THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

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

Criminal Appeal No. 168 of 2018

(Arising from High Court Criminal Session Case No.185 of 2010 at Fort Portal)

BETWEEN

Atukwasa Jonan ..... Appellant No. 1
Butaragaza Waren ..... Appellant No. 2
Muhairwe Jackson..... Appellant No. 3
Businge James ..... Appellant No. 4
Tumuhimbise Ataninsi..... Appellant No. 5
Sande Innocent ..... Appellant No. 6
Majuri Wilson ..... Appellant No. 7

AND

Uganda ..... Respondent

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

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted and convicted of the offence of murder contrary to section 188 and 189 of the Penal Code Act, Cap 120. The particulars of the offence were that the appellants, together with Nyirashaba Beatrice, Mboneko James, Sande Justus and Mugisha Henry on the 30th day of May 2017 at Kinyantale village in Kyenjojo District unlawfully with malice aforethought caused the death of Kabagambe Benon. On 28th January 2011, the learned trial judge sentenced the appellants to 25 years' imprisonment. Dissatisfied with that decision, the appellants previously appealed against conviction and sentence but sought leave to appeal against the sentence only.

[2] The sole ground of appeal is that the learned trial judge erred in law and fact when he sentenced the appellants to an illegal sentence of 25 years imprisonment without reducing the period spent on remand. In the alternative, that the learned trial judge erred in law and fact when he sentenced the appellants to 25 years imprisonment which is manifestly harsh.

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellants were represented by Ms. Nyaketcho Julian and the respondent by Mr. Wasswa Adam, Senior Resident State Attorney.

[5] Counsel for the appellant submits that the sentence of 25 years imprisonment imposed against the appellants without putting into consideration the period spent on remand is illegal for failing to comply with article 23 (8) of the Constitution of the Republic of Uganda and Rule 15 (1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 which require courts to put into account the period spent on remand by the convict before passing a sentence. She cited the case of Rwabugande Moses v Uganda [2017] UGSC 8 for the proposition that taking into account means reducing or subtracting the period spent on remand from the final sentence. It is the appellants' submission that it is not enough for the trial judge to state that he or she has put into consideration the period spent on remand while imposing a sentence. The appellants prayed that this court sets aside the illegal sentence and impose an appropriate sentence with consideration that the appellants have reformed and are still of value to this nation.

[6] In the alternative counsel for the appellant submits that that the sentence of 25 years of imprisonment is harsh and that the trial judge while sentencing the appellants generalised the mitigating factors and also the sentences. He did not consider the mitigation factors for each convict separately and neither did he sentence the convicts separately. The appellants pray that this court reduces their sentence to 15 years. Counsel for the appellants relied on Kia Erin v Uganda [2017] UGCA 70 where this court set aside a term of life imprisonment and substituted it with a term of 18 years imprisonment for the offence of murder. In that decision this court referred to Epuat Richard v Uganda Court of Appeal Criminal Appeal No. 199 of 2011 (unreported) where the appellant who was convicted of murder had his sentence reduced from 30 years' imprisonment to 15 years' imprisonment.

[7] It was the appellants' prayer that this court considers the previous range of sentences and reduce the appellants' sentence to 15 years from which court should deduct the 3½ years the appellants spent on remand and sentence them to 11½ years.

[8] In reply the respondent cites article 23 (8) of the Constitution and Guideline 15 of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions that entitle a convict to a deduction of the time he has spent on remand when being sentenced to a term of imprisonment. Counsel for the respondent contends that the learned trial judge considered the period the appellants spent on remand and all mitigation factors before imposing a sentence against them. Counsel for the respondent contends that the case of Rwabugande Moses v Uganda [2017] UGSC 8 is distinguishable from this instant case because in that case, the trial judge did not mention the time the appellant had spent on remand while in this instant case the trial judge made reference to that period and took it into account.

[9] Counsel for the respondent further submits that the arithmetical deductions referred to by counsel for the appellants in the case of Rwabugande Moses v Uganda[2017] UGSC 8 were clarified by a later decision of the Supreme court in Abelle Asuman v Uganda [2018] UGSC 10 where the Supreme Court held that what is material is that the period spent in lawful custody prior to the trial and sentencing of the convict must be taken into account. It is the respondent's prayer that this appeal be dismissed and the sentence against the appellants' confirmed.

[10] In reply to the alternative ground counsel for the respondent invites this court to consider Guideline 19 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 that requires court to be guided by the sentencing range specified in the Third Schedule for capital offences. He submits that a sentence of 25 years' imprisonment is within the sentencing range where the starting point is 35 years of imprisonment. It is the respondent's submission that the appellants do not deserve lenience because they murdered the deceased in a very gruesome and inhumane manner. Counsel for the respondent prays that this court upholds the sentence against the appellants so as to protect the victims of the murder (the deceased's family) who witnessed the gruesome murder. In conclusion the respondent maintains that this appeal should be dismissed and the sentence of 25 years' imprisonment for all and each of the appellants be upheld.

Analysis

[11] The facts of this case are that on 30th May 2007 at around 6:00 – 6:30 am, the appellant together with Mboneko James, Sande Justus, Mugisha Henly and Nyirashaba Beatrice went to the home of Kabagambe Benon (the deceased) armed with clubs and an axe. The deceased was called out of the house by his brother Mboneko James while the others surrounded the house. When the deceased came out of the house, the appellants with the other convicts started accosting him. Some of the family members came out of the house to witness what was causing the commotion. The deceased managed to flee back into the house and locked the door but his pursuers managed to break into his house. They forcefully removed the deceased from the house and started assaulting him with the weapons they had carried until the deceased passed away. The family members that were present ran away from the scene of the crime as they were pursued by the appellants and the other convicted persons. The matter was later reported to the police who arrested the appellants and the others. The deceased was subjected to a post-mortem examination and the cause of death was established as haemorrhagic shock with brain damage. It was observed in the report that the deceased had been hit several times on the head.

[12] The general principles regarding to the sentencing powers of an appellate court are well established and have been set out in numerous cases by the Supreme Court. In Livingstone Kakooza v Uganda [1994] UGSC 17 it was stated that:

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration" See Ogalo S/O Owoura v R (1954) 21 E.A.CA; Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995; Kamya Johnson Wavamuno vs. Uganda, Criminal Appeal No.16 of 2000; Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001.'

[13] The appellants' contention is that the trial judge while sentencing them did not expressly deduct the period they spent on remand as required by the law rendering the sentence illegal. Article 23 (8) of the 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 the completion of his or her trial shall be taken into account in imposing the term of imprisonment.'

[14] Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 states:

'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.'

[15] The sentencing order which is the subject of this appeal appears at page 17 of the record of the trial court and is set out as follows:

'Court: Sentence and reasons thereof:

Accused persons are all said to be first offenders. They all have spent about 3½ years on remand. I take this period into consideration while considering the appropriate sentence to impose on each one of them. They are said to be relatively young people and have family obligations. However, the accused people have committed a very serious offence. They sought out and pursued the deceased till they got him and thereafter wantonly and savagely hit him until he died. This was in front of his wife and children who no doubt suffered trauma and were helpless and could not assist him. The attitude of the accused persons was brutal and savage in nature. In my view if they thought the deceased had committed any offence, they should have caused his arrest and handed him over to the authorities and courts of law to for handling. They decided to take the matter into their hands and ruthlessly battered the deceased to death. Such behaviour cannot be tolerated by this court.

They deserve no leniency on part of the court. Putting everything into consideration, I sentence each and every accused persons to a term of 25 (twenty five) years imprisonment. Right of appeal explained.'

[16] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that in order to comply with article 23 (8) of the Constitution in a case where a sentence of imprisonment was to be imposed a sentencing court had to

determine first the appropriate sentence for the offence in question and then subtract from that sentence the period spent on remand prior to the determination of the trial. The result would then be the sentence to be imposed upon an offender.

[17] The Supreme Court in Abelle Asuman v Uganda [2018] UGSC 10 while discussing its decision in Rwabugande Moses v Uganda (supra) where it had held that taking into account the remand period while determining the appropriate term of sentence should be an arithmetical exercise stated:

> 'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
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> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.'

[18] The Supreme Court in effect in Abelle Asuman v Uganda (supra) while not directly overruling Rwabugande v Uganda (supra) impliedly approved the previous line of authorities of the Supreme Court like Kizito Senkula v Uganda [2002] UGSC 36; Kabwiso Isa v Uganda [2003 UGSC 36; Kabuye Senvewo v Uganda, [2005] UGSC 23; Katende Ahamad v Uganda, [2007] UGSC 11 and Bukenya Joseph v Uganda [2012] UGSC 3 that held that applying article 23 (8) of the Constitution did not require a mathematical approach and it was sufficient for the sentencing court to take into account or consider the period spent in pre-trial custody alongside other factors that were necessary to be considered in determining an appropriate sentence.

[19] Upon consideration of the foregoing jurisprudence and the sentencing order we are of the view that the learned trial judge put into account the period the appellants spent on remand as required by the law. It is no longer mandatory to expressly deduct the period in the sentencing order. Courts can exercise either approach; the non-arithmetical approach or apply the arithmetical formula in

accordance with Rwabugande Moses v Uganda (supra). In light of the foregoing we find that the learned trial judge complied with the provisions of Article 23 (8) of the Constitution. Therefore ground 1 fails.

[20] Turning to the alternative ground of appeal, during mitigation, appellant no. 2 (A6) stated that he was a first-time offender with a wife and children. He was remorseful and only 29 years of age at that time. Appellant no. 3 (A6)'s mitigation factors were that he was a first -time offender, 29 years of age with a wife and children. Appellant no. 4 (A3) stated in mitigation that he was a first-time offender who was remorseful and deserved a lenient sentence. He stated that he had a wife and ten children who depended on him and that he was only 49 years at the time of sentencing.

[21] Appellant no.5 (A1)'s factors in mitigation were that he was a first-time offender who was remorseful and also deserved leniency. He also stated that he had two wives and children who were dependant on him and he was middle aged. Appellant no. 6 (A2) stated that he was a first-time offender, remorseful, had a wife and four children who depended on him. He was 32 years at the time of sentencing. Appellant no. 7 (A7) stated in mitigation that he was only 23 years at that time, he was remorseful and he had a wife and four children. He asked for a lenient sentence as he could still make a formal contribution to the nation. All the appellants stated that they had spent 3½ years on remand.

[22] We note that the appellants spent three and half years on remand. We also note that the appellant committed a grave offence and therefore his sentence must reflect the severity of the offence. Moreover the offence was committed in a gruesome and inhumane manner. The appellants pursued the deceased relentlessly and battered him to death in front of his family. We have taken into consideration that all the appellants were first time offenders, remorseful, pleaded for leniency and were relatively of a young age.

[23] We also note that there is need for parity in sentencing. Therefore we have to take into consideration the sentences the Supreme Court and this court have imposed on offenders in similar circumstances. Objective 3 (e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to determine the appropriate sentence lies with the Court by weighing all relevant facts and then exercising its discretion judiciously.

[24] We are unable to consider as counsel for the respondent asked us to do the scheme for length of prison sentences for murder provided in Schedule 3 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, given the wide disparity from the sentences imposed in past decisions of the Supreme Court and the Court of Appeal for the same offence as illustrated hereafter.

[25] In Kasaija Daudi v Uganda [2014] UGCA 47, the appellant was convicted of murder and sentenced to life imprisonment. This court taking into account the period of 2½ the appellant spent on remand reduced the sentence to 18 years of imprisonment. In Anguyo Robert v Uganda, 2016 UGCA 39, the appellant was convicted of murder and sentenced to 20 years of imprisonment. On appeal to this court, the sentence was set aside and substituted with 18 years' imprisonment.

[26] In Kia Erin v Uganda [2017] UGCA 70, the appellant was convicted of the offence of murder and sentenced to imprisonment for life. On appeal, the sentence was substituted with a sentence of 18 years of imprisonment. In Tumwesigye Anthony v Uganda [2014] UGCA 61, the appellant was convicted of murder and sentenced to 32 years of imprisonment, this court reduced the sentence to 20 years on appeal.

[27] In Kamya Abdullah and 4 Others v Uganda [2018] UGSC 12 the appellants were convicted of murder and sentenced to 40 years imprisonment by the High Court. On appeal to the Court of Appeal the sentence was regard as excessive and reduced to 30 years imprisonment. On a further appeal to the Supreme Court the sentence was reduced to 18 years imprisonment. The Supreme Court stated in part,

> 'In sentencing, a judge should consider the facts and all the circumstances of the case. Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree. Furthermore, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording suspects the right to defend themselves in a formal trial.
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> Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our

> communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.
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> The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death. Police managed to arrest only a few who included the appellants as identified by the prosecution witness.
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> When we consider the sentences that were passed against those who committed similar crimes as individuals we come to the conclusion that the two courts below did not properly review sentencing precedents of convicts of similar crimes. We think that if they had done so, they would have passed an appropriate sentence against the appellants.'

[28] The appellants in this case were part of a mob that committed this offence alleging that the appellant engaged in witchcraft. Generally acting in the belief that the deceased had committed witchcraft is not a mitigating factor though in appropriate circumstances it may constitute provocation especially if the deceased was caught in an act of witchcraft creating fear in the perpetrators of the crime. However, that is not the situation here. See Eria Galikuwa v Rex (1951) 18 EACA 175 and Fabiano Kinene and Others v Rex (1941) 8 EACA 96.

[29] We note that the appellants were part of a mob that committed the offence in the instant case and as pointed out in Kamya Abdullah and 4 Others v Uganda (supra) this was a factor to be taken into account in assessing the appropriate sentence. Such perpetrators were not to be treated like those engaged in cold blooded murder.

[30] Having taken into account the above facts and past decisions of the Supreme Court and this court we are of the view that the sentences imposed against the appellants were manifestly harsh and excessive. The alternative ground therefore succeeds.

Decision

[31] We find that in the circumstances of this case a term of 18 years imprisonment would be the appropriate sentence to meet the ends of justice. From that

sentence we shall deduct the period of 3½ years the appellants spent in pre-trial detention. We therefore sentence the appellants as follows:

(i) Appellant no. 1 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(ii) Appellant no. 2 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(iii) Appellant no. 3 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(vi) Appellant no. 4 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(iv) Appellant no.5 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(v) Appellant no. 6 to a term of 14½ years imprisonment to be served from 28th January 2011, the date of conviction.

(vii) Appellant no. 7 to a term of 14½ years imprisonment to be served from 28th January 2011, 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