

UGANDA / JUDGMENT

Apoto v Uganda (Criminal Appeal 199 of 2017) [2023] UGCA 245 (28 April 2023)

[2023] UGCA 245**COURT**

Court of Appeal of Uganda

BEFOREBamugemereire, JA, Egonda-Ntende, JA,
Mulyagonja, JA**CASE / FILE NUMBER**

Criminal Appeal 199 of 2017

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**TTM REP'TBLIC OF UGANDA IN fIE COIJRT OF APPEAL OF UGANDA
CRIMINALAPPEAL No.0l99 OF 2017 (Coram: Egonda'Ntende, Bamugemerein &
Mutyaenja JJA)**

DEMSAPOTO VERSIUS UGANDA RESPONDENT APPELI,ANT

**(Appeal from the decision of Dr Winifred Nabisinde J, iD lliSh Court Criminal
Seseion Caee No.0672014 dated LBll2l2OL6 at Lira) 10**

Ciminal Law - Sentencing - Appeal Against sentence only - Failure to deduct the period spent on remand.

Jl]DGMENr OF THE COIIRT**Introduction**

The appellant, Deuie Apoto was indicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code

Act, Cap 120 Laws of Uganda. He was convicted and sentenced to 40 years imprisonment. ,n

Background

The brief background is that on the 13th of November 2013, the deceased infant, Elizabeth Akullu, aged 2 years followed

- Conny Awor, aged 11, who was on her way to harvest cassava in a garden next to their home. On their way to the garden, the said Akullu passed by the appellant's house and is alleged to have borrowed a garden hoe from him. The appellant then followed them to the garden and grabbed the hoe from Conny. 25
- Using the hoe, he hacked her 3 times on the head and particularly the face. The third blow left the hoe stuck on the deceased's brow. The appellant then warned Conny not to 30

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disclose what he had done and advised her to report that it was a one, Andrew Obong who had hacked Akullu to death. Shortly after, the deceased's sister Rachel Etap aged 13 years went looking for her. The appellant informed her that he

- 5 earlier heard a child crying in the garden. Rachel then went to the garden and did not find a crying child but instead found the deceased's body lying in the garden in critical condition with a hoe stuck in the brow. Etap Rachel pulled out the hoe from her sister's face and took her home. The
- deceased was rushed to the hospital where she died from critical head injuries. At a full hearing, the appellant was convicted for murder and sentenced to 40 years imprisonment. Dissatisfied with the sentence, the appellant appealed to this court against sentence. This appeal is made of only on one ground which stipulates as follows: 10 15
- 1. The Learned Trial Judge erred in law when she failed to take into account the period the appellant had spent on remand in determining the sentence and imposed an excessively harsh sentence leading to a miscarriage of Justice.

Representation

At the hearing of the appeal, the appellant was represented by Ms Alice Latigo Akello while the respondent was represented by Ms Deborah Itau, a Chief State Attorney. The appellant was physically present in court. The appellant prayed for and was granted leave of this court to appeal against sentence only. Both Counsel relied on written 25

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submissions for which this court is grateful and has relied on in arriving at this Judgment.

Submissions for the Appellant

Counsel for the appellant faulted the Learned Trial Judge for his failure to reduce the sentence of imprisonment by the period the appellant spent in pretrial custody. Counsel submitted that the Learned Trial Judge did not mathematically compute the period between 2013 to December 2016 that the appellant had spent on remand which was not in line with

- 10 Article 23(8) of the Constitution of the Republic of Uganda of 1995 as amended. He contended that the appellant was 54 years old at the time of sentencing and a sentence of 40 years imprisonment would eliminate his opportunity of restarting a new life after as he will be 94 years old by the time his
- 15 sentence ends. Counsel relied on the authority of *Muhwezi Obedo v Uganda CACA No.147 of 2009* where a death sentence was set aside and replaced with 18 years sentence. Counsel also relied on *Jamada Nzabaikukize v Uganda CACA No.41 of 2014* where a sentence of life imprisonment was set aside and substituted with 20 years. Finally, counsel for the appellant invited this court to allow the appeal, set aside the harsh and excessive sentence of 40 years imprisonment and substituted it preferably, with a sentence of 10 years imprisonment.

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Counsel for the respondent contended that before arriving at the final sentence, the Learned Trial Judge had ^a

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consideration of the mitigating and aggravating circumstances and made a well-reasoned sentencing ruling. Counsel drew this court's attention to the fact that the appellant was sentenced on 13th December 2013, way before

- 5 the decision in *Rwabugande Moset v Ugaada SCCA No.024 of 2016* and that the Learned Trial Judge was under no obligation to make a mathematical deduction of time spent on remand from the sentence awarded. Counsel contended that the legal regime did not require arithmetic calculation
- of the time spent on remand as was held in *Kizito Senkula SCCA No.24 of 2001*. Counsel submitted that the Learned Trial Judge took into consideration the 3 years and 5 days that the appellant spent on remand. Counsel argued that upon considering the mitigation and aggravating circumstances, 10
- the Learned Trial Judge was correct to find that a sentence of 40 years would meet the ends of justice. It was Counsel's submission that the ground was misconceived and ought to be disallowed. the sentence from the lower court confirmed and this appeal dismissed. 15

The Decision of the Court

It is our duty as a first appellate court to subject the evidence and all the material that was available to the trial Judge to a fresh and exhaustive scrutiny in order to determine whether or not the trial judge came to the right conclusions, and where this was not the case, to draw our own conclusions and inferences, bearing in mind, however, that we did not

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have opportunity to see the witnesses testify and that we are not in a position to determine what and whether their demeanour was truthful or not. nub 30(1)(d of the Judicature (Court of Appeal Rulee) Direcions, S. I 13-10, See alaoi FY. Narcensio Begumiea & Ors v Eric fibebaaga SCCA No.17 of 2002, Kifamunte Henty v Uganda SCCA No. 10 of 1997, The Execrrtive Director ef |r[sfia6nal Environmental ManagementAuthority (NEM\\$ v Solid State Limited SCCA No.16 of 2015 (unreported) and Pandya Vs R [f 95d EA 336.

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The jurisprudence in the appellate courts, as regards sentencing, is that appellate courts will often not interfere with a sentence passed by the learned Judge at trial since an appropriate sentence is a matter for the discretion of the sentencing Judge. A lot of factual material goes into consideration before a sentence is finally passed. Since appellate court will not be privy to what the Trial Judge heard, allowance is made, as much as possible, to not interfere with their discretion. It is trite that an appellate

- Court will only alter a sentence imposed by the trial Court if it is evident that the trial court acted on a wrong principle or took into consideration factors which they ought not to take into consideration or overlooked matters which they ought to have taken into consideration or passed a sentence which 20
- was illegal or manifestly excessive or so low as to cause an injustice. See Sekandi Hasaarx v Uganda SCCA No.26 of 2019, Livingetone Kakooza v Uganda SCCA No. 17 of 1993

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[unreported] and Jackeon Zita v Uganda, SCCA No. 19 of 1996.

It was the respondent's argument that the appellant was sentenced on 13th December 2013 before the decision in

- 5 Rwabugande Mosée v Uganda SCCA No.024 of 2016 was passed and that the Learned Trial Judge was under no obligation to mathematically compute and deduct time in terms of years, days and hours spent on remand from the sentence awarded. Granted, the respondent's argument on
- 10 Rwabueande may be valid, nonetheless, it does not eliminate the obligation to follow Article 23(8) and to make an evaluation which proves that the constitutional obligation was followed through. In this case the fact that the Learned Trial Judge did not deduct the 3 years, 11 months and 5 days
- 't5 that the appellant spent on remand and hence created an ambiguity from which forms a sustainable ground of appeal. The Supreme Court in Segawa Joeeph v Uganda SCCA No.66 of 2016 found as follows:

- "This court has the duty to decide which decision is to be followed. Our appreciation of Article 23(8) of the Constitution is that consideration by court of the period spent on remand by a convict is mandatory. A sentencing judge is under a duty to consider the exact period spent on remand in upholding the provisions of the supreme law of the land. For avoidance of imposing ambiguous sentences, we hold that the period spent on remand must be arithmetically deducted. This renders 20 ?5

justice to a convict. We therefore find that Rwabugande is the correct position of the law in matters where the appellant challenges the legality of sentence in relation to whether or not court rightly considered the provisions of Article 23(8) of the Constitution."

We associate ourselves with the above reasoning and agree that the Learned Trial Judge overlooked a constitutional and relevant feature while sentencing. She remarked thus,

"I have also noted that in such a case, the maximum sentence would have been the death penalty however, I find that this will not serve the ends of justice and will be too harsh. I have also taken into account the period the convict has spent on remand and the age of the deceased and the convict... While the starting range in terms of years would be at least (35) years imprisonment, taking into account all the 10 15

circumstances of the case as noted above, I find that the convicts deserve a sentence of (40) forty years' imprisonment as appropriate in the circumstances."

It is clearly evident that the Learned Trial Judge did not demonstrate how the period spent on remand was accounted for. This period was not ascertained by the learned trial judge which is a necessary prelude to taking the same into account whether generally or following the arithmetical method of taking the same into account. We therefore find that the 20

sentence passed was illegal for violating Article 23 (8) of the Constitution. This court hereby sets aside the sentence.

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Counsel for the appellant contended that the sentence of 40 years imprisonment was harsh and excessive.

In deciding what sentence is commensurate to a crime, the High Court is guided by the third schedule to the

5 Constitution (Sentencing Guidelines), which provide that the sentencing range for murder has a starting point of 30 years imprisonment and a maximum of a death penalty which is passed in the rarest of the rare circumstances. We will now do a comparison with similarly placed appellants to evaluate the sentences passed in analogous scenarios. 10

The Supreme Court emphasized the necessity of uniformity and consistency when sentencing in *Aharikurulira Yueiti!^a v Uganda* SCCA No.027 of 2016. Uniformity in sentences increases predictability and fairness. There is less dissonance when two similarly placed appellants are seen to suffer the same fate. 15

In *Atiku T.ins v Uganda* CACA No.0041 of 2009, this court set aside a sentence of life imprisonment for the offence of Murder and replace it with 20 years' imprisonment after taking into consideration the mitigating factors in the case.

In *Tumwesigye Anthony v Uganda* CACA No.46 of 2012 this court substituted the sentence of 32 years' imprisonment with that of 20 years for the offence of Murder.

In *Onyabo Boeco v Uganda* CACA No.737 of. 2014, t}re appellant was indicted and convicted of the offence of Murder and sentenced to 45 years' imprisonment. On appeal, this

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court reduced the sentence to 20 years' imprisonment for the offence of Murder.

In *Kia Erin v Uganda* CACA No.172 of 2013, the appellant was convicted of the offence of Murder and sentenced to s imprisonment for life. On appeal, this court reduced the sentence to 18 years of imprisonment.

In *Jackline Uwera Nsenga v Uganda* CACA No.824 of 2016, this court affirmed a sentence of 20 years imprisonment for the offence of Murder. Similarly, in *Robert Ntambi v Uganda*

- 1o CACA No.334 of 2019 this court also upheld a sentence of ²⁰ years' imprisonment for the offence of Murder as appropriate. More recently, in *John Mweeigrva and 3 Others v Uganda* CACA No. 164 & 394 of 2014, this court set aside a sentence of 40 years' imprisonment for the offence of murder and
- 1s substituted it for 25 years and in *Lamu Manige v Uganda* CACA No.3,t8 of 2011 we set aside a sentence of 44 years and 10 months and substituted it for a sentence of 20 years and 10 months imprisonment.

We earlier agreed that the sentence of 40 years 20 imprisonment was illegal. Given the fact that the appellant committed a serious crime and juxtaposed with his being a first offender with hope of reform since he has a family, we find that a sentence of 20 years will suffrce. From this we deduct the period of 3 years and 5 days that the appellant 25 spent on remand.

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In the result the appellant will serve a sentence of 16 years, 11 months, 3 weeks, and 2 days' imprisonment from the date of his conviction.

We so order.

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Dated at Kampala this \$\cdots\cdots\ 2023\$

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HON. JUSTICE FREDRICK EGONDA NTENDE, \$15\$ JUSTICE OF APPEAL

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HON. JUSTICE CATHERINE BAMUGEMEREIRE, JUSTICE OF APPEAL

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JUSTICE OF APPEAL

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