

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[CORAM: Kakuru, Egonda-Ntende & Obura, JJA] Criminal

Appeal No.46 of 2014

(Arising from High Court Criminal Session Case No. 752 of 2007 at Lira)

Between

OGWAL ALBERTO=====Appellant

And

Uganda=====Respondent

(On Appeal from the Judgment of the High Court of Uganda [Caroline Okello, J.] sitting at Lira and delivered on the 27th April 2010)

JUGDEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant on 17th March 2007 at Bar-Acer village in Apac District unlawfully murdered Okello Peter. The appellant was sentenced to serve life imprisonment. He now appeals against sentence only.

2. The appellant sets forth 3 grounds of appeal.

‘1. That the learned trial judge erred in law and fact when she failed to uphold the right of the convict to legal representation during sentencing.

2. The trial judge erred in law and fact when she failed to take into consideration the three years and 10 days the convict spent in lawful custody before conviction while sentencing the convict.

3. The learned trial judge erred in law and fact when she sentenced the convict to life imprisonment which was harsh and excessive under the circumstances.'

3. The respondent opposed the appeal.
4. The brief facts of this case are that the appellant returned home on the fateful night. He picked a fight with his wife, Helen. The appellant's children including the deceased intervened and removed the panga the appellant had on him. The appellant then went into his house and came out with a spear and he drove the spear into the deceased's chest killing him instantly. The appellant fled to the bush but later returned by himself and was arrested and handed to the police. The deceased, Okello Peter, was the appellant's son.

Submissions of Counsel

5. At the hearing of the appeal Mr Levi Etum appeared for the appellant. Mr Patrick Omiya, Senior State Attorney in the Directorate of Public Prosecutions, appeared for the respondent. Mr Etum, in relation to ground 1, submitted that during the sentencing phase of the trial of the appellant the appellant's state counsel on state brief had not turned up. The court proceeded in his absence and proceeded to sentence the accused. He submitted that this violated Article 28 (3) of the Constitution that assured the appellant of a right to counsel or legal representation at state expense in light of the fact that he was exposed to a death penalty or life imprisonment. He prayed that the sentence should be set aside on that account and this court should, under section 11 of the Judicature Act impose a fresh sentence.
6. In relation to ground 2 Mr Etum submitted that the learned trial judge had not complied with the provisions of article 23 (8) of the Constitution which required a trial court to deduct from the sentence of imprisonment the period a convict had spent in pre-trial custody. The appellant had spent 3 years and 10 days in pre trial custody. In light of that the sentence imposed upon the appellant was a nullity. This court under section 11 of the Judicature Act should impose a fresh sentence.
7. Mr Etum, argued ground 3 in the alternative in case the foregoing 2 grounds did not succeed. He submitted that the sentence imposed upon the appellant was harsh and manifestly excessive. This court should interfere with the same and impose an appropriate sentence.

8. Mr Patrick Omia opposed ground 1. He submitted that the appellant had not suffered a miscarriage of justice. He had been able to act for himself and present his *allocutus*. He prayed that this ground should be rejected.
9. In relation to ground no.2 Mr Omia submitted, if we understood him correctly that the trial judge had decided to impose a sentence of life imprisonment and therefore the period spent in pre-trial custody need not be taken into account. Mr Omia further submitted that an appropriate sentence in this case would be 28 years and 10 days imprisonment from which this court can deduct the period spent on remand and sentence the appellant to 25 years imprisonment.

Analysis

10. The facts in this case are not in dispute. At the trial the appellant was represented by Mr Opok. He last appeared during final addresses to court and summing up for assessors. He was not present when the assessors gave their opinions. He was not present when judgment was delivered. He was not present during the sentencing proceedings and when the trial court imposed sentence.

11. Article 28 (3) (e) provides,

‘Every person who is charged with a criminal offence shall

—

(a)

(b)

(c)

(d)

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;’

12. The appellant was indicted of the offence of murder. The maximum punishment is the death penalty. He was therefore entitled to legal representation during his trial. In our view this included at the sentencing stage. The learned trial judge was in error in conducting sentencing proceedings without affording the appellant legal representation. This was a constitutional imperative. We would allow ground no.1.

13. Turning to ground 2 we shall begin by setting out the provisions of article 23 (8) of the Constitution.

'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.'

14. The Supreme Court has held in Rwabugande Moses v Uganda S C Criminal Appeal No. 25 of 2014 (unreported) that a sentence of imprisonment that is in violation of article 23 (8) of the Constitution is illegal. And in order for a trial court to comply with the provisions of article 23 (8) it must first determine what would be the appropriate sentence, having taken into account all mitigating and aggravating factors. The trial court would then have to deduct the period a convict would have spent in lawful custody before the completion of his or her trial and sentence the convict to the difference between the two.

15. Is life imprisonment [or imprisonment for life which is the expression used in the Constitution and statutes] a term of imprisonment? We are unaware of anything that would suggest that it is not a term of imprisonment. Whether one considers the ordinary meaning of the words or even contextually, life imprisonment is a term of imprisonment. Does article 23 (8) of the Constitution apply to life imprisonment? We see nothing in the words of article 23 (8) which would suggest otherwise. Those provisions apply to all terms of imprisonment including life imprisonment.

16. And if life imprisonment is a term of imprisonment to which article 23 (8) of the Constitution applies how is the term to be determined in years for a court to be able to deduct therefrom the period spent in lawful custody before completion of the trial? The question of the length of a term of life imprisonment was considered by the Supreme Court in the case of Livingstone Kakooza v Uganda S C Criminal Appeal No. 17 of 1993, (unreported). It stated in part,

'We agree with the learned counsel for the Appellant that the sentence of 18 years was harsh and manifestly excessive. The Appellant had been on remand in custody for two years and the learned judge took this factor in passing sentence. In effect the Appellant received a life sentence which is twenty years according to section 49(7) of the Prisons Act, Cap. 313, which provides,
"(7) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment."

17. A similar question was considered by this court in the case of Kisembo Patrick v Uganda C A Criminal Appeal No. 411 of 2014 (unreported). This court stated in part,

‘ 28. It is clear that the intention of the legislature was very clear that a sentence of life imprisonment was to be defined, in law, as a sentence of 20 years imprisonment. If one reads the whole provisions of section 47 of the Prisons Act, (formerly section 49), rather than simply looking at subsection (7) in isolation it would be clear that the legislature had set in place a statutory scheme to manage sentences including the provision of remission in respect of all sentences in excess of one month, and in the process defined what life imprisonment, being a sentence of imprisonment, means.’

18. We are aware of course of the decision of the Supreme Court in Tigo Stephen v Uganda S C Criminal Appeal No. 08 of 2009 (unreported) which also discussed the question of what was the length of life imprisonment and reached a contrary view to that of Livingstone Kakooza v Uganda (supra). For the reasons provided in Kisembo Patrick v Uganda (supra) we are inclined to follow Livingstone Kakooza v Uganda rather than Tigo Stephen v Uganda (supra).

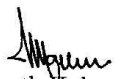
19. In addition we would point out that Tigo Stephen v Uganda (supra) did not consider article 23 (8) of the Constitution at all. Subsequently when the Supreme Court considered the provisions of article 23 (8) of the Constitution in Rwabugande Moses v Uganda (supra) it held those provisions to be mandatory applying to terms of imprisonment. However, Rwabugande Moses v Uganda (supra) did not determine the length of life imprisonment.

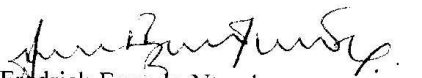
20. In our view a trial court imposing life imprisonment as a sentence must comply with article 23 (8) of the Constitution and deduct from that sentence the period that a convict would have spent in lawful custody prior to the completion of his or her trial. Until otherwise defined in law life imprisonment would be deemed to be twenty years imprisonment for purposes of applying article 23 (8) of the Constitution. In the instant case the trial court failed to do so and therefore the sentence it imposed was a nullity.

21. We shall now proceed to sentence the appellant afresh applying the provisions of section 11 of the Judicature Act. The appellant, 45 years old, was a first offender. He murdered his own son in rage after being

stopped from beating up his wife. The appropriate sentence in our view would be twenty years imprisonment. As the appellant spent 3 years and 10 days in pre-trial custody we sentence him to 16 years 11 months and 20 days to be served from 27th April 2010, the date of conviction.

Dated, signed and delivered at Gulu this 7th day of November 2017


Kenneth Kakuru
Justice of Appeal


Fredrick Egonda-Ntende
Justice of Appeal


Hellen Obura
Justice of Appeal