THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 203 OF 2012 & 05 OF 2018

1. NDAGANO FRED

2. SERWADA STEPHEN..... APPELLANTS

VERSUS

UGANDA..... RESPONDENT

(Appeal from the judgment, conviction and sentence of the High Court of Uganda at Kampala before Hon. Lady Justice Monica K. Mugyenyi dated 20th July, 2012 in Criminal Case No. 072 of 2012.)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice F.M.S Egonda -Ntende, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF THE COURT

The appellants on 20th July, 2012 were convicted of the offence of murder contrary to *Sections 188* and *189* of the Penal Code Act (CAP 120) in High Court Criminal Case

No. 072 of 2012 by Hon. Lady Justice Monica K. Mugenyi and were sentenced to 40 years and 35 years imprisonment respectively.

The appellants with leave of this Court now appeal against their respective sentences only, on the following grounds;-

1. *The learned trial Judge erred in law and fact when she sentenced the appellants to a period of 40 years (A1) and 35 years (A2) imprisonment respectively which was illegal, manifestly harsh and excessive in the circumstances thus occasioned a failure of justice.*

Representation

When this appeal came up for hearing learned Counsel *Mr. Innocent Wanambugo* appeared for the appellants while *Mr. Peter Mugisha* State Attorney appeared for the respondent.

Appellant's case

Mr. Wanambugo submitted that, the learned trial Judge erred when she failed to take into account the entire pre-trial period the appellants spent in custody. He argued that, the appellants had spent 1 year, 1 month and 14 days on remand however the learned trial Judge only took into account a period of 1 year and as such the sentences passed were illegal.

In the alternative, Counsel submitted that a sentences of 40 years in respect of the 1st appellant and 35 years imprisonment in respect of the 2nd appellant were harsh and manifestly excessive in the circumstances of this case.

He asked Court to reduce the sentences taking into consideration the mitigating factors in favour of the appellants as well as the principle of uniformity and consistency in sentencing which requires that offenders convicted of the same offence in similar circumstances be given uniform sentences.

Respondent's reply

Mr. Mugisha opposed the appeal and supported the sentences. Counsel argued that, the learned Judge before imposing the sentences considered all the mitigating and aggravating factors and imposed appropriate sentences in the circumstances of this case. Counsel contended that, taking into account the period spent on remand doesn't require arithmetical deductions and as such the sentences passed were legal.

He further argued that, the sentences imposed by the learned trial were neither harsh nor manifestly excessive in the circumstances of the case. He asked Court to uphold the sentences imposed by the learned trial Judge.

Resolution of Court

We have carefully listened to both Counsel. We have also perused the Court record and the authorities cited to us and those that were not cited.

While this is an appeal against sentence only, it is nevertheless incumbent on this Court, as a first appellate Court, pursuant to the provisions of *Rule 30* of the Rules of this Court to appraise the evidence on record, if only to appreciate the circumstance under which the offence was committed. It is this, that will inform this Court's findings on whether, or not, to fault the trial Court over its imposition of the sentences against which the appellants have now appealed. See: *Bogere Moses and another vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997*

As a first appellate Court, we can only interfere with the trial Judge's decision on sentence in limited instances. The Supreme Court has laid down the principles that should govern our exercise in that regard.

In *Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001,* the Court spelt out the principles as follows: –

> *"The appellate Court is not to interfere with the sentence imposed by the 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 circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

See also: *Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995, Ogalo s/o Owoura Vs R. (1954) 21 E.A.C.A. 126, R. Vs Mohamedali Jamal (1948) 15 E.A.C.A. 126* and *Livingstone Kakooza Vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993,*

The Court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial Court. See: *Ogalo s/o Owoura Vs Republic [1954] 24 EA CA 270.*

The appellants were convicted of murder, the maximum sentence of which is death. The learned trial Judge who listened to the witness and convicted the appellants did not impose the death penalty, instead she sentenced them to 40 years and 35 years imprisonment respectively. She considered aggravating factors specifically the way in which they killed the deceased.

The appellants killed the deceased in a very brutal and inhuman manner, they cut his neck deeply with a machete and later buried him in a shallow grave.

We note that, the learned trial Judge also took into account mitigating factors in favour of the appellants, which were that, the appellants were both first offenders, they were relatively young aged 27 years and 37 years respectively.

Although the learned trail Judge did carefully evaluate the evidence before her relating to the aggravating and mitigating factors, we find with all due respect that

In *Akbar Hussein Godi Vs Uganda, Supreme Court Criminal Appeal No.03 of 2013,* the appellant killed his own wife, he was convicted of the offence of murder and sentenced to 25 years imprisonment. On appeal, this Court upheld the sentence. On further appeal, the Supreme Court, confirmed and maintained the sentence of 25 years imprisonment.

In *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014* (unreported), the appellant was convicted of the offence of murder and sentenced to 35 years imprisonment. On appeal, this Court upheld the sentence. On further appeal the Supreme Court reduced the sentence to 21 years imprisonment taking into account that he was a first offender and was relatively young.

In *Bandebaho Benon Vs Uganda Court of Appeal Criminal Appeal No. 319 of 2014,* the appellant murdered his wife in a brutal manner, this Court reduced a sentence of 35 years imprisonment to 30 years imprisonment.

In *Opio Daniel Vs Uganda Court of Appeal Criminal Appeal 0032 of 2011*, the appellant was convicted of the offence murder of his own wife and sentenced 25 years imprisonment. This Court upheld the sentence to 25 years imprisonment.

Taking into account the gravity of the offence, and the sentencing range established by this Court and the Supreme Court, and the fact that the appellant had spent 1 year, 2 months and 17 days on pre-trial detention, we consider a sentences 24 years imprisonment in respect of the 1st appellant and 22 years imprisonment in respect

she failed to take into account the entire pre-trial period the appellants spent in custody.

The Judge, while passing the sentence upon the appellants stated as follows;-

> *"I have carefully listened to both counsel as well as the convicts in allocutus.*
>
> *I first take into account the one year spent on remand as I consider a proper sentence."*

We note that, Counsel for the appellants submitted that the appellants had been on remand for 1 year, 1 month and 14 days. However upon clear scrutiny of the record we observe that the appellants were taken into custody on 3rd May, 2011 as testified by PW5 AIP Eweru John Michael who was attached to Buwama Police station. They were convicted on 20th July, 2012 therefore the entire remand period was 1 year, 2 months and 17 days. We note that the learned trial Judge took into account only 1 year and ignored the 2 months and 17 days. This error rendered the sentences illegal and we find so. We accordingly set aside the sentences of 40 years and 35 years imprisonment on that account alone.

We now invoke the powers of this Court under *Section 11* of the Judicature Act (CAP 13) which permits us to exercise the powers of the trial Court, while hearing an appeal to impose an appropriate sentence.

of the 2nd imprisonment will meet the ends of justice from which we now deduct the remand period of 1 year 2 months and 17 days. We accordingly order that, the 1st appellant is to serve a period of 22 years, 9 months and 13 days and the 2nd appellant will serve a period of 20 years, 9 months and 13 days in prison. Their respective sentences will run from 20th July 2012, the date of conviction.

We so order.

Dated at **Kampala** this 18th day of February 2020.

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Kenneth Kakuru

JUSTICE OF APPEAL

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F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Christopher Madrama

JUSTICE OF APPEAL