THE REPUBLICOF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 151 OF 2011

MBABALI EDWARD.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against sentence of High Court sitting at Mubende in Criminal Session Case No. 515/2009 before Hon. Lady Justice Faith Mwondha dated 1/7/2011)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

JUDGMENT OF THE COURT

Introduction

The appellant was tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 25 years imprisonment. The particulars of the indictment were that the appellant and others still at large between 20th and 25th day of July, 2006 at Sekanyonyi village Mityana District murdered Senfuma David.

Brief background

The facts of this case as far as we could ascertain from the record are that on the 21st day of July, 2006, the appellant went to Blue Room Shop in Kisenyi, Kafumbe, Mukasa road where the deceased operated his

scrap business and told the deceased that he had scraps at Mityana for sale and claimed that the scrap would cost 600,000/=. The deceased got the money and set off for Mityana being led by the appellant and that was the last time he was seen alive. The deceased was later found dead in Makoba Farm in Bbira "B" Sekanyonyi, Mityana District by the farm manager. Consequently, the appellant was arrested, indicted, tried, convicted of the offence of murder and sentenced to 25 years imprisonment.

Having been granted leave to appeal against sentence alone under section 132(1) (b) of the Trial on Indictments Act, the appellant appealed to this court against sentence only on the following grounds:-

1. ***The sentence of 25 years imprisonment was harsh in light of the mitigating circumstances.***
2. ***The sentence was illegal for failure to comply with article 23(8) of the constitution.***

Representation.

At the hearing of this appeal, Mr. Kafuko Ntuyo, learned counsel appeared for the appellant while Mr. David Ndamurani Atenyi, learned Senior Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present in court.

Submissions by the appellant

Counsel for the appellant submitted that, the sentence of 25 years imprisonment was harsh and excessive in the circumstances of this case. He pointed out that the appellant was a first offender, relatively young and thus capable of reform.

Counsel submitted further that the learned trial Judge did not take into account the period the appellant had spent on pre-trial detention and this resulted into imposition of an illegal sentence of 25 years

imprisonment. He relied on ***Livingstone Kakooza v Uganda***, *Supreme Court Criminal Appeal No. 17 of 1993* in support of his argument above.

He asked court to pronounce itself on the right position of the law under Article 23(8) of the Constitution as to whether or not consideration of the period a person spends on remand means arithmetic reduction. He prayed court to deduct the 5 years the appellant spent on remand and impose an appropriate sentence in the circumstances.

Submissions by the respondent

Learned counsel for the respondent opposed the appeal and supported the sentence of the trial court. He pointed out that, the two grounds of appeal set out in the appellant's memorandum of appeal challenge both the severity and illegality of sentence and as such these two grounds can only be argued in the alternative as opposed to arguing them together.

In reply to the submission on illegality of sentence, counsel submitted that the learned trial Judge took into account the period the appellant spent in pre-trial detention in accordance with Article 23(8) of the Constitution because he alluded to the same. Counsel argued that this was a case decided before the Supreme Court decision in ***Rwabugande Moses v Uganda,*** *Criminal Appeal No. 25 of 2014,* where the learned Justices of the Supreme Court observed that consideration of the period on remand in sentencing is arithmetical.

In regard to severity of sentence, counsel submitted that the sentence of 25 years imprisonment is within the range of sentences in similar cases decided by this court and the Supreme Court. He asked court to disallow the appeal and confirm the sentence of 25 years imprisonment.

Consideration by court

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

As a first appellate court and in accordance with the provisions of rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10, we have a duty to subject the evidence adduced at the trial to fresh appraisal and scrutiny and reach our own conclusion thereon. However, in doing so, we must not disregard the judgment of the trial court against which the appeal lies. This duty was well articulated in numerous cases. In ***Kifamunte Henry v Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997*, the Supreme Court reaffirmed this duty when it stated as follows;

> ***"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."***

Earlier authorities on this principle of law includes ***Pandya V R,*** *(1957) EA 33* and ***Bogere Moses v Uganda****, Supreme Court Criminal Appeal No. 1 of 1997.*

The principles upon which an appellate court may interfere with a sentence of the trial court were considered by the Supreme Court in ***Kyalimpa Edward v Uganda****, Criminal Appeal No. 10 of 1995,* where it referred to the English case of ***R v Haviland****, (1903) 5 Cr App R (S) 109,* and held 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***

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."

See also: ***Ogalo s/o Owoura v R,*** *(1954)24 EACA 270* and ***R v Mohamedali Jamal,*** *(1948)15 EACA 126.*

We note that before passing sentence, the learned trial Judge took into account both mitigating and aggravating factors. The mitigating factors were repeated by counsel for the appellant before this court. The learned trial Judge then gave reasons for the sentence he was imposing on the appellant and stated as follows:-

"The convict is a first offender. He has been in prison for 5 years. The offence he has been convicted of carries a maximum sentence of death. It's so rampant in this area. He is 26 years old. Taking all the above into account he's sentenced to 25 years imprisonment."

It is thus on record that the learned trial Judge was alive to the importance of taking into account the period spent on remand as provided for by Article 23(8) of the Constitution. The learned trial Judge stated that she took into account all the factors she stated before sentencing the appellant. It is therefore clear that the learned trial Judge took into account among others the period spent on remand by the appellant before sentencing him. We are of the opinion that taking into account the period spent on remand did not at that time necessarily require deducting that period from whatever sentence was to be imposed. This case was decided in 2011 before the ***Rwabugande case*** *(supra).* The law then required the trial Judge to mention the specific period spent on remand which the learned trial Judge in this case did and she took it into account. We therefore do not find the sentence of the trial court illegal.

This court and the Supreme Court have imposed sentences in the range of 20 to 30 years in cases of similar circumstances.

In ***Tumwesigye Anthony v Uganda,*** *Court of Appeal Criminal Appeal No. 46 of 2012,* this court reduced a sentence of 32 years imprisonment to 20 years imprisonment after considering that the appellant was a first offender, had spent 1 year and 4 months on remand and aged 19 years old.

In ***Atuku Margret Opii v Uganda***, *Court of Appeal Criminal Appeal No. 123 of 2008*, this court reduced a sentence of life imprisonment to 20 years imprisonment for the offence of murder.

In ***Ayikanying Charles v Uganda***, *Court of Appeal Criminal Appeal No.* 08 of 2012, this court confirmed a sentence of 25 years imprisonment. The appellant had been convicted of murder whereby he stabbed the deceased over a land dispute.

In ***Kyaterekera George v Uganda***, *Court of Appeal Criminal Appeal No. 0113 of 2010*, this court confirmed a sentence of 30 years imprisonment imposed by the trial judge. In that case the appellant was convicted of murder by stabbing the deceased on the chest with a knife.

In ***Akbar Hussein Godi v Uganda***, *Supreme Court Criminal Appeal No. 03 of 2013,* the appellant murdered his wife with a gun and the Supreme Court confirmed a sentence of 25 years imprisonment.

In ***Rwabugande Moses v Uganda***, *Supreme Court Criminal Appeal No. 25 of 2014,* a sentence of 35 years imprisonment was reduced to 21 years imprisonment for the offence of murder where the appellant murdered the deceased by hitting the deceased on the head twice with a herdsman stick.

In the premises, we find the sentence of 25 years neither harsh nor excessive and hereby confirm the sentence of 25 years imprisonment.

This appeal therefore fails and is hereby dismissed.

Dated at Kampala this......8th.........day of..........Aug.................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

8/8/19

Appellant present.

[illegible]

Judgment delivered in the presence of the above.

[illegible] 8/8/19