THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 16 OF 2010

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

TUMANYANE GARASIANO} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(*Appeal from the decision of the High Court of Uganda (Kiiza, J) delivered on the 7th of April, 2011*)

JUDGMENT OF THE COURT

The appellant was indicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120 laws of Uganda. The facts of the prosecution was that on 24th July, 2009 at around 4.00 pm at Bwera Parish, Kicheeche sub county in Kamwenge District, the appellant stabbed his wife one Kabahinda Christine, with a knife killing her instantly. The appellant and the deceased were husband and wife and had two children aged four years and three years respectively at the time of commission of the offence. The appellant was tried and convicted as charged and sentenced to 30 years imprisonment. Being aggrieved with the decision of the High Court, the appellant with the leave of this Court appealed against sentence only on the ground that:

> "The learned trial judge erred in law and fact when he sentenced the appellant to an illegal sentence of 30 years without reducing the period spent on remand.

In the alternative the learned trial judge erred in law and fact when he sentenced the appellant to 30 years imprisonment which is manifestly harsh."

Representation

At the hearing of the appeal the appellant was represented by learned counsel Ms Julian Nyaketcho while the respondent was represented by learned Senior State Attorney Ms Nelly Asiku. The appellant was present in court.

Submissions of the appellant

Ms Nyaketcho adopted her written submissions filed on court record on 14th of June 2019 as the appellant's submissions in support of the appeal.

On the first limb of the submissions addressing the ground of appeal that the learned trial judge erred in law and fact when he sentenced the appellants to an illegal sentence of 30 years without reducing the period spent on remand, the appellant's counsel relied on **Article 23 (8) of the Constitution of the Republic of Uganda 1995** for the legal proposition 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 shall be put into account in imposing the term of imprisonment. She submitted that Article 23 (8) of the Constitution is supported by Rule 15 (1) of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** (hereinafter referred to as the Sentencing Guidelines) which requires that while sentencing any person convicted of an offence, the court shall take into account any period spent on remand in determining an appropriate sentence. The appellant's counsel further submitted that Article 23 (8) of the Constitution was interpreted by the Supreme Court in the **Rwabugande Moses v Uganda; (Criminal Appeal No 25 of 2014) [2017] UGSC 8** where it was held that the taking into

account of the period spent on remand by court is necessarily arithmetical. The period is known with certainty and precision and should be subtracted from the sentence that the court intends to impose. Furthermore, the Supreme Court held that a sentence couched in general terms to the effect that the court has taken into account the time the convict has spent on remand is ambiguous. Thirdly, Article 23 (8) of the Constitution is mandatory.

The appellant's counsel submitted that while sentencing the appellant, the learned sentencing judge held that: *"the accused is allegedly a first offender. He has been on remand for almost 2 years which I take into account while sentencing him."* Thereafter the learned trial judge went ahead to state the mitigating factors like the age of the convict which he lumped together with the remand period and finally while imposing the sentence he stated: *"putting everything into consideration, I sentence the accused person to a term of 30 years imprisonment"*. Learned counsel submitted that it is clear that the trial judge did not take into account the period the appellant had spent on remand. In terms of Rule 15 (2) of the Sentencing Guidelines, the period the convict spent on remand before his conviction is deducted from the final sentence of the court. According to **Rwabugande Moses v Uganda** (supra), it is not sufficient for the trial judge to just state that he has taken into account the remand period as failure to do so makes the sentence illegal.

In the premises, the appellant's counsel submitted that the sentence of 30 years imprisonment imposed on the appellant without putting into consideration the period he had spent on remand before his conviction is illegal for failure to comply with a mandatory constitutional provision and ought to be set aside and an appropriate sentence imposed.

On the alternative ground, learned counsel for the appellant submitted that the learned trial judge erred in law and fact when he sentenced the

appellant to 30 years imprisonment which is a manifestly harsh sentence. The appellant is a first offender and 58 years old. He had prayed for leniency but the learned trial judge while sentencing him said that he did not deserve leniency.

Ms Nyaketcho submitted that a sentence of 15 years imprisonment for the offence of murder has been imposed in several decisions. In **Kia Erin v Uganda; Criminal Appeal No 172 of 2013 [2017] UGCA 70**, this court set aside the term of imprisonment for life and substituted it with a term of 18 years imprisonment for the offence of murder. In that case this court cited with approval the decision in **Epuat Richard v Uganda; CACA No 199** of 2011 where the appellant who was convicted of murder. The appellant's sentence was reduced from 30 years imprisonment to 15 years imprisonment. She prayed that this court, on grounds of parity of sentences, considers the previous range of sentences and reduces the appellant's sentence from 30 years imprisonment to 15 years imprisonment from which the court would deduct two years the appellant had spent on remand and sentence him to 13 years imprisonment. She prayed that the appeal is allowed accordingly.

Submissions of the respondent

In reply Ms Nelly Asiku opposed the appeal. From the wording of the sentencing judge, she submitted that the learned trial judge had taken into account the period of two years that the appellant had spent on remand prior to his conviction. The learned trial judge had therefore complied with the provisions of Article 23 (8) of the Constitution of the Republic of Uganda.

On the alternative ground of appeal on severity of sentence, Ms Asiku submitted that the sentence imposed by the sentencing judge was appropriate. She further relied on **Befeho Iddi v Uganda; (Criminal**

Appeal No 264 of 2009) [2016] UGCA 86 in which this court reviewed several authorities. In **Susan Kigula & Another v Uganda; (Criminal Appeal No 01 of 2004) [2008] UGSC 15**, the appellant was convicted of the murder of her husband and sentenced to death under a mandatory penalty provision but subsequently after the mandatory death penalty was outlawed by the Constitutional Court, she was sentenced to 20 years imprisonment by the High Court. In **Kyaterekera v Uganda; Criminal Appeal No 0113 of 2010**, the Court of Appeal confirmed a sentence of 30 years imprisonment imposed by the trial judge in the case where the appellant was convicted of murder by stabbing with a knife. The sentences reviewed in the judgment range from 25 years to 30 years imprisonment.

Consideration of the appeal

We have considered the submissions of counsel, the authorities cited as well as the applicable law generally. This is a first appeal and our duty is to retry matters of fact by subjecting the evidence on record to fresh scrutiny and to reach our own conclusions on any factual controversies for resolution (See Rule 30 (1) of the Rules of this Court). Reappraisal of evidence must be done with caution and the court warns itself that it has neither seen nor heard the witnesses testify and should make due allowance for that shortcoming (See **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123**), **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**and **Bogere Moses and Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**).

On the first limb of the ground of appeal, Article 23 (8) of the Constitution of the Republic of Uganda states 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.

The wording of Article 23 (8) of the Constitution is clear and can be broken up for clarity. First of all it deals with a situation where a convict is to be sentenced to a term of imprisonment. It follows that it only applies to convicts who are about to be sentenced to a term of imprisonment. It applies to a definite term of imprisonment which is intended to be imposed. Secondly, it states that any period the convict had spent in lawful custody in respect of the offence for which he or she is being convicted before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. The custody has to be lawful custody being a remand period under an order to remand of a court of law or a constitutional detention period not exceeding 48 hours before charging for the offence. Further, the accounting for the period of remand is done at the point of imposing the term of imprisonment. There has been a lot of recourse by courts to the decision of the Supreme Court in the **Rwabugande Moses v Uganda;[2017] UGSC 8** which requires a deduction of the period the convict had spent on remand prior to his or her conviction in imposing the appropriate sentence. Secondly, the decision emphasises clarity in the language used when taking into account the period the convict spent on remand prior to his conviction. The need for clarity ensures that there is certainty that Article 23 (8) of the Constitution of the Republic of Uganda has been applied. In **Rwabugande Moses v Uganda** (supra) the Supreme Court held that there has to be an arithmetic deduction of the period the convict spent in lawful custody prior to his conviction. They stated that:

> It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.
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> We must emphasise that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances,

it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the sentence. Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first offender; remorsefulness of the convict and others which are discretional mitigating factors which the court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors and the courts determination of the sentence cannot be quantified with precision.

This decision received further clarification by the Supreme Court in **Abelle Asuman v Uganda; [2018] UGSC 10** when they held that:

> The Constitution provides that the sentencing Court must take into account the period spent on remand. 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.···

By the above holding the Supreme Court did not depart from its decision in in **Rwabugande Moses v Uganda** (supra) but left it open to the court to take the period spent on remand by a convict before his conviction into account. This does not have to be reflected through an arithmetic deduction but the final sentence of a term of imprisonment should have taken into account the period of pre-trial lawful custody of the convict to the credit of the convict. This is clear from the judgment of the Supreme Court in **Abelle Asuman v Uganda** (supra) where they cited their earlier judgment in **Rwabugande Moses v Uganda** (supra) and stated that:

> What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of **Rwabugande** ***that remand period should be credited to a convict when he is sentenced to a term of imprisonment.*** This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
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> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing judge or justices used

different words in the judgement or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the constitutional obligation in Article 23 (8) of the Constitution. (Emphasis added)

It is indeed a question of language since crediting the period to the convict can be arithmetic and this seems to be the most practical and clear method of application of Article 23 (8) of the Constitution as supported by Rule 15 of the Sentencing Guidelines.

In this appeal the record shows that the learned trial judge when sentencing the appellant stated as follows:

> Accused is allegedly a first offender. He had been on remand for almost 2 years which period I take into account, while sentencing him. He is said to be 38 years old and is reportedly remorseful and that he had regretted what he had done. He has prayed for leniency. However, accused has committed a serious offence. As the learned Resident State Attorney stated, the maximum sentence in murder cases, is a possible death sentence. Hence the law is strict on who (those) convicted of murder. In this case, the accused ruthlessly stabbed his own wife and mother of his own children 7 times. In my view whatever anger he had, did not matter the kind of force he applied on the deceased. He struck seven times and even tried to deceive his brother and mother that thugs had attacked them and killed his wife. This he knew were lies.
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> In my view, he deserves no leniency from the court. He must get an appropriate sentence befitting his crime. Putting everything into consideration I sentence the accused to 30 (thirty years) imprisonment. Right of appeal explained."

We have considered the wording adopted by the learned trial judge. First of all, he does not make any finding as to whether the accused is a first offender. He uses the words "Accused is allegedly a first offender." What was his finding? Secondly, he uses the passive "he is said to be 38 years old and is reportedly remorseful and that he had regretted what he had done." There was no finding on any of those matters. Thirdly, the period that the convict had spent on remand was stated to be almost 2 years. In

Rwabugande Moses v Uganda (supra) it was held that this period can be determined with precision. This is because the records are available to the court. The above words render the decision ambiguous and do not completely comply with Article 23 (8) of the Constitution. Moreover the taking into account of the about 2 years' imprisonment was done before imposing the term of imprisonment. It is supposed to be done at the point of imposing the term of imprisonment. In the premises, we are not satisfied that Article 23 (8) of the Constitution was complied with and we set aside the sentence for being ambiguous and illegal.

The second limb of the appeal is that the sentence of 30 years imprisonment is harsh and excessive. The Supreme Court of Uganda in **Kyalimpa Edward v Uganda; Criminal Appeal No. 10 of 1995** held that:

> ...an appropriate sentence is a matter for the discretion of the sentencing judge; each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: Ogalo s/o Owoura v R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) E.A.C.A. 126

We are however unable to consider whether the sentence was harsh or excessive because we set it aside. We shall consider the matter afresh by exercising our jurisdiction under section 11 of the Judicature Act Cap 13 laws of Uganda. Section 11 of the Judicature Act provides as follows:

> 11. Court of Appeal to have powers of the court of original jurisdiction.
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> 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.

We shall accordingly impose an appropriate sentence on the appellant after considering the mitigating and aggravating factors some of which are

mentioned in the sentencing notes of the learned trial judge. Secondly, we shall consider an appropriate sentence in terms of proportionality in relation to the gravity of the offence and similar sentences passed in similar cases. This is based on the principle of consistency which is founded on the constitutional principle of equality before and under the law enshrined in Article 21 (1) of the Constitution of the Republic of Uganda which provides that:

> 21. Equality and freedom from discrimination.
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> (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

For there to be equal protection of the law, it is imperative that the offence such as the offence of murder which has been proved to have been committed under similar circumstances should receive proportional and consistent punishment for purposes of treating similar offences in a similar manner. Any variation in sentences should be explained in terms of the mitigating and aggravating factors which are peculiar and according to the facts and circumstances of each case. The variables which should explain variation in sentencing may include such factors as the age and the method used for commission of the offence and other relevant factors.

First of all this is a case in which a husband killed his wife. The learned trial judge relied on the charge and caution statement of the appellant. It is apparent from the statement which was relied upon that the couple had misunderstandings in which the appellant was alleging extramarital affairs as well as the fact that his spouse had left him. He stated that he was aggrieved that she was not forthcoming with the home projects. Secondly, the appellants stated that he got annoyed and started committing the offence but regretted it afterwards. This is what he stated:

> I do state that it was on the 24th day of July 2009 at about 1600 hours, as I was at my home at ….. Kabahinda Christine my wife who has gone to their place came. When she came we started our discussions pertaining our family, but the woman was not giving positive discussion. I told her to come back home so that we look after our projects and our children. Before she went to her parents she had started leaving me at home and could go to where she wants and could come back home at night late. As we were in our discussion she … (late) told me that whenever she goes to Ibanda she would have sexual intercourse with other men and gets money at least twenty thousand (20,000) shillings. Having said so I as a person got annoyed and started thinking differently and my mind got changed there and then got my knife and stabbed her and suddenly she fell down because I had stabbed her in the chest. …

The learned trial judge stated at page 5 of his judgement as follows:

> In the instant case, the charge and caution statement was an unequivocal admission of accused in killing his wife by stabbing her several times in the chest. His confession was clear and gives the background to the killing, and how he killed his wife and the steps he took to attempt to kill himself by taking medicine. When he failed in committing suicide he went to his mother and woke up his brother PW6 whom he deceived that people had attacked them and killed his wife. He even led the police to recover the murder weapon and his bloodstained clothes from where he had hidden them.
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> In my considered view the charge and caution statement was so detailed that, it must have been nothing else but true.…

The prosecution cannot choose to rely on one part of the charge and caution statement and disregard others. Similarly, the learned trial judge never considered the element of provocation, if this statement was taken to be true. Nonetheless, it was a heinous murder which deserves just punishment. In mitigation it is stated that the appellant was 38 years old and was reported as remorseful. In **Kia Erin v Uganda; Court of Appeal Criminal Appeal No 172 of 2013 [2017] UGCA 70** which was decided on 7th November, 2017, this court reviewed several decisions on the range of

sentences for purposes of consistency and parity of sentences. The range of sentences for murder cases reviewed in that decision was between 15 years imprisonment and 20 years imprisonment. On the other hand the decision in **Befeho Iddi v Uganda; Court of Appeal Criminal Appeal No 264 of 2009 [2016] UGCA 86** which was decided on 16 December 2016 also reviewed several decisions where a family member was killed. The range of sentences varied from 20 years imprisonment to 25 years imprisonment.

We have considered the range of sentences as well as the peculiar facts of this case where the aggravating factors are that the appellant stabbed his own wife and deceived that they had been attacked. He brutally stabbed her seven times. Even if he had a grievance with his wife, he did not have to take the law into his own hands. As far as mitigating factors are concerned, the appellant is a first offender and the charge and caution statement puts his age at 35 years at the time of commission of the offence.

Given the manner in which the appellant committed the offence and the circumstances under which the offence was committed, we think that a sentence of 27 years imprisonment would be appropriate in the circumstances. From that period we deduct the period of pre-trial remand. The charge and caution statement is dated 26th July, 2009 which we assume to be the time the appellant was arrested. Thereafter he was taken to court where proceedings were commenced and he was finally sentenced on the 7th April, 2011. This is a period of one year eight months and about 10 days. After taking into account the said period, we sentence the appellant to 25 years imprisonment which sentence shall commence running from the date of his conviction on 7th April, 2011.

Dated at Fort Portal the 30th day of July 2019

Frederick Egonda – Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal

Julian Nyakatcho for the Appellant on State Brief.

SRSA Adama Nassuna holding brief for Melly Asiku SSA for Respondent

Appellant — Court

Judgment read.

30/07/2019.