

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA

CRIMINAL APPEAL NO.165 OF 2009

5 *[Arising from HC CSC No.129 OF 2008]*

LUKWAGO IVAN:::APPELLANT

VERSUS

UGANDA:::RESPONDENT

CORAM: HON.JUSTICE S.B.K.KAVUMA, JA

10 **HON.JUSTICE A.S.NSHIMYE, JA**

HON.JUSTICE M.S.ARACH AMOKO, JA

*(Appeal from the judgment of the High Court at Kampala (E.S
Lugayizi,J) dated 7th July,2009 in Criminal case No. 129 of 2008)*

15 **JUDGMENT OF THE COURT**

The appellant, Lukwago Ivan, was tried and convicted on his plea of guilty by the High Court (*E.S. Lugayizi,J*) on an indictment of aggravated defilement c/s 129(3) and (4) (a) of the Penal Code Act. The learned trial
20 judge used the following expression in sentencing the appellant:

“After considering all, court thinks that a sentence of 9 years imprisonment would suffice in this case. It is so ordered”.

Dissatisfied with the sentence, the appellant appealed to this Court against it on the ground that:

5 *“The learned trial judge erred in law when he failed to consider the remand period served prior to conviction thereby occasioning miscarriage of justice.”*

The ground of appeal, according to Mr. Duncan
10 Ondimu who represented the appellant on State brief, is based on **Article 23(8) of the Constitution** which provides that:

15 *“(8) 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.”*

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Mr. Ondimu's contention is that the trial Judge did not take into consideration the period of 1 year and 8 months the appellant had spent on remand when

sentencing him. This offended **clause (8) of article 23 of the Constitution** above as was held by the Supreme Court in ***Criminal appeal No.6 of 2004, Katende Ahamad -vs- Uganda.***

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Mr. Ondimu prayed that this Court considers the period spent on remand by the appellant and adjusts the sentence accordingly.

10 On the other hand, Ms. Betty Khisa, the learned Principal State Attorney who represented the respondent strongly opposed the appeal basically for two reasons:

15 Firstly, she submitted that the appellant's lawyer did not mention anything about the remand period in his address to court which is found at page 5 of the record of proceedings. Therefore the learned trial Judge was right to leave it out.

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Secondly, Ms. Khisa contended that the learned trial Judge was extremely lenient in sentencing the appellant because, while the appellant's own lawyer

had actually thought that a ten (10) year sentence would be sufficient for his client, the learned trial Judge only gave him nine (9) years.

5 Ms. Khisa finally submitted that this Court as a first appellate court has a duty to review the sentence and come to an appropriate sentence. In so doing, the Court may take into consideration the remand period but maintain the 9 years.

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Mr. Ondimu in his brief rejoinder reiterated his earlier submissions and invited Court to disregard the submissions by Ms Khisa arguing that in the absence of a cross appeal, the state cannot ask for
15 enhancement of the sentence.

Secondly, Mr. Ondimu argued that it was not the duty of Mr. Sekabanja, who represented the appellant in the proceedings before the High Court, to ask for 10 years
20 and that whilst the failure to address Court on the remand period amounted to professional negligence, the Judge was bound to take the remand period spent by the appellant prior to his conviction into account

under **Article 23 clause (8) of the Constitution** and the authority of the Supreme Court decision in ***Katende Ahamad -vs- Uganda*** (supra).

- 5 We have taken due consideration of the submissions of both counsel, the law as well as the authority cited by learned counsel for the applicant.

Article 23 (8) of the Constitution is very clear and
10 the position of the law was settled by the Supreme Court in the case of ***Katende -vs- Uganda (supra)*** cited by Mr Ondimu. The brief facts of that case are the following: The appellant, Katende Ahamad, was
15 indicted of defilement contrary to Section 123 (1) of the Penal Code Act. The trial Judge sentenced him to a period of ten years using the words:

***"I sentence you to ten (10) years imprisonment.
20 This is inclusive of the years spent on remand."***

On appeal to the Court of Appeal the second ground which is relevant to the instant appeal, was that the

sentence was vague and in essence contravened Clause (8) of article 23 of the Constitution. The Court of Appeal dismissed that ground.

5 On appeal to the Supreme Court, it re-emphasised the need for trial courts not only to take into consideration the remand period in sentencing, but to say so unequivocally so that the Prisons authorities have no difficulty in calculating the period of remission. The
10 Court then went ahead, at page 10 of the judgment, to give the following guidelines to trial Courts:

“When sentencing a person to imprisonment a trial judge or magistrate should say:-

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***“Taking into account the period of.....years (months or weeks whichever is applicable) which the accused has spent on remand, I now sentence the accused to a term of.....years (months or
20 weeks, as the case may be).”***

In such an event the sentence imposed shall be definite and be treated as excluding the period

spent in custody on remand." (underlining was added for emphasis.)

5 That ground of appeal succeeded and the Supreme Court held that the trial Judge had erred in the way she had sentenced the appellant and the Court of Appeal had similarly erred in upholding her sentencing model.

10 Although the Supreme Court took into account the seriousness of the offence, it was unable to enhance the sentence since there was no cross appeal. The Supreme Court however maintained the sentence and expressed it in the following words:

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20 ***"Considering that the appellant was in custody for a period of 2 ½ years before he was convicted by the High Court, the ends of justice will be met by sentencing him to imprisonment for ten (10) years."***

We note that in the instant case, it is not disputed by the respondent's counsel that the trial judge did not,

when sentencing the appellant, mention the period the appellant had spent on remand prior to his conviction. This was an error since he was no doubt bound to do so under the clear provisions of **Article 23 (8) of the**
5 **Constitution** and to apply the guideline given by the Supreme Court to trial courts in the case of ***Katende Ahamad vs Uganda (supra)***. This is regardless of any mention of the remand period by the appellant's counsel.

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In the premises, we agree with Mr. Ondimu that the learned trial Judge erred in the way he sentenced the appellant without considering the period he had spent on remand. The appeal therefore must succeed on that
15 ground.

Like the trial judge, we do take a serious view of the fact that the appellant defiled a 9 year old girl. The offence of aggravated defilement which he committed is
20 a very serious one for which the maximum sentence is death. Normally this would attract a deterrent sentence. Since there is no cross appeal by the state

against the sentence, however, we cannot pass a sentence of more than 9 years.

Consequently, taking into account the period of 1 year
5 and 8 months which the appellant had already spent on remand before he was convicted by the High Court, the ends of justice would be met by sentencing him to imprisonment for nine (9) years.

10 We order accordingly.

Dated at Kampala this ^{13th} day of ^{Dec}2012

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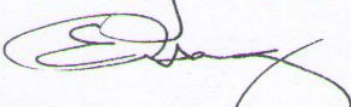

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S.B.K.KAVUMA

JUSTICE OF APPEAL

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A.S.NSHIMYE

JUSTICE OF APPEAL

Appellant Present
Mr. Duncan Ondimu for the appellant on State bench
Mrs. Tumuhimbise Rosemary
Judgment delivered

13.12.2012

M. S. Arach Amoko



M.S.ARACH AMOKO
JUSTICE OF APPEAL

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