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COMMONWEALTH RESORT HOTEL MUNYONYO

Theme: **AN INCLUSIVE JUDICIARY FOR SUSTAINABLE DEVELOPMENT.**

Topic: **INTRODUCTION TO THE UGANDA SENTENCING GUIDELINES, ITS USE AND EFFECTIVENESS**

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INTRODUCTION

Sentencing is the process whereby Court determines a punishment consequent upon conviction of an accused. The fundamental purpose is promotion of respect of the law, maintenance of a just, peaceful and safe society and prevention of crime. You were yesterday introduced to the importance of sentencing in the administration of justice and reminded on the principles and objectives of sentencing.

The Penal Code Act and other various statutes have penal provisions which create the various offences and spell out the corresponding sentences. Since the pronouncements in the **Suzan Kigula case**, in Uganda there is no mandatory sentence .Subject to the penalty provisions of the relevant Penal laws the sentence imposed upon conviction is to the discretion of the trial judicial officer.

In 2002 the Uganda Law Reform Commission conducted a study on the law on sentencing. Fundamentally a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The study, however noted the following:

- In many instances miscarriage of justice was occasioned in the sentences passed attributable, among others, to general weakness and limitations in the overall sentencing process in Uganda
- The sentencing process was unfair and did not lead to justice due to the disparities and inconstancies in sentencing. There was an outcry for consistency of the sentences passed for the same offences, in similar circumstances.
- The public confidence in courts fair dispensation of justice was at stake because the concept of judicial discretion was sometimes abused.

While handing over the Drafted Sentencing Guidelines to the Hon Chief Justice, The Hon Principle Judge, Justice Yorakam Bamwire summed up the effects of the situation as follows:

"***Sentencing is the final stage of a trial. It legally impact on public confidence in the whole trial process. Therefore, due diligence ought to be exercised while assessing the same. The***

conviction may be proper but if the sentence is laughable or amounts to a travesty of justice the whole process stands to be faulted"

The study findings and recommendations were presented at the judges' conference in 2009.

Against this background on 10th August 2010 the Hon Chief Justice inaugurated a Taskforce chaired by the Hon Principal Judge and tasked to develop sentencing guidelines. After a long journey of research, study tours to the South Africa and the United Kingdom, consultations, and workshops, on 13st November 2011 the Taskforce handed over the Draft Sentencing Guidelines to the Hon Chief Justice. The Taskforce was directed to translate the draft sentencing guidelines into a Practise Direction. After consideration by the Rules Committee the Hon. Chief Justice on the 26th April 2013, pursuant to Article 133 (1)(b) of the Constitution issued **The Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice)Direction, Legal Notice No;8 of 2013**.

THE SENTENCING GUIDELINES –THEIR USE

The objectives of the Practice Directions are;

"

a. To set out the purpose for which offenders may be sentenced or dealt with;
a. To provide principles and guidelines applied by courts in sentencing;
b. To provide sentence ranges and other means of dealing with offenders;
c. To provide a mechanism for considering the interests of victims of crime and community when sentencing; and
d. To Provide a mechanism that will promote uniformity, consistency and transparency in sentencing"

The Sentencing Guidelines don't provide sentences; they don't interfere with judicial discretion or independence. Court has a duty to evaluate all the evidence and circumstances in order to arrive not only at a suitable but also a fair, just and lawful sentence. In the exercise of this duty the Guidelines provide guidance to the sentencing judicial officer on how to proceed while considering the sentence to impose and how to fairly and judiciously exercise his/her independence and discretion when proceeding to sentence.

In Part III the Sentencing Guidelines guide court on what it should take into account when sentencing an offender. In Para 7 court is guided on how to proceed when sentencing co-accused person or multiple offenders and in Para 8 how to proceed when calculating the totality of sentence when imposing consecutive sentences. In Para 9 court is guided on the circumstances under which court can impose a custodial sentence, other than a sentence of imprisonment for life. Custodial sentence is classified into

(a) Long term imprisonment (ranging from 30 years to 45 years)
(b) Mid-term imprisonment (ranging from 15 years to 29 years)
(c) Short-term imprisonment (ranging from 15 years and below)

In Para 9 court is guided on;

- the factors to consider before imposing a custodial sentence,
- circumstances under which a custodial sentence may not be imposed and

- reminded that imprisonment is not a desirable sentence when sentencing a first time offender for a minor offence.

In Part IV; Court is guided on the sentencing options.

Prior to the Guidelines, to determine sentence upon conviction court would hear the prosecutor's submission in support of his/her prayer for sentence. It used to be: -

"*The offence is serious and rampant. I pray for deterrent sentence*"

In his/her submission the defence counsel would state;

"The convict as a first offender, a person of good character, has a big dependant family, he is repentant and remorseful. I pray for lenient sentence"

In his alloctus the convict would pour out whatever he felt would convince court to be lenient to him/her.

In a sentence or two the judicial officer would instantly pronounce the sentence.

The Guidelines have introduced an elaborate sentencing procedure in Part V. The court is guided on how to proceed and what to take into account to determine the appropriate sentence. In so doing, Court may summon and examine any person to give evidence regarding;

"a. any custom prevalent in any area.

b. the way of living of any community or

c. the background against which the alleged offence was committed" (Para 4(3))

Court is required to conduct an inquiry which may include:

" a. *Consideration of the employment, earning ability, financial resources and assets of the offender at the present or in the future including any circumstances that may affect the ability to reparation, pay compensation or fine; or*

b. Information relating to any benefit, financial or otherwise derived directly or indirectly as result of the commission of the offence (para 4 (4)

c. court is required to take into account the period spent on remand (para 15)"

In addition, court may require the prosecution to produce to court

a) a Victim Impact Statement; and
b) a Community Impact Statement"
(Para 14 (2))

Further court is required to take into account the general factors specified in the 2nd schedule to the Guidelines (Para 14 (5))

Also Court is required to consider and evaluate the aggravating and mitigating factors for the offence convicted of.

Part VI Guides court on how to proceed in capital offences where death is prescribed as the maximum sentence Para 17 states: "*the court may only pass a sentence of death in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for the life or other custodial sentence is demonstrably inadequate*"

Para 18 attempts to define the "rarest of the rare"

Para 20 provides the general aggravating factors and para 21 general mitigating factors court should take into account when imposing a sentence of death.

Para 22 provides circumstances under which court may consider imposing a sentence of death in cases of rape or defilement

In Part VII the court is guided on the circumstances when it may impose a sentence of imprisonment for life (the second gravest sentence) in capital offences (Para 24) and in non – capital offences (para 25)

In Part VIII the Guidelines provide aggravating and mitigating factors for some specific non-capital offences. These include: -

- Manslaughter (para 28 & 29)
- Robbery (Para 31 & 32)
- Defilement (Para 34, 35 & 36)
- Criminal Trespass (Para 38, 39 & 40)
- Corruption and related offences (Para 42, 43 & 48)
- Theft and related offence (Para 46, 47 & 48)

We should always appreciate that what LN 8 /2013 provides are guidelines. There are no set or standard aggravating or mitigating factors. Each case has to be considered on its own facts and circumstances.

In Part IX court is guided on sentencing primary care givers (para 49) and child offenders (para 50)

The various statutory Penal provisions create the various offences and provide a maxim sentence for the respective offences. However, the maximum sentence is rarely imposed. The trial judicial officer is left with the discretion to determine the sentence provided it is within the legally provided rage. In guidance the Guidelines introduced the concept of sentencing rages, LN8 of 2013 provides sentencing rages for Capital offences and sentencing ranges for some specific offences i.e. manslaughter, robbery, defilement, criminal trespass, corruption and related offences by providing the branket within which sentence is given (3rd Schedule), For example in

- Capital offences the sentencing rage is provided to start from 30 years with a starting point of 35 years and a maximum sentence of death.
- Manslaughter the sentencing ranges from 3 years with a starting point of 15years and a maximum of imprisonment for life.
- Defilement of idiots or imbeciles the sentence ranges from 8 months with a starting point of 7 years and a maxim of the 14 years' imprisonment

Though LN 8/2013 doesn't specifically provide for sentencing hearing, Para 13 provides:

"***The court may before imposing a sentence or during the sentencing hearing, ask the offender and the prosecution to indicate to the court an appropriate sentence in respect of the offence.***"

And in Part XII provides the duties of the Prosecution (Para 55 -58) and Defence (Para 60) at sentencing. The Prosecutors presentations and the defence information can only be presented to court at a hearing.

In summary Para 55 (5) provides;

> ***"(5) Upon conviction the prosecution shall summarise to the court any aggravating factors arising from any inquiry or report, the victim impact statement and community impact statement to assist the court to determine the most appropriate Sentence"***

Para 60 imposes a duty on the Defence to inform court about the offenders mitigating factors, while in Para 59 imposes a duty on the Prosecution to adduce evidence to disprove beyond reasonable doubt the defence assertions in mitigation.

The sentencing process was summarised in the South Africa Case of **State Vs Makwangave 1995 (3) SA 391** where the Constitutional Court stated;

"***Mitigating and aggravating circumstances must be identified by court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person' s conduct and these factors must then be weighed with the main objectives of punishment, which have been held to be; deterrence, prevention, reformation and rehabilitation. In this process any relevant considerations should receive the most scrupulous care and reasoned attention***……"

There has been diversity in sentence between one Judge and another and it has also been exhibited in sentencing by the same Judge which could even appear in the same session. On many occasions the public fail to appreciate the sentence. For example in an Article entitled Defilers deserve tougher sentences in the New Vision of 1st March 2013 it was stated;

"It is clear that, in spite of the tough sentences provided in the Penal Code, many judges have not been as tough as they should be on defilers. For example, Kabanda was liable for a tough sentence, in view of the fact the he defiled a girl probably aged below 14 and affected her with HIV. If the judge felt constrained to sentence him to death, then he could have subjected him to a much tougher custodial sentence because he ruined the entire life of an innocent girl. Judges should not handle such dangerous defilers with kid gloves. They should impose sentences that will act as a deterrent"

The Judge had sentenced this convict to 15years reasoning that he hadn't wasted Courts time, was remorseful and first time offender. It is important that the Judge in his/her sentencing order show consideration and evaluation of all the factors and circumstances put before him and gives a reasoned sentence.

EFFECTIVENESS OF THE SENTENCING GUIDELINES

It is one thing to have a law in place and another for it to be useful and effective. Its effectiveness is influenced by a number of factors.

The Practice Directions LN 8/2013, was issued on the 26th day of April 2013. To ensure proper application of the Guidelines and compliance therewith prior to their issuance and thereafter various workshops and trainings were conducted for the various stakeholders. For the effective assessment and evaluation a Sentencing Guidelines Committee was put in

place again under the Chairmanship of the Principle Judge. I expect its report to give a proper and useful assessment of the effectiveness of the guidelines. However, I am reliably informed that the work is still progressing and no report (whether interim)) is yet out. That notwithstanding I have been able to identify some challenges affecting the application of the Guidelines which need to be addressed.

- The guidelines are to date in the form of a Practice Direction yet they make provisions which, save for the judicial decisions, require legislative enactments to address them. These include provisions on the death penalty no longer being mandatory (Part VI). The interpretation of imprisonment for life, which requires a legislative enactment to resolve the confusion between the court judgements and provisions of the Prisons Act.

  A former Head of the Criminal Division in one of his communications to the Principle Judge wondered:

  "---------(d) in view of sections 84 and 85 of the Prisons Act 2006 it is doubtful whether our Courts have power to interfere with the remission of sentences, which is purely administrative act'

  The principle Judge in his own letter dated 14th April 2017 to the Executive Director JSI stated;

  "***Following the Kigula Case Judges have resorted to unprecedently long sentences (e.g. 70 years or more) with the implied or stated goal of ensuring that certain prisoners will never be released***"

  The Supreme Court has made judgements aimed at resolving the issue but still satisfactory resolution requires a legislative statutory enactment.

- Lack of uniform appreciation of the Guidelines by the different levels of the Bench. For example, Para 15 requires the period spent on remand to be deducted from the period of the sentence considered appropriate after all factors have been taken into account. Most High Court Judges had been complying but the Justices of the Court of Appeal in various Decisions have shot this requirement down. However the Supreme Court of recent has upheld the provisions of the Guidelines. **(Rwabuganda Vs Uganda, SCCA No: 25 of 2014.)**

- Heavy workload. The guidelines introduced a new level of trial at the conclusion –the sentencing process. Because of the heavy workload some judicial officers may not give adequate time to the sentencing process. For example, a judge in a session is given 40 cases to complete in 40days (weekends inclusive) yet some of the cases have multiple offences, multiple accused persons, trials within trials, then at the end the multiple sentencing processes.

- The Sentencing Rages appear not have been adequately addressed. In the conduct of an evaluation of the adequate sentence the Judicial officer is expected to focus his/her mind to the starting point, then address the aggravating factors which are expected to attract a plus and balance them with the mitigating factors which are expected to attract a deduction. For example, for the Capital offence where the maximum sentence is death, the starting point is 35 years. From 35years to Death there could be any range of years (as P J put it some judges have given as long as long 70 years or more) yet from the starting point of 35 years downwards the range stops at 30 years, a difference of only 5 years. The fact is that judges have on many occasions given sentences below 30

years. The main objective to address disparities and inconsistences ends up being compromised.

- Production of the Victim Impact statements and the Community Impact Statements (para 14(2)) The victim is defined to mean "**a person directly or indirectly affected by the commission of the offence or omission of a lawful duty**" so it is beyond the actual/principal victim and addresses the secondary victims. Form A of the of the first schedule draws in a number of players who can fill the Victim impact statements similarly Form B draws an open list of people who may fill the Impact Statement. This calls for widened sensitisation.

- The need to widen the scope of investigation to cover the crime impact on the victims and the community.

- Only a few Penal offences are covered by LN8/2013. I am aware that "The Constitution (Sentencing Guidelines for Magistrate Courts) (Practice) Directions are being worked on and a draft of 2017 is in place. Still it will not cover all the Penal offences. The Uganda Law Reform Commission should take up its duty and may be consider including sentencing ranges in the sentence provisions of the Penal Act and other Penal Laws.

CONCLUSION:

The Sentencing Guidelines are in their infancy. There is a need to develop them further and ensure their compliance and effectiveness.

The Judiciary Cannot succeed in isolation, All stakeholders must come on board and play their respective roles.

May the Lord Bless The Judiciary and bless you all