THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 103 OF 2010

(Arising from High Court Criminal Session Case No. 20 of 2010 before Lady Justice Elizabeth Nahamya)

BUWASO PAUL::APPELLANT

VERSUS

UGANDA::RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF COURT

The appellant was convicted of Murder contrary to sections 188 and 189 of the Penal Code Act on his own plea of guilty and sentenced to 28 years imprisonment. The appellant was dissatisfied with the decision of the High Court and filed this appeal against conviction and sentence on grounds that;

1. The learned trial Judge erred in law and in fact when she convicted the appellant of Murder yet the circumstances of the case disclosed an offence of manslaughter.
2. The sentence of 28 years passed onto the appellant was harsh and illegal in the circumstances.

Background

On the 11th May 2009 at around 5:00pm at Buwenge Town Council in Jinja District, the appellant was seen armed with a panga and dressed in a pair of black trousers, white shirt and black pull over running towards Buwenge Town while saying that he was going to kill a man. At Buwenge market, one Nsubuga saw the appellant armed with a panga while running after the deceased. The appellant was dressed in black trousers and a white shirt. The deceased was alleged to have had an affair with the appellant's wife and at one time, the appellant caught them red-handed. The deceased was later found lying dead in a pool of blood at Madarasati Primary School in Buwenge Town Council.

That after killing the deceased, the appellant approached one Tape Nambi of Buwenge Town Council and informed her that he had just finished killing a man at Madarasati Primary School. The appellant then ran to the home of his sister where he washed off blood from the panga. Upon arrest, the appellant admitted attacking the deceased with a panga in his extra judicial statement.

Representation

At the hearing of the appeal, Mr. Chris Munyamasoko appeared for the appellant while Mr. David Ndamurani Ateenyi, Senior Assistant DPP, appeared for the respondent.

Appellant's submissions

Counsel submitted that whereas the appellant pleaded guilty to the offence, his confession before the Grade 11 Magistrate was not to the offence of murder but manslaughter. That the killing was not pre-meditated but was a result of a fight between the appellant and the deceased after the appellant caught the deceased with his wife.

On ground 2, counsel argued that the sentence of 28 years was harsh and excessive considering that the appellant pleaded guilty and did

not waste court's time. In addition, the appellant spent 1 year and 2 months on remand and the trial Judge should have considered it while sentencing.

Respondent's submissions

Mr. Ndamurani submitted that the appellant pleaded guilty and was sentenced accordingly. That there was no evidence of provocation or self defence adduced by the defence at the trial. The offence to which the appellant pleaded guilty is quite severe and it attracts a death sentence. As such, the 28 years meted on the appellant was appropriate in the circumstances. In addition, the sentencing guidelines give a range of 30 to 35 years imprisonment for a murder conviction.

In addition, that the trial Judge complied with Article 28 (3) of the Constitution and put into consideration the period the appellant had spent on remand.

Court's consideration of the appeal

This being a first appellate court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. In ***Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997*** court stated that:

"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it." See also the cases of **Pandya v. R [1957] EA 336, Bogere Moses v. Uganda SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules** that are of the same effect.

We have carefully considered the submissions of both counsel and the authorities cited by counsel.

At the trial, the indictment was read and explained to the appellant and he was told to plead to it. At page 9 of the record, the trial Judge recorded as follows;

"Court: Have you understood the indictment against you?

Accused: yes I have heard

Court: how do you plead?

Accused: I know the charge.

Court: re-read indictment. Do you understand the indictment?

Accused: yes.

Court: are you sure you plead guilty to the charges against you?

Accused: Yes I admit the charge.

Court: plea of guilty entered."

The facts of the case where then read to the appellant and his confession tendered in as exhibit PF. 24. And when put to him by the trial Judge he answered thus:

Accused: I have heard the facts. Let court go with what was written

And what was read.

The trial Judge then convicted the appellant.

The procedure for taking a guilty plea is clearly set out in the case of ***Adan Vs R [1973] EA. 445*** where the East African Court of Appeal (as it then was) stated as follows:-

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible*

in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."

The case of **Tomasi Mufumu v. R [1959] EA 625** decided by the same court had earlier stated that;

"...it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder...and understands that the penalty is death."

The indictment was read and explained to the appellant and he indicated that "I know the charge". The trial Judge asked the appellant whether he is sure he is pleading to the charges against him and he said "yes, I admit the charge" and a plea of guilty for the offence of murder was entered. The appellant also made an extra judicial statement which was tendered in by the prosecution. From the statement made by the appellant it indicated that the appellant and the deceased had numerous issues involving the appellant's wife

who had an affair with the deceased. The LC of the area was involved in the dispute resolution but when the appellant returned to Mukono where he was working, his wife went back to the deceased. On the day the deceased died, he was on his way back home when he heard someone following him. He held a stick and stepped aside to let the person pass but the person threw a panga at him and he lifted the stick against the panga. He got the panga and threw it at the person randomly. He then ran to his sister's place after noticing that the person was not following him anymore.

The extra judicial statement made by the appellant did not disclose the element of malice aforethought for a conviction of murder to be sustained. To prove murder, the prosecution must prove that the deceased is dead, the death was caused unlawfully, that there was malice aforethought and that the appellant/accused person directly or indirectly participated in the commission of the alleged Offence. From the above facts, the element of malice aforethought was not present. Basing ourselves on the nature of plea by the appellant and what was contained in the extra judicial statement, the trial Judge was wrong to convict the appellant for murder.

Section 11 of the **Judicature Act** provides that;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

From the evidence on record, we invoke our powers under section 11 above and quash the conviction for murder and substitute it with a conviction of the appellant for manslaughter.

Ground 1 therefore succeeds.

Regarding sentence, counsel for the appellant argued that the sentence passed by the trial court was harsh, excessive and illegal

because the trial Judge did not take into account the period the appellant spent on remand.

It is trite law that an appellate court should not interfere with a sentence imposed by a trial court where the trial court has exercised its discretion on sentence, unless the exercise of that 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 the trial court ignored to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle (see **Kyewalabye Bernard v. Uganda Supreme Court Criminal Appeal No. 143 of 2001).** It does not matter that this Court would have given a different sentence if it had been the one trying the appellant (see **Ogalo s/o Owoura v. R (1954) 24 EACA 270).**

Since we have found that the appellant was wrongly convicted of murder, it follows that the sentence imposed was equally wrong in principle. It is set aside.

The appellant spent 1 year and 2 months on remand and the appellant contends that this period was not taken into account by the trial court. The Supreme Court in **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016** held that;

"it does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in ***Article 23(8) of the Constitution*** *is for the Court to take into account the period spent on remand."*

While passing impugned sentence, the trial Judge held that;

"...for the foregoing, I hereby sentence you to a term of imprisonment of 28 years. The period of one year and a half, and two (2) months already spent on remand has been taken into account"

Clearly, the trial Judge took into account the period the appellant had spent on remand. As already stated in **Abelle Asuman Vs Uganda** (supra), the period spent on remand does not have to be calculated in an arithmetic way.

The appellant faults the trial Judge for passing a harsh and excessive sentence on the appellant. We note that the appellant was convicted on his own plea of guilty and did not waste court's time. This should be a valid consideration in the appellant's favor. Having found the appellant guilty of manslaughter, we shall proceed to sentence him accordingly. According to the sentencing guidelines, the range of sentence for manslaughter is 15 years to imprisonment for life. On the mitigating factors, the appellant is a first offender, he pleaded guilty and the offence arose from a jilted husband's reaction to the deceased's provocative relationship with his wife. The appellant is remorseful and has 5 children. He was 31 years at the time the offence was committed and had spent 1 year and 2 months on remand. On aggravating factors, the deceased, who was 60 years old, was murdered in cold blood by the appellant.

Having considered both the aggravating and mitigating factors and the period the appellant spent on remand, we find that a sentence of 15 years imprisonment will meet the ends of justice in this case. We therefore sentence the appellant to 15 years' imprisonment from the date of conviction.

We so order

Dated this 17th day of July 2019

Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

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Hon. Lady Justice Percy Night Tuhaise, JA

17.7.19

Appeal proceed.
Ruling of the Court.
Appeal is allowed.
Orders: as per.
Order: Judgment delivered in the presence of
the parties.

17.7.19