THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT JINJA

(Coram: Elizabeth Musoke, Barishaki Cheborion and Hellen Obura, JJA)

CRIMINAL APPEAL NO. 234 OF 2017

ALEMIGA JAMES:: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

[Appeal from the decision of the High Court of Uganda sitting at Tororo ***(Hon. Lady Justice Mutonyi Margret)*** *delivered on 30th June 2017 in Criminal Session Case No. HCT-CR-SC-1491-2012]*

JUDGMENT OF THE COURT

Background

The appellant in this case was convicted of the offence of murder of Okuzia Alex c/s 188 and 189 of the Penal Code Act and sentenced to 30 years imprisonment.

On 3rd October 2012, the appellant and one Mugume Ashraf were indicted for murder of Okuzia Alex. The appellant pleaded not guilty. However, during the trial and after the testimony of PW1 Abiko Juliet who clearly identified him as one of the people who murdered the accused, he changed his plea to guilty. He was convicted after the facts were read to him and after being warned that the offence of murder carries a maximum sentence of death but he maintained

his plea of guilty. The learned trial judge sentenced the appellant to 30 years imprisonment.

With leave of court granted under Section 132 (1) (b) of the Trial on Indictments Act, the Appellant now appeals to the Court of Appeal of Uganda against sentence only on grounds that;

1. ***The learned trial judge erred both in law and fact when she out rightly denied the appellant a chance to participate in plea bargaining which would have assisted the appellant secure a lesser sentence.***
2. ***The learned trial judge erred in both law and fact when she denied the appellant an opportunity to say something in mitigation of the sentence.***
3. ***The learned trial judge erred in both law and fact in passing a sentence which was harsh in the circumstances.***

Representations:

At the hearing, the appellant was represented by Ms. Kevin Amujong on State brief; while Mr. Edward Muhumuza, Chief State Attorney, represented the respondent.

The appellant was not in court physically but attended the proceedings via video link to Prison. Both parties sought, and were granted leave to proceed by way of written submissions which were already on the court record.

Appellant's Submissions

Counsel for the appellant submitted that the appellant was denied a chance to participate in the plea bargain process which would have assisted him to secure a lesser sentence. After the trial court hearing the evidence of PW1 Abiko Juliet and upon court calling the prosecution witness, defense counsel informed court that the appellant was willing to enter into a plea bargain and wanted to consult the appellant on the sentence but, the said submission was shut down by court. That the learned trial judge told the appellant to plead guilty and leave it to the discretion of court since she didn`t want to disqualify herself in case she disagreed with the sentence agreed on by the parties.

Further, that defense counsel should have insisted on plea-bargaining to get the best result for all parties but he did not object to the course adopted by the trial court. That this mistake of counsel should not be visited on the appellant.

Counsel cited Rule 8(2) of the Plea Bargain Rules that gives the parties an opportunity to inform court of the plea bargain negotiations and consult court on its recommendations with regard to possible sentence before an agreement is brought to court for approval and recording. He contended that a judicial officer does not have the discretion to impose her own sentence since plea bargain limits the discretionary sentencing powers of the judicial officer. That the learned trial judge didn't give the appellant chance to pursue plea bargaining simply because she did not want to disqualify herself from continuing with the case. In his view, the trial court seemed to have formed

an opinion about the guilt of the appellant at the mere mention of plea bargaining.

Counsel further submitted that the learned trial judge ought to have encouraged both parties to consult the victim`s family with a view of settling the matter under plea bargain which in turn would have secured the appellant a lenient sentence of about 5 years as was imposed in **Kanyamunyu Mathew v Uganda Criminal Misc. Application 151 of 2020.**

It was submitted for the appellant that neither the appellant nor his counsel were given chance to say anything in mitigation to assist court in coming up with an appropriate sentence. He cited **Magala Ramathan v Uganda Criminal Appeal 14/2014 [2017] UGSC 34 (20 September 2017)** for the proposition that an accused person must be given an opportunity to say something in mitigation of the sentence. That the failure to give the appellant a chance to say something in mitigation was a huge oversight that occasioned a miscarriage of justice.

Regarding the harshness of the sentence, counsel submitted that the appellant was sentenced to 30 years imprisonment after he had pleaded guilty even after having been denied chance at plea bargaining. That the appellant was an illiterate who had to wait for 5 years to get an opportunity to appear in court and decided to plead guilty but instead court ridiculed him when the learned trial judge stated that;" *it has taken him 5 years to feel remorseful for the gruesome act and he had to wait to hear a witness testify against him as if*

it was so pleasant to be reminded on how he cut the deceased with a panga to death"

Counsel for the appellant further submitted that the sentence passed by the trial court must as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts.

He cited **Aharikundira Yustina versus Uganda Supreme Court Criminal Appeal No.27 of 2015** to say that it is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts and that consistency is a vital principle of a sentencing regime deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.

To demonstrate similarity, Counsel cited **Tom Sazi Sande alias Hussien Saddam versus Uganda CA Criminal Appeal No.127 of 2009** where this court upheld a sentence of 18 years imprisonment for the appellant who had pleaded guilty to murder. In **Kusemererwa and another versus Uganda CA. Criminal Appeal No. 83 of 2010** where this court substituted a sentence of 20 years imprisonment that had been imposed upon each of the appellants with one of 13 years imprisonment, on grounds that it was manifestly excessive.

Counsel further submitted that the 30-year sentence imposed on the appellant without being given chance to mitigate the same was harsh and excessive and that this court be pleased to set it aside and substitute the

same with a lenient sentence of 9 years imprisonment. That since the period the appellant had spent in lawful custody was 9 years, he ought to be set free.

Respondent`s Submissions

In reply, the respondent opposed the appeal. However, he submitted only on the aspect of the harshness and excessiveness of the sentence and did not submit on the complaint about plea bargain and mitigating factors.

He submitted that the learned trial judge considered both aggravating and mitigating factors before passing sentence of 30 years, namely; he appellant`s plea of guilty, the period of 5 years spent on remand, his remorsefulness and that he was a youth aged 26 years. That the learned trial judge considered that the aggravating factors outweighed the mitigating factors. He contended that the sentencing range in murder cases is 30 years up to death and that in the instant case, the death penalty was mitigated to 30 years imprisonment. He cited **Opolot Justine and Agamet Richard versus Uganda SCCA No. 31/2014** where court held that if the maximum penalty for the offence of murder is not given, it could not be said that the sentences were harsh and excessive.

Regarding the view of maintaining consistency in sentencing, counsel cited the following authorities to justify the sentence of 30 years imprisonment.

Turyahabwe Ezra & 12 others versus Uganda SCCA No. 50/2015 where it was held that the sentence of life imprisonment was not illegal and neither was it harsh and excessive because the maximum sentence for the offence of murder is death and for the wanton manner the appellants killed the deceased

they could have faced the death penalty. **Abaasa Johnson and another versus Uganda CA Criminal Appeal No.33/2010** the appellants killed and robbed items belonging to the deceased. They were each sentenced to life imprisonment for murder and 15 years imprisonment for robbery. On appeal, this court reduced the sentence to 35 years.

Aharikundira Yusitina versus Uganda (Supra) where the Supreme Court reduced the sentence of death to 30 years for the appellant who had murdered her husband and thereafter dismembered his body.

Nsabimana versus Uganda Court of Appeal Criminal Appeal No. 189/2013, this Court substituted the death sentence with 30 years imprisonment. The appellant had killed his own son.

Analysis

As a first appellate Court, we are required to re-evaluate all the evidence on record and come up with our own inferences on all issues of law and fact. This principle has been set out in many authorities of the Supreme Court in particular in ***Fr. Narsensio Begumisa and 3 Others Vs Eric Tibebaga,Supreme Court Civil Appeal No. 17 Of 2002***, where the Supreme Court held that;-

> *"The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it*

has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

See also ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997, and Rule 30 (1)*** of the Rules of this Court. We shall proceed to apply this principle in the determination of this appeal.

The learned trial judge is faulted for having denied the appellant an opportunity to enter into plea bargain which would have assisted court to secure a lesser sentence. Further, that counsel`s failure to object to court`s change of plea should not be visited on the appellant.

Plea bargaining is regulated by the Judicature (Plea Bargain) Rules 2016 which were established under the Judicature Act section 41 (1) and (2). Under rule 3 (b) (c) (d) (e) (f) of the rules, a plea bargain enables the accused and the prosecution in consultation with the victim to reach an amicable agreement on an appropriate punishment. This facilitates reduction of case backlog and prison congestion. It provides a quick relief from the anxiety of criminal prosecution and encourages accused persons to own up to their criminal responsibility. This also helps to involve the victim in the adjudication process thus widening the scope of access to Justice.

The record, shows that counsel for the appellant informed the trial court about the appellant`s willingness to enter plea bargain after the prosecution had called its first witness and was yet to call the 2nd one. In response to the appellant`s request the learned trial judge stated;

"So what will happen if I don't agree to the sentence? You know that if I don't agree to the sentence you have agreed upon, I disqualify myself from this case and yet I am ready to hear this case because I have started hearing it; the witness is here right before me. I would propose that if he wants to plead guilty; do we have the relatives of Okuzia Alex here apart from witness. If he is pleading guilty, let him plead guilty and you leave it to the discretion of court. I don't want to disqualify myself because we have disagreed on what you have agreed on."

The response of the learned trial judge, to the appellant and his Counsel was that if the appellant wanted to plead guilty, he was free to do so but the court remained with the discretion on the matter. That she was ready to continue hearing the case and the prosecution had called its 2nd witness.

Counsel submitted that the failure by the defense to object to the learned trial judge`s statement should not be visited on the appellant.

In our view, counsel`s failure to object did not occasion a miscarriage of justice. However, we are of the strong view that once an accused person expresses a desire to explore a plea bargain, it's incumbent upon the trial judge to allow him or her do so since it's an available option under the law which is intended to speed up trials and ease backlog. A trial judge should not decline to allow that option merely because she feels inclined to hear the case and fears to step from hearing it in the event that plea bargain fails. The whole concept of plea bargain would in my view, be defeated if trial judges adopted that kind of attitude.

Suffice to note the trial judge also tended to confuse a plea bargain with an ordinary plea of guilt hence her suggestion that the appellant should just plead guilty if he wanted to.

We also note that the appellant`s complaint is on the harness of the sentence that was imposed on him following the trial and not on the conviction arising from the trial.

For the above reason, I fault the learned trial judge for denying the appellant the opportunity to explore a plea bargain which could have afforded him a less sentence than what the learned trial judge imposed upon convicting him after the trial.

The learned trial judge was also faulted for not giving the appellant or his counsel an opportunity to say anything in mitigation.

In reply, counsel for the respondent submitted that the learned trial judge ably considered the appellant`s mitigating factors.

In sentencing the appellant the learned trial judge stated as follows;

"Descending on a human being and savagely cutting him with a machete is not only atrocious but barbaric, cruel and scary. This kind of savage conduct depicts a seriously depraved mind. It calls for a deterrent and punitive sentence. The convict does not value human life and yet he lives in society. He was a young man of 26 years at that time. He was old enough to differentiate between good and evil. He chose evil.

I have considered the aggravating factors of this case. They outweigh the only mitigating factor of pleading guilty which has been construed as a sign of

remorse. Otherwise, there is nothing else that can be used to mitigate the death penalty.

....The convict who was a young energetic man wasted his energy. Instead of cutting sugar cane as a cane cutter with SCOUL, he decided to cut a human being. He misused his garden tool.

His plea of guilty did not come immediately. It has taken him 5 years to feel remorseful for the gruesome act and he had to wait to hear a witness testify against him as if it was so pleasant to be reminded on how he cut the deceased with a panga to death.

In the result, being a young man, he is sentenced to 30 years imprisonment period on remand inclusive. This will help him respect human life when he gets out of prison."

The record shows that the learned trial Judge alluded to both the aggravating and mitigating factors while sentencing the appellant. Aggravating factors were; the cutting the deceased with a machete, the accused was old enough to differentiate between good and evil, attacking an innocent person, he wasted his youthful energy in cutting the deceased and his plea of guilty did not come immediately. The mitigating factors were; the appellant pleading guilty which was construed as assign of remorse and that he was a young man aged 26 years. Be that as it may, the record does not show that the learned trial Judge and sentencing judge held Allocutus. Neither the prosecution nor the defense counsel addressed court on the aggravating and mitigating factors respectively. The learned trial Judge stated that, *"I have considered the aggravating factors of this case. They outweigh the only*

mitigating factor of pleading guilty which has been construed as assign of remorse".

Therefore, it's not clear where the learned trial judge got the aggravating and mitigating factors she alluded to in her decision.

The circumstances when an appellate court can interfere with the sentence imposed by a trial Judge are now well settled. In ***Kiwalabye v Uganda SCCA No 143 of 2001*** it was held that;

> *"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 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 the 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."*

In **Ramathan Magala vs Uganda (Criminal Appeal No.01 Of 2014) [2017] UGSC 34 (20 September 2017)**; Supreme Court held that a judicial officer must record what the accused submitted in mitigation and this should be evident on record. The judicial officer must state that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones.

The above decision of the Supreme Court is clear that a judicial officer must record what the accused submitted in mitigation and this should be evident on record. With due respect to the learned trial Judge, how could court have known that there were aggravating factors that outweighed the only mitigating factor of pleading guilty without having accorded both parties an opportunity to aggravate and mitigate the sentence as required by the law? How could the accused be sure that the judge addressed his or her mind to the mitigating factors which he was never given an opportunity to present before court?

The omission on the part of the trial court to conduct allocutus amounted to ignoring an important matter or circumstance which ought to be considered and this occasioned a miscarriage of Justice on the part of the appellant. This is one of the circumstances under which this court, as a first appellate court, can interfere with the sentence imposed by the trial court.

Accordingly, we set aside the sentence of the trial court because of ignoring an important matter. It is not necessary to consider the other leg of the appellant's ground namely, that the trial judge passed a harsh sentence. We shall now proceed to sentence the appellant afresh pursuant to **Section 11** of the **Judicature Act,** which provides as follows:

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *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"

For purposes of sentencing in this appeal, Counsel for the appellant submitted in mitigation of the sentence that the appellant in this case was a first offender, had been on remand for five years before conviction. He was 26 years at the time of commission of the offence, a single family man with 2 children aged 10 and 11 years and an elderly mother who can barely support herself, that was and is still remorseful, still within the reformative age and has spent close to 10 years in lawful custody without causing trouble.

On the other hand, the respondent submitted several aggravating factors to wit; that the appellant led a gang that planned and killed the deceased, the deceased sustained severe injuries, the murder was gruesome considering that he used a panga, he deliberately caused loss of life, murder carries a maximum sentence of death and that murders resulting from allegations of witchcraft were rampant in the court`s jurisdiction. He cited guide line 20 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Patrice) Directions 2013.

In **Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013**, this court after reviewing numerous decisions of the Supreme Court and the Court of Appeal stated thus:

"Although the circumstances of each case may certainly differ, this court has now established a range within which these sentences fall. The term of imprisonment for murder of a single person ranges

between 20 to 35 years imprisonment. In exceptional circumstances the sentence may be higher or lower."

In **Aharikundira Yusitina Vs Uganda Supreme Court Criminal Appeal No. 27 of 2015** where the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial court and substituted it with a sentence of 30 years imprisonment.

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, convicted of murder and 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.

In **Hon. Akbar Godi V Uganda Supreme Court Criminal Appeal No.3 of 2013,** Court confirmed a 25 year imprisonment where the appellant had killed his wife.

In the instant case, the appellant was convicted of the offence of murder which carries a maximum penalty of death. In the circumstances of this case, upon

considering both aggravating and mitigating factors more especially the fact that he pleaded guilty and saved court`s time and resources, and the 5 years period the appellant had spent on remand, we find that 20 years imprisonment for murder will serve the ends of justice. This sentence is to run from the date of Conviction

In the result, the appeal succeeds.

We so order

Delivered at ..... 10th ..... this ..... day of ..... Dec 2021

Elizabeth Musoke

JUSTICE OF APPEAL

Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL

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