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**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPEAL NO. 532 OF 2016**

**1. WETYA TWAYIRU**

**2. ONYANGO PETER:.....APPELLANTS**

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**VERSUS**

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

*(Appeal from the decision of the High Court of Uganda at Mukono before Mutonyi Margret, J dated 21<sup>st</sup> December, 2016 in High Court Criminal Case No.207 of 2016)*

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**CORAM: HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA**

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

**HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA**

**JUDGMENT OF COURT**

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This is an appeal from the decision of the High Court in Criminal Session Case No.207 of 2016 in which the appellants were convicted of murder contrary to section 188 and 189 of the Penal Code Act and each sentenced to 25 years imprisonment following a plea bargain agreement.

5 The background to the appeal is that the complainant a one Gusinde Peter owned  
4 boat engines which he used for fishing on lake Victoria. On the 27<sup>th</sup> day of  
November 2015, he released the 4 boat engines to the workers and on 28<sup>th</sup>  
November 2015 at 11:00 O'clock only 3 returned and the one managed by the  
deceased Abu Wagaboge did not. Upon receiving information that the boat was  
10 missing, a search was mounted and the boat was found without anyone, no  
engine and no nets. A case of a missing person was reported and a search was  
mounted whereupon the deceased's body was discovered floating at Bakagabo  
landing site. A post mortem carried out revealed that the deceased had deep cut  
wounds on the right side of the head and the cause of death was excessive  
15 bleeding due to wounds on the right side of the head coupled with drowning.

A week later A2 Wean Twayiri informed one Richard about the deal made with  
Peter of an engine hidden in the bush under a stone. Richard informed one Tonny  
who instructed Richard and A2 to go and see where the engine was. A2 took  
Richard and showed him the engine. Later, Tonny summoned A1 and A2 and  
20 asked them what had happened to the deceased and their answer was that they  
had left him with little life floating on the lake. The matter was reported to the  
LC 1 chairperson, Opolot who recovered the oars and engine and arrested the  
appellants.

Subsequently, the appellants were tried, convicted and sentenced to 25 years  
25 imprisonment each following a plea bargaining agreement entered on the 20<sup>th</sup>  
December 2016.

5 Being dissatisfied with the decision of the learned trial Judge, the appellants with leave of Court appealed against sentence only faulting the learned trial Judge for not taking into account the period they had spent on remand and for passing a manifestly harsh sentence of 25 years imprisonment for each of them.

At the hearing of the appeal, Mr. Opendo appeared for the appellants while the  
10 respondent was represented by Ms. Tumukinze Joanita a State Attorney holding brief for David Ndamurani Ateenyi Senior Director of Public Prosecutions.

Counsel for the appellants submitted that the learned trial Judge failed to consider the period the appellants had spent on remand in contravention of Article 23(8) of the Constitution which imposes a duty on a sentencing court to  
15 take into account the period a convict spent on remand. He cited **Rwabugande Moses Vs Uganda SCCA No. 25 of 2014**.

Secondly, Counsel submitted that in mitigation of their sentences A1 and A2 were both aged 28 years and had reformed while in custody. That they had learnt building skills while in prison and were now capable of being resourceful people  
20 in the community. He contended that the sentence of 25 years imprisonment was harsh and manifestly excessive and cited **John Kasimbazi & 6 others vs Uganda CACA No. 167 of 2013** and **Magala Ramadhan vs Uganda SCCA 1/2014** where the appellants' sentence of life imprisonment was reduced on appeal to 12 years imprisonment.

5 In reply, counsel for the respondent submitted that in arriving at the sentence  
of 25 years for each appellant, the learned trial Judge considered the plea  
bargain agreement entered into between the appellants and the respondent. He  
contended that the learned trial judge proceeded under the Judicature (Plea  
Bargain) Rules, 2016 and handed down the sentence in pursuance of a Plea  
10 Bargain Agreement.

That the appellants had voluntarily pleaded guilty to the charge of Murder and  
agreed to be sentenced to 25 years each and therefore, the severity of sentence  
would not arise. Further that under plea bargain proceedings, it's the appellants  
who voluntarily agree to the sentence and the judge's discretion is largely limited  
15 and cannot be faulted for upholding the sanctity of the provisions of the plea  
bargain agreement freely and voluntarily entered into between the parties to the  
agreement including the length of the sentence to be served.

As a first appellate Court, we are required to re-appraise the evidence adduced  
and make our own inferences. **See Rule 30(1) of the Rules of this Court and**  
20 ***Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

The learned trial Judge is faulted for not taking into consideration the period  
which the appellants spent on remand and for passing a manifestly harsh  
sentences. The respondent submitted that the learned trial Judge did not have  
to consider the period spent on remand since the sentence emanated from a  
25 plea bargain agreement in which the trial Judge's discretion was limited.

5 **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.*

The appellants were sentenced on 21/12/2016 and the relevant part of the  
10 proceedings is;

*Accused 1: I understand the facts. The facts are correct.*

*Accused 2: I understand the facts of the case. The facts are correct.*

*Court: Accused 1 is convicted of the offence of murder on his own plea of guilty.*

*Accused A2 is convicted of the offence of murder on his own plea of guilty.*

15 *State: Under plea bargain we have agreed to serve 25 years imprisonment*

*That is the position*

*Accused 1: It is true.*

*Accused 2: It is true.*

*Court: Sentenced to 25 years as agreed under plea bargain.*

20 Plea Bargaining is regulated by the Judicature (Plea Bargain) rules, 2016.

Rule 4 of the Judicature (Plea Bargain) Rules, 2016 subjects conclusions reached by the parties in the plea bargaining process to approval by Court.

5 Rule 8(2) provides that parties shall inform Court of the ongoing plea bargain negotiations and shall consult the Court on its recommendations with regard to possible sentence before the agreement is brought to Court for approval and recording.

The record does not show that court participated in the appellants' plea bargaining process nor does it show that the parties consulted Court on the 10 recommendations before the agreement was brought to Court for approval and recording as required under Rule 8 of the Plea bargain rules. It is during this time that the trial judge guides the parties on matters of law which include the period a convict spent on remand and all other issues that may not have been 15 considered by the parties during negotiations. Before endorsing the agreement, court must satisfy itself that matters of law and fact have all been taken into consideration by the parties.

In the instant case, the period of 1 year and 7 days the appellants had spent on remand was not taken into consideration before court approved and recorded 20 the appellants' plea bargain agreement. This was a violation of article 23(8) of the constitution.

While sentencing the appellants, the Judge did not take into account the period which the appellants had spent on remand as required under article 23(8) of the Constitution. Counsel for the respondent submitted that this was not necessary 25 because the sentence was a result of a plea bargaining agreement. We do not

5 agree with this submission because rules made under the Judicature Act cannot  
override Constitutional provisions.

In **Rwabugande Moses vs Uganda Supreme Court Criminal Appeal NO.25 of 2014** a  
sentence of imprisonment arrived at without taking into consideration the period  
spent on remand by a convict is illegal for failure to comply with a mandatory  
10 constitutional provision.

Ground 1 succeeds and we set aside the sentence. Having resolved thus, it is  
not necessary to resolve the issue regarding harshness of the sentence.

**Section 11 of the Judicature Act, Cap 13** grants this Court the same powers  
as the court of original jurisdiction including power to impose a fresh sentence.

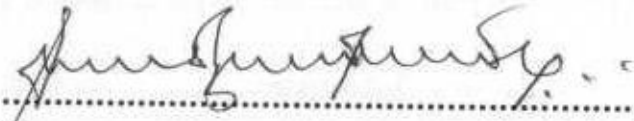
15 The deceased was murdered in a heinous way; He was cut by a panga several  
times before he was ordered to jump into the lake where he later drowned and  
died. There is need to deter the re-occurrence of such crimes in society. However,  
the appellants were both aged 28 years, had reformed while in custody and had  
learnt building skills while in prison and were capable of being resourceful people  
20 in the community. There is need to accord them an opportunity to reform.

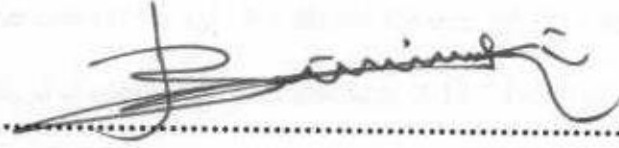
After considering both the aggravating and mitigating factors and the fact that  
the appellant pleaded guilty and did not waste Court's time, and after taking into  
account the 1 year and 7 days period the appellants spent on remand having  
been arrested and charged on 13/12/2015 and convicted on 20/12/2016, we

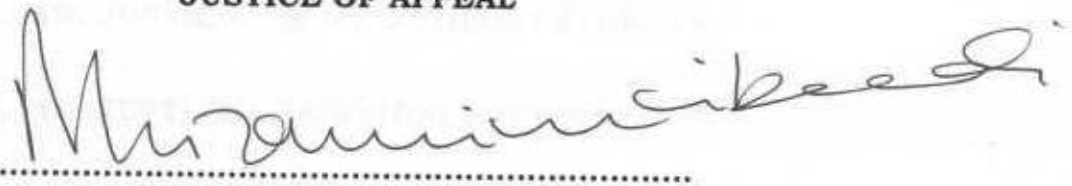
5 hereby sentence each of the appellants to 15 years imprisonment commencing  
from 20<sup>th</sup> October, 2016 when they were convicted.

**We so order**

10 Dated at Mbale this.....15<sup>th</sup>.....day of September.....2020

  
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**HON. MR. JUSTICE F.M.S EGONDA-NTENDE**  
**JUSTICE OF APPEAL**

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

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**HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEEDI**  
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