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 23 OF 2016

BETWEEN

KARISA MOSES :: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal from the Judgment of the Court of Appeal at Kampala (Kiryabwire, Mugamba, & Bamugemerire, JJA) dated 21st October 2016 in Criminal Appeal No. 160 of 2010]

JUDGMENT OF THE COURT

Karisa Moses (hereinafter referred to as the appellant) filed this second appeal challenging the Court of Appeal's decision to uphold a sentence of life imprisonment. It was imposed on him by Lawrence Gidudu, J., who tried and convicted him on an indictment of murder.

The appellant's appeal in this Court is in respect of sentence only.

Background:

The background of the case is that during the evening of 19.8.2004, the appellant who was a grandson of the deceased visited the home of the deceased and demanded to see him. The appellant went to the main house where the deceased was and after about 1 hour, he left. When other members of the family checked on him they found the deceased dead.

The appellant having been the last person to be with the deceased, when he was alive, was suspected, arrested and charged with murder. He was tried, convicted and sentenced to life imprisonment.

REPRESENTATION:

Samuel Seguya appeared for the appellant on state brief while Sam Oola, Senior Assistant DPP appeared on behalf of the respondent. The appellant was present during the hearing of his appeal. Both parties filed and adopted their written submissions.

After reading the submissions of both parties, the record and authority referred to us we wish, from the onset, to point out the discrepancy between the appellant's ground of appeal as it appears in his Memorandum of Appeal vis-à-vis the ground of appeal as framed in the written submissions of the appellant made by his counsel. According to the appellant's Memorandum of Appeal that was filed in this Court on the 27th May 2019, the sole ground of appeal contained therein is framed as follows:

> ***That the learned Justices of Appeal erred in law in confirming the life imprisonment sentence notwithstanding the compelling mitigating factors available to the appellant, and without adhering to provisions of article 23(8) of the Constitution of the Republic of Uganda.***

However, according to the appellant's written submissions the ground therein is framed as follows:

> ***That the learned Justices of Appeal erred in law in maintaining the life imprisonment sentence which was***

harsh and excessive, yet he had spent 6 years on remand, which in effect would have reduced the sentence to a lesser term of years.

We note that there is a discrepancy in the above two grounds notwithstanding the fact that they all relate to the same issue *"dissatisfaction"* by the appellant with the Court of Appeal's decision to uphold his sentence. We need to reemphasize duty of counsel to his client and to this court to stick to the ground of appeal as framed in the memorandum of appeal. The latter ground, as framed, has two flaws that would warrant it's being struck out by this Court.

The first flaw relates to its challenging the appellant's sentence in this Court on grounds of severity. This Court has repeatedly emphasized that under section 5(3) of the Judicature Act, an appellant is precluded from appealing against a sentence on ground of severity. For clarity, 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."

In **Nzabaikukize Jamada v. Uganda, SC Criminal Appeal No. 01 of 2015**, this Court observed thus:

"First and foremost we have to point out that the ground of appeal on severity of sentence is barred by law. Section

5(3) of the Judicature Act prohibits grounds of appeal based on severity of sentence..."

The above position has been reiterated in several decisions of this Court. Notable among these are ***Sewanyana Livingstone v. Uganda, Criminal Appeal No. 19 of 2006***; ***Bonyo Abdul v. Uganda, Criminal Appeal No. 07 of 2011***; ***Okello Geoffrey v. Uganda, Criminal Appeal No. 34 of 2014***; *and* ***Abelle Asuman v. Uganda, Criminal Appeal No. 66 of 2016***.

We reiterate the above position as pointed in these decisions that a ground of appeal on severity of sentence cannot stand in this Court by virtue of the provisions of section 5(3) of the Judicature Act as enumerated above.

The second flaw relates to the said ground of appeal being argumentative. Rule 82(1) of the Judicature (Supreme Court Rules) Directions provides as follows:

> ***"A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make."*** *Emphasis Ours.*

A review of this ground shows that, apart from stating the alleged error committed by the learned Justices of Appeal (upholding a harsh sentence), the ground also contains the views of the appellant in

respect of the time spent on remand and what the effect of this time spent on remand should have on the sentence imposed by the trial Judge. This is clearly contrary to Rule 82(1) cited above.

These two flaws, in our view, are fatal to the appellant's ground of appeal as framed in his counsel's written submissions.

Be that as it may, our review of the ground of appeal as framed in the Memorandum of Appeal shows that the appellant is not appealing against severity of sentence but rather, is challenging the alleged failure by the Court of Appeal to:

(i) Consider compelling mitigating factors available to the appellant; and

(ii) Adhere to the provisions of Article 23(8) of the Constitution while upholding the sentence imposed by the trial Judge. This, in our view, qualifies this appeal as one against sentence on matters of law. We shall now proceed to consider whether it is meritorious or not.

On this ground, the appellant prayed that this Court sets aside the sentence of life imprisonment and substitute it with a lesser sentence as this Court deems proper.

Parties' Arguments in Respect of this ground

Counsel for the appellant acknowledged that an appellate Court does not normally interfere with the trial Court's discretion to impose an appropriate sentence on a convict. He however contended that, there may be instances when an appellate Court can interfere with the exercise of such discretion. On this note, he argued that an appellate

Court could interfere if it was of the view that in the course of exercising such discretion, the trial Court ignored or failed to consider an important matter or circumstances which it ought to have considered while passing sentence. In support of this contention, he relied on the decision of this Court of **Kiwalabye Bernard v. Uganda, Criminal Appeal No. 143 of 2001.**

Turning to the present case, counsel for the appellant submitted that circumstances existed that warranted interference with the sentence imposed by the trial Judge. He advanced two major reasons which in his view ought to have justified the Court of Appeal's interference with the appellant's sentence rather than upholding it.

The first reason related to the alleged failure by the Court of Appeal to consider and/or appreciate the compelling mitigating factors presented by the appellant. According to counsel, these factors included the fact that the appellant was:

(a) aged 22 years at the time of committing the offence and was therefore a youthful offender who had room for reform;

(b) a first offender who did not deserve a long custodial sentence; and

(c) that he was remorseful. Counsel argued that because the appellant was never given the benefit of these mitigating factors by the Court of Appeal (just like the trial Court), which would have had the effect of reducing the sentence of life imprisonment imposed on the appellant had they been

appreciated, the learned Justices of Appeal instead ended up upholding it.

The second reason relates to the alleged failure by the learned Justices of Appeal to comply with the provisions of Article 23(8) of the Constitution. According to counsel, in upholding the appellant's sentence of life imprisonment, the learned Justices of Appeal failed to appreciate the fact that the appellant had already been on remand for 6 years. He argued that, by such omission, the learned Justices of Appeal failed to comply with Article 23(8) of the Constitution.

Counsel contended that, had the learned Justices of Appeal considered the above two factors, they would have come to the conclusion that there was justification for interfering with the appellant's sentence of life imprisonment as imposed by the trial Judge. Relying on *inter alia* the decision of this Court in **Mugasa Joseph v. Uganda, Criminal Appeal No. 10 of 2010**, counsel for the appellant prayed that this Court sets aside the sentence of life imprisonment imposed on the appellant and substitute it with a lesser sentence in view of the anomalies indicated above.

Respondent's Submissions

Counsel for the respondent disagreed with the appellant's contentions that the Court of Appeal did not consider the compelling mitigating factors available to the appellant. He argued that at page 3 of the Court of Appeal Judgment, the learned Justices of Appeal reviewed the sentencing process applied by the trial Judge and found that he had considered both the mitigating and aggravating factors and found

that the aggravating factors far outweighed the mitigating factors and thus found no justification to interfere with the sentence imposed by the trial Judge.

Regarding the argument of the appellant that there was noncompliance with Article 23(8) of the Constitution, counsel for the respondent submitted that the two lower Courts had complied with the stated provision of the Constitution. He pointed out that before the decision of this Court in **Rwabugande Moses v. Uganda, Criminal Appeal No. 25 of 2014**, taking into consideration the time spent on remand by a convict was not necessarily arithmetical. He invited Court to take note that by the time the present appellant was sentenced by the trial Court and his sentence upheld by the Court of Appeal, **Rwabugande** (supra) had not yet been decided.

Further relying on the decision of **Sebunya Robert & anor v. Uganda, Criminal Appeal No. 58 of 2016**, he argued that the **Rwabugande** (supra) ratio could not be applied retrospectively and thus the two lower Courts could not be faulted on this aspect.

In conclusion he argued that the sentence of life imprisonment imposed on the appellant as upheld by the learned Justices of Appeal was lawful and appropriate in the circumstances. He called upon this Court to find that there was no need to interfere with the findings of the learned Justices of Appeal.

Court's Consideration of the Ground of Appeal.

The fundamental question which requires resolution under this ground is whether there was justification for the learned Justices of

Appeal to interfere with the sentence imposed on the appellant by the trial Judge such that we can conclude that they erred in not doing so.

First, we are alive to the guidance that has been given by our predecessors regarding the circumstances when an appellate Court may interfere with a sentence imposed by a trial Judge. In **Kyalimpa Edward v. Uganda, Criminal Appeal No. 10 of 1995**, this Court referred to **R v. Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

> ***"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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice*: Ogalo s/o Owoura Vs R. (1954) 1 E.A.C.A.270 and R.V Mohamedali Jamal [1948] 1 E.A.C.A 126."**

In **Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001**, this Court held thus:

> ***"The appellate court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered***

when passing the sentence or where the sentence imposed is wrong in principle."

An appellate Court will not interfere with a trial Judge's exercise of his or her discretion unless the discretion has been used unjudiciously. This Court in **Kamya Johnson Wavamuno v. Uganda, Criminal Appeal No. 16 of 2000** opined as follows:

"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion, or a failure to take into account a material consideration, or taking into account an immaterial consideration or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently."

We wish to clarify that the above two authorities [**Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995** and **Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001**] should be read and applied while bearing in mind the provisions of section 5(3) of the Judicature Act that statutorily bars appcals to this Court on severity of sentence.

Bearing in mind the above guidance, we now turn to the present case. Counsel for the appellant argued in his written submissions that:

"whereas the trial Judge considered some of the mitigating factors presented on behalf of the appellant, he was never given benefit of them, which also the Court of Appeal never did."

According to counsel, by such omission Article 23(8) of the constitution was not complied with. That the factors that the appellant was never given benefit of both by the trial Court and the learned Justices of Appeal are:

(i) consideration of time spent on remand by the appellant and that he was remorseful

(ii) the appellant was 22 years old at the time he committed the offence and was therefore a youthful offender who had room for reform;

(iii) the appellant was a first offender who did not deserve a long custodial sentence; and

(iv) appellant was remorseful.

Counsel for the respondent submitted that the trial judge took into account the period spent on remand and that the sentence handed out was not illegal.

We have revisited the learned trial Judge's decision regarding how he conducted the appellant's sentencing. We note that before sentencing the appellant, he afforded both the prosecution side and the appellant's side an opportunity to make submissions in respect of sentence. The prosecution laid down their justification for a maximum sentence while the appellant's side laid down justification for a lenient sentence. The appellant's then counsel, in mitigation stated that the appellant:

(i) did not deserve death;

(ii) had no previous record of crime;

(iii) was 22 years and still had a chance of living a useful life;

(iv) would be moulded into a useful citizen; and

According to the case of ***Turyahabwe and twelve others (SCCA No 50 of 2015)*** the fact of being the first offender is irrelevant.

(v) had been on remand for close to 6 years. The appellant himself was also afforded an opportunity to address Court. He among others prayed that he be given a lenient sentence.

Having heard from both sides, the learned trial Judge proceeded to determine his sentence. He considered the following factors:

(i) was a first offender;

(ii) had been on remand for close to 6 years; and

(iii) was only 22 years.

Thereafter the learned trial Judge then observed that:

(i) the deceased had raised the appellant and provided for him but that the appellant paid him with the most brutal currency-death; and

(ii) the deceased was savagely cut splitting his brains in cold blood from his own house, bedroom and died.

Based on these considerations, the learned trial Judge was of the view that despite the appellant's young age, he ought to be kept

away from society and accordingly sentenced him to life imprisonment.

The learned Justices of Appeal reviewed the above sentencing process of the learned trial Judge and concluded as follows:

> ***"Counsel for the appellant mentioned mitigating factors saying they were not taken into account by the trial Judge. On the other hand the trial Judge mentioned those areas of concern as having been had in mind before sentence was passed. Then he meted out the sentence the way he wanted it to be...In the result we find no ground to alter the sentence handed down by the trial Court."***

Having perused the record, we respectfully agree with the above observations of the learned Justices at the Court of Appeal. Our perusal of the record shows that the sentencing process as conducted by the trial Judge complied with the law to the dot. Both the aggravating and mitigating factors as laid out by the two sides were considered by the trial Judge who found that the aggravating factors far outweighed the mitigating factors in the circumstances and thus proceeded to mete out a sentence he deemed suitable.

We also note that counsel for the appellant appeared to allude to the fact that both lower Courts did not comply with the provisions of the Article 23(8). Without specifically stating so, he wanted this Court to fault the two lower Courts for failing to comply with the provisions of the above Article as pointed out in the **Rwabugande** case (supra). In **Rwabugande**, this Court clarified that taking into account the period

of remand is arithmetical. However, prior to the **Rwabugande** decision, the position was that the judge had to demonstrate by stating on record that the court had taken into account the period spent on remand. See for example **Kizito Senkaula v. Uganda, Criminal Appeal No. 24 of 2001** and **Kabuye Senvawo v. Uganda, Criminal Appeal No. 02 of 2002**.

The authority of Rwabugande cited by counsel for the appellant was irrelevant because **Rwabugande** case was decided on 03/03/2017. The appellant in the present case was sentenced by the trial Court on 27/07/2010. His appeal in the Court of Appeal was determined on 21/10/2016, long before the decision in Rwabugande. In **Sebunya Robert & Anor v. Uganda, Criminal Appeal No. 58 of 2016**, this Court observed as follows:

> ***"Rwabugande does not have any retrospective effect on sentences which were passed before it by Courts 'taking into account the periods [a convict] spends in lawful custody." Accordingly, we find no justifiable reason to fault the High Court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences were in conformity with the law that applied at the time the sentences were passed."***

Similarly, in **Duke Mabaya Gwaka v. Uganda, Criminal Appeal No. 59 of 2015** where a similar argument had been made by the appellant in that case basing on **Rwabugande**, this Court observed that the Court of Appeal could not be faulted for upholding the trial Court's

sentence because *'it was guided by what was accepted as the meaning of Article 23(8) of the Constitution at that moment in time.*

We agree with the above position as elucidated in those two decisions. On that basis, we cannot fault the learned Justices of Appeal for upholding the present appellant's sentence. It therefore follows that the appellant's argument in respect of Article 23(8) cannot be sustained.

More importantly the sentence being impugned was life imprisonment. In ***Magezi vs Uganda SSC Criminal Appeal No17 of 2014,*** this held that Article 23(8) was inapplicable where a sentence of life imprisonment is imposed because it is indefinite.

In conclusion, it is our finding that the learned Justices of Appeal were justified in not interfering with the sentence imposed by the learned trial Judge. We have therefore found no reason to fault the decision of the learned Justices of Appeal. We also wish to add that having reviewed the circumstances of this case, we agree with the learned trial Judge's imposition of the said sentence.

We have found no merit in this appeal and is accordingly dismissed.

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

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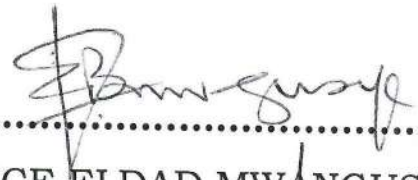
JUSTICE STELLA ARACH-AMOKO

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.

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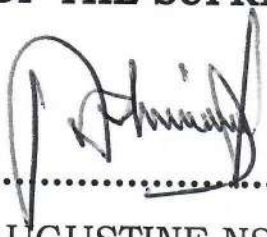
JUSTICE RICHARD BUTEERA

JUSTICE OF THE SUPREME COURT.



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JUSTICE AUGUSTINE NSHIMYE

AG. JUSTICE OF THE SUPREME COURT.