THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT GULU

CRIMINAL APPEAL NO. 108 OF 2018

Coram: Kakuru, Tuhaise, & Kasule, JJA

Okwera Joseph .... **Appellant**

Versus

Uganda .... **Respondent**

(Appeal arising from the judgment of John Eudes Keitirima J, at the High Court of Uganda at Gulu in Criminal Case No. 116 of 2009 delivered on 14th March 2014).

Judgment of the Court

The appellant, Okwera Joseph, was convicted of murder contrary to sections 285 and 286 of the Penal Code Act. He was sentenced to 40 years imprisonment. The appellant, with leave of this Court granted under section 132 (b) of the Trial on Indictments Act, appealed against the sentence alone, on the sole ground that:-

1. The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence in the circumstances thereby occasioning a gross miscarriage of justice to the appellant.

Background

The particulars of the offence were that Okello Peter and Okwera Joseph (appellant in this appeal), on the 2nd day of July 2009 at Lacor Trading Centre in Gulu District, murdered Komakech Patrick Okot.

The prosecution case was that on the 2nd of July 2009, in the evening, the deceased went to Lacor trading centre. While there at

around 9.00 pm, he was attacked by the appellant and a one Okello Peter who were both known to him. An altercation ensued and the appellant, together with Peter Okello set upon the deceased and brutally beat him. They left the deceased for dead. The appellant then went to a nearby bar and bragged having beaten the deceased properly. People who were passing near the bar saw the deceased lying on the ground and called his relatives to witness what had happened. The deceased disclosed that he had been beaten by both the appellant and his co-accused Peter Okello. The deceased was taken to Lacor Police Post where a complaint was made implicating the appellant and his co-accused. Later on, the victim was admitted at Lacor hospital where he subsequently died on 4th July 2009.

The appellant was arrested, tried and convicted of murder. The appellant's co-accused, Okello Peter, pleaded guilty to the offence of murder and was sentenced to 8 years imprisonment on 9th April 2010.

Representation

Mr. Ochaya Achellam Paul, learned Counsel, appeared for the appellant, on state brief, while Mr. Onenchan Moses, Assistant DPP, appeared for the respondent.

Preliminary

Before the hearing could proceed, this Court brought it to the attention of both counsel, the appellant, and the open court that the appellant and his co-accused (Okello Peter), at trial, appeared before Hon. Justice Remmy Kasule, then a High Court Judge resident in Gulu, now on the panel, who convicted the co-accused on his own plea of guilty and sentenced him. The appellant pleaded not guilty and the matter went to another Judge who conducted the trial and

delivered a judgment from which the instant appeal arises. Both counsel expressed no objection to Hon. Mr. Justice Remmy Kasule sitting on the panel to hear the instant appeal.

Submissions for the Appellant

Mr. Ochaya Achellam Paul submitted that the appellant's appeal against sentence is based on the mitigating factors. He referred this Court to the record of appeal where both Counsel agreed that the appellant was a first offender. Counsel submitted that the appellant was a young man at the time he committed the offence. He was then 23 years of age, and now he is about 37 years of age. He submitted that the appellant, having had an experience of what prison is all about, he will be a wiser man and will not repeat the same when he comes out. Counsel prayed for a reduction of the sentence from 40 years imprisonment to between 17 and 20 years imprisonment. He relied on the case of **Aharikundira Yustina V Uganda, Supreme Court Criminal Appeal No. 27 of 2015** where it was stated that it is the duty of Court while dealing with appeals regarding sentence to ensure consistency and ensure that cases of similar facts be treated alike.

Submissions for the Respondent

Mr. Moses Onenchan, while conceding that the 40 years imprisonment was on the higher side, opposed the recommendation of 17 to 20 years imprisonment in favour of the appellant. He suggested that 30 years imprisonment would be appropriate. He relied on the authority of **Bwefugye Patrick & Another V Uganda, Court of Appeal Criminal Appeal No. 268 of 2010** to support his propositions.

Resolution of the appeal

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. It will however be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. See **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No.10/1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

This appeal is against sentence only. Sentencing is a discretion of the sentencing court. Each case is determined on its facts to enable the court exercise the sentencing discretion. It is now settled law that an appellate court will only alter a sentence imposed by the trial court if it is evident that the trial court acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of a case.

In **Kiwalabye Bernard V Uganda Supreme Court Criminal Appeal No. 143 of 2001**, the Supreme Court stated as follows:-

> *"The appellate court is not to interfere with the 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 circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

Thus, based on the foregoing principle, we as the appellate court must consider whether there are circumstances in this case which

justify this Court to interfere with the sentence passed by the learned trial Judge.

The appellant in this appeal was convicted of murder which offence carries a maximum penalty of death. The record of appeal shows at page 63 that the mitigating factors in this case were that the appellant had no previous record and was a first time offender, and he was still a young person. He had spent 4 years on remand. The prosecution agreed that the appellant was a first offender, but prayed for a deterrent sentence to curb the vice.

The learned trial Judge, while sentencing the appellant, gave reasons why he arrived at the sentence, at page 64 of the record of appeal, that:-

> *"I have heard both the aggravating and mitigating factors. However the sanctity of human life should be jealously protected and preserved. The convict was never remorseful. I have considered the period the convict spent on remand.*
>
> *I will sentence the convict to 40 (forty) years in prison".*

We have addressed our minds to the adduced evidence and submissions from both sides. We agree, based on the record, that the convict was a first offender with no previous record. He was a young man aged 23 years when he committed the offence. The learned trial Judge took all this into account when he was sentencing the appellant.

It is also evident from the record that the circumstances under which the appellant and his convicted co-accused killed the deceased were clearly unlawful. The appellant went on to boast about beating the deceased. The learned trial Judge, when

sentencing the appellant, noted that he (appellant) was not remorseful.

The appellant's counsel has appealed to this Court to pass a sentence which is consistent with sentences meted out in cases of similar facts, and that it should be reduced to something between 18 and 20 years imprisonment. The respondent's counsel on the other hand submitted that the sentence should be reduced to 30 years imprisonment.

In **Bwefugye Patrick & Another V Uganda, Court of Appeal Criminal Appeal No. 268 of 2010**, both appellants were convicted of murder and sentenced to life imprisonment. Both appellants were first time offenders, they had spent some time on remand, and the murder was not coupled with any other offence; neither was it a ritual sacrifice. This Court set aside the sentence of life imprisonment and imposed on each of the appellants a sentence of 30 years imprisonment starting from the date of conviction.

In **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No. 25 of 2014**, the Supreme Court, while agreeing that the offence of murder committed by the appellant was grave, and that the sentence given should reflect the enormity of the accused's unlawful conduct, nevertheless considered that the appellant was a first time offender and was aged 24 years. The Court imposed against him a sentence of 22 years imprisonment as an appropriate sentence which would enable him to reform and be re-integrated back into society.

The Constitution (Sentencing Guidelines For Courts Of Judicature) (Practice) Directions, 2013 set a sentencing range for murder to be 35 years imprisonment to death with starting point of 30.

Thus, based on the adduced evidence, the circumstances of this case, and the relevant authorities cited above, we find that the sentence of 40 years' imprisonment against the appellant was manifestly harsh and excessive. The appellant and the deceased were both young men who knew each other and had a fight which resulted in the deceased's death. The appellant, being a young man, should be given a sentence which will enable him to reform and be re-integrated in society.

We accordingly set aside the manifestly harsh and excessive sentence of 40 years' imprisonment imposed against the appellant by the learned trial Judge. On that account, taking into account all the factors in the instant appeal as set out above, including the circumstances of the case and the sentencing ranges regarding cases of similar circumstances, we substitute the sentence of 40 years imprisonment with a sentence of 25 years imprisonment. We note from the record that the appellant spent a period of 4 years and 8 months on remand, which we deduct from the 25 years. We now order that he serves a sentence of 20 years and 4 months imprisonment, to run from 14th March 2014, the date of conviction.

We so order.

Dated at Gulu this ....20th.... day of ....Dec....2019.

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Kenneth Kakuru

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal

Remmy Kasule

Ag. Justice of Appeal