

UGANDA / JUDGMENT

Byamukama v Uganda (Criminal Appeal 14 of 2017) [2021] UGSC 13 (13 August 2021)

[2021] UGSC 13

COURT

Supreme Court of Uganda

BEFORE

Arach-Amoko, JSC, Mwendha, JSC, Mugamba, JSC, Tuhaise, JSC, Mike Chibita, JSC

CASE / FILE NUMBER

Criminal Appeal 14 of 2017

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.14 OF 2017

{Coram: Arach-Amoko, Mwendha, Mugamba, Tuhaise & Chibita. JJSC.}

BYAMUKAMA NABOTH ::::::::::::::::::::::::::::::

VERSUS

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UGANDA ::::::::::::::::::::::::::::::

[Appeal from the judgment of the Court of Appeal at Mbarara (Kenneth Kakuru, Simon Mugenyi Byabakama and Alfonse. C Owiny-Dollo JJA.) dated 6th December, 2016 in Criminal Appeal No.316 of 2009

JUDGMENT OF THE COURT

This is a second appeal. Katutsi J tried this case in the High Court sitting at Rukungiri and delivered judgment on 5th June 2009. The Court record shows that the appellant was convicted of defilement contrary to Section 129(3)(a) and (4)(b) of the Penal Code Act and was sentenced to life imprisonment. The appellant was not satisfied with the judgment and

initially appealed to the Court of Appeal against both conviction and sentence. However, at the hearing of the appeal he sought leave to abandon appeal against conviction. Leave was granted to him. The Court of Appeal after hearing the appeal reduced the appellant's sentence from life imprisonment to 25 (twenty-five) years imprisonment. Hence this appeal.

Background

The background to this case is best summarized by the Court of Appeal which narrated as follows. On the 30th October 2006, at Kanyeganyenge village in Rukungiri District, the appellant (Byamukama Naboth) had sexual intercourse with one Tukamushaba who was only 4 (four) years of age. In the course of allocutus, following appellant's conviction, it was revealed by the State Prosecutor that the appellant had, before the instant conviction, been convicted of defilement in another case in High Court Criminal Case No. 54 of 2008 where he had been sentenced to 14 (fourteen) years in prison. The appellant admitted he was serving that term. It was when he was on bail in the earlier case that he committed the instant case of defilement.

Following conviction and sentence the appellant appealed to the Court of Appeal in Criminal Appeal No.316 of 2016 and eventually to this Court. His sole ground of appeal to this Court reads:

1. "THAT the learned Justices of Appeal erred in Law when they sentenced the Appellant to an illegal sentence."

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Representation

At the hearing of this appeal the appellant was represented by Mr. Arthur Ayorekire on a State brief. Ms. Vicky Nabisenke, Assistant Director of Public Prosecutions appeared for the respondent.

Submissions of Counsel for the appellant

Both counsel filed written submissions backed by authorities. They adopted these at the hearing of the appeal.

Counsel for the appellant submitted that the sentence handed down by the Court of Appeal was illegal because the Court did not take into account the period the appellant had spent on remand in order to subtract it from the final sentence.

Counsel argued that before the appellant was convicted he had spent seven (7) years on remand, which time was not considered when Court passed sentence on him. Counsel further submitted that the decision of the Court of Appeal was a gross departure from the mandatory provisions of Article 23 (8) of the Constitution. According to counsel, the said decision was at variance with **Rwabugande vs Uganda, SCCA No. 25 of 2014**.

In conclusion, counsel contended that the sentence was illegal given that it omitted to subtract the period the appellant had spent on remand. According to counsel, the remand period was $\overline{3}$

7 (seven) years. He prayed that this court finds that sentence handed down was illegal and substitutes it with a legal sentence. He proposed a sentence of twenty years' imprisonment on each count to run concurrently from the date of conviction. He further prayed for the remand period to be subtracted from that sentence.

Submissions of Counsel for the State

In response, the Assistant Director of Public Prosecutions submitted that it was clear that the Court of Appeal had the provisions of Article 23 (8) of the Constitution in mind when it reduced the sentence of life imprisonment to 25 years' imprisonment and that the sentence was with effect from 6th June 2009.

She contended that the appellant would not be classified as a remand prisoner since he was already serving sentence in another case at the time of conviction.

She prayed that this Court finds the case of $\mathbf{R} \ v \mathbf{Jonsyn}$ [2014] EWCA Crim 239 persuasive. She stated that in the case it was held that the remand period of an offender in respect to a case, while an offender is a convict serving a sentence (detained) on another case, is not credited to the offender as this would be a double deduction.

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She submitted that to deduct the period spent on remand in the instant case would amount to double deduction in favour of the appellant.

In conclusion, the learned Assistant Director of Public Prosecutions submitted that the learned Justices of the Court of Appeal correctly applied the law and that the sentence of 25 years' imprisonment was not illegal. She prayed that this Court finds the sentence legal and dismisses the appeal.

Consideration by the court

We have appraised the written submissions tendered before us as well as the authorities available. We have also looked at the record and given consideration to it.

The thrust of this appeal is that the Court of Appeal sentenced the appellant to an illegal sentence of 25 years' imprisonment without taking into account the period he had spent on remand.

Article 23(8) of the Constitution provides: \$23(8)\$

"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."

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We note that the Court of Appeal did address this issue in its judgment. Thereafter it gave pertinent reasons why the appellant could not be a beneficiary of Article 23 (8) of the Constitution. The Court stated as follows:

"In the instant case before us, it is evident that the Appellant was not a first offender, as he was already a convict serving sentence for another offence of defilement. by the time of the conviction against whose sentence he now appeals. We do appreciate why the trial judge did not direct his mind to the provisions of clause (8) of Article 23 of the Constitution referred to above. First, the Appellant did not fall in the category of convicts envisaged by the said provision of the Constitution since at the time of his conviction and sentencing in the instant case before us, he was not a remand prisoner; but was already a convict serving sentence in an earlier case, also of aggravated defilement.

Second, the trial judge had already decided to sentence him to life imprisonment; hence, it would have been pointless to take whatever period he had spent on remand into consideration since it would make no difference in computing the period of life imprisonment. Third, because he was serving sentence for another offence of defilement, the Court was entitled to, as in fact it did, consider him a

dangerous habitual defiler targeting the most vulnerable of the vulnerable children in his society; which was an aggravating circumstance, necessitating imposing a more deterrent punishment for the subsequent defilement."

It was appellant's argument that the Court of Appeal did not consider the principle in the case of **Rwabugande Moses vs Uganda** (supra). In that case this Court departed from the earlier position of considering the time spent on remand and set a more ascertainable threshold to the effect that thereafter Courts were to apply a mathematical formula when calculating the time spent on remand. We agree with the Court of Appeal that the appellant was not a remand prisoner when he was convicted of this subsequent offence. Rather he was already a convict serving a sentence of 14 years' imprisonment for defilement.

Consequently, we are satisfied that in the circumstances of this case the appellant was legally sentenced to life imprisonment by the trial Court. Needless to say, the appellant was very lucky in that the Court of Appeal was lenient with him by reducing his sentence to 25 years' imprisonment. The appellant's contention that the sentence of 25 years' imprisonment handed to him is illegal is misplaced given that the circumstances of the case and the time span in which he committed the two offences would have exposed him to a much heavier sentence than what he got

from the Court of Appeal. Be that as it may we are alive to the case of Kyalimpa Edward vs Uganda, SCCA No.10 of 1995 which cited with approval the English case of *\$R\$ vs Haviland* (1983) 5 Cr. App. R 109 and stated that:

"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice. *Ogalo Owuora vs R* (1954) 21 E. A. C. A 126 and *R vs. Mohamedali Jamal* (1948) 15 E. A. C. A 126".

We find that the learned Justices of the Court of Appeal properly exercised their discretion and passed a legal sentence of 25 years' imprisonment.

This appeal is accordingly dismissed for want of merit.

Dated this

Hon. Lady Justice Stella Arach-Amoko, JSC **Justice of the Supreme Court**

Hon. Lady Justice Faith Mwendha, JSC Justice of the Supreme Court

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Hon. Justice Paul Mugamba, JSC Justice of the Supreme Court

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Hon. Lady Justice Percy Night Tuhaise, JSC Justice of the Supreme Court

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Hon. Justice Mike Chibita, JSC **Justice of the Supreme Court**

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