THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT LIRA

CRIMINAL APPEAL NO. 281 of 2016

(Arising from the judgment dated 30th August, 2016 of the High Court at Arua (Mubiru, J) in Criminal Session Case No. 0106 of 2012

[CORAM: ELIZABETH MUSOKE, HELLEN OBURA, JJA & REMMY KASULE, Ag. JA]

ANGUIPI ISAAC alias Zako::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the Judgment of His Lordship Stephen Mubiru delivered on 30th August, 2016, in High Court sitting at Arua in Criminal Session Case No. 0106 of 2012. After a full trial, the appellant was convicted of murder contrary to Sections 188 and 189 of the Penal Code Act and was sentenced to 26 years and 9 months imprisonment.

The appeal is against sentence only.

The facts of the case, as accepted by the trial Judge, were that on 2nd August, 2008 at around mid-day, at Naipio Village, Ombia parish, Yivu Sub-County, Maracha District, a meeting was convened at the home of one Atonozi and attended by the deceased Jasindo Blasio, amongst others.

At that meeting it was alleged that the deceased was a wizard and was responsible for the death of one George who had just been buried in the area. The meeting resolved that the deceased leaves the village at once.

At about 5:30 p.m. after the meeting, the people who attended the meeting escorted the deceased to his three houses, threw out all his hous hold properties, demolished the three houses and also destroyed his sugar cane plantation.

The deceased's wife Pw2, Lydia Cumaru, on being briefed by the deceased that the meeting had resolved to expel him from the village for being a wizard, left the area together with the deceased and both took refuge to the home of her relatives. At about 9:00 p.m. the deceased left his wife, Pw2, at the said relative's home and he returned to his home where his house had been demolished.

At 7:00 a.m. the following day, 3rd August, 2008, the deceased's wife, Pw2 left her infant child at the home of her relatives and went back to her home to collect whatever properties had not been destroyed. She found that her husband had been killed. His body was in the compound by the door way of one of the demolished houses. It was naked with a cut on the head, nose and on the leg. One of the eyes had been removed.

On Sunday the 3rd August at around 3:00 a.m. one Adiru Harriet, Pw3 who stayed in the same homestead with the deceased and was in her house only 10 metres away from the scene of crime, had, through the window of her house, seen and heard the deceased being beaten and pleading that he is not the one who killed George. Pw3 also heard the deceased shouting the name *"Zako"* of the appellant saying ***"why do you want to kill me"***. The appellant was with other people who continued to beat the deceased. The deceased tried to escape but was pursued and during the beating, they threatened that any person who came out to rescue the deceased would also be killed.

Pw3 saw the deceased run towards an ant hill where they continued to beat him until he died. Thereafter the

deceased's body was then dragged to one of his demolished house. One of the murderers then removed grass from the demolished house of the deceased, set it ablaze and then also went to the house of Pw3 and set the same ablaze as well. On realizing that her house was on fire, Pw3 ran outside with her child, then woke up her husband who was in another small house nearby and both were able to rescue some of their household property.

Pw3 clearly saw the appellant as one of those that killed the deceased. The appellant was later arrested at Nyadri Trading Centre and was charged with the murder of the deceased. He was convicted and sentenced to 26 years and 9 months imprisonment.

This appeal is premised on two grounds, namely;

"1. That the learned Trial Judge erred in law and fact when he passed an illegal sentence to the appellant of 26 years and 9 months imprisonment without considering the time spent on remand which occasioned a miscarriage of justice.

2. The learned Trial Judge erred in law and fact when he passed a manifestly harsh and excessive sentence of

26 years and 9 months against the appellant thereby occasioning a gross miscarriage of justice."

At the hearing of this appeal, the appellant was represented by learned counsel Daniel Evans Olwoch on state brief, while learned Chief State Attorney Fatina Nakafeero was for the respondent.

The appellant remained confined to Uganda Government Prison at Lira during the hearing of the appeal. This was in compliance with the obtaining Government health rules to prevent the spread of the Covid 19 Virus. The appellant was however enabled to follow and participate in the Court proceedings and to be in touch with his legal counsel through video conferencing and communications technology of the Court.

Counsel for the appellant applied to Court for leave for the appellant to appeal against sentence only. The Respondent's Counsel did not oppose this application. This Court granted the leave to appeal pursuant to **Section 132 (1) (b) of the Trial on Indictments Act, and Rule 43 (3) (a)** of the Rules of this Court.

Both counsel for the respective parties, with the permission of Court, filed, adopted and relied upon written submissions.

Submissions for the Appellant:

Learned Counsel for the appellant argued the two grounds of the appeal concurrently.

He submitted that the learned trial Judge did not consider the period spent on remand when sentencing the appellant. This omission rendered the sentence of 26 years and 9 months imprisonment of the appellant to be illegal for non-compliance with **Article 23 (8) of the Constitution**. Counsel relied upon the case of **Rwabugande Moses Vs Uganda: Supreme Court Criminal Appeal No. 25 of 2014,** where the Supreme Court held that the period spent on remand in lawful custody prior to the trial and conviction of a convict, must be taken into account by the sentencing Court when imposing a sentence upon a convict.

Appellant's Counsel also argued that the sentence of 26 years and 9 months imprisonment was too harsh and excessive in the circumstances of this case. Learned Counsel referred this Court to the case of **Batuli Moses and 7 others vs Uganda: Court of Appeal Criminal Appeal No. 225 of 2014,** where the Court of Appeal sentenced each one of the appellants to 13 years and 9 months imprisonment for murder. The eight appellants had over ran a police station

violently seized from the police, 3 suspects who were in police custody and proceeded to kill them by physically beating them on the ground that the 3 were witch doctors who had caused disappearance of a young boy in the area. The young boy, as it turned out later, but after the murder had been committed, was alive. Learned Counsel for the appellant invited this Court to find that the sentence of 26 years and 9 months imprisonment imposed upon each appellant was too harsh and excessive, proposed that each appellant be sentenced to of 13 years and 9 months imprisonment.

Respondent's Submissions:

Learned Counsel for the respondent opposed the appeal and contended that sentencing is a matter of the Judicious exercise of discretion by trial Court and the Court of Appeal ought not interfere in with the exercise of discretion by the sentencing Court unless the sentence imposed is illegal or excessively so low or excessively so high as to occasion a miscarriage of justice. Learned Counsel relied on the case of **Kiwalabye vs Uganda: Supreme Court Criminal Appeal No. 143 of 2001,** in support of this submission.

Respondent's Counsel supported the sentence of 26 years and 9 months imprisonment imposed upon the appellant by the learned trial Judge as being proper in law and appropriate, given the circumstances of the case. Counsel submitted that the learned trial Judge considered the mitigating and aggravating factors as well as the period spent on remand by the appellant before determining the said sentence.

As to the applicable Court precedents, Respondent's Counsel referred this Court to the case of **Karisa Moses vs Uganda: Supreme Court Criminal Appeal No. 23 of 2016,** where the Supreme Court confirmed a sentence of life imprisonment which had been imposed by the Court of Appeal upon the appellant who had murdered his grandfather. Learned Counsel also relied on the case of **Asuman Abelle v Uganda: Supreme Court Criminal Appeal No. 66 of 2016,** where the Supreme Court held that ***"a precedent has to be in existence for it to be followed".*** Learned Counsel contended that the Judgment and sentence in this appeal having been delivered respectively on 25th and 30th August, 2016, there is no way the **Rwabugande case (supra)** decision which was delivered on 3rd March, 2017 could have been a precedent in the case.

Learned Counsel prayed this Court to uphold the sentence of 26 years and 9 months imprisonment imposed by the learned trial Judge upon the appellant as appropriate and to dismiss the appeal

Resolution by Court:

This appeal is in respect of sentence only.

The principles upon which an appellate court may interfere with a sentence passed by the trial sentencing Court were considered by the Supreme Court in the case of **Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995**. The Supreme Court referred to **Rvs Haviland (1983) 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 normally 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".*

The above principles were also later applied in **Kiwalabye vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

The offence of murder for which the appellant was convicted carries the maximum sentence of death.

We have carefully subjected the evidence adduced at the trial to fresh scrutiny. As to the aggravating factors, we note that the degree of injury inflicted on the deceased showed that the appellant had, no respect for the life of a human being. As to the mitigating factors, this Court notes that the appellant was aged 35 years at the time of conviction, and was as such relatively a young man, capable of reform. He was a first offender, and a bread winner to his two young children. He was remorseful and prayed for leniency. There were other people of the public who also participated with the appellant to assault the deceased to death

In **Rwabugande Vs Uganda: Supreme Court No. 25 of 2014**, a scuffle ensued between the deceased on the one hand and the appellant together with his herdsman on the other hand, over an impounded herd of cattle. The deceased was hit with a herdsman stick twice on the head. He sustained bodily injuries which led to his death. The Court

of Appeal upheld the sentence of 35 years imprisonment imposed by the learned trial Judge. However on appeal to the Supreme Court, the sentence was reduced to 21 years imprisonment.

We have accordingly come to the conclusion that the sentence of 26 years and 9 months imprisonment was too harsh and excessive in the circumstances. We set the same aside.

Pursuant to **Section 11 of the Judicature Act**, we proceed to exercise the powers of the trial Court by re-sentencing the appellant.

Taking into account the gravity of the offence, the mitigating and the aggravating factors that have already been identified and being guided by the sentence passed in **Rwabugande vs Uganda (Supra),** we sentence the appellant to 24 years imprisonment.

The trial Court records are to the effect that the appellant was arrested on 3rd August, 2008. He was kept in lawful custody until he was granted mandatory bail some time in 2010. He was then re-arrested for trial on 28th December, 2012. He was again kept in lawful custody until his being convicted of the offence of murder on 25th August, 2016. All

in all the appellant spent a period of 5 years and 4 months in lawful custody, as found by the learned trial Judge.

We deduct the 5 years and 4 months remand period form the 24 years and order that the appellant serves a period of 18 years and 8 months imprisonment commencing from 30th August, 2016, the date of his conviction.

We so order.

Dated at Lira, this.....30th..... of .....March.....2021.

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Elizabeth Musoke
Justice of Appeal

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Hellen Obura
Justice of Appeal

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Remmy Kasule
Ag, Justice of Appeal