

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT MBALE

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru Kibeedi, JJA)

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CRIMINAL APPEAL NO.499 OF 2015

BETWEEN

ELUNGAT GRACE NAPTAL ::: APPELLANT

AND

10 **UGANDA ::: RESPONDENT**

(Appeal against the decision of the High court of Uganda at Kumi (Hon Lady Justice Margaret C. Oguli Oumo) made on 18.12.2010 in High Court Criminal Session Case No.23/2009)

JUDGMENT OF THE COURT

15 The appellant was originally indicted for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act. The charge was subsequently amended and reduced to Manslaughter contrary to sections 187 and 190 of the Penal Code.

The particulars of the offense stated that the appellant on the 26th of October 2008 at Akuoro Village, Aakum Parish in Kumi District, unlawfully killed a one Apolot
20 Janet Beatrice.

The prosecution case was to the effect that the appellant and the deceased were husband and wife with one child. They were staying near the appellant's mother's house. The two were always in constant quarrels and their marriage was a rocky one with accusations and counter accusations of extra marital affairs by and
25 against each other.

Muzamiru Kibeedi

On the fateful night, the appellant returned from an evening he had gone to enjoy. The couple started quarrelling which resulted into a fight. The appellant assaulted his wife, picked a panga nearby and cut the deceased. The appellant soon thereafter reported himself to the police at Kumi CPS and was arrested.

30 The medical examination of the deceased's body established that she had sustained five deep cut wounds on her head which had led to excessive haemorrhage causing death.

The appellant was convicted of manslaughter on his own plea of guilty and sentenced to twenty years of imprisonment on 08.12.2010. He was dissatisfied with
35 the decision of the High court. With leave of this court, the appellant has appealed to this court against the sentence only on the following grounds:

1. *"The learned trial Judge erred in law and fact when she failed to evaluate the mitigating factors thus reaching an erroneous decision to sentence the appellant to a harsh sentence of 20 years imprisonment.*
- 40 2. *The learned trial Judge erred in law and fact when she sentenced the appellant to 20 years imprisonment without considering the time the appellant had spent on remand."*

Counsel's Arguments.

The appellant was represented by Ms Faith Luchivya, while the respondent was
45 represented by Ms Nabisenke Vicky, an Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions. The parties filed written submissions which they adopted when the appeal was called on for hearing.

With regard to Ground No. 1, Counsel for the appellant submitted that the learned
50 trial Judge did not follow the sentencing Guidelines No.27 (1) and (2), 28 & 29 of Legal Notice No.8 of 2013 which enjoin the trial Judge to consider the aggravating and mitigating factors and determine the appropriate sentence in accordance with the sentencing range specified in Part II of the Third Schedule. Counsel submitted

that the trial Judge did not properly take into account the mitigating factors but only capitalized on the fact that the appellant was not remorseful, he had pleaded not guilty and had maintained his plea throughout the trial process and the fact that the appellant's own mother had told lies to the court for which she had been tried, convicted and sentenced to 8 months imprisonment.

Counsel submitted that it was wrong in law for the trial judge to make the lies told by the appellant's mother a basis for giving the appellant a harsh sentence of 20 years.

Counsel concluded her submissions on ground No. 1 by praying that we follow the decision of this court in Ainobushobozi Venancio Vs Uganda, Court of Appeal Criminal Appeal No. 242 of 2014 (unreported) where this court reduced the sentence of manslaughter from 18 years to 12 years.

With regard to ground No. 2, Counsel for the appellant submitted that it was wrong in law for the trial Judge not to take into account the two years which the appellant had been on remand when sentencing him. For the above submission, Counsel quoted Article 23 (8) of the Constitution of the Republic of Uganda and Tukamuhebwa David Junior & Anor Vs Uganda, Supreme Court Criminal Appeal No 59 of 2016

Counsel concluded her submissions by praying that we be pleased to allow the appeal and vary the harsh sentence imposed by the learned trial Judge and impose a befitting sentence.

Counsel for the respondent opposed the appeal.

With regard to ground No.1 Counsel for the respondent submitted that it is not true that in passing the sentence, the learned trial judge failed to evaluate the mitigating factors. That on the contrary, the learned trial Judge considered both the mitigating and aggravating factors and came to the conclusion that a 20 years imprisonment term was the suitable sentence given the circumstances of the case. Counsel

80 submitted that the trial judge did not act on a wrong principle, never overlooked any material factor to warrant the interference of her discretion which she exercised judiciously in deciding that the sentence of 20 years imprisonment was appropriate. For this submission counsel relied on the case of Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No.143 of 2001.

85 In reply to the appellant Counsel's reference to the need for the trial court to have been guided by the sentencing Guidelines (The Constitution Sentencing Guidelines for Courts Of Judicature) (Practice) Directions, 2013 Counsel for the respondent submitted that at the time the trial Judge passed the contested sentence on 08.12.2010, the said sentencing Guidelines were then non-existent and do not work
90 retrospectively.

As regards ground No 2, Counsel submitted that the Trial Judge considered the period the appellant had spent in lawful custody before his trial. Counsel submitted that although the style of the trial Judge of delivering the sentence may be different from the precision required by the current legal regime, that does not render the
95 sentencing erroneous.

Counsel ended by praying to this court to uphold the sentence and accordingly dismiss the appeal for lack of merit.

Consideration by Court.

For this court, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is
100 illegal, or founded upon a wrong principle of the law, or that the trial court failed to take into account an important matter or circumstance, or made an error in principle, or imposed a sentence which is harsh and manifestly excessive in the circumstances. (See Kamy Johnson Wavamuno Vs Uganda, Supreme Court
105 Criminal Appeal No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe

Jamiru Vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007 and Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014)

110 It is with the above principles in mind that we now proceed to consider the grounds of appeal.

Ground No.1- Harsh And Manifestly Excessive Sentence.

115 The complaint of the appellant under this ground is that the sentence of 20 years imprisonment was harsh and manifestly excessive by reason of the trial judge failing to follow the sentencing Guidelines of 2013 and also not taking into account the mitigating factors.

The respondent disagreed.

The sentencing Guidelines are set out in The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 - Legal Notice No. 8 of 2013. They were issued by the Chief Justice of Uganda on the 26th of April 2013.

120 On the other hand, the sentence under contest was made by the trial judge on 08.12.2010. To fault the trial judge for non-compliance with the Sentencing Guidelines that were, at the time, non-existent has no legal basis.

125 As regards the 2nd line of attack of the trial judge's sentence under this ground, namely the alleged non-consideration of the mitigating factors, it is important to examine closely the factors the trial judge considered in order to arrive at the decision to sentence the appellant to 20 years imprisonment.

From the record of the trial court, counsel for the appellant submitted in mitigation as follows:

130 *"The convict has pleaded guilty and this has greatly saved court's time and resources. He has no previous record; he is a first offender who is remorseful and sorry about the death of his wife and [readily] handed himself [over to the police] the day the incident occurred. He is now being left alone to shoulder the care and responsibility of 10 people mainly the*

135 *old mother and yet another older potential grandmother and then their own
children 5 of them and 5 other dependants. The convict is a young man of
38 years and only pleads to be given an opportunity to attend to [those]
responsibilities for the sake of these people named.*

140 *What court looks at is that death occurred and what we want now is the
practical management of the case. He has been on remand since 2008
and further incarceration is counterproductive and no person can be held
as a sacrifice for those who may do or intend to do such a thing.*

*We ask the court to treat him as a person who is repentant and pleaded
guilty, he has humbled himself and to fend for the old who cannot [fend] for
themselves."*

145 Below is how the trial judge considered the submissions of both the prosecution
and the defence:

150 *"I have considered both factors submitted by the prosecution, that the
accused is a 1st offender and has no criminal record, the circumstances of
the case, the mitigating factors raised by his counsel and am of the
considered opinion that the applicant is not remorseful for the death of his
wife. He pleaded not guilty and maintained his plea throughout the trial
process of the case. His mother has [already] told lies to support him and
was declared a hostile witness, although she had been called for the
prosecution. She was later charged with perjury and was convicted and
155 sentenced to 8 months imprisonment in CRB883/2010, CR case
No.532/2010 although he has to shoulder the burden of looking after
young children and other dependants. The death of the deceased showed
as an act of domestic violence which has been rampant in our society with
the majority of the victims being women and the court must put a deterrent
sentence to curb such impunity. Consequently the accused [is] sentenced
160 to 20 years imprisonment."*

From the above, it is apparent that the trial judge considered not only the
aggravating and mitigating factors, but also irrelevant factors like the appellant
having pleaded not guilty and maintained his plea throughout the trial process of
165 the case. The court record indicates that the appellant was initially charged with the
murder of his wife. Article 28 (3) (a) of the Constitution conferred the appellant the
right to be presumed innocent in respect of the murder charge until proved guilty.
Exercise of that right shouldn't have been used against the appellant to aggravate
the sentence.

170 Indeed the Court record indicates that the moment the charge was amended to manslaughter he readily pleaded guilty and was convicted on his own plea of guilt.

In the same vein, the trial judge erred to penalize the appellant for the lies which his mother had told the court. Both the mother and son are adults who are individually responsible for the consequences of their respective decisions and actions.

175 Further, the trial judge did not consider the principle of "parity" and "consistence" which courts of law are enjoined to consider while exercising the discretion in sentencing. (*See Livingstone Kakooza Vs Uganda [1994] UGSC 17*). We shall delve deeper into the principle of parity in sentencing later in our judgment.

180 As a result of the misdirection by the trial judge which we have pointed out, she ended up imposing a sentence which was out of range with sentences imposed in cases of a similar nature. Ground No 1 would succeed.

Ground No 2 – Remand Period.

185 The complaint of the appellant under this ground is that the trial judge did not consider the remand period while sentencing the appellant.

The respondent did not agree.

We have carefully analyzed the judgment of the trial court. We find that the appellant's complaint is valid. Article 23 (8) of the Constitution of the Republic of Uganda obliged the trial judge to take into account the remand period while
190 sentencing the appellant. It provides as follows:

"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."

195 Failure of the trial court to take into account the remand period renders the sentence illegal for non compliance with the mandatory Constitutional provision and entitles the appellate to interfere with the sentence of the trial court (See Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014, Umar Sebidde Vs Uganda, Supreme Court Criminal Appeal No 22 of 2002 and
200 Kaddu Kavulu Lawrence Vs Uganda, Supreme Court Criminal Appeal No 72 of 2018.)

Accordingly ground No. 2 succeeds.

In the premises above, we set aside the sentence passed by the trial court and invoke Section 11 of the Judicature Act, Cap. 13 which gives this court the
205 same powers as the High Court. The Section is couched in the following terms:

"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."

210 In the instant case the appellant was a very young man. From the Police Form 24 which was exhibited before the trial court as "P1" his apparent age at the time of the commission of offence was stated to be 24years.He is a first offender and has dependants. These are mitigating factors.

215 On the other hand, the offence committed is grave and carries a maximum of life imprisonment. The deceased was killed in a very gruesome manner. Domestic violence was noted by the trial judge to be rampant in our society and required deterrent sentences. All these are aggravating factors.

Furthermore, as we stated earlier in this judgment, the principle of "parity" and consistency is another key consideration while sentencing.

220 In the case of Livingstone Kakooza Vs Uganda, Supreme Court Criminal Appeal No.17 of 1993(unreported) the deceased was the appellant's mother. She was

225 beaten by the appellant on the stomach which led to her intestines to protrude from her anus and her spleen to rupture. The cause of her death was bleeding from the ruptured spleen. The appellant was convicted of manslaughter and the sentence of 18 years imprisonment imposed by the trial court was on appeal to the Supreme Court reduced to 10 years imprisonment.

In Ainobushobozi Venancio Vs Uganda, Court of Appeal Criminal Appeal No.242 of 2014(unreported) a sentence of 12 years imprisonment was imposed on the appellant who was 21 years old at the time of commission of the offence.

230 In Mumbere Julius Vs Uganda, Supreme Court Criminal Appeal No. 15 of 2014 (Unreported) a sentence of 10 years and two months imprisonment was imposed by the Supreme Court.

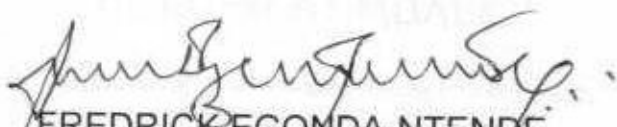
235 In Baguma Abasi Vs Uganda, Court of Appeal Criminal Appeal No.192 of 2009 where the deceased had been killed by being hit with a big stick on the head, the term of 10 years was imposed by the Court of Appeal.

Decision.

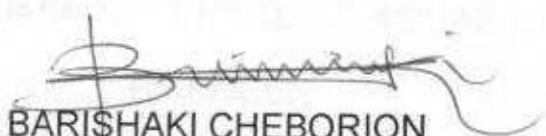
240 Taking into account the mitigating and aggravating factors and the sentences imposed in similar case by the appellate courts in Uganda, we find that a term of 10 years of imprisonment would have met the ends of justice if the conviction had been made after full trial. However, as the appellant pleaded guilty to the offence of Manslaughter, he would be entitled to credit on that account which we put at 3 years in the circumstances. The credit would reduce his term of imprisonment from 10 years to seven years.

245 From that sentence, we deduct the period of 2 years 1 Month and 8 days that the appellant spent on pre-trial detention. We therefore sentence the appellant to a term of 4 years 10 months and 8 days imprisonment to be served from the 08th day of December 2010, the date of conviction.


250 Signed, dated and delivered at Mbale this 15th day of September 2020.


FREDRICK EGONDA-NTENDE
Justice of Appeal

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BARISHAKI CHEBORION
Justice of Appeal

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MUZAMIRU KIBEEDI
Justice of Appeal