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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 0729 OF 2014**

**1. ORYEMA JOSEPH ATHOBAR
2. OMIRAMBE ALFRED MOSES.....APPELLANTS**

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VERSUS

UGANDA.....RESPONDENT

*(An appeal from the decision of the High Court at Gulu
Before His Lordship Hon. Justice Rugadya Atwoki dated
17th July, 2014 in Criminal Case No. 0123 of 2014)*

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**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA**

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JUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship Rugadya Atwoki J, in High Court *Criminal Case No. 0123 of 2014* delivered on 17th July, 2014 at Gulu.

The appellants were convicted of the offence of murder contrary to *Sections*
25 *188 and 189* of the Penal Code Act (CAP 120) and sentenced to death since it was the only sentence prescribed by law at the time. Subsequent to the Supreme Court decision of *Suzan Kigula and Others Vs Attorney General, Constitutional Appeal No. 03 of 2006*, the mandatory death penalty was declared unconstitutional and all cases were ordered to be sent back for
30 mitigation on sentence. Following, the re-sentencing proceedings the 1st appellant was sentenced to 35 years and the 2nd appellant to 30 years imprisonment.

5 The appellants being dissatisfied with this decision of the High Court now appeal against sentence only.

At the hearing of this appeal, learned Counsel *Mr. Levi Etum* appeared for the appellant while *Ms. Rose Tumuheise* learned Counsel from the Office of the Directorate of Public Prosecutions appeared for the respondent.

10 At the hearing, Court was served with a Medical Certificate of Death of the 1st appellant, hence his appeal abates under *Rule 71* of the Rules of this Court. Hearing proceeded in respect of the 2nd appellant's appeal only.

Appellant's case

15 Counsel for the appellant having been granted leave to appeal against sentence alone, submitted that, the sentence of 30 years imposed upon the appellant was harsh and manifestly excessive in the circumstances of the case. He contended that, the sentencing Judge did not take into account the age of the appellant, a major mitigating factor. He was aged 26 years at the time of the commission of the crime.

20 Counsel further contended that, the sentencing Judge erred in law when he did not take into account the pre-trial detention period as required under *Article 23 (8)* of the Constitution which rendered the sentence a nullity.

25 He asked this Court to consider both the aggravating and mitigating factors and reduce the sentence from 30 (thirty) years to 20 (twenty) years imprisonment and thereafter, deduct from that sentence 2 years and 3 months the period the appellant had spent on pre-trial detention.

Respondent's reply

Counsel conceded that the re-sentencing Judge erred in law when he did not take into account the period the appellant had spent on remand as required

5 under *Article 23 (8)* of the Constitution thus rendering the sentence a nullity. She asked this Court to invoke *Section 11* of the Judicature Act which confers upon it the powers/ authority and jurisdiction of the trial Court to impose an appropriate sentence of its own.

10 She asked Court to consider a deterrent sentence of 30 years imprisonment after deducting the period the appellant had spent on remand.

Resolution of issues

We have carefully listened to the submissions of both Counsel and we have also perused the Court record and the authorities cited to us.

15 Both Counsel agree that, the sentence of 30 years imprisonment imposed by the re-sentencing Judge on the appellant ought to be set aside as he did not take into account the pre-trial detention period the appellant had spent on remand. This omission, both Counsel agree, renders the sentence a nullity as it contravenes *Article 23 (8)* of the Constitution.

20 It is evident on Court record that the period the appellant had spent on remand was not taken into account by the trial Judge as required by *Article 23 (8)* of the Constitution, which provides as follows;-

25 *"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."*

In Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014, the Supreme Court stated that, taking into account is necessarily an arithmetical exercise. Therefore, the period the appellant had spent in pre-

5 trial detention ought to have been deducted from the sentence. Since the trial Judge did not do so, the sentence imposed is a nullity.

We now invoke *Section 11* of the Judicature Act (Cap 13) and impose a sentence we consider appropriate in the circumstances of this appeal. It provides as follows;-

10 "Court of Appeal to have powers of the Court of original jurisdiction

For the purpose of hearing and determining an appeal, the Court of Appeal 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."

15 There are aggravating factors in this case. The appellant killed the victim in a brutal and gruesome manner. She was 55 years old. She was a mother and a wife. Her family lost her love, care and affection.

However, there are mitigating factors in appellant's favour. He was a first offender. He was relatively young aged 26 years at the time of the commission
20 of the offence. He was remorseful. He had spent 2 years and 3 months on remand at the time of the conviction.

In Omusenu Sande Vs Uganda, Court of Appeal Criminal Appeal No. 0029 of 2011, the appellant was convicted of the offence of murder and sentenced to 30 years imprisonment. On appeal, this Court reduced the sentence to 20
25 years imprisonment.

In Kosayi Wambwa Vs Uganda, Court of Appeal Criminal Appeal No. 747 of 2011, this Court reduced a sentence of 35 years imprisonment to 25 years imprisonment for the offence of murder.

5 In *Turyahika Joseph Vs Uganda, Court of Appeal Criminal Appeal No. 0327 of 2014*, this Court reduced a sentence of 36 years imprisonment to 26 years imprisonment for the offence of murder.

In *Wodaba Moses Vs Uganda, Court of Appeal Criminal Appeal No. 0758 of 2014*, the appellant was convicted of the offence of murder and sentenced to 39
10 years imprisonment. On appeal, this Court reduced the sentence to 23 years imprisonment.

Taking into account all the aggravating and mitigating factors and considering the cases cited above and others not cited, we consider that a term of 20 years imprisonment will meet the ends of justice. We now deduct from the 20 years,
15 2 years and 3 months the appellant spent in pre-trial detention and order that he serves 17 years and 9 months in prison starting from 2nd June, 2004, the day he was convicted.

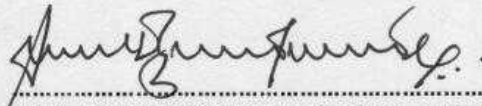
We so order.

Dated at Gulu this 7th day of November 2017.


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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

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