitted that life imprisonment has been interpreted to mean 20 years according to section 47 (6) of the Prisons Act Cap 304 which provides that:

> For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be 20 years imprisonment.

He submitted that Article 23 (8) of the Constitution of the Republic of Uganda 1995 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 a term of imprisonment."

Counsel submitted that Article 23 (8) of the Constitution the Republic of Uganda was interpreted by the Supreme Court in the case of **Rwabugande Moses v Uganda; Supreme Court Criminal Appeal No 25 2014** where at page 10 their Lordships of the Supreme Court held that:

> "it is our view that the taking into account of the period spent on remand by a court is necessarily arithmetic..."

The appellant's counsel submitted that in passing sentence, the learned trial judge never took into account the period spent on remand even in a sentence of life imprisonment. He submitted that the case of **KIA Erin v Uganda; Court of Appeal Criminal Appeal No 172 of 2013** is very instrumental where the Justices of the Court of Appeal deduced life imprisonment to mean 20 years and also reduced the period spent on remand. The case of **Rwabugande Moses v Uganda** (supra) was cited with approval where it was held 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.

The appellant's counsel accordingly prayed that this court sets aside the sentence of life imprisonment imposed on the appellant for being illegal and invokes section 11 of the Judicature Act to impose a sentence that is appropriate in the circumstances. He relied on **Epuart Richard v Uganda; Court of Appeal Criminal Appeal No 199 of 2011** where a sentence of 30 years imprisonment was reduced to 15 years imprisonment in a case where the appellant had been convicted of murder. Secondly, in **Ariko Francis v Uganda; Court of Appeal Criminal Appeal No 2111 of 2011** where a sentence of 17 years imprisonment was confirmed. In **Anguyo Robert v Uganda; Court of Appeal Criminal Appeal No 0428 of 2011**, a sentence of 20 years imprisonment for murder was reduced to 18 years imprisonment. In the premises he prayed that a reasonable sentence is imposed after a deduction of the period the appellant spent on remand.

Submissions of the respondent

In reply, the learned Senior Assistant Director of Public Prosecutions Mr David Ndamurani Ateenyi opposed the appeal and submitted that on the first limb of the appeal, life imprisonment is a lawful sentence. It is a sentence which is less than the maximum penalty of death. Secondly, life imprisonment is an indeterminate sentence and Article 23 (8) of the

Constitution of the Republic of Uganda does not apply to it. He submitted that in the circumstances of the appeal, the sentence was a lawful sentence and secondly it was not harsh or excessive and prayed that it should be upheld.

Consideration of the appeal

We have carefully considered the appellant's appeal, the submissions of counsel and the applicable law generally.

The appellant's counsel initially proceeded from the erroneous premises that the Prisons Act and particularly section 47 (6) thereof is applicable to the definition of a sentence of life imprisonment to the extent that it should be deemed to be a term of imprisonment of 20 years. Section 46 (6) of the Prisons Act Cap 304 provides that:

> "For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be 20 years imprisonment."

The Prisons Act Cap 304 was repealed by section 125 of the Prisons Act, 2006 and sections 46 of Cap 304 re-enacted under section 86 of the Prisons Act 2006. Sections 84 and 86 (3) provide that:

> "84. Remission of part of sentence of certain prisoners
>
> (1) A convicted prisoner sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences.
>
> (2) For the purpose of giving effect to subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he or she would be entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission.
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> 86. Grounds for grant of further remission by the President

(1) The Commissioner General may recommend to the Minister responsible for justice to advise the President under article 121(4) (d) of the Constitution to grant a further remission on special grounds.

(2) The Commissioner General may restore forfeited remission in whole or in part.

(3) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment."

The wording of section 86 (3) of the Prisons Act, 2006 is the same as that of the repealed section 46 (6) of the Prisons Act Cap 304.

Submissions of the respondent's counsel counteracting that of the appellant's counsel in relation to the definition of *life imprisonment* as being deemed to be 20 years is that *life imprisonment* is an indeterminate term of imprisonment and therefore Article 23 (8) of the Constitution of the Republic of Uganda does not apply to it. It should be noted that Article 23 (8) of the Constitution of the Republic of Uganda seems to apply only to a definite term of imprisonment. It 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.*" (Emphasis italicised)

The expression *term of imprisonment*, should be defined as a definite term of imprisonment meaning a number of years that can be ascertained rather than an indeterminate period of time depending on the lifespan of the convict. The argument of the respondent's counsel is that because life imprisonment is an indefinite period of time that cannot be ascertained, Article 23 (8) of the Constitution of the Republic of Uganda cannot be applied to it. It follows that definition of the term *life imprisonment* is necessary to resolve the issue.

After the Constitutional Court outlawed the mandatory death penalty for certain capital offences in Uganda and held that the High Judges have discretionary powers whether to impose a death penalty or not and its decision was upheld by the Supreme Court in **Attorney General v Susan Kigula and 417 others; Constitutional Appeal No 3 of 2006** Courts were faced with the issue of whether a sentence of life imprisonment meant 20 years imprisonment. In **Tigo Stephen v Uganda**; **Criminal Appeal No 08 of 2009**, the High Court had sentenced the appellant to life imprisonment and the Court of Appeal dismissed the appeal and affirmed the sentence. On further appeal to the Supreme Court the matter in controversy was whether the sentence was vague. The ground of appeal in the Supreme Court was that: "**The learned Justices of Appeal erred in law when they upheld the sentence which sentence is illegal by virtue of its ambiguity**." The learned trial Judge of the High Court had stated that he had taken into account the fact that the appellant has been on remand for 2 years and sentenced him to life imprisonment after taking into account the remand period. On the issue of whether a sentence of life imprisonment meant a term of 20 years imprisonment as deemed under section 86 (3) of the Prisons Act 2006, the Supreme Court held that there was no basis for holding that a sentence of life imprisonment meant 20 years imprisonment because the Prisons Act and Rules made there under were meant to assist Prison Authorities in administering Prisons and sentences imposed by courts. The Prisons Act does not prescribe any penalty for defined offences as this is done by the Penal Code Act and other penal statutes while Courts have powers to pass sentences as enabled by the Magistrates Courts Act and the Trial on Indictment Act among other laws. Secondly, imprisonment for life is the second gravest sentence next to the death sentence and it is not defined. The Supreme Court held that life imprisonment means:

> "... imprisonment for the natural lifetime of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned."

What is further material is that the Supreme Court further noted that it would be absurd if specific terms of imprisonment beyond 20 years were held to be more severe than life imprisonment. In **Okello Godfrey v Uganda; SCCA No. 34 of 2014** the Supreme Court held that:

> In terms of severity of punishment in our penal laws, a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.

The Supreme Court reaffirmed its decision on the meaning of life imprisonment in **Ssekawoya Blasio v Uganda, Supreme Court Criminal Appeal No 24 of 2014** where the Court held that the term *life imprisonment* meant imprisonment for the remainder of the convict's life subject to the right of remission and secondly, life imprisonment was a less severe sentence than the death penalty.

The decision of the Supreme Court is consistent with the criminal law of England whose expressions can be used to define works and expressions used in the Penal Code Act according to the statutory rule found in the general rule of construction under section 1 of the Penal Code Act Cap 120 laws of Uganda which provides that:

> 1. General rule of construction.
>
> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

Under English criminal law, a sentence of *life imprisonment* was defined by the Court of Criminal Appeal of England in **R v Foy [1962] 2 All ER 245** where Lord Parker CJ delivered the judgment of court said that:

> Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentence of life imprisonment remains on them until they die.

That is the import of the Supreme Court decision in **Tigo Stephen v Uganda** (supra). Therefore release by the Prison Authorities or the Minister of Internal Affairs after the prisoner has earned remission according to the case of **Ssekawoya Blasio v Uganda** (supra) is a matter falling under the management powers of prisoners by the Prisons Authorities and has nothing to do with the sentence. Similarly, we consider the earning of remission under the Prisons Act as a matter falling under management powers of Prison authorities which do not affect the sentence.

By the very definition of *life imprisonment,* the submission of the respondents counsel that Article 23 (8) of the Constitution of the Republic of Uganda is inapplicable imports the conception that the sentence is for an indefinite period of time depending on the lifespan of the convict. If a convict is sentenced at the age of 30 years, he would spend a longer time in prison presumably depending on life expectancy than a person sentenced at the age of 60 years. We think that such issues are matters for management by the Prison Authorities or the Minister responsible to handle since they are responsible for whom to release i.e. for good conduct or on account of old age, infirmity; etc. under sections 84 – 86 of the Prisons Act, 2006. The matter is however not free of contradiction and is a possible area for legislative reform. In **Wamutabanewe Jamiru v Uganda; Supreme Court Criminal Appeal No. 74 of 2007**; the Supreme Court dealt with a similar matter. In that appeal the Court of Appeal exercised its jurisdiction under section 11 of the Judicature Act and imposed a sentence of 35 years imprisonment without remission. The Supreme Court reaffirmed its decision in **Tigo Stephen v Uganda** (supra) that:

> The Prisons Act and Rules made thereunder 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.

Further, in **Wamutabanewe Jamiru v Uganda** (supra), the Supreme Court stated that:

> 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.

Additionally in **Wamutabanewe Jamiru v Uganda** (supra) it was argued that the period the appellant had spent on remand was not considered contrary to Article 23 (8) of the Constitution. The court relied on its earlier decision in **Rwabugande Moses v Uganda; Supreme Court Criminal Appeal No 25 of 2014** for the proposition that it is illegal not to comply with the said mandatory constitutional provision. As a matter of fact it found that the Court of Appeal took into account the period that the appellant had spent in lawful custody before his conviction and sentence. We hold that the holding in **Wamutabanewe Jamiru v Uganda** (supra) is distinguishable because the court was dealing with a definite term of imprisonment of 35 years. On the other hand we agree that life imprisonment by its very nature is an indeterminate sentence and is also next in severity to the death penalty. The contradiction is in the practical application of the sentence. The practical application of the sentence is that 35 years imprisonment would be more severe than a sentence of life imprisonment because of the practice of the prisons authorities. It follows that for purposes of calculating remission just as was done to calculate the period spent in pre-trial detention in the **Wamutabanewe Jamiru v Uganda** (supra), a person sentenced to life imprisonment might end up

serving a lesser term of imprisonment than one sentenced to 34 years or 35 years imprisonment. For the above reasons, it is our holding that the provision for taking into account the pre-trial period of detention of a convict prior to his conviction under Article 23 (8) of the Constitution of the Republic of Uganda is inapplicable to a penalty of life imprisonment pursuant to the definition of life imprisonment by the Supreme Court in **Tigo Stephen v Uganda** (supra). As noted above this is a possible area for legislative reform. Should life imprisonment in practical terms be most the severe penalty next in severity to the death penalty? Last but not least in **Magezi Gad v Uganda; Supreme Court Criminal Appeal No 17 of 2014,** the Supreme Court determined the issue of whether a sentencing judge who sentences the convict to life imprisonment should take into account the period he or she spent on remand prior to conviction as provided for in Article 23 (8) of the Constitution and they stated that:

> We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23 (8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e. a quantified period of time which is deductible. This is not the case with life or death sentences.

For the above reasons we agree with the submissions of the respondent's counsel in the first limb of the appeal that the court was not required to take into account the period the appellant spent prior to his conviction and this limb of the appeal has no merit and is disallowed.

The second limb of appeal deals with whether the sentence of life imprisonment is excessive, harsh and so severe as to amount to an injustice in the circumstances.

We have carefully considered the second limb of the appeal. The appellant's counsel contended that in the circumstances, a sentence of life imprisonment was severe and did not take into account the circumstances of the appellant. The respondent's counsel on the other hand submitted

that life imprisonment is a legal and legitimate sentence and is not harsh in the circumstances of the case.

The established principles for determining whether to set aside a sentence imposed by a trial court are set out and summarised in the leading decision of the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270.** In that appeal, the appellant appealed against a sentence of 10 years imprisonment with hard labour for the offence of manslaughter and the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

(See also holding of the Supreme Court in **Kyalimpa Edward v Uganda; Criminal Appeal No. 10 of 1995** on the powers of the Appellate Court to interfere with sentence).

The first principle to consider is an overarching principle which is the need to maintain consistency and uniformity in sentencing. In considering uniformity and consistency, it is crucial that one examines previous precedents in similar cases for guidance. In **Kajungu Emmanuel v Uganda; Court of Appeal Criminal Appeal No 625 of 2014** this court held *inter alia* that the other factor that ought to have been considered by the trial court is the need to maintain uniformity of sentence.

The learned trial judge when sentencing the appellant said that:

> I have listened to the pleas for mercy from the defendant and I have also heard that he is a first offender.
>
> Have decided to exercise leniency and not mete out the maximum sentence.
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> Prosecution has however submitted that murders and the accompanying impunity are on the rise and asked for the death penalty.
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> In balancing the prayers of the prosecution and the pleadings of the defence, I sentence the convict to LIFE imprisonment.

The facts of the appeal are that the deceased heard noise coming from his garden and when he went to inspect, he came upon the appellant who speared him to death. In **KIA ERIN v Uganda; Court of Appeal Criminal Appeal No 172 of 2013,** this court considered the need for parity of sentences by looking at the range of sentences confirmed or imposed in the previous cases for similar offences. We have considered the range of sentences of between 15 years imprisonment and 22 years imprisonment in cases that were reviewed in that decision for the offence of murder.

As far as age is concerned, the consideration is whether the appellant deserves a second chance. In **German Benjamin v Uganda; Court of Appeal Criminal Appeal No 142 of 2010** this court held that the rehabilitation objective of imprisonment was also important and should be considered. It stated:

> It should be observed that courts tend to lean more on the punitive element of sentencing and lose sight of one of the most crucial elements of sentencing which is rehabilitation of the offender.

Further, in **Kabatera Steven v Uganda C.A.C.A No. 123 of 2001** (unreported)), this Court held that the age of an accused person is always a material factor that ought to be taken into account before a sentence is imposed when it held that:

We agree with the submission of the counsel for the appellant that the learned trial Judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not reform him.

In the circumstances of this appeal, the appellant was 27 years old and a long period of imprisonment would not likely give him a chance of a fresh start in life after the rehabilitation by the prison authorities.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No. 128 of 2008,** the appellant had been convicted of two counts of murder by the High Court and was sentenced to imprisonment for life. The Court of Appeal considered the fact that the appellant was a first offender and was 29 years old at the time of commission of the offences. Secondly, it was a senseless and brutal murder of two suspects already under arrest and the process of law had been set in motion in respect of the suspects. Nonetheless, the Court reduced the sentence of life imprisonment to 18 years imprisonment on each count to be served concurrently from the date of conviction. In **Kakubi Paul and Muramuzi David v Uganda; Criminal Appeal No. 03 of 2009,** the appellants were tried and convicted by the High Court of the offence of murder and sentenced to suffer death. They had killed the deceased in a brutal manner with a cutlass. The court noted that the case did not fall among the rarest of the rare or the worst of the worst. Given the manner in which the murder was executed, the age of the appellants and the opportunity for reform, the case did not merit the death penalty. Having taken into account the mitigating circumstances, the appellants were re-sentenced to 20 years imprisonment.

In **Atiku Lino v Uganda; Criminal Appeal No 0041 of 2009**, the appellant was armed with a cutlass, a bow and arrows and attacked the deceased at night whereupon he cut the deceased several times causing her death. His motivation was a delusion that the deceased had bewitched his ailing son. He had been convicted and sentenced to life imprisonment by the High

Court. His appeal against sentence was allowed and sentence reduced from life imprisonment to 20 years imprisonment.

In the facts and circumstances of this appeal, we find that a sentence of life imprisonment is relatively harsh and excessive and we accordingly allow the appeal and set the sentence aside. Exercising the powers of the High Court under section 11 of the Judicature Act, we take into account the fact that the appellant committed the offence when he was surprised by the deceased finding him in the act of stealing his coffee beans. Secondly, the age of the appellant at 27 years, is ground to give him a chance to reform. We accordingly consider that a sentence of 17 years imprisonment would suffice. Taking into account the period of 1 year and 6 months that the appellant spent in lawful custody, we deduct the same and sentence the appellant to 15 years and six months imprisonment which term shall commence running from the date of his conviction on 4th April, 2012.

Dated at Fort Portal the 20th day of June 2019

Frederick Egonda – Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal