IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA HOLDEN AT KAMPALA

(CORAM: KATUREEBE, CJ, KISAAKYE, JSC, ARACH-AMOKO, JSC, TIBATEMWA-EKIRIKUBINZA, JSC, CHIBITA, JSC)

CRIMINAL APPEAL NO.46 OF 2017

(ARISING OUT OF CRIMINAL APPEAL NO. 754 OF 2014)

NASHIMOLO PAUL KIBOLO:::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No. 223 of 2014 before Hon. Justice Elizabeth Musoke, JA, Hon. Justice Barishaki Cheborion, JA, Hon. Justice Paul Kahaibale Mugamba, JA dated 21st August, 2018.)

JUDGMENT

This is a second appeal by the appellant, Nashimolo Paul Kibolo. He was tried and convicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. He was sentenced to the mandatory death sentence. The death sentence was later set aside and substituted with a sentence of life imprisonment. On appeal, the Court of Appeal set aside the life sentence and substituted it with an imprisonment term of 30 years. He now appeals against the 30-year imprisonment sentence on the ground of illegality of sentence.

Brief background:

The facts of the case as accepted by the lower courts were that:

On 23rd September, 2001 at Bulusemu village in Mbale District, the appellant armed with a panga went to the home of the deceased Muleme Clement and cut his head, shoulders and other parts of his body continuously in the presence of the deceased's grandson. The appellant remained at the scene of crime wielding his panga and threatening anyone who offered assistance to the deceased until the time of his arrest. The deceased was rushed to a nearby clinic, soon after the appellant's arrest, where he later died.

The appellant was indicted, tried and convicted of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to the mandatory death sentence by the High Court of Uganda sitting at Mbale presided over by Mwondha J, (as she then was) on 12th/03/2004.

Following this Court's decision in **Attorney General vs. Suzan Kigula and 417 Others,** Constitutional Appeal No. 03 of 2006, his case was remitted to the High Court for resentencing. Wangutsi J, sentenced him to life imprisonment after hearing him on mitigation.

Being dissatisfied with the decision of the High Court, the appellant lodged an appeal in the Court of Appeal on ground the following grounds:

(i) **The learned trial judge erred in law and fact when he passed a harsh and excessive sentence of life imprisonment**

(ii) **That the decision of the learned trial judge constituted and caused a miscarriage of justice.**

The Court of Appeal allowed the appeal, set aside the sentence of life imprisonment and substituted it with a term of 30 years' imprisonment.

Being dissatisfied with the decision of the Court of Appeal, the appellant lodged an appeal in this Court on the sole ground that:

- **"The learned justices of the Court of Appeal erred in law while reducing the sentence of imprisonment for life to 30 years' imprisonment did not direct their minds to provisions of article 23(8) of the Constitution of the republic of Uganda, to consider and offset the period of 2 (two years) and 6 (six months) which the appellant had been on pre- trial remand." (sic)**

At the hearing, the appellant was represented by Mr. Seguya Samuel whereas Nakafeero Fatina, Senior State Attorney appeared for the respondent. Both counsel filed written submissions. They also made additional oral arguments.

Learned counsel for the appellant contended that although the Court of Appeal correctly found that the sentence of life imprisonment was manifestly harsh and excessive, and consequently substituted it with

a 30-year imprisonment term, the court did not arithmetically deduct the period of two and a half (2 ½) years the appellant had spent on remand.

Counsel's contention was that Article 23(8) requires the sentencing court to take into account the period spent on remand before sentencing. He argued that the phrase "taking into account of the period spent on remand" was discussed in the case of **Rwabugande Moses vs. Uganda**, SCCA No. 25 of 2014 to mean an arithmetic deduction from the final sentence and that the Court of appeal's omission to deduct that period made the sentence unlawful.

He submitted that this illegality provided this Court as a second appellate with jurisdiction to interfere with the exercise of discretion by the Court of Appeal in sentencing the appellant.

He thus prayed Court to allow the appeal, set aside the sentence of 30 years' imprisonment and substitute with a sentence of at least 28 years' imprisonment which would have been the sentence to be served had the Court of Appeal complied with Article 23(8) and the case **Rwabugande Moses vs. Uganda** (supra).

Ms. Nakafeero Fatina, Senior State Attorney, opposed the appeal. Counsel contended that this Court could not interfere with the sentence imposed by the Court of Appeal in the exercise of discretion unless the appellant demonstrated to it that the exercise of discretion by the Court of Appeal resulted in the sentence imposed being manifestly excessive or low as to occasion a miscarriage of justice or

that there was a failure to consider an important matter or that the sentence imposed was wrong in principle.

He relied on the case of **Kiwalabye v Uganda** SCCA No. 143 of 2001 and **Wamutabanewe Jamiru v Uganda** SCCA No. 74/2007 to support her argument.

She submitted that the sentence imposed by the learned justices of Appeal was not illegal because the Court of Appeal considered both the mitigating and aggravating factors before imposing the appellant's sentence of 30 years' imprisonment. She referred Court to the Court of Appeal judgment where the learned justices of Appeal pointed out the trial judge's failure to consider the mitigating factors which resulted in the setting aside of the life sentence. She also referred to the Court of Appeal statement that both the mitigating and aggravating factors had been evaluated before handing down the 30 years' imprisonment sentence to the appellant.

Counsel further submitted that the appellant's contention that the sentence imposed fell short of arithmetic deduction as required by law was misconstrued because the Court of Appeal could not be faulted for an issue of style when in effect it complied with the constitutional obligation under Article 23(8). She relied on the case of **Abelle Asuman vs. Uganda** SCCA No. 66 of 2016 for the proposition that consideration of the period spent on remand does not necessarily have to be arithmetic and that the words to deduct and in an arithmetic way that were used in the case of **Rwabugande vs. Uganda** (supra) were mere metaphors that were not based in the

Constitution. She further argued that where a court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the appellate cannot interfere with such sentence merely because the sentencing court omitted to state that they deducted the period spent on remand.

She thus prayed the Court to dismiss this appeal for lack of merit.

Consideration of Court:

The appellant asks this Court to interfere with the decision of the Court of Appeal on ground that the sentence is unlawful.

It is trite that an appellate court can only interfere with sentence imposed by a trial court in very limited circumstances. This Court has in numerous cases discussed the circumstances under which an appellate court can interfere with the discretion of a lower court.

In **Kyalimpa Edward vs. Uganda**, SCCA No. 10 of 1995, this Court while referring to **R vs. Haviland** (1983) 5 Cr. App. R(s) 109 found 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 vs. Mohamedali Jamal [1948]1 E.A.C.A 126."

In **Kamya Johnson Wavamuno vs. Uganda** SCCA No. 16 of 2000, the court held 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."

The above position has been reiterated in several decisions of this court. These include **Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001, Wamutabanewe Jamiru vs. Uganda SCCA No. 74 of 2007, Karisa Moses vs. Uganda SCCA No. 23 of 2016.**

This Court can only interfere with the exercise of discretion if it is satisfied that there was a failure to exercise discretion, or a failure to take into account a material consideration, or an error in principle.

It was the appellant's contention that the Court of Appeal failed to make an arithmetic deduction of the period spent on remand as held in the case of **Rwabugande Moses vs. Uganda** (supra), SCCA No. 25 of 2014 which amounted to an illegality warranting the interference with the exercise of discretion by the Court of Appeal.

There is need for this Court to determine the question as to whether the Court of Appeal complied with the provisions of Article 23(8) of the Constitution when it sentenced the appellant to a term of 30 years' imprisonment. This is paramount because the resolution of this issue would determine whether or not this Court can interfere with sentence imposed by the Court of Appeal in the exercise of its discretion under section 11 of the Judicature Act.

Article 23(8) of the Constitution 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." (Emphasis ours).

The meaning of the phrase "**taking into account the period spent on remand**" has gone through an evolution over time.

In the case of **Rwabugande Moses vs. Uganda** (supra), this Court while re-defining the meaning of the phrase considered its previous decisions and categorically departed from them under Article 132(4) to make arithmetic deduction a must before the imposing of a sentence. This Court stated *inter alia* that:

"But in arriving at an appropriate sentence, we find it pertinent to re-visit this Court's previous decisions on the meaning of the phrase in Article 23(8) of the Constitution that in imposing a term of imprisonment on a convicted person, "any period he or

she spends in lawful custody shall be taken into account when imposing the term of imprisonment."

The principle enunciated by the Supreme Court in Kizito Senkula vs. Uganda SCCA No. 24 of 2001; Kabuye Senvewo vs. Uganda SCCA No. 2 of 2002; Katende Ahamad vs. Uganda SCCA No. 6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010 is to the effect that, the words "to take into account" does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court.

The principle of stare decisis et non quieta movera, which is applicable in our judicial system obliges the Supreme Court to abide or adhere to its previous decisions. However, Article 132(4) of the Constitution creates an exception and states that the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so.

We have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision;

consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused." *(Emphasis ours)*

It is clear from the above quotation that this Court while bearing in mind the previous position of the Court in the cases of **Kizito Senkula vs. Uganda** (supra), **Katende Ahamad vs. Uganda** (supra) and **Bukenya Joseph vs. Uganda** (supra) which did not require arithmetic deduction while taking into account the period spent on remand invoked Article 132(4) of the Constitution to depart from these previous decisions and made "arithmetical deduction a must while a sentencing Court takes into account the period spent on remand.

The decision was delivered on 3rd March, 2017. In accordance with the principle of precedent, this Court and the courts below have to follow the position of the law from that date hence forth.

The Court of Appeal decision that is subject of this appeal was delivered on 21st August, 2017, approximately 6 months, after the decision in **Rwabugande Moses vs. Uganda** (supra) became law.

Be that as it may, the Court of Appeal did not rely on the case of **Rwabugande Moses vs. Uganda** (supra) while discussing the application of Article 23(8) of the Constitution, and the meaning of the phrase "taking into account the period spent on remand" and the eventual sentencing of the appellant.

The Court of Appeal stated as follows:

"While dealing with a matter which involved analyzing clause 8 of the Article 23 of the Constitution, the Supreme Court in Kabwiso Issa vs. Uganda (2001-225) HCB 20 held that clause 8 of Article 23 of the Constitution is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term of imprisonment to be served.

Further in Katende Ahamad vs. Uganda, Supreme Court Criminal Appeal No. 6 of 2004, it was held that in Article 23(8) of the Constitution, the words "to take into account" does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial Court. This was echoed in Bukenya Joseph vs. Uganda, Criminal Appeal No. 17 of 2011 where the same Court went further to state that:

"It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence that Court would give. But it must be considered and that consideration must be noted in the judgment. (Emphasis ours)". *(Emphasis ours)*

The above position is synonymous with the previous position that this Court categorically departed from in the case of **Rwabugande**

Moses vs. Uganda (supra). It relies on cases such as **Bukenya Joseph vs. Uganda** (supra) that are barred in law. Counsel for the appellant rightly submitted that the Court of Appeal did not make an arithmetic deduction while taking into account the period spent on remand. We will reproduce the relevant parts of the Court of Appeal judgment for easier reference.

"The Court of Appeal while sentencing in Attorney General vs. Susan Kigula & Others, Supreme Court Constitutional Appeal No. 1 of 2005, the Court pointed out that murders are not committed under the same circumstances; and the murderers vary in character, as some are first offenders and others are remorseful. Court should consider these factors while exercising its sentencing discretion.

We have evaluated both the mitigating and aggravating factors. We have found that the sentence of imprisonment for natural life of the convict was manifestly excessive in the circumstances. We accordingly set aside and substitute it with a sentence of 30 (thirty) years imprisonment to run from the date of conviction."

From the foregoing, it is clear that the court merely made a general statement about the consideration of both mitigating and aggravating and then arrived at 30 years. This is against the principle in the case of **Rwabugande Moses vs. Uganda** (supra).

We will now discuss the decision in **Abelle Asuman vs. Uganda** (supra) that the learned Senior State Attorney relied upon to oppose

this appeal. The parts of the decision of **Abelle Asuman vs. Uganda** (supra) that she referred this Court to read as follows:

"What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for sentencing Courts but those metaphors are not derived from the Constitution.

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 Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

The quotation above is synonymous with the Court of Appeal decision in the present case.

Both extracts go against the doctrine of *Stare decisis* and the principle of precedent.

There seems to be a big controversy regarding the application of the cases of **Rwabugande Moses vs. Uganda** (supra) and **Abelle Asuman vs. Uganda** (supra). There is confusion as to which of the two cases is the prevailing law especially pertaining to the meaning of the phrase "taking into account the period spent on remand."

This issue also came up in the case of **Latif Buulo vs. Uganda** SCCA No. 31 of 2017 where the appellant submitted that the sentence of 25 years' imprisonment was unlawful because the Court of Appeal did not arithmetically deduct the period the appellant had spent on remand as required under the **Rwabugande** case.

Counsel for the respondent on the other hand argued that the period spent on remand was considered by both the Court of Appeal and the mitigation judge when they stated that they had taken into account the period spent on remand. According to counsel, Court cannot follow the decision of **Rwabugande** (supra) to arithmetically subtract the remand period as this Court departed from **Rwabugande** decision in the case of **Abelle** (supra).

This Court dismissed the appeal because it was misconceived as the period envisaged under Article 23(8) of the Constitution is limited to pre-trial trial and did not extend to the time the appellant spent on death row.

The Court in that case went further to reconcile the positions in the cases of **Rwabugande Moses vs. Uganda** (supra) and **Abelle Asuman vs. Uganda** (Supra).

The Court stated, inter *alia* as follows:

"We note that counsel for the respondent clearly misinterpreted this Court's decision in both Rwabugande and Abelle (supra).

In the case of Rwabugande (supra), Court made it clear that it that it was departing from its earlier decisions in Kizito Senkula vs. Uganda SCCA No. 24 /2001; Kabuye Senvawo vs. Uganda SCCA No. 2 of 2002; Katende Ahamad vs. Uganda SCCA No. 6 of 2004 and Bukenya Joseph vs. Uganda, SCCA No. 17 of 2010 which held that "taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula" Court then held..."

"...the Courts decision in Abelle above, is to the effect that this Court and the Courts below have to follow the position of the law as stated in Rwabugande (supra) only those cases decided after the Courts decision in Rwabugande. i.e 3rd of March 2017."

In our view, the case of **Latif Buulo vs. Uganda** (supra) did not settle the controversy.

We will now try to resolve the said controversy once and for all.

Generally, this Court and the Courts below are bound by the previous decisions of this Court as the final Court of appeal. This is based in the common law doctrine of doctrine of Stare decisis. In Uganda, the application of this doctrine is contained in Article 132(4) of the Constitution which provides as follows:

"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law." (Emphasis mine)

The application of this constitutional provision was discussed by this Court in the case of **Attorney General vs. Uganda Law Society** SC Const. Appeal No.1 of 2006, where the Court with reference to the Court of Appeal and its subordinate courts held that under the doctrine of stare decisis, a court of law is bound to adhere to its previous decisions except where the previous decisions is distinguishable or was over ruled by a higher court on appeal or was arrived at per incurium.

The Court of Appeal decision that is subject of this appeal, was bound to follow the decision in the case of **Rwabugande Moses vs. Uganda** (supra) having been delivered on 21st August, 2017, six (6) months, after the delivery of the Rwabugande decision that became law on 3rd March, 2017. The Court of Appeal having failed to follow the prevailing law, made its decision *per incurium.*

The case of **Abelle Asuman vs. Uganda** (supra) which the learned Senior State Attorney relied on was delivered on 19th April, 2018 a year after the decision in the case of **Rwabugande Moses vs. Uganda** (supra). This Court was, therefore, bound by its previous decision. The principle of horizontal precedent, which means, that a court is

bound by its own decisions in the absence of exceptional reasons to warrant the departure from its decision applies.

Article 132(4) of the Constitution clearly stipulates the circumstances under which this Court can depart from its previous decisions. Indeed, this Court invoked that power in the case of **Rwabugande Moses vs. Uganda** (supra). This Court took cognizance of its previous decisions and also gave reasons for the departure from that position.

The rationale behind the departure according to this Court was that:

"We must emphasize that a sentence couched in general terms that court has taken into account the time has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. Article 23(8) of the Constitution makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision."

It is therefore unlikely that the Court would outlaw its previous position in the cases of **Kizito Senkula vs. Uganda** (supra) **Bukenya**

Joseph vs. Uganda (supra) among others and give justification for the departure and then unceremoniously reinstate it a year later.

In the **Abelle Asuman** case, the Court quoted the outlawed position, it was followed by an unequivocal statement that:

"In its judgment this Court made it clear that it was departing from its earlier decision in Kizito Senkula vs. Uganda SCCA No. 24/2001; Kabuye Senvano vs. Uganda SCCA No. 2 of 2002; Katende Ahamed vs. Uganda SCCA No. 6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010 which held that "taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula

This Court and the Courts below before the decision in Rwabugande (supra) were following the law as it was in the previous decisions above quoted since that was the law then.

After the Court's decision in the Rwabugande case this Court and the Courts below have to follow the position of the law as stated in Rwabugande (supra). This is in accordance with the principle of precedent." (Emphasis ours)

This in our view, brought clarity on the prevailing position of the law as contained in the case of **Rwabugande Moses vs. Uganda** (supra).

The decision in **Abelle Asuman vs. Uganda** (supra) was made *per incurium* to the extent that it made reference to an outlawed position.

Counsel for the respondent's contention that the Court of Appeal's omission to state that it had deducted the period the appellant spent on remand was a mere issue is untenable.

This ground therefore succeeds.

Having found that the Court of Appeal decision was illegal, this Court invokes section 7 of the Judicature Act to arrive at an appropriate sentence in this matter. Section 7 provides:

"For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

This Court is placed in the same position as the Court which had original jurisdiction to hear the matter and sentence the appellant. In light of the fact that human life had been lost, the prosecution prayed for a maximum penalty of the death penalty as a deterrent. The learned State Attorney submitted that the convict committed a heinous crime of killing his uncle by cutting him with a panga and that prior to cutting him, the convict had beaten up the deceased and caused him a fracture on one hand.

On the other hand, it was pleaded in mitigation that the death penalty is only given in the rarest of the rare cases and that this case did not qualify as that. Counsel contended that the murder was not premeditated and that the appellant had been on death row for 10

years and 4 months and that the appellant had acquired skills and education while in prison and that the prison report portrayed him as a person of good character and a disciplined in mate.

We have evaluated both the mitigating and aggravating factors. We have also taken cognizance of the principle of consistency as was discussed in the case of **Aharihundira Yusitina vs. Uganda** SCCA No. 27 of 2015.

In the circumstances of the case, we are of the view that a sentence of 33 years would be appropriate. However, in line with Article 23(8) of the Constitution and this Court's decision in the case of **Rwabugande Moses vs. Uganda** (supra), we are required to deduct the 2 years and 6 months the appellant spent on remand. The appellant will therefore, serve a sentence of 30 years and 6 months that will run from the time of conviction.

We so order.

Dated at Kampala this .....9th.....day of .....September.....2020.

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Hon. Justice Bart Katureebe

CHIEF JUSTICE

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Hon. Justice Dr. Esther Kisaakye

JUSTICE OF THE SUPREME COURT

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Hon. Justice Stella Arach-Amoko

JUSTICE OF THE SUPREME COURT

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Hon. Justice Prof. Lillian Tibatemwa- Ekirikubinza

JUSTICE OF THE SUPREME COURT

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Hon. Justice Mike J. Chibita

JUSTICE OF THE SUPREME COURT