THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Obura, Madrama, JJA*]

Criminal Appeal No. 507 of 2017

(Arising from HCT-01-CR-SC-108 of 2005 at Kasese & High Court Criminal Session Case No.0280 0f 2013 at Kampala)

BETWEEN

No. 32732 P C Kakuru Pascal..... Appellant No. 1

AND

Uganda ..... Respondent

(An appeal from the judgement of the High Court of Uganda [A F Rugadya, J] delivered on 28th January 2011)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of murder contrary to section 188 and 189 (f) the Penal Code Act, Cap 120. The particulars of the offence were that on the 5th day of May 2005 at Club Atlas in Kasese town, Kasese District, the appellant murdered Byekwaso Mubarak. On 21st December 2007, the learned trial judge sentenced the appellants to death. Following the decision of Attorney General v Susan Kigula & others [2009] UGSC 6, the Supreme Court annulled the mandatory death penalty and ordered that the case files of all persons who had been convicted of capital offences and sentenced to the mandatory death penalty be returned to the High Court for mitigation proceedings and re-sentencing. On 18th November 2013, the learned judge upon hearing the parties in mitigation re-sentenced the appellant to 18 years of imprisonment. Being dissatisfied with that decision, the appellant has appealed against the sentence.

[2] The sole ground of appeal is that the learned trial judge erred in law in sentencing the appellant to an illegal term of 18 years imprisonment contrary to Article 23 (8) of the Constitution.

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellants were represented by Mr. Cosma A Kateeba assisted by Mr.Cloud Arinaitwe while the respondent was represented by Mr. Charles Bwiso, Senior State Attorney, in the Office of the Director, Public Prosecutions.

[5] Mr. Kateeba submits that it is now trite law that an appropriate sentence is a matter specifically in the discretion of the trial judge and the practice is that an appellate court will only interfere with the discretion of the trial court if the sentence is illegal or if it is satisfied that the sentence is manifestly harsh or excessive to amount to an injustice or in instances where there has been failure to exercise discretion or to take into account a material consideration. In support thereof he referred to Rwabugande Moses v Uganda [2017] UGSC 8.

[6] He submits that in this instant case, the sentence that was imposed against the appellant is illegal for failure to comply with Article 23 (8) of the Constitution and Guideline 15 of the Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Direction 2013 that obliges courts to take into consideration the period the convict has spent on remand while considering the appropriate sentence. It is the appellant's submission that although the learned judge in mitigation considered the appellant's mitigation factors, he failed to comply with the Constitution. Counsel for the appellant contends that the sentence is ambiguous because the learned judge did not clarify the remand period he considered. He submits that while the appellant spent 2 years and 7 months on pre-trial detention, the learned judge referred to a period of 8 years coming to 9 years.

[7] Mr. Kateeba further submits that since the decision in Rwabugande Moses v Uganda [2017] UGSC 8, it is now the position that taking into account the period spent on remand by court is necessarily arithmetical and the period spent on remand must be specifically accredited to the convict by deducting it from the appropriate sentence. Counsel for the appellant argues that the recent supreme court decision in Abelle Asuman v Uganda [2018] UGSC 10 that

discusses Rwabugande Moses v Uganda (supra) is not binding on cases decided before 3rd March 2017.

[8] He further submits that Abelle Asuman v Uganda (supra) should be restricted to its own facts. Firstly, that the Supreme Court in Rwabugande Moses v Uganda (supra) merely applied a constitutional provision that predates the case and secondly, holding that the decision in the latter case is applicable to sentences imposed after 3rd March 2017. He further contends that since the appellant was re-sentenced on 18th November 2013 when the sentencing guidelines were already in force, the learned trial judge ought to have deducted the 2 years and 7 months the appellant spent on remand from the sentence. Therefore counsel for the appellant invites this court to invoke its powers under Section 11 of the Judicature Act to deduct that period from the 18 years of imprisonment leaving the appellant with a term of imprisonment of 15 years and 5 months to serve from the date of conviction.

[9] In reply to the appellant's submission, counsel for the respondent submits that the sentence imposed against the appellant is legal and that the learned trial judge was lenient to the appellant given the fact that he committed a serious offence. Mr. Bwiso submits that the learned judge was alive to the constitutional provision under Article 23 (8) as he categorically stated so in the order. He is of the view that the learned judge was aware of the decision in Abelle Asuman v Uganda (supra) since he re-emphasised Article 23 (8) in the re-sentencing order. He further makes reference to Ndyomugenyi Patrick v Uganda [2018] UGSC 20 where the sentence was 32 years after mitigation. He also relies on the case of Kifamunte Henry v Uganda [1998] UGSC 20 for the proposition that this court has the power to revise the sentence upwards to 35 years. Counsel for the respondent submitted, in the alternative, that this court can confirm the sentence imposed by learned judge as was done in Ogalo s/o Owura v Republic (1954) 021 E.A.CA 270 that was cited in Sekitoleko Yudah & 2 Ors v Uganda [2017] UGSC 40.

[10] Counsel for the respondent concludes by praying that this court dismiss the appeal and uphold the sentence or revises the sentence upwards.

Analysis

[11] The facts of this case are that on the 6th day of May 2005 at around 3:00 am, the appellant went to Club Atlas in Kasese and was denied entrance for failure to pay the entrance fee of UGX 2,500. Out of anger, the appellant who was a former police officer went back to the barracks, picked up his gun and went back to the club whereupon he started openly firing at people. In the process, he

shot the deceased, Byekwaso Mubarak, who died on his way to hospital. Other people were injured in the process. The appellant was later arrested and detained in police custody. The post mortem report revealed that the deceased died due haemorrhagic shock resulting from gun shots. The appellant was examined and found to be of sound mind.

[12] It is now a well-settled position in law that this Court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See Bashir Ssali v Uganda [2005] UGSC 21; Ninsiima Gilbert v Uganda [2014] UGCA 65; Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17

[13] The appellant's main contention is that the sentencing judge did not take into consideration the period he spent in pre-trial detention while sentencing him, contrary to Article 23 (8) of the Constitution. Article 23 (8) 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 the completion of his or her trial shall be taken into account in imposing the term of imprisonment.'

[14] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that the proper application of article 23 (8) of the Constitution involved a two-step process. The sentencing court must first initially determine an appropriate sentence taking into account all aggravating and mitigating factors. The court must then deduct from that appropriate sentence the period the convict has spent on remand. The result would be the sentence to be imposed upon the offender.

[15] The relevant part of the sentence is set out as follows:

> After considering the period of 8 years, coming to 9 years he has spent on remand which I am required to do by the constitution, I am imposing a sentence of imprisonment of 18 years. Of course, this sentence of imprisonment also starts at the time of conviction.
>
> You have the right to appeal the conviction which I am sure was explained to you and also against the sentence to the

Court of Appeal within fourteen days from today if you should so wish.

[16] From the evidence on record, the appellant was arrested and detained in police custody on 6th May 2005 and was sentenced to death on 21st December 2007. The period the appellant spent on remand before conviction is 2 years and seven months. It appears that the learned sentencing judge included post-conviction period before 18th November 2013 (re-sentencing date) when determining the period to be taken into account pursuant to article 23 (8) of the Constitution. Article 23 (8) refers only to the pre-trial period. In this case the learned sentencing Judge took into account the post-conviction period which was an error. See Turyahika v Uganda [2016] UGCA 83, Mboinegaba Vs Uganda [2016] UGCA 80.

[17] In addition the period the learned sentencing judge purported to take into account was not exact. He stated that the period he was taking into account was 8-9 years. It is therefore not clear whether he took into account 8 years or 9 years or something in between. The variance between any of those possibilities is significant. The sentence is therefore vague and ambigious. The period spent on remand is capable of exact calculation. It is only that period that article 23 (8) directs a court to take into account. Neither more nor less.

[18] For the aforementioned reasons the sentence against the appellant is set aside. We now invoke section 11 of the Judicature Act which gives this court power of the trial court to impose a sentence of its own.

[19] In mitigation the appellant told the sentencing court that he was remorseful and regrets his actions. He said that he had learnt to respect his fellow human beings, control his emotions and live a purposeful life. He went ahead to make his life meaningful by acquiring a Diploma in Entrepreneurship and Small Business Management and a Bachelor of Laws from London University while in prison as a form of rehabilitation. He said he feared God and had been actively involved in religious activities He told court he was a young man of 35 years at the time of re-sentencing with a wife and children.

[20] The appellant's exemplary conduct in prison since his conviction for this offence may not necessarily amount to a mitigating factor though we suppose it may point to the possibility of the appellant undergoing reform which is one of the objectives of sentencing and imprisonment in particular.

[21] On the other hand the appellant was a police officer charged with the duty of protecting society but used a firearm assigned to him for that work to commit a grave offence whose maximum punishment is the death penalty.

[22] In Livingstone Kakooza vs Uganda (supra), the Supreme Court was of the view that sentences imposed in previous cases of similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are obliged to maintain consistence or uniformity in sentencing while being mindful that cases are not committed under the same circumstances.

[23] In Tumwesigye Anthony v Uganda [2014] UGCA 61 this court set aside the sentence of 32 years imprisonment and substituted it with 20 years. The appellant in that case was convicted of murder. The deceased had reported him for stealing his (deceased) employer's chicken. The appellant killed him by crushing his head after which he buried the body in a sandpit.

[24] In Atiku Lino v Uganda [2016] UGCA 20, the appellant was convicted of murder and sentenced to life imprisonment. The appellant had attacked and cut to death the deceased in the latter's house accusing him of bewitching his son. This Court, citing the case of Tumwesigye v Uganda [2014] UGCA 61 (supra) observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was reduced to 20 years' imprisonment.

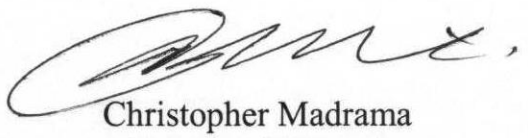
Decision

[25] Taking into account the above factors we find that a term of 20 years imprisonment would be the appropriate sentence upon the appellant. We deduct therefrom the period spent on remand which is 2 years and 7 months. In the result we impose upon the appellant a term of imprisonment of 17 years 5 months to run from the 21st December 2007 the date of conviction.

Dated, signed and delivered at Fort Portal this 19th day of June 2019

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal



Christopher Madrama
Justice of Appeal