THE REPUBLIC OF UGANDA

IN THE COURT OF APPPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 75 OF 2012

(ARISING FROM JINJA HIGH COURT CRIMINAL SESSION NO. 135/2003)

ALENYO MARKS ::APPELLANT

VERSUS

UGANDA:::RESPONDENT

CORUM:

HON. MR JUSTICE A.S NSHIMYE, JA
HON. LADY. JUSTICE FAITH E. MWONDHA, JA
HON. MR JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT.

The appellant appealed against sentence only.

The background of the case is that, on December 16th 2000 the appellant a police man and two others performed a Mobile highway patrol duty in Jinja under the command of Corporal Okello Lawrence. They intercepted motor vehicle NO. UAB 787T which according to the appellant, the control officer informed them that the said vehicle carried armed robbers. It carried 3 men and one woman. The 3 men were shot and killed instantly.

The brief facts as stated by the trial judge (Hon. D.K Wangutusi J) in his judgment were that:

> ***"The accused persons with no apparent reason chased the deceased's motor vehicle and intercepted it. The accused then ordered the deceased out, told them to lie down and shot them in cold blood. The accused on their part admitted chasing, intercepting and shooting the deceased.***
>
> ***They however said they had received communication from control room Jinja Police to intercept the deceased's motor vehicle since it was suspected to be carrying robbers. That when they intercepted it, the occupants of the said motor vehicle opened gun fire in a bid to resist arrest. They (accused) also fired back in self defence leading to the death of the deceased."***

At the end of the trial, the learned Judge stated.

> ***"The manner in which the deceased were killed was not accidental or sanctioned by law. It was unlawful. The intentional killing was full of malice aforethought."***

On the 2nd September 2003, the judge found the appellant and his co accused guilty of all the 3 counts of murder and sentenced them to suffer death on each of them.

The appellant and his co-convicts appealed to the court of appeal against both convictions and sentences but lost their appeals. They made a final appeal to the Supreme Court.

Following the decision in **Suzan Kigula Vs Attorney General Constitutional Appeal NO. 3 of 2006,** the Supreme Court ordered that the file of the appellants be sent back to the High Court to hear their plea of mitigation of sentence.

On 25th November, they appeared before the Hon. Justice Yokaramu Bamwine PJ at Jinja High Court. After hearing the appellant's mitigation, he sentenced the appellant to 20 years imprisonment. The appellant being dissatisfied with the sentence, appealed to this court.

On 17th December 2012, the appellant appeared before a panel that comprised of Hon Justices, C.K Byamugisha, (now deceased) S.B.K Kavuma, and M.S Arach Amoko which heard his appeal on sentence. Before judgment was given, unfortunately our sister Justice C. K Byamugisha passed on. Anew panel comprised of ourselves was constituted to re-hear the appeal.

In his substituted memorandum of appeal dated 13.5.2014, the appellant raised 4 grounds of appeal namely;

1. ***That the learned trial judge erred in law and fact when he failed to take into account the time spent by the appellant in custody both prior to and following the conviction, and pronounced that the sentence was to start from the date of re-sentencing.***

2. ***That the learned trial judge erred in law and fact when he failed to give reasons for the starting date of the sentence.***
3. ***Alternatively, and without prejudice to the ground (i) that the learned trial judge erred in law when he passed a sentence that was unclear and ambiguous.***
4. ***Alternatively, and without prejudice to the ground (i), that the learned trial judge erred in law and fact when he sentenced the appellant to a manifestly excessive sentence in all the circumstances.***

Representation.

The appellant conducted the appeal himself while Miss. Khiisa Betty, Assistant DPP was for the respondent.

The appellant read from his written submission and stated that the learned Principal Judge of the High Court erred in law and in fact when he imposed on him a 20 year sentence disregarding the remand period and the post conviction period served, which denied him the right to remission. He further stated that the Judge erred in law and fact when he failed to give reasons to justify his decision which occasioned the appellant a miscarriage of justice. The appellant further complained that the sentence of 20 years was excessive.

In his opening statement, he referred us to the case of ***Salvatori Abuki and Richard Abuga vs Attorney General, constitutional***

case number 2 of 1997 which is about the enjoyment of fundamental rights and freedoms. That the enjoyment must not prejudice the rights and freedoms of others and that it must not prejudice public interest. That the test for both limitations as set therein was that they must be acceptable and demonstrably justifiable in a free and democratic society. He preferred to argue each ground of appeal separately.

With regard to ground one, the appellant argued that the fresh 20 year sentence imposed on him on the 25th day of November 2010 by the Hon. Principal Judge was a second punishment for the same offence. That he was treated differently compared to his former fellows on death row who were not punished twice for their same offences during mitigation and sentencing proceedings.

He referred to page 10 of the mitigation proceedings paragraph 6 where the Principal Judge after passing the 20 year sentence stated that "**for avoidance of doubt the sentences shall be served from today".**

He again referred to the case of ***Silvation Abuki & another Vs Attorney General*** (supra) which according to him, was on constitutionality of the sentence.

He stated that he stayed on remand for two years 7 months and 28 days before he was sentenced to death by the High Court.

He cited **Section 82(5) of the Trial on Indictment Act** which states that the sentencing court shall only pass sentence on the convicted person according to the law and that the Criminal

Procedure Code Act cap 116 section 40(6) provides that every custodial sentence shall always commence from the date of conviction which was not the case in his case. He further cited **Article 28(12) of the Constitution** which provides that no sentence shall be passed on any convicted person unless that particular sentence was defined by the law.

He stated further that the conviction date was 2nd September 2003, not 25th November 2010 when the mitigation proceedings were conducted. He further cited ***Section 18 of the Penal Code Act cap 120*** which protects a person from being punished twice for the same offence.

He argued that he was supposed to receive a deduction of two years, seven months and 28 days he spent on remand and the post conviction period from the 20 years imprisonment sentence. In support of his argument, he cited **clause 8, Article 23, of the 1995 constitution** which is to the effect that 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.

According to the appellant, all his fellow former death row inmates who were for mitigation hearing were accorded the privilege under the law and their remand period were deducted from the sentences deemed appropriate by the court. For example the case of **Uganda vs. Angope Miraj, Criminal Mitigation No. 286 of 2013** where the

remand period was deducted from the sentence. He prayed that court deducts the period spent on remand and confinement after conviction from the 20 years sentence.

On severity of sentence, the appellant argued that the sentence for 20 years imprisonment was excessive and suggested that seven years imprisonment would have been appropriate.

He prayed that the appeal be allowed.

Submissions in reply.

Learned Assistant DPP Khisa Betty stated that the right to appeal before this court from the High Court is provided for under ***Section 132 of the Trial on Indictment Act*** which right arises from convictions and sentences in the High Court in the exercise of its original jurisdiction. The court which exercised that original jurisdiction was the court presided over by Justice Mwagutusi in Jinja who delivered Judgment on 2nd September 2003 and sentenced the appellant to death.

From the time of sentence, the appellant was awaiting the appeal processes or execution of the sentence of death. Before being executed, the Supreme Court came up with the decision of **Suzan Kigula** (supra) which directed that mitigation of sentence proceedings be conducted by the High Court.

From the record of the mitigation proceedings, both the appellants and their lawyers were silent about the remand period and with

that record the appellants were more concerned about their post conviction period.

Counsel stated that the remand period as pointed out by the appellant was 2 years 7 months and that the Constitution provided for deduction of this remand period since it was the period spent in custody before court pronounced its verdict. She explained that the rationale was to take into account the period spent in prison before a court has pronounced itself on the guilt of an accused person.

Counsel further explained that from 2nd September 2003 the appellant was in prison as a convict and was awaiting execution. He was not entitled to deduction on the post conviction period he spent in custody because he was a convict then.

However, she conceded that the remand period of two years and 7 months was deductable and it was possible the Judge considered all that period before handing out the sentence. The appellant killed three people. The victims had been subdued and they were made to lie down and then shot at close range. Counsel pointed out that the only error was that the learned Principal Judge did not put it in his sentencing reasons. When the appellant talks about his rights, counsel contended, those rights should be balanced against the rights of the victims who were executed in cold blood.

She submitted that the sentence of 20 years imposed on the appellant was extremely lenient in the circumstances. She prayed

that the sentence be up held save for the remand period conceded and the appeal be dismissed.

Submissions in reply.

The appellant in reply agreed with the learned judge who stated that the appellant was not personally the origin of the whole problem. He was a subordinate officer on duty working under a series of commands. He was obliged to obey hence prayed that court considers this aspect in this appeal. He further stated that he had a family, with seven children and two wives who needed him. He reiterated his earlier prayer that this court reduces his sentence to seven years.

Decision of Court.

Duty of the first appellate court.

The Principles that govern an appellate court to either interfere or not to interfere with the sentence handed out by the trial court in exercise of its discretion are settled. It is whether the sentence was illegal or so excessive or too small as to amount to a miscarriage of Justice. It need not be that sentence that the appellate court would have handed out in the circumstances.

See **Kiwalabye Bernard Vs Uganda Supreme Court Criminal Appeal NO. 143 of 2001** in which court held:-

> "***The appellate court is not to interfere with the sentence imposed by a trial court which has exercised it's discretion on sentence unless exercise of the discretion is***

such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider and important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle".

This principle has been applied in a number of cases like **Semakula Yosam Vs Uganda, Court of Appeal Criminal Appeal NO. 322 of 2009** and **Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal NO. 16 of 2000**.

The appellant complained that, the learned trial judge erred in law and fact when he failed to take into account the time spent by the appellant in custody both prior to and following the conviction, and pronounced that the sentence was to start from the date of re-sentencing, alternatively, and without prejudice to the ground (i) that the learned trial judge erred in law when he passed a sentence that was unclear and ambiguous alternatively, and without prejudice to the ground (i), that the learned trial judge erred in law and fact when he sentenced the appellant to a manifestly excessive sentence in all the circumstances.

While sentencing the appellant and his co appellants, the learned Principal Judge had this to say;

"Court; Sentence and reasons.

The accused persons/convicts were charged with and indicted for murder of three persons. From the evidence, they were on patrol duty as police officers and in the course of their employment, they intercepted a motor Vehicle UAB 787T which according to them had been communicated to them by the Control Officer JinJa Police, to have armed robbers. It was found at the trial that:

1. *The vehicle in which the deceased persons travelled was never seen at the scene of the robbery.*
2. *None of the people who reported a case of robbery to police made mention of UAB 787T in which the deceased persons travelled and were killed.*
3. *The information Control room in Kampala never received any report on Motor Vehicle UAB 787T being involved in a robbery no did pass on information to Jinja CPs about it.*
4. *The deceased persons were shot at when they were lying down. They were not shot at in self defence. I consider the 4 facts to be serious aggravating factors.*

On a positive note, however, they have lived resourceful lives in prison and they have had the opportunity to reflect on their heinous acts. Their good reports in prison are mitigating factors which I have taken into account. I consider the prime purpose of sentencing as being to punish offenders for the offence of which they have been convicted. This court therefore takes the clear stand that a sentence should be retributive proportionate to the offence committed. Accordingly the seriousness of this offence must determine the

severity of the sentence. There was a high degree of harmfulness. Three people were killed in cold blood by officers of government who should have been there to protect them from harm.

The accused persons have given passionate pleas about their families. They forgot that the people they killed were also bread winners of their respective families.

In coming to an appropriate sentence, I have considered the fact that the plight of the victims of the offence, both the dead and the living, must be considered. Society must be protected from the likes of the accused persons who used the state guns to terminate lives of three innocent persons. Doing the best I can in the circumstances of this case, I hereby impose the following sentences.

A1 Okello Lawrence: Twenty five (25) years imprisonment in respect of each count. All sentences to be served concurrently.

A2 Mujuni Denis and A3 Aryengo Marks: Twenty (20) years imprisonment each, in respect of the three counts, all sentences to be served concurrently.

The difference in sentence is accounted for by the fact that A1 was the author of the false report that led to the death of the three persons much as A2 and A3 were joint offenders.

For avoidance of doubts, the sentences shall be served from today. Orders accordingly.

SIGNED YOKARAM BAMWINE
JUDGE
25/11/10 "

The Constitution **(Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013** under **section 15** it is provided that:-

"15. Remand period to be taken into account.

(1)The court shall take into account any period spent on remand in determining an appropriate sentence.

(2)The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account"

Both the Constitution and the sentencing guidelines provide for the period spent on remand and not the post conviction period.

Upon reading the learned Principal Judge's sentencing proceedings quoted above, we are satisfied that he did not comply with the provisions of Clause 8 Article 23 of the Constitution and the sentencing guidelines. If he had them in mind, he should have stated so before sentencing the appellant.

Since the learned Assistant DPP concedes that limb of *the* appeal, we uphold the appellant's submission that the remand period should have been deducted.

Since the learned Assistant DPP concedes that limb of the appeal, we uphold the appellant's submission that the remand period should have been taken into consideration. Taking into consideration is not an arithmetic exercise. See: ***Kizito Senkula Vs Uganda Supreme Court (Criminal Appeal No 24 of 2001) and Tom Sande Sazi Alias and Hussein Sadam vs Uganda Court of Appeal (Criminal No. 127 of 2009).*** (Both Unreported). Article 23(8) of the Constitution is mandatory. See ***Kizito Senkula vs Uganda*** (Supra).

Failure by the Court to comply with the provisions of Article 23 (8) of the Constitution renders the sentence a nullity. We accordingly set aside the sentences imposed by the High Court on that account. Having set aside the sentences this Court has a duty and the power to impose any sentence it considers appropriate by invoking the provisions of Section 11 of the Judicature Act (Cap 13). See: ***Mubogi Twairu Siraji Vs Uganda (Court of Appeal Criminal Appeal No.20 of 2006)*** (unreported). That section provides as follows.

> **11.** ***"Court of Appeal to have powers of the court of original jurisdiction.***
>
> ***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."***

Before conviction the appellant had been on remand for a period of 2 years and 7 months. He was convicted on 2nd September 2003 and he has been in prison since then. The Court does not have to take into consideration the post conviction period if it imposes a sentence that runs from the date of conviction. If however, the Court imposes a sentence that runs from the date the sentence is pronounced in specific reference to cases such as this one, which were remitted to the High Court only for consideration of sentence following the decision in the ***Susan Kigula*** petition (Supra), Court has to take into account the post conviction period.

Both the Constitution and the sentencing guidelines could not have envisaged the peculiar circumstances of the post ***Kigula cases*** regarding sentences they are thus silent on the post conviction period.

We find therefore that the learned trial Judge erred when he imposed a sentence of 20 years imprisonment without taking into account the period the appellant had spent in post conviction custody. He also erred when he did not impose a separate sentence in respect of each of the three counts of murder but instead imposed one omnibus sentence.

However, that is now moot as we have already set aside the sentence.

We note that the appellant was a first offender, that he was remorseful and was young at the time he committed the offences.

However, murder is a very heinous crime. The appellant killed three innocent people in cold blood. He was a Police officer with a duty to

protect lives and property of the people in this country, he failed to do so, instead used the gun that he had been given to protect the people to kill them.

After taking into account the 2 years and 7 months the appellant had spent on remand and the period he has spent in prison after his conviction on 2nd September 2003, we now sentence him to 27 years imprisonment in respect of each of the 3 counts of murder, all the sentences to run concurrently from the date of conviction.

DELIVERED AT KAMPALA THIS 15TH DAY OF January...2015.

HON. MR JUSTICE A.S NSHIMYE,
JUSTICE OF APPEAL

HON. LADY. JUSTICE FAITH E. MWONDHA,
JUSTICE OF APPEAL

HON. MR JUSTICE KENNETH KAKURU,
JUSTICE OF APPEAL

15 of 15
Mandawa Lillian State Attorney for resp.
Appellant pst.
Charity court clerk.
Ct Judgment delivered.
16

Acting Reg
15/1/15