THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 748 OF 2014

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

1. **Kayondo Andrew**
2. **Senyomo Emmanuel.....Appellants**

V

Uganda.....Respondent

(Appeal arising from the judgment of His Lordship Hon. Justice D.K. Wangutusi at the High Court of Uganda at Mukono, Criminal Session Case No. 100 of 2002 delivered on 9th January 2003)

JUDGMENT OF COURT

The appellants (Kayondo Andrew and Ssenyomo Emmanuel) were indicted for murder contrary to sections 183 and 184 of the Penal Code Act. The particulars of the offence were that the two appellants, on or about the 8th day of June 1999 at Bukata Village in Mukono District, murdered Tumwine Denis. The two appellants were arrested, indicted and convicted of murder. On 9th January 2003, they were each sentenced to suffer death. On 21st January 2014, both appellants appeared before His Lordship Hon. Justice D.K Wangutusi in High Court Criminal Session No. 120/2014 for mitigation and re-sentencing. The appellants were each sentenced to 25 years imprisonment.

The appellants, with leave of Court, appealed against the sentence on one ground, namely:-

1. That the trial judge erred in law and in fact when he passed a manifestly harsh and excessive sentence against the appellant thereby failing to exercise his discretion judiciously.

Background

On 8th June 1999 at 10.00 pm, A2 Senyomo Emmanuel (2nd appellant) reported a case of blanket theft to the Local Council (LC) Chairman who directed his area Defence Secretary A1 Kayondo Andrew (1st appellant) to handle the matter. The two appellants were told by one resident that Tumwine Denis (the deceased) had come to sell him a blanket but that he declined to buy it. The two appellants traced the deceased to his lover's house. The deceased was lying on a bench very drunk. They arrested the deceased and took him to a nearby bar, then again took him away by a rope in his waist saying they were going to the LC 1 Chairman. They assaulted him from around 10 pm, all the way to the 1st appellant's residence where he died at around 3.00 am, before they reached the Chairman's place.

Representation

Mr. Ivan Mangeni Geoffrey represented the appellants while Ms. Nyanzi Macrina Gladys, Principal State Attorney, represented the respondent. The appellants were in court at the time of hearing this appeal.

Submissions for the Appellant

Mr. Ivan Mangeni Geoffrey referred this Court to page 12 of the appeal and submitted for the appellants that the trial Judge only considered two of the mitigating factors of the appellants, that is, being first offenders, and that they had spent 15 years in custody.

Regarding the 1st appellant, Counsel argued that the trial court did not consider mitigating factors for him, namely that there was no premeditation; that the 1st appellant is of advanced age of 67 years; that he is sick with hypertension, peptic ulcers, hernia, and visual impairment, requiring a special diet which is not readily available in prison; and that he has spent a long period in custody totaling 15 years. Counsel also submitted

that the 1st appellant has a family which is in disarray as he was the sole bread winner.

Regarding the 2nd appellant, Counsel submitted that the factors before court were that he was a young man aged 41 years, capable of reforming and turning out to be a good citizen; that he has a family which depends on him as its bread winner; and that, because of his incarceration where he has spent 15 years in custody, his children suffered, in that they dropped out of school, his daughters married at tender age, and he lost his wife.

The appellant's counsel argued that failure to consider some of the mitigating factors occasioned a miscarriage of justice to the appellants. He cited the cases of **Bikango Aaniel V Uganda, Court of Appeal Criminal Appeal No. 38 of 2014;** and **Obwalatum Fancies V Uganda, Supreme Court Criminal Appeal No. 30 of 2015,** to support his submissions.

He prayed to this Court to invoke section 11 of the Judicature Act and vary the sentence. He proposed a sentence of 18 years imprisonment for each of the appellants.

Submissions for the Respondent

Ms. Nyanzi Macrina Gladys referred this Court to pages 11, 12 and 13 of the record. She submitted for the respondent that the mitigating factors and the aggravating factors were considered by the trial Judge when re-sentencing the appellants. She contended that the trial Judge explained why the aggravating factors outweighed the mitigating factors, that is, because A2 was involved in mutiny attacking a prison warder, and A1 was a defence secretary expected to protect his subjects, but he instead did the contrary. Counsel contended that this stripped the two appellants of the mitigating factors that had been presented by their defense counsel. She also argued that the remand period was given consideration in the last paragraph; and that therefore there was no reason to alter the sentence. She cited the case

of **Semanda Christopher V Uganda, Court of Appeal Criminal Appeal No. 77 of 2010** to support her submissions.

Counsel also cited the case of **Buhinda V Uganda, Court of Appeal Criminal Appeal No. 129 of 2012** and submitted that the sentences of 25 years of imprisonment given by the trial Judge against each of the appellants are within the sentencing range for the crime they were convicted of. She invited this Court to uphold the sentence.

Resolution of the appeal

We have considered the adduced evidence, the submissions of counsel for both sides, the authorities cited, and the law applicable to the instant case.

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) 2005. However, this Court is mindful of the fact that, unlike the trial court, it did not see or observe 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 is an appeal against sentence only. The criteria for interference with sentence by an appellate court, as stated by the Supreme Court in **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No 143 of 2001** was set out 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 sentence or where the sentence is wrong in principle."*

The duty of this Court as a first appellate Court is, therefore, to establish whether the sentence passed against the appellants when re- sentencing each of them to 25 years imprisonment was manifestly excessive, or so low as to amount to a miscarriage of justice, or whether the trial Court ignored to consider an important matter or circumstance which ought to have been considered while passing sentence, or whether the sentence is wrong in principle.

The record of appeal shows that the appellants were initially convicted of murder on 9th January 2003 and sentenced to death. On 15th July 2014, after they had been on death row for 11 years and 6 months, they appeared before the same trial Judge, Hon. Mr. Justice David Wangutusi, for mitigation of their sentence, following the constitutional court decision in **Suzan Kigula and Others V AG Constitutional Appeal No. 3/2006**. They were re-sentenced to 25 years imprisonment each, commencing from the time of the re-sentencing.

The record shows on page 12 that the Judge, while re-sentencing the two appellants, took into account the fact that both appellants were first offenders who had been incarcerated for 15 years (including the period of 3 years and 7 months they spent on remand), as mitigating factors. The Judge however took it as an aggravating factor that the appellants were respectable people in society, yet they conducted themselves irresponsibly. He noted that the 1st appellant, being a secretary for defence at the time of the murder, should have known better than arresting and beating to death a vulnerable drunk man. He also noted that the 2nd appellant's mutiny and attacking a prison warder while in prison, was an aggravating factor.

The Judge however noted that though the killing of the deceased was cold blooded, it fell short of the category of *"the rarest of the rare"* as there was no premeditation or planning of the murder. He also took into account the sentencing ranges set by the sentencing guidelines. He stated that he would

have sentenced the appellants to 40 years imprisonment, but he subtracted the 15 years each appellant had spent in prison, and sentenced them to 25 years imprisonment, to run from the time of the re-sentencing.

In **Obwalatum Fancies V Uganda, SCCA 30 of 2015,** the Supreme Court confirmed a sentence of 20 years imprisonment passed against the appellant who, as a former Local Council V Chairperson of Bukedea District, arrested two deceased persons on suspicion of being in possession of firearms upon which they were tortured. He picked a hoe and hit their heads, squeezed their testicles and was later joined by a mob in assaulting the deceased persons until they died. The Court of Appeal upheld the conviction but quashed the sentence after finding that it was an illegality, since the judge did not consider the period spent on remand by the appellant. He sentenced the appellant to imprisonment for 20 years on each count.

The case of **Obwalatum Fancies** cited by the appellants' counsel is distinguishable from the instant case in as far as sentencing is concerned because in the cited case, unlike in the instant case, the trial Judge did not take into account the period the appellant spent on remand, upon which this Court quashed the sentence on grounds of illegality, and substituted it with a sentence of 20 years imprisonment on each count.

In the instant case, it is clear that the sentencing Judge considered all the mitigating factors and the aggravating factors, as well as the period spent by the appellants in incarceration, including remand.

We agree with the trial Judge, who also re-sentenced the appellants, that the sentence imposed against each of the appellants, having noted that the murder in the instant case was not *"the rarest of the rare"*; and having considered all the aggravating factors and the mitigating factors, including their period of incarceration while on death row and on remand; was not manifestly excessive or so low as to amount to a miscarriage of justice. We

find that the sentence of 25 years imprisonment against each of the two appellants was appropriate and fair in the circumstances.

In the result, we dismiss this appeal. The sentence of 25 years imprisonment against each of the two appellants is upheld, to run from the date of 22nd July 2014 when they were re-sentenced.

Dated at Jinja this 30th day of Sept. 2019.

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Hon. Justice Cheborion Barishaki
Justice of Appeal

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Hon. Justice Stephen Musota
Justice of Appeal

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Hon. Lady Justice Percy Night Tuhaise
Justice of Appeal

30/9/19

Both Appellants present.
D.P.P. representative absent but had been duly served.
Clerk: [illegible]
Court: Judgment delivered in presence of the above.

30/9/19