

UGANDA / JUDGMENT

omundanihare v Uganda (Criminal Appeal 176 of 2017) [2023] UGCA 169 (7 June 2023)

[2023] UGCA 169

COURT

Court of Appeal of Uganda

BEFORE

Luswata, JA, Bamugemereire, JA, Buteera, JA

CASE / FILE NUMBER

Criminal Appeal 176 of 2017

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT MASAKA CRIMINAL APPEAL NO.0176 OF 2017

(*Coram: R. Buteera, DCJ; C. Bamugemereire & E. Luswata, JJA*)

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OMUNDANIHARE GODWIN ::::::::::::::::::::::::::::::::::

VERSUS

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

(Appeal against the decision of the High Court of Uganda at Masaka, Dr. Flavian Zeija, J, dated 18th April 2017, in Criminal Case No. 060 of 2014)

JUDGMENT OF THE COURT

INTRODUCTION

The appellant was convicted of the offence of Murder contrary to Sections 188 & 189 of the Penal Code Act, Cap 120, and sentenced to 24 years' 15 imprisonment.

Brief Facts

It was the prosecution's case that on the 29th July 2013 after a skirmish between two friends at the nearby bar, the appellant found the deceased in the house of his concubine. He grabbed a spear which he used to injure the deceased in the chest wall culminating into the deceased's death.

The occupant of the house took off and alerted residents who called the Police. The appellant was then arrested and upon interrogation, he admitted having speared the deceased.

On the 30th July 2013 the deceased body was medically examined. The report 25 revealed that the deceased had died due to severe bleeding secondary to a deep cut wound in the chest wall.

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The accused was medically examined and it was revealed that he was 27 years in a mental status and appeared to be normal and no recent physical to his body. He was charged with Murder.

The High court tried and convicted him of Murder and sentenced him to 24 years' imprisonment. Being dissatisfied with that decision, he filed this $\$ \mathit{S} \$$ appeal against sentence only. He prayed that the Appeal is allowed, the decision of the lower court be set aside and the sentence of 24 years' imprisonment be set aside.

Ground of Appeal

That the learned trial Judge erred in law and fact when he sentenced the 10 appellant to 24 years' imprisonment which sentence was illegal.

Representation

At the hearing of the Appeal, the appellant was represented by Ms Brenda Ainomugisha, on state brief, while the respondent was represented by Mr.

Allan Musinguzi, State Attorney from the Chambers of the Director of Public Prosecutions.

Case for the appellant

Counsel argued that the sentence of 24 years' imprisonment was in total disregard of Article 23 (8) of the Constitution. He submitted that in sentencing the appellant, the learned trial Judge stated:

> "...in the result, I sentence the convict to 24 years in prison. The time spent has been on remand shall be put into consideration and *deducted from the sentence."*

It was counsel's contention that the sentence was ambiguous in as far as it left the matter of deducting the period spent by the appellant on remand in 25 the hands of another authority when actually it was the duty of the trial Judge.

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He cited *Naturinda Tamson v Uganda*; Criminal Appeal No. 13 of 2011, where it was noted that where a court determines that a sentence of imprisonment is the appropriate sentence, the trial court is required to take the period spent on remand in account in determining the sentence. This duty belongs to the Judge and not to the prison authorities. This misdirection rendered the sentence a nullity.

Counsel thus prayed that this Court exercise its discretion to interfere with the sentence and substitute it with a lesser sentence.

Case for the respondent

Counsel for the respondent conceded that the trial Judge, while sentencing the appellant, did not consider the period that he had spent on remand. He only stated that the remand period shall be deducted. Counsel cited a number of authorities to show that the sentence passed was neither harsh nor excessive. He prayed that this court deducts the remand period from the sentence that was passed by the trial Judge.

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Court's consideration

Counsel for the appellant faults the trial Judge for not deducting the time the appellant had spent on remand. The law that governs appellate courts in regard to sentencing is well settled. In *Kamya Johnson v Uganda*; SCCA No. 16 of 2000, the Supreme Court held:

> "It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis ours)"

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Article 23 (8) of the Constitution provides:

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"(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."

Court has interpreted 'taken into account' to mean mathematical deduction of that period. See *Rwabugande Moses v Uganda*; Criminal Appeal No. 25 of 2014 (2016) UGSC 8

'Court Sentence:

The convict has pleaded guilty. He has not wasted court's time. He is remorseful. However, court acknowledges that he took away life of a young man. He deprived the deceased's family of a member with a brosoing future. In the result, I sentence the convict to 24 years in prison. The time he has been on remand shall be put into consideration and deducted from the sentence.' (Sic) (emphasis added)

- It is not clear that the trial Judge deducted the period that the appellant had 20 spent on remand. For that reason, the sentence is illegal for failure to comply with the constitutional requirement under Article 23 (8) of the Uganda Constitution. It is trite that failure to comply with the foregoing constitutional provision renders the subsequent sentence a nullity. See Kwamusi Jacob v
- Uganda; COA Criminal Appeal No. 203 of 2009 [unreported]. The sentence 25 of 24 years' imprisonment is hereby set aside.

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In the instant case, while sentencing the appellant, the learned trial Judge 10 stated as follows:

This Court shall invoke its powers under Section 11 of the Judicature Act, to sentence the appellant afresh. The appellant was sentenced to 24 years' imprisonment. He had spent 3 years and 8 months on remand.

We shall now proceed to sentence the appellant afresh. We sentence him to 24 years' imprisonment, from which we shall deduct 3 years and 8 months. He shall serve 20 years and 4 months' imprisonment. This sentence shall run with effect from 18/04/2017, the date of conviction.

We so order.

$\frac{1}{1}$ day of therefore 2023 Dated at Masaka this 10

Richard Buteera

Deputy Chief Justice

Catherine Bamugemereire Justice of Appeal

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Eva K. Luswata Justice of Appeal

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