THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

CRIMINAL APPEAL NO. 110 OF 2012

ISAAC TUMUSIIME::APPELLANT

VERSUS

UGANDA::RESPONDENT

(An appeal from the decision of the High Court at Kampala before Her Lordship Hon. Lady Justice Monica Mugenyi dated 17th April, 2012 in Criminal Session Case No. 34 of 2012)

JUDGMENT OF THE COURT

Introduction

This appeal arises from the decision of the High Court sitting at Kampala delivered on 17th April, 2012 by Her Lordship Monica Mugenyi, J in which the appellant was convicted of the offence of murder contrary to sections 188 & 189 of the Penal Code Act and sentenced to 35 years imprisonment.

Background to the Appeal

The facts giving rise to this appeal as found by the trial Judge are that on 06/01/2000 at around 7:00 pm the appellant together with another person went to Trans Africa Holiday Inn where the deceased, David Bitwire was the proprietor. Both were in military uniform and armed with guns. They went to the deceased and made a representation that they had been deployed to guard Trans Africa Holiday Inn as that was a period of insurgency in Kasese District. The deceased believed the two persons and welcomed them and even gave them money for buying cigarettes for their use because it was not the first time that soldiers were guarding the place. From the time of their arrival at Trans Africa Holiday Inn until about

11:00pm, the appellant and his colleague sat chatting at the guard post usually manned by a Security 2000 guard in front of the bar which was part of Trans Africa Holiday Inn. Meanwhile the deceased together with the bar patrons were inside the bar. At around 11:00pm, as the deceased got out of the bar to go home, the appellant attacked him and shot him dead. His body was examined and the post mortem report revealed that the cause of death was gunshot wounds leading to severe hemorrhage. The appellant was indicted, tried and convicted of the offence of murder and sentenced to death which was a mandatory penalty for murder at the time.

Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing. Having heard the submissions of both counsel, the learned re-sentencing Judge sentenced the appellant to 35 years imprisonment.

Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court on the following grounds;

> *"1. The learned trial Judge erred in law and fact when she sentenced the appellant without considering the period spent on remand.*
>
> *2. The learned trial Judge erred in law and fact when she sentenced the appellant to 35 years imprisonment which is manifestly harsh and excessive."*

Representations

At the hearing of this appeal, the appellant was represented by Mr. Albert Mooli on State Brief while Ms. Joanita Tumukirize, a State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

Counsel submitted that the re-sentencing court did not take into account the period spent in detention. He relied on the case of ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014*** in which the Supreme Court held that such a sentence is illegal for failure to comply with a mandatory Constitutional provision. Counsel argued that in the instant case, the re-sentencing Judge only stated that she had made due regard for the period of 12 years already spent in incarceration. She also stated that the sentence would run from the date of re-sentencing which according to counsel was wrong. He prayed that this Court sets aside the illegal sentence and imposes an appropriate sentence taking into account the period spent on remand. Counsel pointed out the mitigating factors which are that: the appellant was a first offender, he had acquired some qualifications and he is therefore reformed. Counsel proposed a sentence of 20 years imprisonment.

The Respondent's reply

Counsel opposed the appeal and submitted that the re-sentencing Judge took into account the period the appellant spent in incarceration. She prayed that the sentence be upheld because of the following aggravating factors: the appellant shot the deceased dead, the appellant was putting on an army uniform which is a symbol of security. He relied on the case of ***Ssemanda Christopher and anor vs Uganda, CACA No. 77 of 2010*** to support his submissions.

Resolution by the Court

We are aware of our duty as the first appellate Court under **Rule 30 of the Judicature (Court of Appeal Rules) Directions** to re-appraise the evidence on record and draw inferences of fact. ***See: Narsensio Begumisa vs Eric Tibebaga, SCCA 17/2002.***

Before passing sentence, the re-sentencing Judge took into account both the mitigating and aggravating factors. Having done so she stated as follows:

> *"...I do take into account the reform that is evident in the convict. With due regard for the 12 years already in incarceration I do hereby sentence the convict to 35 years imprisonment to run from the date hereof."*

We note that the re-sentencing Judge combined and subtracted both the period spent on remand and the post-conviction period from the sentence of 45 years she had found appropriate to impose on the appellant. That was contrary to the requirements of Article 23(8) of the Constitution which makes it mandatory for a court, while imposing a sentence, to take into account the period a convict spent in lawful custody in respect of the offence before the completion of his or her trial. The article clearly specifies that the period to be taken into account is the pre-conviction period. In this case the learned re-sentencing Judge took into account the post-conviction period which was irregular.

In the circumstances, we find that the sentence of 35 years imprisonment that was imposed by the re-sentencing Judge without complying with Article 23 (8) of the Constitution was illegal. We therefore set it aside.

We now invoke the provisions of section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of the trial court to impose a sentence of its own which it considers appropriate. In so doing, we shall consider both the mitigating factors and the aggravating factors presented by counsel during re-sentencing.

The mitigating factors that favour the appellant which the re-sentencing Judge considered are that the appellant was a first offender, he spent 3 years on remand, he was a young man of 23 years at the time he committed the offence, he had a deprived background having been orphaned when he was barely 2 months, he was conscripted at 14 years to go and serve in

the Rwanda War, he lost direction at an early age, he had no opportunity to go to school and therefore lacked authoritative guidance, while in prison he went to school and attained a Certificate in Entrepreneurship and Small Business Management, he is now a devout leader of the Catholic Church and Chaplaincy, he has been recommended for good conduct, he is remorseful. The learned Judge also considered the aggravating factors that the appellant was at that time an army officer, the battalion he was attached to had been assigned to protect the residents of Kasese and their property during the ADF insurgency , the appellant however turned his gun to the same people and property he was meant to protect, the deceased was killed in cold blood in front of his disabled daughter (Peninah), the appellant shot the deceased several times with the intention to kill him and he was not remorseful.

We shall also consider the range of sentences in similar offences to determine an appropriate sentence of our own.

In ***Wodada Moses vs Uganda, CACA No. 0758 of 2014,*** the appellant was convicted of murder and sentenced to death by the trial Court. Following the decision in ***Attorney General vs Susan Kigula and 417 others (supra)*** a plea in mitigation of sentence was made and the appellant's sentence was reduced to 39 years imprisonment. The appellant appealed against the sentence to this Court and it was reduced to 25 years imprisonment.

In ***Atiku Lino vs Uganda, CACA No. 0041/2009,*** the appellant was convicted of murder and sentenced to life imprisonment. He attacked the deceased in his house and killed him. On appeal, this Court observed that the appellant ought to be given an opportunity to reform and it reduced the sentence to 20 years imprisonment.

Considering the range of sentences for murder in the above cited cases and others not cited here, we find that a sentence of 25 years imprisonment will be appropriate in the circumstances of this case. We deduct the period of 3 years the appellant spent in lawful

custody prior to his conviction, and sentence him to 22 years imprisonment from the date of his conviction, that is, 14/11/2002.

Having so determined ground 1 of the appeal, it is now not necessary to consider ground 2 of the appeal.

We accordingly allow the appeal in the above stated terms.

We so order.

Dated at **Kampala** this 25th day of June 2019

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Ezekiel Muhanguzi

JUSTICE OF APPEAL