THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[Coram:Egonda-Ntende, Barishaki Cheborion & Kibeedi JJA]

CRIMINAL APPEAL NO. 0225 OF 2014

(Arising from High Court Criminal Session Case No. 169 of 2011 at Iganga)

BETWEEN

Batuli Moses=====================================Appellant no.1
KairuArajab =====================================Appellant no.2
TenywaYayiro===================================== Appellant no.3
MakandyaBabirye================================= Appellant no. 4
KagaaliSowali==================================== Appellant no. 5
Isabirye Charles===================================Appellant no.6
Iswaya Godfrey==================================== Appellant no. 7
Kange Patrick===================================== Appellant no. 8

AND

Uganda ==Respondent

(On appeal from a judgment of the High Court of Uganda [ ] at Iganga delivered on 30th April 2014)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted on three counts for the offence ofmurder contrary to sections 188 and 189 of the Penal Code Act.The particulars of the first count werethat the appellants and others still at large on the 9th day of February 2011 at

Nambale police post in Iganga district murdered Yolyanaye Itazi. For the second count, the particulars of the offence were that the appellants and others still at large on the 9th day of February 2011 at Nambale police post in Iganga district murdered Baleta Stephen. The particulars of the offence for the third count were that the appellants and others still at large on the 9th day of February 2011 at Nambale police post murdered Mudungu Moses.

[2] The appellants were convicted of the offences of murder on all the three counts and the learned trial Judge sentenced each of them to a term of imprisonment of 15 years on each count to run concurrently.

[3] The appellants have now appealed against the sentence on the sole ground that:

> 'That the learned trial Judge erred in law and/ or fact when he handed the Appellants' an illegal, harsh and/ or excessive sentence of 15 years each.'

[4] The respondent opposed the appeal.

Submissions of Counsel

[5] At the hearing, appellant no.1, appellant no.2, appellant no.3 and appellant no.4 were represented by Mr. Obedo Deogratius, appellant no. 5, appellant no.6 and appellant no.8 were represented Ms. Kanyago Agnes. The respondent was represented by Ms Kauma Babra, Assistant Director Public Prosecutions, in the Office of the Director, Public Prosecutions. Counsel for all the parties filed written submissions on record.

[6] Counsel for the appellants submitted that the sentence of 15 years imprisonment is harsh and excessive and referred to John Kasimbazi &ors v Uganda Court of Appeal Criminal Appeal No. 167 of 2013 (unreported) where the appellants were charged with murder and sentenced to life imprisonment and on appeal this court reduced the sentence to 12 years imprisonment. Counsel for the appellants also relied on Magala Ramathan v Uganda [2017] UGSC 34 where the Supreme Court reduced the sentence from 14 years to 7 years imprisonment on each count for the offence of murder. Counsel for the appellants alluded to the principle of *stare decisis et non quieta movera* that enjoins courts to follow previous decisions. To support this submission, counsel for the appellants relied on Mbunya Godfrey v

Uganda Supreme Court Criminal Appeal No. 4 of 2011 (unreported) where it was held that there is need for consistency in sentencing.

[7] Counsel for the appellants further submitted that all appellants aver that they are remorseful, reformed and have spent 10 years in prison which should be taken into consideration. Counsel for the appellants stated that appellant no.1 has 9 children who need him in these trying times and that he can be a useful person in the community. It was submitted that appellant no.2 had developed pressure from prison and has an elderly mother who needs him. For appellant no. 3, counsel stated that he is of advanced aged (70 years), has become weak in prison and has children who believe in him and has learnt crafts and digging. Counsel for the appellants stated that appellant no.4 has a young family who need him since his wife is now remarried, that he has three children and that he has learnt carpentry in prison. For appellant no.5, counsel stated that he has a young family, a wife and two children who need him during these hard times. Counsel for the appellant stated that appellant no.6 also has a family consisting of three children and dependants (three sisters) who need him and that he will be useful in society since he has been working on a farm in Moroto. Counsel stated that appellant no.7 has six children, he is now born again and a member of bible society. Counsel for the appellants further submitted that appellant no.8 has a blind mother who is 102 years and still needs him, that he last heard about her before the outbreak of COVID 19 and he also has 18 children who need him.

[8] Counsel for the appellants prayed that these factors be put into consideration. Further, counsel for the appellants submitted that the sentences imposed on the appellants are illegal because the period spent on remand was not deducted from the sentence as required by the law. Counsel stated that the appellants were arrested in 2011 and were on remand until April 2014 which makes the remand period three years. Counsel for the appellants relied on Article 23(8) of the Constitution, Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 and Rwabugande Moses v Uganda [2017] UGSC 8 for the submission that the period spent on remand ought to be deducted from the sentence and not just considered as was done in this case.

[9] In reply, counsel for the respondent stated Rule 30 of the judicature (Court of Appeal Rules) Directions SI 13-10 that lays down the duty of this court as a first appellate court and also referred to Kifamunte Henry v Uganda [1998] UGSC 15. Counsel for the respondent laid down the principles to be followed by courts when interfering with sentences imposed by the trial court as pronounced in

Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported).

[10] Ms Barbra Kauma for the respondent argued that the trial court took into account the aggravating and mitigating factors before arriving at the respective sentences handed down to the appellants. She submitted that some of the aggravating factors included the gruesome manner in which the deceased persons were killed while they were in police custody as suspects. She also stated that the learned trial Judge took into consideration the fact that the appellants had dependants before imposing the sentences. Counsel for the respondent prayed that this court finds that the trial court put into consideration the mitigating factors of each of the appellants and arrived at the right conclusion.

[11] Ms Kauma for the respondent contended that Magala Ramathan v Uganda (supra) relied on by the appellants was in respect of two counts that is; manslaughter and not murder. Counsel for the respondent also stated that in the above case, the time spent on remand had not been deducted unlike in this instant case where the trial court put into consideration the period spent on remand by each of the appellants. Counsel for the respondents stated that the trial court was alive to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 for the offence of murder with the starting point being imprisonment for 35 years and the maximum penalty being death. Counsel for the respondent submitted that the period of 15 years of imprisonment imposed upon the appellants is proof that the trial court put into consideration the period each of the appellants spent on remand in comparison to the maximum penalty for the offence of murder.

[12] Counsel for the respondent submitted that the decision in Rwabugande Moses v Uganda[2017] UGSC 8 has long been overtaken by the decision in Abelle Asuman v Uganda [2018] UGSC 10 where it was stated that what is material is that the period spent on remand is taken into account in line with Article 23(8) of the Constitution. Counsel for the respondent submitted that in Sunday Gordon v Uganda [2015] UGCA 67 where an elderly lady was murdered in a case of mob justice, this court confirmed a sentence of imprisonment for life and that in Simbwa Paul v Uganda [2014] UGCA 57, this court stated that the appellants were lucky to get away with a sentence of 14 years' imprisonment for murder by mob justice.

[13] Counsel for the respondent submitted that given the circumstances of the deceased persons' murder and in light of the principles laid down in Kiwalabye Bernard v Uganda (supra), there is no reason for this court to interfere with the sentence imposed on the appellants by the trial court. Counsel stated that the sentences imposed on the appellants are neither illegal nor manifestly excessive or harsh. Counsel for the respondents prayed that this appeal be dismissed, the convictions be upheld and the sentences be confirmed in respect of appellant no.1, appellant no.2, appellant no.4, appellant no.5, appellant no.6, appellant no.7 and appellant no.8. Counsel for the respondent prayed that the appeal of appellant no.3 be dismissed under rules 66 (5) and 73 (6) of the Judicature (Court of Appeal Rules) Directions S1 13-10 for failure to file a memorandum of appeal and written submissions within the prescribed time.

Analysis

[14] The facts of this case are that on the 3rd of April 2011, a young boy was sent to the shop but did not return home, a case of disappearance was reported at Nambale Police post. That evening, a group of villagers went to the police post and complained that nothing was being done by the police and as a result three persons namely Baleta Steven, Yolyanaye Itazi and Mudungu Moses who were known witch doctors in the area were arrested on the morning of 9th February 2011 in connection with the disappearance of the child. That around 2:30 pm that day, a group of people gathered at the home of Abbo Catherine and were later seen matching to Nambale police post while drumming; armed with hoes, hammers, big sticks and big stones demanding for the three suspects. At the police post, the group was at first dispersed by the police but later returned throwing stones overpowering and forcing the police officers to run for their lives. The appellants were joined by a mob who broke into the police cells and assaulted the three suspects leading to their death. A few days later the missing child was discovered at Mayuge police station. The appellants together with others were arrested and charged with three counts of murder

[15] This Court will only interfere with a sentence imposed by a trial Court only where the sentence is illegal, or founded upon a wrong principle of the law. It will equally interfere with a sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See Bashir Ssali v Uganda [2005] UGSC 21,Ninsiima Gilbert v Uganda [2014] UGCA 65, Kiwalabye Bernard v

Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17.

[16] The appellants contend that the learned trial Judge did not take into consideration the period they spent on remand while sentencing them. Article 23(8) of the Constitution states:

> '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.'

[17] Guideline 15 of the Constitution (Sentencing Guidelines for courts of Judicature) (Practice) Directions 2013 states:

> '15. **Remand period to be taken into account.**
> (1) The court shall take into account any period spent on remand in determining an appropriate sentence.
> (2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.'

[18] Taking the remand period into account is a mandatory requirement. In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. The period to be taken into account is that period which an accused person spends in lawful custody before completion of the trial. This period should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. It must be considered and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[19] The relevant part of the sentencing order is set out as follows:

> '**SENTENCE**
> The offence carries a sentence of death penalty.
> The act of attacking the police deserves the death penalty.
> The deceased persons were innocent and they lost their lives.
> The use of violence by the mob should not be tolerated.

> **Therefore after taking into consideration time spent on remand, one year on remand**, and the fact that they have dependants I will remove the death penalty and start from 35 years imprisonment.
> The convicts were part of the mob that attacked the police and killed innocent people. This conduct is unacceptable. Therefore I convict each accused to 15 years imprisonment to run concurrently on each count.' **[Emphasis is ours.]**

[20] In light of the law stated above and the sentencing order, the learned trial Judge did not take into account the correct period the appellants spent in pre-trial detention while sentencing the appellants to the appellants' detriment. The learned trial Judge wrongly took into account only 1 year instead of 3 years and almost 3 months the appellants had spent in pretrial detention. This renders the sentences imposed against the appellants illegal and therefore null and void.

[21] We now invoke Section 11 of the Judicature Act which gives this court power to impose a sentence of its own.

[22] In mitigation, all the appellants prayed for lenience and stated that they have dependants. The appellants are first offenders with no previous record. The appellants spent three years and three months in pre-trial detention. Though the appellants were individually culpable we take into account that these offences were committed by a mob, acting under the mistaken belief that the persons in police cells were responsible for the disappearance of a child, presumably for the purpose of child sacrifice. The aggravating factors are that murder is a very grave offence that carries the maximum penalty of death. The deceased persons were killed in a very gruesome manner moreover while under police custody. This behaviour undermines the rule of law and the administration of justice system.

[23] We also note that there is need for parity in sentencing. In Livingstone Kakooza v Uganda [1994] UGSC 17, the Supreme Court was of the view that sentences imposed in previous cases of a similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are obliged to maintain consistence or uniformity in sentencing while being mindful that cases are not committed under the same circumstances.

[24] In Kamya & 4 Ors Vs Uganda [2018] UGSC 12, it was alleged that a one Ayubu Sokoma (deceased) was arrested for allegedly stealing household items of one Naluwoza Annet. A mob gathered which consisted of the appellants and others who beat the deceased to death. The appellants were consequently indicted, tried and convicted of murder contrary 188 and 189 of the Penal Code Act. They were all sentenced to 40 years imprisonment each by the trial Court. They appealed to this court which confirmed and upheld the conviction but substituted the sentence of 40 years with 30 years' imprisonment each. On appeal to the Supreme Court, the court found that the sentence of 30 years imprisonment was not a proper exercise of jurisdiction given the circumstances of the case. It reduced the sentence to 18 years imprisonment for each of the appellants.

[25] In Simbwa v Uganda [2014] UGCA 57, the appellants arrested a one Mukisa John on allegations that he stole a bicycle. They tied him with ropes. A mob joined them and the deceased was assaulted. The appellants tried to take him to hospital but he died on the way. The appellants were arrested, charged with murder, convicted and sentenced to 14 years' imprisonment each. On appeal, this court found no reason to interfere with the sentence that had been imposed by the trial court and observed that the appellants were lucky to get away with murder given the sentence they got.

[26] In Kasaija Daudi v Uganda [2014] UGCA 47, the appellant was convicted of murder and sentenced to life imprisonment. This court taking into account the period of two and half years the appellant spent on remand reduced the sentence to 18 years of imprisonment. In Anguyo Robert v Uganda, [2016] UGCA 39, the appellant was convicted of murder and sentenced to 20 years of imprisonment. On appeal to this court, the sentence was set aside and substituted it with 18 years.

Decision

[27] We find that under the circumstances of this case, a term of imprisonment of 17 years of imprisonment, on each count, would meet the ends of justice. From that sentence we deduct the period of 3years and 3 months the appellants spent on pre-trial detention.

[28] We therefore sentence appellant no. 1 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

[29] We therefore sentence appellant no. 2 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

[30] We therefore sentence appellant no. 3 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

[31] We accordingly sentence appellant no. 4 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

[32] We accordingly sentence appellant no.5 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

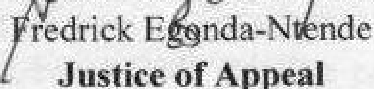
[33] We accordingly sentence appellant no.6 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

[34] We accordingly sentence appellant no.7 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction.

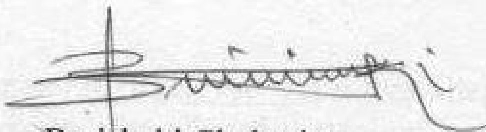
[35] We accordingly sentence appellant no.8 to a term of 13 years and 9 months imprisonment to be served from 30th April 2014, the date of conviction

[36] For the foregoing reasons, the appeal against sentence is allowed

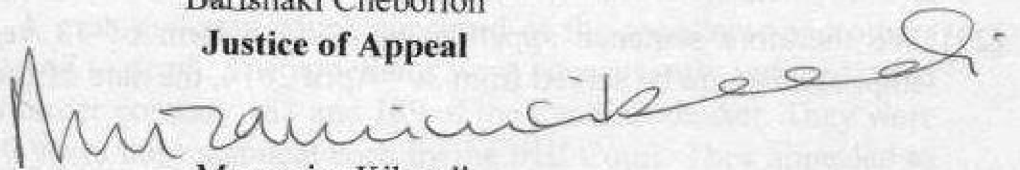
Signed, dated and delivered at Mbale this 11 day of September 2020.



Fredrick Egonda-Ntende
Justice of Appeal



Barishaki Cheborion
Justice of Appeal



Muzamiru Kibeedi
Justice of Appeal