

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA SITTING AT MASAKA
CRIMINAL APPEAL NO. 463 OF 2014

1. **SENYONDO MATIA (A2)**

5 2. **KALYANGO MISUSERA (A3) :::::::::::::::::::::::::::::: APPELLANT**

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::: RESPONDENT

(Arises from the judgment of Justice Akiiki Kiiza in Masaka High Court Mitigation Appeal No. 7 of 2005)

10 **CORAM: HON. JUSTICE EGONDA NTENDE, JA**

HON. JUSTICE, HELLEN OBURA, JA

HON. JUSTICE, STEPHEN MUSOTA JA

JUDGMENT OF COURT

15 This is a second appeal. The appellant was convicted of Murder C/S 188 and 189 of the Penal Code Act.

The appellant and 2 others were sentenced to death on both counts of murder and robbery. The convictions and sentences were confirmed by this court. On further appeal to the Supreme Court, the matter was referred back to the High Court for mitigation following
20 the Supreme Court's order in **Constitutional Appeal No. 03 of 2006 Attorney General Vs Susan Kigula.**

Background

25 On 8th November 1998 at Kijaba village Lwengo sub-county in Masaka district, the appellants and others robbed the deceased, Mwanje Peter of his motorcycle registration Number UAC 968B and used a deadly weapon, to wit a knife, on the deceased. During the robbery, Mwanje Peter lost his life hence the second count of Murder C/S 183 and 184 of the Penal Code Act. At the High Court before

Justice Akiiki Kiiza, the appellants were sentenced to death on both counts of Aggravated Robbery and Murder. Dissatisfied with that decision, the appellants appealed to the Court of Appeal against both convictions and sentences. Their appeal was however dismissed. On
5 further appeal to the Supreme Court and following the Supreme Court Judgment/Order in Constitutional Appeal No. 03/06 Attorney General Vs Susan Kigula and 3 others, the matter was referred back to the High Court for mitigation.

The appellant now appeals to this court against the sentencing
10 Judge's decision which imposed 20 years on each of the counts of robbery and murder contrary to sections 285/286 and 188 and 189 of the Penal Code Act respectively. This appeal is, with leave of this court, against sentence only on the following grounds as stated in the amended Memorandum of Appeal;

- 15 1. The learned mitigating/re-sentencing Judge erred both in law and in fact to pass a sentence without stating the time when the sentence should start running.
- 20 2. The mitigating/re-sentencing Judge erred in fact to sentence the appellants to 20 years imprisonment exclusive of the remand period which was harsh according to the circumstances.

Representation

At the hearing of the appeal, Ms. Kentaro Specioza appeared for the appellants on state brief, while Ms. Jacquelyn Okui, Senior State
25 Attorney, appeared for the respondent.

Submissions of the appellants

Counsel for the appellants sought leave to appeal against sentence only under Section 132(1) (b) of the Trial on Indictments Act which we granted.

30 Counsel cited section 40(6) of the Criminal Procedure Code Act and submitted that the trial judge ought to have mentioned that the sentence should start running from the date of the original sentence which was not indicated or from the date of resentencing. That the

1st sentencing was done on 14th September 2000 and from that time to date, about 17 years and 9 months have passed. Also, that the appellants had been on remand since 1998. Counsel considered the remand period from that time of remand up to the time of conviction and on considering the sentencing to start running from the conviction, she submitted that the appellants have already completed the period they are supposed to be in prison, that is, the 20 years period they were sentenced to.

And on that ground, counsel prayed that this court sets them free from prison.

Counsel abandoned ground number 2.

Submissions of the respondent

Counsel for the respondent argued that the sentence passed on re-sentencing was illegal in as far as it never took into account both the remand period and the post-conviction period served by the appellants and thus rendered the sentence a nullity. That this would mean that the appellants would have to be resentenced. Counsel referred to the record of appeal in which the resentencing Judge noted the submission of counsel and stated that:

“Mr. Mudde has submitted that his clients are now repentant and remorseful, they had spent 3 years on remand before conviction in 2000 and have spent an additional 12 years awaiting to serve their sentence of a death penalty. I have carefully considered all the submissions of both learned counsel. I also take into account the time the convicts have been in prison since 1998.”

This would therefore require that the appellants be re-sentenced in regard to the time the sentence starts running. That the offences they committed were grave, to wit; aggravated robbery and murder which both carry a maximum penalty of death. The offences were premeditated, there was use of a deadly weapon, a sharp knife was used on the victim and they inflicted deep cuts on his back and head and tied his hands and legs. They also took the victim's motorcycle and also the rampancy of the offences and as such proposed a

sentence of 35 years imprisonment having taken into account the period spent on remand which was 1 year and 10 months.

Counsel cited the case of **Mpangi vs. Uganda, Court of Appeal Criminal Appeal Number 91 of 2000** in which the appellant was convicted of murder and sentenced to 34 years imprisonment and the Court of Appeal found that 34 years imprisonment was sufficient punishment.

Resolution of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996**. In the latter case, the Supreme Court held that;

“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”

Consideration of sentence

An appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda, SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda, Criminal Appeal No. 143 of 2001(S.C)**)

We have evaluated the record of proceedings of the sentencing Judge as well as the trial record and judgment. We have also carefully considered the submissions of Counsel for both sides.

5 The appellant's Counsel submitted that the sentencing judge did not state when the sentence was to start running. For clarity, the re-sentencing Judge held that;

10 *"I have carefully considered all the submission of both counsel. I also take into account both the circumstances under which the offence was committed in 1998, and the current circumstances surrounding the accused person. I also take into account the time the convicts have been in prison since 1998. I find that this is a proper case where the court can exercise its discretion not to impose a death penalty had by 2000. Putting everything into consideration I sentence all the accused persons individually to a term of 20 (twenty) years imprisonment on the 1st count and a term of 20 years imprisonment, on the 2nd count."*

15 From the above extract from the re-sentencing Judge's ruling, we find that the re-sentencing Judge acknowledged that the appellants' had been committed in 1998 but did not state whether he had taken into account the period spent on remand.

20 Current jurisprudence has established that if a sentencing Judge does not take into account the remand period while determining the sentence, then the sentence that Judge passes is illegal as it is contrary to the mandatory provisions of Article 23(8) of the Constitution. The Constitution provides that the sentencing Court must take into account the period spent on remand. It was held in 25 the Supreme Court decision of **Abelle Asuman Vs Uganda, S.C.C.A No 66 of 2016** that:

30 *"it does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in **Article 23(8) of the Constitution** is for the Court to take into account the period spent on remand."*

Although the process is not a mathematical exercise as stated above, a sentencing Judge should clearly indicate the mitigating and

aggravating factors he/she has taken into account, particularly the remand period. In the result, we have no option but to set aside the sentence and re-sentence the appellants.

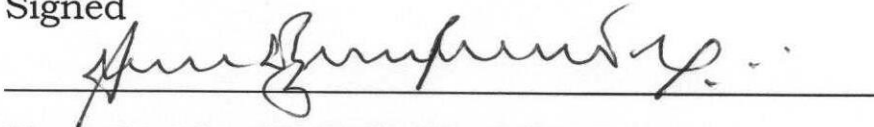
5 On the aggravating side, the offences the appellants were convicted of are grave offences which carry a maximum penalty of death. There was use of a deadly weapon, a knife, which was used to inflict wounds on the victim which led to his death. His motorcycle was robbed from him.

10 In mitigation, the appellants are repentant and remorseful and had spent close to 2 years on remand before conviction. Having considered all the above factors and the period spent on remand, we sentence each of the appellants to 18 years imprisonment on each count, from the date of conviction which is 14/009/2000. Sentences to run concurrently. This appeal accordingly succeeds.

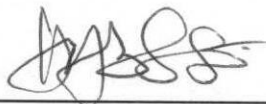
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Dated this ^{30th}..... Day of^{July}..... 2018

Signed

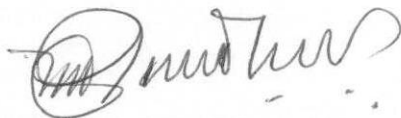


20 **Hon. Justice Egonda Ntende, JA**



Hon. Justice, Hellen Obura, JA

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Hon. Justice, Stephen Musota JA