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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; & BUTEERA, JJ.S.C.; NSHIMYE; AG.,JSC]

CRIMINAL APPEAL NO 70 OF 2018

BETWEEN

MUSEDE NANKYA :: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal from the Judgment of the Court of Appeal at Jinja (Kasule, Cheborion, & Obura, JJA) dated 27th March 2018 in Criminal Appeal No. 196 of 2013]

JUDGMENT OF THE COURT

Musede Nankya (hereinafter referred to as the appellant) filed this appeal challenging the sentence of 32 years and 6 months imprisonment imposed on him by the Court of Appeal for murder. The Court of Appeal had invoked its powers under Section 11 of the Judicature Act to impose this sentence.

BACKGROUND:

The relevant background to this appeal as can be discerned from the record is that the appellant was convicted of murder on December, 2004 by Mwondha, J. (as she then was) at Mbale. At the time of his conviction, there existed one mandatory sentence for a murder convict. This was a sentence of death. In compliance with the

sentencing regime of the time, Mwondha, J. (as she then was) imposed a death sentence on the appellant.

Subsequently, this Court in ***Attorney General v. Susan Kigula & 417 others, Constitutional Appeal No. 03 of 2006*** upheld the Constitutional Court's decision which had declared the imposition of a mandatory death sentence for murder convicts unconstitutional. Pursuant to this upholding, this Court made various orders. For purposes of this appeal, the relevant order was that:

> ***"For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law"***

The present appellant was one such respondent. Thus, pursuant to the above order, the appellant's file was remitted back to the High Court so that he could be heard on mitigation of sentence.

The appellant's allocutus was before Mugamba, J. (as he then was). Having heard from both the appellant and the State on the mitigating and aggravating factors, the learned Judge came to the conclusion that a custodial sentence rather than the death sentence earlier imposed on the appellant was appropriate. Hence, having considered the period the appellant had spent on remand and deducting the same, the judge sentenced the appellant to 35 years imprisonment for murder.

The appellant was dissatisfied with the sentence imposed and appealed to the Court of Appeal. The appellant's contention was that, the sentence imposed by Mugamba, J. (as he was then) was harsh and excessive. The Court of Appeal did not agree with the appellant's contentions. It observed that the sentence imposed was *'neither harsh nor excessive bearing in mind that the offence with which the appellant was indicted carries a maximum penalty of death.'*

The above finding notwithstanding, the learned Justices of Appeal while referring to the decision of this Court in ***Rwabugande Moses v. Uganda, Criminal Appeal No. 25 of 2014***, found that the sentence imposed by Mugamba, J. (as he then was) for murder was illegal because the judge did not to comply with Article 23(8) of the Constitution by deducting the period of 3years and 6months she had spent on remand. The provision provides a mandatory provision of the constitution.

The Court of Appeal hence set aside the illegal sentence. Invoking their powers under section 11 of the Judicature Act, the learned Justices of Appeal, having taken into account both the mitigating and aggravating factors sentenced the appellant to 35 years imprisonment. Applying the ratio in **Rwabugande** (supra), the Court observed that the appellant had spent 3 years and 6 months on remand. The Court of Appeal deducted this from the sentence of 35 years and ordered the appellant to serve a sentence of 32 years and 6 months from the date of conviction which was 16/December/2004.

The appellant was dissatisfied with the decision of the Court of Appeal and appealed to this Court on two grounds of appeal set out in this

judgment based on these grounds, the appellant prayed that the judgment of the Court of Appeal be set aside and that this Court *'includes the period spent on remand by the appellant or any sentence it deemed fit.'*

REPRESENTATION:

Emmanuel Muwonge appeared for the appellant on state brief while Joan Tumwikirize, State Attorney appeared for the respondent. Both parties filed written submissions.

Ground 1 of Appeal

This ground was framed as follows:

The Learned Justices of the Court of Appeal erred in law and fact in sentencing the appellant to 33 years a sentence which was harsh, illegal and manifestly excessive in the circumstances.

We have read and considered the written submission of both counsel and read the record and authorities referred to us.

Having reviewed Ground 1 as framed and the appellant's submissions under this ground, it is our view that this ground is untenable. This is because the appellant is appealing against severity of sentence which is prohibited by section 5(3) of the Judicature Act. This section provides as follows:

> ***"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order,***

on a matter of law, not including the severity of the sentence".

This provision has been a subject of various decisions of this Court. For example recently in **Okello Geoffrey v. Uganda, Criminal Appeal No. 34 of 2014**, this Court observed thus:

"...section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence. It only allows him or her to appeal against sentence only on a matter of law."

In ***Abelle Asuman v. Uganda, Criminal Appeal No. 66 of 2016***, this Court while relying on the above ratio in **Okello Geoffrey** (supra) held as follows:

The sentence being harsh and excessive are matters that raise the severity of the sentence...Accordingly we shall not consider issues of the sentence being harsh or excessive since that goes to severity of sentence. The appellant has no right of appeal on severity of sentence.

We agree with the above position as expounded in the above two authorities. We only wish to add that whereas the appellant in Ground 1 of his appeal mentions that the sentence was among others 'illegal' all the arguments in respect of this ground rotate around the appellant's sentence being too long.

Ground 1 therefore fails.

Ground 2 of Appeal.

This ground was framed as follows:

The learned Trial Justices of Court of Appeal erred in law and in fact when they failed to deduct the period the appellant had spent on remand on his final sentence of 33 years.(sic)

Appellant's Contentions.

Under this ground, counsel for the appellant contends that the learned Justices of Appeal did not take into account the time spent by the appellant on remand. According to appellant's counsel, the appellant had spent 3 years on remand before being sentenced by the trial Judge and 9 years in prison before the decision of this Court in the case of **Kigula** (supra). Thus appellant's counsel argued that by the time the appellant filed his appeal in the Court of Appeal, he had been on 'remand' for a period of 12 years. In light of this submission, he called on this Court to set aside the sentence of 32 years and substitute it with a more lenient sentence of 20 years imprisonment.

Furthermore, while relying on **Rwabugande** (supra) counsel for the appellant submitted that whereas the learned Justices of Appeal were aware of the ratio in the above decision, they did not apply it while sentencing the appellant. Counsel thus called on this Court to make a proper application of the ratio in **Rwabugande** in respect of the appellant.

Respondent's Contentions

Counsel for the respondent disagreed with the appellant's contentions. Relying on Article 23(8) of the Constitution, counsel contended that the Constitution requires Court to take into account the period spent on remand by a convict prior to conviction. In counsel's view, this means the period between remand and conviction.

Turning to the present case, counsel for the respondent submitted that the learned Justices of Appeal took time to arithmetically compute the time spent on remand by the appellant and deducted the same from the 35 year sentence imposed on the appellant. According to counsel, this left the appellant with a sentence of 32 years and 6 months imprisonment which commenced from the time of his conviction. Counsel also argued that the appellant was misdirected in asking this Court to consider the 9 years spent in prison before ***Kigula*** (supra) as remand. According to counsel, this was untenable because by the time **Kigula** was decided, the appellant was not on remand but was already awaiting to undergo a legal sentence (execution).

The question that requires resolution under this ground is whether, in sentencing the appellant to 32 years and 6 months imprisonmcnt, the learned Justices of Appeal complied with the provisions of Article 23(8) of the Constitution as guided by this Court in the case of **Rwabugande** (supra).

The learned Justices of Appeal approached the appellant's sentencing as follows:

"We note that while resentencing the appellant, the sentencing Judge merely mentioned that the appellant had been in custody for over 12 years. He did not take into account the period of 3 years and 6 months which the appellant had spent on remand. According to the Supreme Court decision in Rwabugande Moses v. Uganda, Criminal Appeal No. 25 of 2014, this sentence was illegal for failure to comply with the mandatory constitutional provision. We therefore set it aside."

Having set it aside, the learned Justices invoked their powers under section 11 of the Judicature Act and proceeded to determine an appropriate sentence to be imposed on the appellant and concluded as follows:

"We therefore, after taking into account both mitigating and aggravating factors sentence the appellant to 35 years imprisonment. We note that the appellant had spent 3 years and 6 months on remand which we deduct therefrom. He shall serve a sentence of 32 years and 6 months. The said sentence shall run from 16th December, 2004, the day the appellant was convicted by the High Court."

What is clearly evident from the above excerpt of the Judgment of the Court of Appeal is that the learned Justices of Appeal properly applied the ratio in the case of **Rwabugande** on how deduction of the period spent on remand is done. It is therefore our view that the learned Justices of Appeal properly complied with the provisions of Article 23

(8) of the Constitution as guided by this Court in the case of **Rwabugande**.

On this basis alone, this ground would also fail. We however, find it necessary to briefly comment on counsel for the appellant's contention that the period the appellant spent in prison from the date of his sentencing by Mwondha, J. (as she then was) to the time when he appeared before Mugamba, J. (as he then was) for resentencing pursuant to **Kigula** constituted 'remand' which the learned Justices of Appeal ought to have deducted from the sentence they had imposed.

The provision of our Constitution which mandates Court to consider the remand period while sentencing a convict is Article 23(8) which provides as follows:

> ***"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."***

We reiterate that the period which constitutes remand is that period the accused person spends in lawful custody before the conviction. A review of the record shows that the appellant was convicted by the trial Judge on 16/12/2004. In line with the above quoted constitutional provision, the period spent by the appellant on remand was from the date he was put on remand until 16/12/2004 when he was convicted and sentenced). It is clear therefore that from

16/12/2004 to 9/12/2013 (a total of 9 years) when he was re-sentenced pursuant to the **Kigula** decision, he was not on remand

He was a convict and not a remandee, as envisaged under Article 23(8) of our Constitution.

We therefore find that the learned Justices of Appeal did not err when they only considered the period of 3 years and 6 months as the period spent on remand by the appellant. The period of 9 years, in agreement with counsel for the respondent, was spent by the appellant awaiting execution.

It also suffices to note that while sentencing the appellant, the learned Justices of Appeal after deducting the three and a half years spent by the appellant on remand observed that the thirty two and a half years sentence was to commence from 16/12/2004, the date on which the appellant was convicted by the trial Judge and not 9/12/2013 when the trial Judge re-sentenced him.

In light of our analysis above, Ground 2 also fails.

Before we take leave of this matter, we note further that the appellant also relied on two authorities to persuade this Court to interfere with the 32 years sentence imposed by the learned Justices of Appeal and replace it with a 20 years sentence. The first is **Tumwesigye Anthony v. Uganda, Criminal Appeal No. 46 of 2012** where an appellant had been sentenced by the trial Court to 32 years. Counsel for the appellant did not avail us this authority. That notwithstanding, we have on our own accessed it and perused it.

We find that this authority is not binding on us since it is a Court of Appeal decision. It can therefore only be of persuasive value. Further this decision shows that: (i) the appellant therein was below 18 years at the time of committing the unlawful homicide and thus the provisions of section 104 of the Children Act applied to him; and (ii) in line with its observation in (i) the Court of Appeal considered the circumstances of the case and found that the 32 year sentence imposed on him was harsh and manifestly excessive.

It is also perhaps of importance to note that the only ground of appeal that was before the Court of Appeal was on severity of sentence which, as we have already pointed out is not a point for consideration by this Court by virtue of the provisions of section 5(3) of the Judicature Act.

The appellant was also appealing against severity of sentence which is prohibited in this Court. In any case, while this Court was considering an appeal from the Court of Appeal in **Tigo Stephen v Uganda, Criminal Appeal No. 08 of 2009** clarified that life imprisonment did mean imprisonment for 20 years but imprisonment for the whole of one's life.

In conclusion, we have found no merit in the appellant's appeal. It therefore fails and is accordingly dismissed. The appellant is to continue serving his sentence as imposed by the Court of Appeal.

Dated at Kampala this ..... 22nd ..... day of ..... August 2019

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JUSTICE STELLA ARACH-AMOKO

JUSTICE OF THE SUPREME COURT.

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JUSTICE ELDAD MWANGUSYA

JUSTICE OF THE SUPREME COURT.

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JUSTICE RUBY OPIO-AWERI

JUSTICE OF THE SUPREME COURT.

.....

JUSTICE RICHARD BUTEERA

JUSTICE OF THE SUPREME COURT.

.....

JUSTICE AUGUSTINE NSHIMYE

AG. JUSTICE OF THE SUPREME COURT.