THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 519 OF 2014

1. TAYEBWA ROBERT

2. KANYAMAGWA ENOCK.....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

(Appeal against sentence in High Court Criminal Session Case No. 188 of 2013 at Kampala before Hon. Lady Justice Margret Tibulya dated 21st day of November, 2013)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Justice Ezekiel Muhanguzi, JA

JUDGMENT OF THE COURT

Introduction

The appellants were charged, tried and convicted of murder contrary to sections 188 and 189 of the Penal Code Act. The 1st and 2nd appellants were accordingly sentenced to 40 years imprisonment and life imprisonment respectively.

Brief background

The facts of this case as accepted by the trial judge are that on the night of 30th September 2000 Byamukama God and his wife were sleeping when they were attacked by some armed thugs who gained access into the house after breaking open the door.

Their intention was to rob him of money but a struggle immediately ensued before the occupant (God) resisted the attackers who ended up cutting him with knives ending his life. Scared of the alarm he was raising they ran away from the scene but later inquiries slowly narrowed down up to the arrest of Kanyamanga Enock while a combination of circumstances had earlier led to the arrest of Tayebwa Robert in Rukungiri. As the appellants seemed to be implicating each other in their extra judicial statements they were accordingly jointly charged with this offence.

The prosecution called ten witnesses and put in eight exhibits in an endeavour to prove its case beyond reasonable doubt.

The appellants gave their versions of events that led to their arrest in which they only recounted how they were arrested, and subsequently taken to make statements. They were tried, convicted and sentenced to 40 years imprisonment and life imprisonment to the first and second appellants respectively.

Initially, the appellants had been sentenced to suffer death by the High Court sitting at Rukungiri before Maniraguha, J on the 31st day of March, 2004. In re-sentencing, following the directive in ***AG V Susan Kigula Sserembe & 417 Ors,*** *Supreme Court Constitutional Appeal No. 3 of 2006,* **the death sentence was substituted for custodial sentences of 40 years**

imprisonment and life imprisonment for the first and second appellants respectively, before Tibulya Margret, J on 21/11/2013.

Being dissatisfied with the sentences and having been granted leave to appeal against sentences only under section 132(1) (b) of the Trial on Indictments Act Cap 23, the appellants now appeal to this court against sentences alone on the following ground:-

> *"The learned trial judge erred in law and fact when she sentenced the appellants to 40 years imprisonment and life imprisonment which is manifestly harsh and excessive."*

Representation

At the hearing of this appeal, learned counsel Mr. Mooli Albert Sibuta represented the appellants while Ms. Annet Namatovu Ddungu, learned Senior State Attorney appeared for the respondent. Both appellants were present.

Submissions by the appellants

Mr. Mooli submitted that, the mitigating factors were not taken into consideration by court. He pointed out that the appellants had spent about 4 years and 5 months on remand. In respect to the 2nd appellant, counsel submitted that he was a first offender and this factor was not taken into account by court when sentencing him.

Counsel further submitted that, the young age of the appellants was not considered. He pointed out that the 1st appellant was 18 years and the 2nd appellant was 26 years old at the time the offence was committed.

Counsel relied on ***Wamutabaniwe Jamiru v Uganda***, *Supreme Court* ***Criminal Appeal No. 74 of 2007 and Rwabuganda Moses v Uganda,*** *Supreme Court Criminal Appeal No. 25 of 2014,* and submitted that,

where court fails to consider mitigating factors, such sentence is considered illegal and an appellate court may set aside that sentence and substitute the same with a lawful sentence.

Counsel further relied on ***Kamya Abdallah v Uganda***, *Supreme Court Criminal Appeal No. 24 of 2015,* where a sentence of 30 years imprisonment was reduced to 18 years for the offence of murder and submitted that, there is need to maintain consistency in sentences. Counsel asked court to exercise its powers under section 11 of the Judicature Act and pass an appropriate sentence of 25 years imprisonment in the circumstances.

Submissions by the respondent

The learned State Attorney, conceded that, the sentences of the High Court be set aside due to the mix up between the appellants and their age on record. She prayed court to take into account the fact that the appellants were motivated by robbery and the victims were injured on the delicate parts of the body.

She further submitted that, due to this mix up, court should subject the evidence on record to a fresh scrutiny and make its own findings. She further submitted that, no mitigating factors were pointed out at trial and during re-sentencing to guide the trial court to impose an appropriate sentence in the circumstances.

She prayed court to consider the aggravating factors on record while re-evaluating the evidence on record and impose an appropriate sentence.

Consideration by court

We have carefully listened to the submissions of both counsel, read the court record and considered the authorities cited to us and others.

We are alive to the duty of this Court as the first appellate Court to re-appraise the evidence on record and come up with our own findings of fact and law. See: - *Rule 30(1)* of the Judicature (Court of Appeal Rules) Directions SI. 13-10, ***Bogere Moses Vs Uganda***, *Supreme Court Criminal Appeal No. 1 of 1997* and ***Kifamunte Henry v Uganda***, *Supreme Court Criminal Appeal No. 10 of 1997.*

At the hearing of this appeal, court observed that there was a confusion in respect of sentences and the age of the appellants. To sort out this confusion, we are going to refer to the judgment of the trial court. In his judgment, the learned trial judge referred to the first appellant, Tayebwa Robert as A1 and the second appellant, Kanyamanga Enock as A2 and it is on this basis that we hold that the 1st appellant Tayebwa Robert is A1 and the 2nd appellant Kanyamanga Enock is A2. Therefore, the 40 years imprisonment referred to Tayebwa Robert the 1st appellant and life imprisonment referred to Kanyamanga Enock the 2nd appellant. As regards age, we shall go by the medical reports made in respect of both appellants.

This Court may not interfere with the discretion of the trial Court in the matter of sentence except in specific instances and on established principles set out in judicial precedents. The principles under which an appellate court can interfere with the sentence of the trial Court were set out in ***James s/o Yoram Vs R,*** *1950 (EACA)18 P. 147* as follows:-

> *"It may be that had this court been trying the appellant, it might have imposed a lesser severe sentence but that by itself is not a ground for interference and this court will not ordinarily interfere* ***with the discretion exercised by a trial judge in the matter of***

sentence, unless it is evident that the judge had acted on some wrong principle or over looked some material factor"

See also: - ***Ogalo s/o Owoura Vs R**, (1954) 24 EACA 270.*

The same principles were upheld by the Supreme Court of Uganda in ***Kiwalabye Vs Uganda,*** *Supreme Court Criminal Appeal No. 143 of 2001* as follows:-

"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."

In this case, the appellants were indicted, tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 40 years imprisonment and life imprisonment for the 1st and 2nd appellants respectively.

In her judgment, the re-sentencing judge noted at page 17 of the record of appeal that:-

"For both accused persons I don't see any mitigating factors. For A2 there is no prospect of reform and I only substitute the death sentence with imprisonment for life for him and imprisonment for 40 years for A1 to allow him time to reform. The 40 years is in addition to time already spent in prison."

This implies that the re-sentencing court did not take into account the period the first appellant had spent on remand or any other mitigating factors in case of the second appellant.

Article 23(8) of the Constitution provides that;

> *"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."* (emphasis added).

It is clear to us that the sentencing court did not consider the mitigating factors stated by counsel for the appellants and the appellants themselves because the judge noted on page 17 of the record of appeal that he did not see any mitigating factors. The consideration of the period spent on remand while sentencing is a constitutional right and failure to do so renders the sentence illegal. See: ***Rwabugande Moses v Uganda,*** *Supreme Court Criminal Appeal No. 25 of 2014.*

Further, the re-sentencing court did not take into account the age of the appellants and the fact that the 2nd appellant was a first offender. The 1st and 2nd appellants being 18 years and 26 years old respectively when the offence was committed. They were relatively young to be sentenced to 40 years imprisonment and life imprisonment. The 1st appellant will leave prison when he is aged about 58 years and will by then have lost the period to reform into a useful and productive member of his family and the nation. The second appellant's age of 18 years when the offence was committed shows he had just crossed from being a minor to an adult and life imprisonment, in our view, was harsh and excessive in the circumstances of this case.

Being 26 years old and a first offender, court should have considered these factors in favour of the 2nd appellant. In ***Kasaija David v Uganda,*** *Court of Appeal Criminal Appeal No. 128 of 2008*, court reduced a sentence of life imprisonment to 18 years imprisonment for the offence of murder, basing on the fact that the appellant was a first offender.

We find that the court acted on a wrong principle and imposed illegal and harsh/excessive sentences. There is therefore cause for us to alter the sentence imposed by the re-sentencing court.

To arrive at appropriate sentences, we have considered both the aggravating and mitigating factors on record. We agree that the offence committed was grave and a life was lost. The sentence given must reflect the enormity of the appellant's unlawful conduct. The first appellant had a record of earlier conviction for attempted murder and also played a bigger role in the commission of the offence under consideration. The second appellant had no earlier criminal record and played a minor role in the commission of the offence in this appeal. On the other hand, the two appellants were relatively young and if given a chance to reform, they would positively contribute to their families and the nation. They had spent 4 years and 5 months on remand.

We have therefore come to a conclusion that in the circumstances of the case, a sentence of 25 years and 15 years imprisonment for the first and second appellants respectively would be appropriate. However, in line with Article 23(8) of the Constitution, we deduct the period of 4 years and 5 months the appellants had spent on remand. They will thus serve a sentence of 21 years and 11 years imprisonment for the first and second appellants respectively which will run from 31/03/2004, the date of their conviction.

Dated at Kampala this 2nd day of July 2019.

Elizabeth Musoke
Justice of Appeal

Hellen Obura
Justice of Appeal

Ezekiel Muhanguzi
Justice of Appeal

2/7/19

Both appellants present.
[illegible]: clerk.
Court: The appellants' officer has duly [illegible] that there is no representative present [illegible] [illegible] [illegible] presence of the same in open court.