

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 63 OF 2018

*(Coram: Mwondha, Mugamba, Buteera JJSC; Nshimye,
Tumwesigye Ag. JJSC.)*

BETWEEN

BWEMBI LAMECK.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal against the Judgment of the Court of Appeal, at Kampala delivered on the 28th June 2018 by Kasule, Barishaki and Obura JJA)

JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the Court of Appeal. The appellant was indicted on a charge of murder contrary to sections 188 and 189 of the Penal Code Act. He was tried, convicted and sentenced to imprisonment for life.

Being dissatisfied with the sentence imposed by the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and confirmed the trial court sentence of imprisonment for life. Hence this appeal.

Back ground:

The facts as found by the Trial Court were as follows:

The deceased and the appellant were husband and wife having lived together for about two years. The deceased (for undisclosed reasons) had separated from the appellant and gone back to her parents who lived in Buwolero, Mawolero in Kagoma sub-county, Buwera, in Jinja District. On 05/10/2005, the deceased went to the garden and harvested potatoes. On the way back home, she met the appellant. The appellant asked her to go to their matrimonial home with him so she could help him wash clothes but the deceased was reluctant. The deceased asked her nephew Isma Mpoya (PW1) who happened to pass by to take the potatoes home where she would find them later. The deceased resisted going home with the appellant but the appellant continued to pull her along the path insisting that she should go with him. He threatened her saying that if she did not comply, there would be consequences. A scuffle ensued and eventually the appellant, who carried a panga, used it to cut the deceased on the head. After the deceased fell down, the appellant continued to hack at her in different parts of the body.

Bakirya Lucy (PW2) who watched the incident unfold from a distance made an alarm causing the appellant to flee. Several people responded to Bakirya's alarm to come to the aid of the deceased. They helped to take her to hospital where she was admitted for treatment. She stayed in hospital for about three weeks after which she succumbed to tetanus and septicaemia. She died owing to respiratory failure. The appellant was convicted

of murder by the High Court and sentenced to imprisonment for life. Being dissatisfied with the sentence, the appellant appealed to the Court of Appeal. The Court of Appeal upheld the sentence passed by the trial court hence this appeal.

He appealed to this Court on the following ground:

The learned Justices of the Court of Appeal erred in law when they confirmed a sentence of life imprisonment never considering the period spent on remand, which sentence was illegal, based on wrong legal principles, was harsh and manifestly excessive given the circumstances of the case.

Representation

Mr. Andrew Sebugwawo represented the appellant and Ms. Tumuheise Rosemary, Principal state Attorney represented the respondent.

Appellant's submissions

At the hearing of this appeal, counsel for the appellant adopted the written submissions he filed in Court on the 20th day of May 2019.

Counsel cited section 7 of the Judicature Act Cap 13 on the powers of this Court in hearing and determining an appeal and relied on the case of **Kyalimpa Edward Vs Uganda, Criminal Appeal No.10 of 1995** for the proposition that; *"it is the practice that as an appellate court this court will not normally interfere with the discretion of the trial Judge unless the sentence is illegal or*

unless court is satisfied that the sentence imposed by the trial Judge was manifestly excessive as to amount to an injustice.”

Counsel submitted that in sentencing the appellant to imprisonment for life, the trial court did not consider the mitigating factors which included being a first time offender, having twelve children to support and elderly parents to fend for, remorsefulness and the three year period the appellant spent on remand. He relied on the case of **Aharikunda Yustina Vs Uganda, Criminal Appeal No. 27 of 2015** for the proposition that the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, Statutes, Practice Directions together with general principles of sentencing as guided by case law.

Counsel further submitted that the said sentence of imprisonment for life is not uniform and consistent with other sentences previously meted out by the High Court on similar facts. He cited the cases of **Suzan Kigula Seremba Vs Uganda HCT-00-CR-SC-0115-2011** where the accused who had cut her husband's throat with a panga in their child's presence was sentenced to 20 years imprisonment and **Jackie Uwera Nsenga Vs Uganda Nakawa High Court session No. 0312 of 2013** where the accused who had run over her husband with a car was equally sentenced to 20 years imprisonment. To buttress his argument, counsel relied on the case **Aharikunda Yustina Vs Uganda (supra)** where it was held that; *“it is the duty of this court while dealing with appeals regarding sentence to ensure*

consistency with cases that have similar facts. Consistency is a vital principle of the sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.”

Counsel submitted that in arriving at the appropriate sentence, this court should take into consideration the period of three years that the appellant spent on remand in accordance with Article 23(8) of the Constitution. Counsel invited this court to follow the reasoning in **Rwabugande Moses Vs Uganda, SC Criminal Appeal No. 25 of 2014** that taking into consideration the period spent on remand is necessarily arithmetical and a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

Respondent's submissions

On the complaint that the sentence was harsh and excessive, Counsel for the respondent submitted that section 5(3) of the Judicature Act does not allow the appellant to appeal against severity of sentence in the Supreme Court and therefore the appellant has no right to appeal to this court against a harsh sentence.

On the legality of sentence, counsel submitted that sentence of life imprisonment is not an illegal sentence. Counsel averred that the appellant was convicted for murder under section 188 and 189 of the Penal Code Act and death is the severest sentence followed by life imprisonment.

Counsel argued that life imprisonment was defined in the case of **Tigo Stephen Vs Uganda, SCCA No. 08/2009** to mean imprisonment for the natural life of a convict and therefore Article 23(8) of the Constitution and **Rwabugande Moses Vs Uganda (supra)** are not applicable in a sentence of life imprisonment because it is an indefinite sentence.

Counsel further submitted that the Court of Appeal re-considered the mitigating factors and arrived at imprisonment for life as the appropriate sentence. On uniformity of sentences, counsel relied on the case of **Obote William Vs Uganda, Supreme Court Criminal Appeal No. 12 of 2014**, where a sentence of life imprisonment against an appellant who was convicted for murdering his wife by shooting was upheld by this Court.

Counsel further argued that the Justices of Appeal executed their role of re-evaluation of the evidence and arrived at their own decision. He added that after re-evaluating both the mitigating and aggravating factors, the Justices of Appeal found no sound reason to interfere with the sentence which was meted out by the trial Judge. Counsel prayed that the appeal should be dismissed.

Appellant's submissions in rejoinder

In rejoinder, counsel for the appellant reiterated his submissions and prayed that this Court grants the accused a lesser sentence of twenty (20) years imprisonment.

Consideration of the Appeal

This is a second appeal and it is against sentence only. Under section 5(3) of the Judicature Act, the appellant has a right of

appeal to this Court against the legality of sentence, not its severity. (**See Tigo Stephen Vs Uganda (supra)**).

The appellant argued that the sentence passed by the High Court and confirmed by the Court of Appeal is illegal for the following reasons: that both the High Court and Court of Appeal did not consider mitigating factors in arriving at the said sentence, that both the High Court and the Court of Appeal did not consider the period of 3years that the appellant spent on remand as required by Article 23(8) of the Constitution, that the sentence of imprisonment for life is not uniform and consistent with sentences meted out by the High Court in similar cases.

On the other hand, counsel for the respondent argued that the sentence of imprisonment for life is legal and was arrived at by the High Court and confirmed by the Court of Appeal after considering all the mitigating and aggravating factors involved in the case. Counsel submitted that the sentence is not amenable to Article 23(8) of the Constitution as interpreted in the **Rwabugande Vs Uganda decision (supra)** and that it is uniform and consistent with sentences previously meted out in similar cases.

While passing sentence against the appellant, the High Court held as follows:

“I have listened to the submissions of both the prosecution and the state on the sentence. I have also considered the fact that convict has been on remand for three (3) years.

(emphasis added)

However, the murder of wives by their husbands has become a rampant offence which should seriously be punished by Courts. Although court has the discretion to grant the death sentence as the maximum, I shall exercise my discretion not to award it. However, the convict is a brutal man who could hack at his wife in broad day light in front of 2 small boys who were her nephews.

Such an act cannot be taken lightly, not even to allow him to take charge of young children where he is fully reformed. For that reason, the convict is hereby sentenced to imprisonment for life...”

In confirming the above sentence, the Court of Appeal held as follows:

“We conclude from the above that the trial Judge sentenced the appellant to imprisonment for the rest of his life. As already stated, this is the sentence next to death in terms of gravity of sentences. Having escaped death, the appellant was sentenced to the next grave sentence of being imprisoned for the rest of his life...”

Accordingly in this appeal, where the trial Judge passed a sentence of imprisonment for life against the appellant, the trial Judge cannot be faulted for having taken into account the period the appellant spent on remand in the terms set out by the Rwabugande Moses decision (supra) or at all.”

In **Ogalo s/o Owoura Vs R (1954)21 EACA 270**, it was 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 trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive or so low as to amount to a miscarriage of justice.” (See also *Kiwalabye Bernard versus Uganda*, SCCA No. 142/2001)

From the above excerpt of the High Court Judgement, it is clear that the trial Judge took into account all the mitigating and aggravating factors. In ***Abelle Asuman Vs Uganda Criminal Appeal No. 66 of 2016***, this Court held as follows:

“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 their Judgment....These may be issues of style for which a lower court would not be faulted.”

In the circumstances, we find no fault in the High Court’s sentencing decision as confirmed by the Court of Appeal. It took into account the mitigating and aggravating factors and properly exercised its discretion in sentencing the appellant to imprisonment for life.

In the Court of Appeal, the appellant appealed against sentence on the following grounds:

(1) *The learned trial Judge erred in law when she sentenced the appellant to life imprisonment which sentence has created uncertainty and confusion as to whether the sentence is 20 years imprisonment or imprisonment for the rest of his natural life.*

(2) *The learned trial Judge erred in law and fact when she sentenced the appellant to life imprisonment without taking into account the period spent on the trial remand.*

The Court of Appeal accordingly gave a decision on the grounds as framed by the appellant. In this Court, Counsel went beyond the scope of the grounds and decision of the Court of Appeal and faulted the learned Justices of Appeal for upholding a sentence which was illegal, based on wrong legal principles, harsh and excessive in the circumstances of the case.

Section 4 of the Judicature Act states that;

An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as are prescribed by the Constitution, this Act or any other law.

Section 5(3) of the Judicature Act equally provides as follows:

In the case of an appeal against a sentence..., the accused person may appeal to the Supreme Court against the sentence...on a matter of law, not including the severity of the sentence.

The appellant's ground of appeal as presented and argued went beyond the scope of the decision of the Court of Appeal and also

beyond what is permissible to be appealed against under section 5(3) of the Judicature Act.

In the case of **Jamada Nzabaikukize Vs Uganda Criminal Appeal No. 01 of 2015**, this Court dismissed a ground which was based on the harshness and severity of sentence.

In result, we find no reason to interfere with the sentence as confirmed by the Court of Appeal. The ground of appeal therefore lacks merit and is dismissed.

This appeal is dismissed. The appellant shall continue serving the sentence imposed by the trial court and confirmed by the Court of Appeal.

Dated at Kampala this.....^{5th}.....day of ^{Sept}.....2019.


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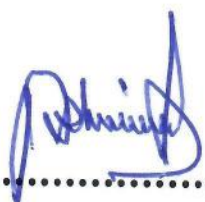
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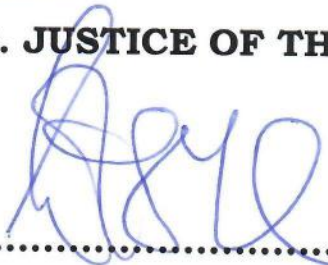
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