THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL No. 087 OF 2013
ARINAITWE FRANCIS :: APPELLANT
VERSUS
UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Mbarara before His Lordship Mr. Justice Bashaija K Andrew in High Court Criminal Session case No. 117 of 2013 delivered on 19th June, 2013)

CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE BARISHAKI CHEBORION, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of *Bashaija K. Andrew*, J in High Court Criminal Session Case No. 117 of 2013 at Mbarara wherein the appellant was convicted of the offence of Murder contrary to *Sections 188 and 189* of the Penal Code Act, Cap 120 and sentenced to 25 years imprisonment on 19th June, 2013.

Background to the appeal

The facts as accepted by the trial Court were that the deceased, *Mujuni John Sowedi* and the appellant were brothers. On 27th July, 2012, the appellant was informed by the deceased that their mother had gone missing. The accused suspected that his mother had been killed by the deceased due to a land wrangle pending between the two of them. Later that day, the appellant and others went to the deceased's home where they excavated a heap of soil in the deceased's compound and

discovered the body of their mother. The appellant in a fit of rage entered the deceased's house with a panga and cut him on several body parts which led to his death. The appellant was then arrested, charged, convicted and sentenced to 25 years imprisonment on his own plea of guilt.

The appellant, with leave of this Court granted under **Section 132(b) of the Trial Indictment Act Cap 23**, now appeals against sentence alone on two grounds as follows:-

1. ***The learned trial Judge erred in law when he did not put into consideration the period spent on remand while sentencing the appellant and thereby passed an illegal sentence.***

2. ***The learned trial Judge erred in law and fact when he passed a harsh and excessive sentence upon the appellant in the circumstances of the case.***

Representations

When the appeal came up for hearing, Ms. Kentaro Specioza, learned Counsel, appeared for the appellant on state brief, while Mr. Alex Bagada, the Assistant Director of Public Prosecutions represented the respondent. The appellant was present.

Appellant's case

Counsel for the appellant submitted that, the learned trial Judge erred in law, while passing sentence, he did not take into account the period of 10 months and 18 days the appellant had spent in pre-trial detention as required under Article 23(8) of the Constitution. This, he submitted, rendered the sentence a nullity.

Counsel asked Court to find that the sentence was illegal, set it aside and invoke **Section 11 of the Judicature Act** which grants this Court while determining an appeal, the same powers as that of the trial Court to impose an appropriate sentence of its own.

In the alternative, Counsel submitted that the sentence of 25 years was harsh and excessive in the circumstances of this case. She asked court to consider both the mitigating and aggravating factors in this case. She submitted that the appellant was aged 25 years and still a youth at the time of commission of the offence, he was a first offender who readily pleaded guilty to the offence and did not waste court's time and resources. The appellant also has a wife and one child who need his services as a father in the home. Further, that the appellant acted in anger and rage while reacting to the death of his mother.

Counsel invited Court to consider a term of 10 years' imprisonment to be appropriate and just in the circumstances.

The respondent's reply

Mr. Bagada, conceded that the learned trial Judge erred when he imposed a sentence of 25 years imprisonment upon the appellant without taking into consideration the period the appellant had spent on remand as required by Article 23(8) of the Constitution.

He further conceded that the sentence imposed was excessive given the circumstances of this case where the appellant was forced to act in a fit of rage, he pleaded guilty and never wasted court's time. Counsel agreed that a term of imprisonment for 10 years as proposed by Counsel for the appellant would meet the ends of justice.

Decision of the court

We have listened to the submissions of learned counsel on either side and carefully studied the record. We have also reviewed the law and authorities relied upon.

This court can only interfere with the sentence of the trial Court if that sentence is illegal or is based on a wrong principle or the court has overlooked a material factor, or where the sentence is manifestly excessive or so low as to amount to a miscarriage of Justice. **See James vs. R [1950] 18 EACA 147 and Kizito Senkula vs. Uganda Supreme Court Criminal Appeal No. 24/2001.**

Both Counsel agree that, the sentence of 25 years imprisonment imposed by the learned trial Judge on the appellant ought to be set aside as he did not take into account the period the appellant had spent on remand. This omission, both Counsel are in agreement, renders the sentence a nullity as it contravenes Article 23(8) of the Constitution.

The record shows that while passing sentence the learned trial Judge stated as follows:-

> ***"The following are the reasons for the sentence:-***
>
> ***i. Murder is a grave offence.***
> ***ii. The convict took the law into his own hands***
> ***iii. There is need to curb such acts***
> ***iv. The convict had no regard for life.***
> ***v. He is a first offender and has pleaded guilty.***
>
> ***All these factors taken into account, the convict is sentenced to 25 years imprisonment."***

It is evident from the above that the learned trial Judge did not, while passing sentence take into account the period spent on remand.

Further, the learned trial Judge came up with a generalized sentence and did not consider the mitigating and aggravating factors. We note that Article 23 (8) of the 1995 Constitution states:-

> ***"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 completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

In **Rwabugande Moses vs. Uganda, Criminal Appeal No. 025 of 2014**, the Supreme Court stated that, the taking into account of the period spent on remand by a court is necessarily an arithmetic exercise. Therefore, the period the appellant had spent in pre-trial detention ought to have been deducted from the sentence. Since the trial Judge did not do so, the sentence imposed is a nullity following the Rwabugande (supra) decision of the Supreme Court. We hereby set it aside.

We now invoke **Section 11 of the Judicature Act Cap 13** which grants this Court, while hearing an appeal, the same power as that of the trial court to impose a sentence of our own which we consider appropriate in the circumstances of this appeal.

The appellant acting in a fit of rage killed his brother by cutting him with a panga in a brutal and gruesome manner, after he believed the deceased had murdered their mother and buried her in a shallow grave in his compound. We note that the offence of murder carries a maximum sentence of death. We also take into account the fact that the appellant pleaded guilty, an indication that he was remorseful and had come to realize the folly of his conduct. He was also a first offender and

a relatively young man of 25 years capable of reform. He has a family to look after.

In **Mattaka versus Republic [1971] E.A 495,** it was stated that a plea of guilty springing from genuine repentance may be treated as a mitigating factor.

In our opinion, this is a borderline case where we note that even though the accused was convicted of murder on his own plea of guilt, the defence of provocation was plausible and should have been available to him in the circumstances of this case. In our view the murder of his brother was caused by the rage from realising that the deceased had killed their mother and buried him in his compound and yet he had informed the appellant that their mother has simply disappeared. We accordingly find it necessary to quash the conviction of murder and substitute it with a conviction of manslaughter contrary to Section 187 and 190 of the Penal Code Act, Cap 120.

In **Byabagambi Gabriel versus Uganda, Supreme Court Criminal Appeal No. 016 of 2002,** the Supreme Court quashed the conviction of murder and substituted it with a conviction of manslaughter, where the appellant and another had cut the deceased with a panga in his home. The appellant was sentenced to six years imprisonment after reducing the 2 years spent on remand.

Taking into account all the aggravating and mitigating factors and considering the cases cited above and others not cited, we consider that a term of 10 years imprisonment will meet the ends of justice. We now deduct from the 10 years, the 10 months which the appellant spent in

pre-trial detention and order that he serves 9 years and 2 months in prison starting from 19th June, 2013, the day he was convicted.

For the foregoing reasons, the appeal against sentence is allowed and sentence reduced as above.

We so order.

Dated at **Mbarara** this 3rd day of October 2018

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Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL

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Hon. Mr. Justice Cheborion Barishaki
JUSTICE OF APPEAL

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Hon. Mr. Justice Christopher Madrama
JUSTICE OF APPEAL