

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBALE

CRIMINAL APPEAL NO. 708 OF 2015

WABWIRE IDDI:.....APPELLANT

VERSUS

10

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Tororo delivered on 20th April 2014 in Criminal Session Case No.159 of 2013 by Hon. Justice Henry .I Kawesa)

CORAM: HON. MR. JUSTICE FMS.EGONDA NTENDE, JA

15

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE KIBEEDI MUZAMIRU, JA

JUDGEMENT OF COURT

The appellant was convicted of murder contrary to section 188 and 189 of the Penal Code Act and sentenced to life imprisonment by the High Court of Uganda at Kampala before Hon. Justice. Henry .I Kawesa. He has appealed to this Court against sentence only.

20

5 The facts of this case as found by the trial Judge are that; on the 19th day of
February 2012 at about 9:00pm, the deceased Bagume Angella complained to
the area LCs that she had misunderstandings with the accused for reasons of
infidelity. On 25/2/2012 at about 10:00pm, the appellant went to his home and
started accusing the deceased of cheating on him. He got into Jealousy fit, drew
10 a panga and cut the deceased several times until she died. Thereafter, he set the
house on fire with their child and the deceased inside. An alarm was raised the
victims daughter and neighbors who responded rescued the child but the
deceased died immediately thereafter. The accused went into hiding but was later
arrested and charged. At trial, he pleaded guilty and was sentenced to life
15 imprisonment.

Being dissatisfied with the above decision, he sought and was granted leave by
Court to appeal against sentence only pursuant to section 132 (1) (b) of the Trial
on Indictment Act and leave was accordingly granted

The two grounds of Appeal are;

- 20 **1. That the learned trial Judge erred in law and fact when he sentenced the
appellant without considering the time spent on remand.**
- 2. That the learned trial judge erred in law and fact when he imposed a harsh
sentence of life imprisonment on the appellant hereby occasioning him a
miscarriage of justice.**

25 At the hearing of the appeal, Mr. Opendo appeared for the appellant on State
brief while Mr. Peter Mugisha, Senior State Attorney represented the respondent.

5 It was submitted for the appellant that the trial Judge did not take into account the period the appellant had spent on remand as required under article 23(8) of the Constitution and cited **Wabamutabanewe Jamil vs Uganda SCCA NO.74 of 2007** to support the submission that such sentence would be illegal.

Counsel further submitted that the sentence of life imprisonment meted out on the appellant was harsh and excessive given that there were mitigating factors which still existed up to date including the fact that the convict acknowledged guilt, he was a first time offender, remorseful, aged 77 years and a patient with Hiv/Aids and had developed complications like high blood pressure.

Counsel cited the case of **John Kasimbazi & 6 others vs Uganda CACA No. 167 of 2013** where the appellant was charged with murder and sentenced to life imprisonment and on appeal, the appellate court reduced the sentence to 12 years. Counsel also referred to **Odongo Ronald vs Uganda CACA048/2010** where the appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced of death. On appeal, this court found the sentence to be harsh and manifestly excessive and substituted it with 18 years and 4 months.

Counsel for the respondent opposed the appeal and supported the sentence imposed by the trial Judge. He submitted that there was no way the period spent on remand was to be subtracted from life imprisonment.

25 On ground 2, counsel for the respondent submitted that the sentence meted out was too lenient basing on the factors of the case. That the appellant committed

5 this gruesome crime in the presence of his children, he cut the deceased several times till her death and then set the house ablaze when one of the child was inside. That there were no factors upon which this court could interfere with the sentencing discretion of trial judge. He cited ***Kiwalabye Bernard vs Uganda; Criminal Appeal No.143 of 2001*** and prayed that the appeal be dismissed and
10 the sentence upheld.

The duty of this Court as a first appellate Court was re-stated by the Supreme Court in ***Oryem Richard vs Uganda; Criminal Appeal No. 22 of 2014 (SC)*** in the following words;

15 ***“We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case.”***

20 The ***Supreme Court in Kiwalabye vs Uganda Criminal Appeal No. 143 of 2001*** agreed with the decision of this court in ***Kamya Johnson Wavamuno vs Uganda Criminal Appeal No. 16 of 2000*** when it reiterated that ‘*The Appellate Court is not to interfere with the sentence imposed by a trial court which has exercised its discretion , unless the exercise of the discretion is such that it results in the*
25 *sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter*

5 *or circumstance which ought to be considered while passing the sentence or where
the sentence imposed is wrong in principle.'*

In the instant case, the trial Judge is being faulted for not taking into account
the period the appellant had spent on remand before meting out the sentence of
life imprisonment. The respondent contended that because this was a sentence
10 of life imprisonment the sentencing judge could not take into account the period
the appellant had spent on remand.

It is a mandatory constitutional requirement enshrined in **Article 23(8) of the
Constitution** that court has to take into account the period spent on remand
while sentencing a convict. The article provides;

15 ***"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."***

While sentencing the appellant, the learned trial judge stated that;

20 *"In this case the accused has pleaded guilty...He has been on remand.
These operate as mitigations to remove the sentence away from death. ..The
mind of the accused was totally full of crime...With the above in mind
accused deserves a very deterrent sentence which will permanently keep
him away from society...The accused is accordingly sentenced to
25 imprisonment for life."*

5 The judge imposed a sentence of imprisonment for life sentence and did not take into account the period the appellant had spent on remand. The supreme court while dealing with a similar issue in **Opolot Justine & Another versus Uganda Supra** referred to its decision in **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014** it where it held that;

10 *'A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.'* Be that as it may, the constitutional provision which obliges a sentencing court to consider the period spent by a convict on remand does not apply to a sentence of life imprisonment (for capital offences as in this
15 appeal).Indeed this court has stated so in an earlier decision in **Magezi Gad vs Uganda SCCA No.17 of 2014**, wherein it was held that;

*We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23(8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e a
20 quantified period of time which is deductible. This is not the case with life or death sentences."*

In light of the above Supreme Court decisions, the learned trial Judge was not mandated to take into consideration the period the appellant had spent on remand when he sentenced the appellant to life imprisonment. We find
25 no reason to fault him.

Ground 1 fails.

5 On the second ground, the learned trial judge is faulted for imposing a harsh and excessive sentence without considering the mitigating factors. It was submitted for the convict that he had acknowledged his guilt, was remorseful, aged 70 years and a patient with HIV/AID. That he had also developed high blood pressure.

10 Counsel for the respondent submitted that the appellant had committed a gruesome crime and the sentence of life imprisonment was too lenient considering the barbaric way he murdered the deceased.

While sentencing the appellant the learned trial judge stated as follows;

15 *"Accused has pleaded guilty to murder. Murder attracts death penalty in the rarest of the rare of cases. In this case the accused has pleaded guilty. He has a family. He is said to be sickly. He has been on remand. These operate as mitigations to remove the sentence away from death. However, the crime was gruesome, done in presence of close family members, and was combined with other crimes of arson*
20 *and attempt to finish the life of a young child.*

The deceased was hacked several times. The mind of the accused was totally full of crime. With the above in mind accused deserves a very deterrent sentence which will permanently keep him away from society. It should teach others to avoid similar crimes. The accused is
25 *accordingly sentenced to imprisonment for life."*

5 The appellant cut the deceased to death several times with a deadly weapon in
the presence of family members and thereafter set the house ablaze with his own
child inside .While we agree with the trial Judge that it is the duty of the court
to protect , deter and send a clear message to the would be perpetrators of such
heinous offences, we are of the firm view that the mitigating factors in favor of
10 the appellant, namely; that he was remorseful throughout the trial, saved court's
time and resources when he pleaded guilty, was aged 70 years and left behind
17 children and 1 child with the deceased who needed care and support, should
not have been ignored.

In **Kabatera Steven V Uganda, Court of Appeal Criminal Appeal No.123/2001,**

15 Court stated that;

*".....We are of the opinion that the age of an accused person is always a
material consideration that ought to be taken into account before a sentence
is imposed."*

While considering the weight to be accorded to the need for care of children
20 affected by crime in mitigation of sentence, this court in **Tuhumwire Mary v
Uganda Criminal Appeal No. 352 of 2015** stated that;

*"There is need to weigh the aggravating factors against the special
mitigating factor of the fate of the children of this marriage, who are of tender
age and are unfortunate victims of a deed, which they had no hand in. In
25 the circumstances of this case, we reduce the sentence to ten (10) years, to*

5 *enable the appellant reform further, pick up the pieces with the children, and reconcile with her family.”*

The trial judge failed to take into consideration important matters and circumstances which he ought to be considered while passing the sentence including the fact that the appellant was sickly with HIV/AID and had developed
10 high blood pressure.

We therefore, set aside the sentence and exercise the jurisdiction granted to this Court by section 11 of the Judicature Act cap 13 and proceed to sentence the appellant afresh.

The maximum sentence for a conviction on a capital offence is death. The Trial
15 Judge sentenced the appellant to serve life imprisonment. We have re-considered both the mitigating and aggravating factors presented before the trial court and have also looked at the range of sentences imposed in similar offences. In ***Mbuya Godfrey vs Uganda, Criminal Appeal No. 4 of 2011*** the Supreme Court held that court should try as much as possible to have consistency in sentencing.

20 In the ***Mbunya*** appeal the appellant had been convicted of murder of his wife. The Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

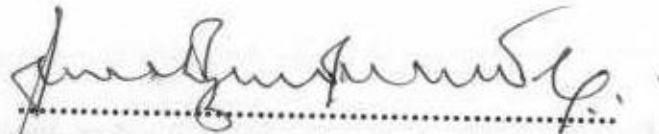
In ***John Kasimbazi & 6 Others vs Uganda CACA No.167/2013***, where the appellant was convicted of Murder and sentenced to life imprisonment but on appeal, the
25 sentence was reduced to 12 years.

5 After taking into account the period of 1 year and 8 months the appellant spent on remand, we sentence him to 18 years imprisonment. The sentence is to be served from the date of his conviction.

We so order.

Dated at Mbale this.....15th.....day of September.....2020.

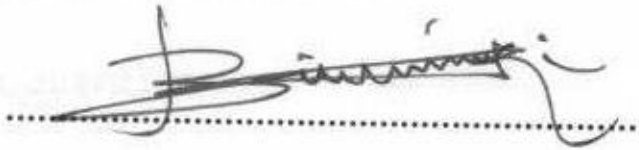
10



HON. MR. JUSTICE FMS EGONDA NTENDE

JUSTICE OF APPEAL

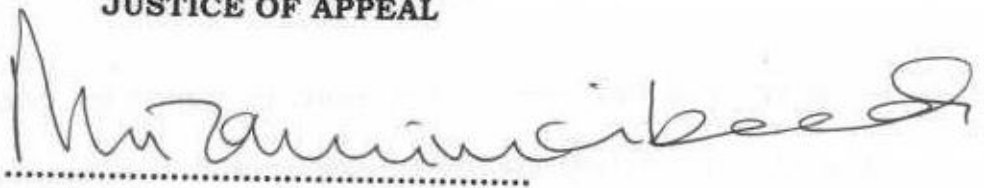
15



HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

20



HON. MR. JUSTICE MUZAMIRU KIBEEEDI

JUSTICE OF APPEAL

25