THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0321 OF 2014

(An appeal against Sentence of the High Court of Uganda at Kololo before His Lordship Hon. Justice Moses Mukiibi dated 3/12/2013 in Criminal Case No. 0260 of 2014)

NAKIBINGE ELIYA::APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal from the judgment of Mukiibi, J in High Court Criminal Case No.0260 of 2014 at Kololo dated 3rd December 2014 in which the appellant was re-sentenced to 30 years imprisonment for murder.

Background of the case.

The facts as accepted by the learned trial Judge are as follows: -

On 17/3/2005, at about 10:00p.m, Kibalama, the deceased, his brother, one Ssekitoleko Isaaya and the deceased's female companion, visited London Look Bar and Restaurant at Nabweru, near Kampala. While at the

bar the deceased and Ssekitoleko started drinking and watching a pool game. At around 3:30a.m when the appellant and a number of his friends showed up at the same bar, they were quite rowdy. One of them removed a cap from the head of Ssekitoleko and deceased's female companion. The deceased was not amused by that type of conduct. Therefore, he pursued the matter with the appellant's group, which in turn manhandled him; and ultimately forced him out of the bar where they thoroughly assaulted him. Ssekitoleko was fortunate enough to escape from the assailants and ran away. Eventually when he returned to the scene of crime, he found the deceased in a state of unconsciousness. The police came to the scene of the crime and took the deceased to Mulago Hospital where he died a day later.

The Post Mortem report revealed that the deceased died due to a brain injury from the head wounds that were inflicted on him by a blunt object.

Following the deceased's death, the appellant was arrested and charged with murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120. On 19th February 2007, he was convicted of murder and sentenced to suffer death by Lugayizi, J.

Following the decision of ***Susan Kigula and 417 Others vs. Attorney General, Constitutional Appeal No. 003 of 2006,*** in which the Supreme Court annulled the mandatory death penalty and ordered that the case files for all accused persons who had, before then, been convicted of capital offences and sentenced to the then mandatory death penalty be sent back to the High Court for mitigation proceedings and re-

sentencing.

The matter was subsequently sent back to the High Court for mitigation of sentence. On 18th November 2013, the appellant appeared before Mukiibi, J who upon hearing the matter re-sentenced him to 30 years imprisonment.

The appellant being dissatisfied with the sentence, with leave of Court granted under Section 132 (1) (b) of the Trial on Indictments Act, Cap 23, appealed to this Court against sentence only. The following was the only ground:-

1. ***The learned trial judge erred in law and fact when he imposed a harsh and excessive sentence of 30 (thirty) years imprisonment upon the appellant and failed to take into account the appellant's mitigating factors in the circumstances and further failed to exercise his discretion appropriately in light of the mitigating factors and thereby occasioned a miscarriage of justice.***

Legal Representation:

At the hearing of the appeal, Mr. Bruno Sserunkuma, learned Counsel, appeared for the appellant on State Brief, while Ms. Joanita Tumwikirize, learned State Attorney, appeared for the respondent. The appellant was in court.

Appellant's Submissions

It was submitted for the appellants that the sentence of 30 years imprisonment was harsh and manifestly excessive in the circumstances of this case. Counsel contended that the appellant was a first offender, was

remorseful and was relatively young being 19 years old at the time of commission of the offence. He was also the breadwinner for his widowed mother and siblings aged 7 and 9 years old. Learned Counsel asked court to allow the appeal, set aside the sentence. In his opinion the sentence ought to be reduced to 10 years. He relied on ***Livingstone Kakooza vs. Uganda: SCCA No. 17/1993***, in which the Supreme Court reduced the sentence of 18 years imprisonment to 10 years imprisonment for the offence of murder.

Ms. Tumwikirize, learned State Attorney, opposed the appeal and supported the sentence. She pointed out, quite rightly in our view, that sentencing was at the discretion of the trial court and the appellate court could only interfere with the sentence if the trial court acted on wrong principles. Further, that the sentence was not manifestly excessive considering the fact that it had been subsequently reduced from death to thirty (30) years. She contended that it was the most appropriate sentence in the circumstances of the case.

Decision of Court

We have carefully listened to both Counsel and perused the court record and the law and authorities cited to us.

While this is an appeal against sentence only, it is nevertheless incumbent on this Court, as a first appellate Court, pursuant to the provisions of ***Rule 30 (1)*** of the Rules of this Court to re-appraise the evidence on record, if only to appreciate the circumstance under which the offence was

committed. It is this that will inform this Court's findings on whether, or not, to fault the trial Court over its imposition of the sentence against which the appellant has now appealed. ***See Kifamunte Henry vs. Uganda, Supreme Court criminal appeal No.10 of 1997.***

The Supreme Court has laid down the principles that should govern the interference by the appellate Court on sentence in ***Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995,*** as follows: -

> ***"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal, or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."***

The Supreme Court expanded these principles further in ***Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993,*** when it stated:-

> ***"An appellate Court will only alter a sentence imposed by the trial Court if it is evident that 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 vs. R. (1954) E.A.C.A.270."***

See also **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

We bear in mind that the foregoing principles are equally applicable in the instant appeal.

We now proceed to consider the only issue before us. The issue of whether the sentence of 30 years imprisonment is manifestly excessive as claimed by the appellant.

In passing the sentence the re-sentencing judge said:-

> ***"I have taken into account all the mitigating factors which have been presented to court. I have considered the circumstances in which the offence was committed. I have considered the circumstances of the convict. I, therefore, sentence the convict to thirty (30) years imprisonment. I now deduct eight (8) years and seven (7) months representing the total period the convict has been in prison, both before and after conviction, which leaves a balance of a term of imprisonment 21 years and 5 months to be served by the convict subject to remission".***

We find that, the re-sentencing Judge with all due respect did not take into account the age of the appellant when exercising his sentencing discretion. On sentence we are of the view that there is need to consider the need to give the convicts, especially the very young ones, a chance to reform by not keeping them for long in incarceration.

In ***Kabatera Steven vs. Uganda, Court of Appeal Criminal Appeal No. 123 of 2001***, it was stated that the age of an accused is always a material consideration that ought to be taken into account before a sentence is imposed.

We further find that the re-sentencing Judge erred when he lamped the period spent on remand together with the post conviction period. Usually the period after conviction is subject to remission but if it is merely deducted the appellant forfeits remission on the period he has already served in prison.

We therefore fault the re-sentencing Judge for acting on a wrong principle thereby causing an injustice to the appellant. This error rendered the sentence illegal and we find so. We accordingly interfere with it on the account of the above reasons.

In the instant appeal, the appellant was aged 19 years at the time of commission of the offence. He was a young man capable of reform and sentencing him to 30 years imprisonment could potentially make him a hardened criminal.

Nevertheless, we note that the appellant committed a very serious offence of murder that attracts a death sentence. The appellant and others still at large brutally assaulted an innocent man to death. They used blows and kicks to the head of the deceased repeatedly causing his death. We also consider the need to protect the public from crimes committed through mob justice.

We have considered both mitigating and aggravating factors and the need

to maintain consistency or uniformity in sentencing.

In ***Tumwesigye Anthony vs. Uganda, Court of Appeal Criminal Appeal No. 46/2012***, 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.

In another case before the same court, ***Atiku Lino vs. Uganda, Court of Appeal CA No. 041/2009,*** the appellant was convicted of murder and sentenced to life imprisonment. The appellant had attacked and cut to death the deceased in his house accusing him of bewitching his son. This Court, citing the case of Tumwesigye (supra) observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was reduced and substituted with 20 years' imprisonment.

In ***Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No.004 of 2011***, the Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment. The appellant had been convicted of murdering his wife.

Having subjected the re-sentencing carried out by the learned re-sentencing Judge in this case to a fresh scrutiny, and having considered the record, the law and past court precedents, we have come to the conclusion that the sentence of 30 years imprisonment was harsh and manifestly excessive in the circumstances. We find that a sentence of 17 years would meet the ends of justice. Taking

into account the period of 1 year and 10 months spent by the appellant on remand, we consider a sentence of 15 years and 2 months imprisonment as appropriate. The appellant shall serve a period of 13 years and 2 months from the 19th February 2007, the date of his conviction.

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