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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 176 OF 2012

OCAYA ROBERT alias KILENGA:.....APPELLANT

VS

10 **UGANDA:.....RESPONDENT**

(Appeal from the decision of Hon. Justice Wilson Masalu Musene holden at Pader High Court Criminal Session Case No. 019 of 2012 delivered on 20/6/2012)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

15 **HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA**

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

20 This is an appeal against sentence only following the conviction of the appellant by the High Court sitting at Pader in a judgment delivered on 20th June, 2012 by Hon. Justice Wilson Masalu Musene. The appellant was indicted, tried and convicted of the offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act and sentenced to 18 years imprisonment.

25 **Background to the Appeal**

The facts giving rise to this appeal are that on 27th July, 2011, the appellant fought with his deceased wife, Aneno Grace. She ran away from her home to a distance of about 200 meters with a baby strapped on her back and

5 where she collapsed and died. The matter was reported to Alango Police Station. A post-mortem was done on the deceased's body which revealed
that she sustained a ruptured spleen due to direct trauma on the abdomen
and she died as a result of internal bleeding. The accused was later traced
and arrested on 28/07/2012 and taken to police.

10 He was indicted with the offence of murder and tried. However, the trial Judge found that the prosecution evidence adduced could not sustain an indictment for murder but rather a lesser offence of manslaughter. Subsequently, the appellant was convicted of the offence of manslaughter and sentenced to 18 years imprisonment.

15 Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court against sentence only on one ground which was set out in the memorandum of appeal as follows;

20 *"That the learned trial Judge erred in law and fact when he sentenced the appellant to imprisonment for eighteen years, which is manifestly harsh, excessive, unreasonable, unfair, unjust and inappropriate in the circumstances of this case."*

Representations

At the hearing of this appeal, Mr. Geoffrey Boris Anyuru represented the appellant on state brief while Mr. Martin Rukundo, learned Principal State
25 Attorney from the Office of the Director Public Prosecutions represented the respondent.

5 **Case for the Appellant**

- ✓ The appellant was granted extension of time within which to appeal and the notice of appeal filed out of time was regularized. Leave was also granted to the appellant to appeal against sentence only.

Counsel submitted that, the sentence of 18 years for the offence of
10 manslaughter which was imposed on the appellant was harsh and
manifestly excessive in the circumstances of this case. He also submitted
that, the Judge did not take into account the period of 1 year the appellant
had spent on remand and prayed that this Court takes that period into
account as required under Article 23 (8) of the Constitution and reduces the
15 harsh sentence. He cited the case of ***Ainobushobozi Venancio vs
Uganda, CACA No. 242 of 2014*** in which the appellant was convicted of
manslaughter and on appeal this Court reduced a sentence of 18 years to
12 years for reasons that it was harsh and manifestly excessive and out of
range with sentences imposed in cases of this nature.

- 20 He prayed that this Court adopts that precedent of uniformity and allows
the appeal.

The Respondent's reply.

Counsel opposed the appeal and supported the sentence. He submitted
that the offence is serious and the maximum sentence is life imprisonment
25 but the trial Judge took into account the aggravating factors and the
mitigating factors and imposed a sentence of 18 years which was
appropriate in the circumstances. Counsel distinguished the case of
Ainobushobozi Venancio vs Uganda (supra) from the instant case, and

5 submitted that in that case the appellant had quarreled with the deceased
over a bicycle and he pushed him down. The deceased fell on a tree stump
which injured him and eventually led to his death. According to counsel, the
facts of this case are different because the appellant repeatedly hit the
deceased in a vulnerable part like the head, the chest and waist which
10 caused her death.

He referred this Court to the case of ***Kyalimpa Edward vs Uganda, SCCA No. 10 of 1995*** which was an appeal against sentence of 15 years and the Supreme Court held that the sentence was not so manifestly excessive.

Counsel conceded that the trial Judge did not take into account the period
15 spent on remand. He however, contended that the sentence that was
imposed was fair and justified in the circumstances. He prayed that the
appeal be dismissed.

In rejoinder, counsel for the appellant submitted that the authority of
Kyalimpa Edward vs Uganda (supra) cited by counsel for the respondent
20 is a 1995 case but there are recent authorities which show that 18 years is
manifestly excessive. He referred this Court to the cases of
Ainobushobozi vs Uganda (supra) and ***Livingstone Kakooza vs Uganda, SCCA No. 17 of 1993***. Interestingly, the case of ***Livingstone Kakooza vs Uganda (supra)*** was decided 2 years before that of ***Kyalimpa Edward vs Uganda (supra)***.
25

5 **Resolution by the Court**

7 The principles upon which this Court can interfere with the sentence of the
8 trial Judge were considered by the Supreme Court in **Kamya Johnson**
9 **Wavamuno vs Uganda, SCCA No. 16 of 2000** where the court stated:

10 *"It is well settled that the Court of Appeal will not interfere with the*
11 *exercise of discretion unless there has been a failure to exercise*
12 *discretion, or failure to take into account a material consideration, or*
13 *an error in principle was made."*

14 The appellant faults the trial Judge for meting out a harsh and manifestly
15 excessive sentence upon him and for not taking into account the period
16 spent on remand. Counsel for the respondent conceded that the trial Judge
17 did not take into account the period of 1 year the appellant spent on
18 remand.

19 Article 23 (8) of the Constitution makes it mandatory for court to take into
20 account while passing a sentence the period a convict would have spent in
21 pre-trial detention. It provides thus;

22 *"Where a person is convicted and sentenced to a term of*
23 *imprisonment for an offence, any period he or she spends in lawful*
24 *custody in respect of the offence before the completion of his or*
25 *her trial shall be taken into account in imposing the term of*
26 *imprisonment."*

27 The trial Judge in this case, so far as it is relevant to this point, while
28 sentencing the appellant stated thus;

5 *"I therefore agree with State Counsel, Mr. Okello that a harsh penalty
is called for to serve as a warning to others be criminals (SIC). I will
only consider the fact of the two children left behind who belong to
both the deceased and convict as submitted by Mr. Ladwar. So the
convict will be spared life imprisonment. I nevertheless sentence the
10 convict to 18 years imprisonment."*

It is apparent that the period of 1 year the appellant had spent on remand was not taken into account by the trial Judge as required by Article 23 (8) of the Constitution.

In ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014***, the Supreme
15 Court held that;

"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."

In that case, the Supreme Court set aside the sentence of 35 years
20 imprisonment for being illegal and invoked section 11 of the Judicature Act to arrive at an appropriate sentence of 21 years imprisonment in the matter after deducting the period of 1 year the appellant had spent in lawful custody prior to completion of his trial.

In ***Anguyo Robert vs Uganda, CACA No. 48 of 2009*** the trial Judge did
25 not take into account the period of 1 year and 7 months the appellant had spent on remand. On appeal, this Court set aside the 20 years imprisonment the appellant had been sentenced to and substituted it with 18 years imprisonment.

- 5 In the instant case, upon our re-evaluation of the record of sentencing proceedings, we find that the learned trial Judge erred in law in failing to take into account the period the appellant had spent on remand thus rendering the sentence of 18 years imprisonment he imposed on the appellant illegal. We accordingly set it aside.
- 10 Having so found, we invoke the provisions of **section 11 of the Judicature Act** which gives this Court the powers, authority and jurisdiction vested in the High Court and proceed to determine the appropriate sentence in the circumstances of this case. In so doing, we shall consider the aggravating factors and the mitigating factors on court record at pages 56-57.
- 15 We take into consideration the mitigating factors that, the appellant was a first time offender and only aged 28 years at the time of committing the offence. The child left at home is his child whom he needs to raise, he had spent one year in custody prior to his conviction. Domestic violence is a neutral offence where both parties participate and it will not serve the ends
20 of justice to take it out on the convict alone. For the aggravating factors, it was presented that the appellant has no previous record and has been on remand since 9/8/2011. The offence is a serious one. The deceased left behind young kids. The circumstances indicate domestic violence which cases are on the increase.
- 25 We have also taken guidance from a number of decisions that provide the sentencing range to be meted out in cases of a similar nature. In **Simon Amodoi vs Uganda, SCCA No. 14 of 1994 [1995] UGSC 20**, the appellant was convicted of murder of his father by the High Court and sentenced to death. This Court upheld both conviction and sentence and

5 he appealed to the Supreme Court which quashed the conviction of murder and set aside the sentence of death. A conviction of manslaughter was substituted and a sentence of 12 years imprisonment was imposed.

In ***Kabuye Senvewo vs Uganda, SCCA No. 2 of 2002 [2005] UGSC 23***, the appellant was convicted of manslaughter and rape and sentenced to 8
10 years and 10 years imprisonment respectively. His appeal to the court of Appeal was dismissed and he appealed to the Supreme Court which dismissed the appeal against conviction for manslaughter and confirmed the sentence of 8 years imprisonment for the offence of rape.

In ***Okwaimungu Dominic vs Uganda, CACA No. 0036 of 2014***, the trial
15 court convicted the appellant of the offence of murder and sentenced him to 21 years imprisonment. On appeal to this Court, the conviction was quashed and the sentence set aside. This Court then convicted the appellant of manslaughter and sentenced him to 15 years imprisonment.

We have also considered the case cited by counsel for the appellant of
20 ***Ainobushobozi Venancio vs Uganda (supra)*** in coming to our conclusion.

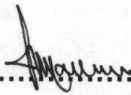
In the circumstances, we are of the considered view that the ends of justice will be met by sentencing the appellant to 11 years imprisonment. In view of the decision in ***Rwabagande vs Uganda (supra)*** at pages 15-16, we
25 are enjoined to deduct the period of 1 year the appellant spent on remand. The appellant shall therefore serve a sentence of 10 years imprisonment.

5 This first leg of the ground alone disposes of the appeal without the need to consider severity of sentence of 18 years since it has already been set aside.

The sentence is to be served from the date of conviction of the appellant, that is 20th June, 2012.

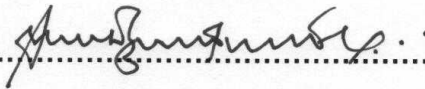
10 We so order.

Dated at Gulu this 29 day of September 2017



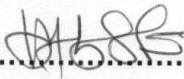
.....
Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL



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Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL



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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL