THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 370 OF 2019

(Arising from Criminal session No. 0006 of 2018)

KAKEETO JOSEPH .....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Henry Kawesa, J., the High Court of Uganda sitting at Mpigi in Criminal Case No. 0006 of 2018 dated 25th September 2019]

JUDGMENT OF COURT.

Introduction.

The Appellant was indicted and convicted of the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act**. The particulars of the offence were that Kakeeto Joseph on 24th April, 2017 at Kweri village in Kamengo sub county, Mpigi with malice aforethought unlawfully caused the death of Kisenyi Peter.

The trial court found the Appellant guilty and sentenced him to serve 25 years of imprisonment. Dissatisfied with the decision of the trial court the Appellant filed this Appeal on grounds that:

1. *The learned Judge erred in law and fact when he failed to appraise, evaluate and adequately scrutinise the prosecution evidence in absence of the police witnesses' testimony alongside defence thereby wrongly convicted the Appellant of the offence of murder.*
2. *The learned judge erred in law and fact when he imposed upon the Appellant a harsh excessive custodial imprisonment of 25 years without deducting remand period'.*

The Appellant prayed that:

1. His appeal be allowed and conviction be quashed.
2. Orders of the trial Court be set aside.

The Respondent opposed the appeal.

Representation

The Appellant was represented by Mr. Seth Rukundo. The Respondent was represented by Ms. Ann Kabajungu.

Ground 1

Submissions of counsel for the Appellant.

Counsel for the Appellant submitted that the there was no police officer witness to support the case of the prosecution. Counsel further submitted that the non-production of the Police testimony left a corroborative link to the Appellant as the perpetrator of the offence of murder. Counsel argued that the non- production of the evidence of the investigating police officer rendered the indictment of murder contrary to **Sections 188 and 189 of the Penal Code,** not proved beyond reasonable doubt.

Additionally, counsel submitted that the legal requirement is for corroboration of death through a death certificate.

Counsel further submitted that there was no evidence of proper identification of the Appellant as the one who killed the deceased. Counsel for the Appellant submitted that there was no evidence to place the Appellant at the scene of the Crime.

Submissions of counsel for the Respondent.

Counsel for the Respondent cited Section 133 of the Evidence Act which provides that no particular number of witnesses are required to prove any particular fact. The absence of the investigating officer was therefore immaterial since the prosecution proved its case beyond reasonable doubt.

Counsel cited **Ntambala Fred vs. Uganda SCCA No. 34 of 2015**, where court held that:

> "a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. This was stated by this court in Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006, what matters is the quality and not quantity of evidence."

Furthermore, counsel argued that a close scrutiny of S. 40 (3) of the Trial on Indictment Act reveals that it is the unsworn evidence of tender years that cannot be relied on unless corroborated by other material evidence. All witnesses are sworn. So the provisions of section 40(3) are not applicable in this matter. Counsel cited **Senyondo Umar vs. Uganda CACA No. 267 of 2007** and **Patrick Akol vs. Ug. SCCA No. 23 of 1992.**

Counsel submitted that the trial Judge evaluated the evidence of all the prosecution witness and properly found that the prosecution had proved its case beyond reasonable doubt.

It was further submitted that the evidence of PW1 and PW2 is of the people who saw the action at the scene. The Appellant was therefore properly identified by several witnesses.

Analysis

Duty of this Court

In resolving issues raised on this appeal, this court is mindful of its duty as the first Appellate court to re-evaluate, reappraise and review the evidence on the record of appeal which was before the trial court and come out with its own conclusions. See **Rule 30(1) of the Rules of this Court and Kifumante Henry vs. Uganda, Supreme Court Criminal appeal No. 10 of 1997.**

We agree with the submissions of counsel for the Respondent that the law does not require the prosecution witness to adduce a number of witnesses before they can secure a conviction against the Appellant. It is well settled that in section 133 of the Evidence Act, no particular number of witnesses is needed to prove any fact and a conviction can be based on evidence of a single identifying witness as long as the prosecution has proved the ingredients beyond reasonable doubt with the witnesses that have been produced before court. See **Christopher Bagonza vs. Uganda Criminal Appeal No. 25 of 1997.** It is therefore inconsequential that the prosecution chose not to adduce the investigating officer as a witness in this case. The evidence of the identifying witness alone were sufficient in placing the appellant at the scene of crime.

As regards the identification of the Appellant as the perpetrator, the test of proper identification was set out in **Abdalla Bin Wendo vs. R, [1953]20 EACA 166**, and these are:

> '1. Whether the accused was known to the witness before the offence.
> 2.The condition of the lighting used for identification
> 3. The distance from which the identification was made.
> 4.The length of time during which the accused was identified'.

We are satisfied that the test of identification was satisfied. To prove their case, the prosecution brought 3 witnesses, including PW2 and PW 3 who testified that they saw the Appellant run from the scene. The Appellant was well known to them. The time of day was early in the morning between 9 am and 10 am. The light at that moment was sufficient to enable a person make proper identification. The length of observation and distance was conducive for a person to be identified by the witnesses.

It is therefore our finding that there was proper identification of the Appellant as the perpetrator of the offence of murder contrary to section 188 and 189 of the Penal Code Act.

We therefore find no reason for faulting the trial Judge on this ground.

Ground 2

Submissions of counsel for the Appellant.

Counsel for the Appellant submitted that the sentence of 25 years of imprisonment handed down to the Appellant was harsh and excessive. It was also illegal because the court did not deduct the years the Appellant had spent on remand. Counsel **cited Mateka vs. R, 1971 EA 512** cited in **Adukule Natal vs. Uganda CACA No. 10 2000**. He prayed that the 25-years imprisonment be reduced to 15 years.

Submissions of counsel for the Respondent.

Counsel for the Respondent submitted that the Appellant was convicted for murder which carries a maximum sentence of death. In passing the sentence, the learned trial judge analysed all the mitigating factors raised on the Appellant's behalf.

Counsel further submitted that this court can only interfere with the sentence of the trial court if the trial court acted on wrong principles, over looked some material factors, or the sentence was manifestly excessive.

Considering the previous decisions in similar offences counsel cited **Bukenya Stephen vs. Uganda, Court of Appeal Criminal Appeal No. 0051 of 2007,** where this court maintained a sentence of life imprisonment that had been handed down by the trial court.

In **Sebuliba Siraji vs. Uganda, CACA No. 0319 of 2009**, this court did not see any justification to interfere with the discretion of the trial court in awarding a life sentence for murder.

Counsel submitted that the trial Judge therefore properly exercised his discretion in coming up with the sentence of 25 years. The judge went ahead to indicate that the sentence will run from the first day of remand. Which indicated that he had considered the time spent on remand.

Counsel argued that this court should uphold the said sentence since its imposition was not based on the wrong principle of law neither did the court overlook any material factor of evidence.

Consideration of Court.

It is now settled law that for an appellate court to interfere with the discretion of the trial court while passing sentence, it must be shown that the sentence is illegal or founded upon a wrong principle of the law, or where 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: **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

While sentencing the Appellant, the court stated that :

> "Accused is a first offender. The maximum sentence is death. The aggravating factor is that accused used violence on a vulnerable old aged person. There is also no indication of remorse. In mitigation accused is a first offender, has a family and prays for leniency. Accused is sentenced with a view to deter and rehabilitation. He is sentenced to 25 years running from the first day of remand."

In the judgment it is evident that the trial court was alive to both the aggravating and mitigating factors. In establishing whether the sentence is manifestly harsh or excessive this court is guided by the principle of consistency under **Principle No. 6(c) of the (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** which provides that:

> "Every court shall when sentencing an offender take into account the need for consistency sentencing an offender take into the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

The purpose of this provision is to ensure uniformity while sentencing similar offences by considering what ranges the courts have been considering in handling similar matters. This principle is entrenched in our Constitution under Article 21(1) which guarantees that all persons are equal before the law. This doctrine of equality mandates this court to hand down similar sentences in offences that occurred under similar circumstances.

Considering the precedents set by the Supreme court in similar offences, in **Aharikundira vs. Uganda, SCCA No.27 of 2015**, the Supreme Court reduced a sentence from a death sentence to 30 years imprisonment. And in **Mbunya Godfrey vs. Uganda, SCCA No.004 of 2011**, the Supreme Court set aside the death sentence

imposed on the Appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

In the circumstances of this case the sentence of 25 years would not be considered manifestly harsh or excessive.

However, it is not clear whether the trial judge actually considered the time the Appellant had spent on remand. Failure to consider the years spent on remand renders the sentence illegal. The trial judge just mentioned that the sentence runs from the first time the Appellant was remanded. This is very vague.

In Article **23(8) of the Constitution of the Republic of Uganda 1995, as amended** stipulates that:

> "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."

Principle 15 of the Sentencing guidelines (*Supra*) is instructive as well. The principle provides that:

> "**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."

In **Byamukama Herbert vs. Uganda, Criminal Appeal No. 21 of 2017,** which cited with approval in **Abele Asuman vs. Uganda, Criminal Appeal No. 66 of 2016,** where court held that

> "this court has previously guided that sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision"

The requirement of deducting the period spent on remand is couched in mandatory terms. Any court that passes a sentence without considering the time spent on remand, the sentence is therefore illegal because it offends the provisions of the Constitution.

The sentencing regime has evolved within a short period. Previously, the courts would just take note of the period spent on record, but that changed with the Supreme Court decision delivered on 3rd March 2017 **in Rwabugande Moses vs. Uganda** *(Supra)* which was to the effect that while sentencing, the court ought to arithmetically take into account the period spent on remand, because the period is known with precision.

The position of the law in **Rwabugande Moses vs. Uganda** (*Supra*) was short lived, when the Supreme Court on the 19th April 2018 delivered a differing position in **Abelle Asuman vs. Uganda, Criminal Appeal No. 66 of 2016**, nearly a year after, stating that the arithmetical deduction is not necessary because the sentencing judge has choice to either arithmetically deduct the sentence or not, as a matter of style.

The position in **Abelle** (*Supra)* delivered in 2018, was also short lived as the position in Rwabugande was upheld in **Segawa Joseph vs. Uganda, Criminal Appeal No. 65 of 2016**, the Supreme Court on the 6th October 2021 held that:

> "This court is bound to follow its earlier decisions for the purpose of maintaining the principle of stare decisis. This court has the duty to decide which decision is to be followed. Our appreciation of Article 23(8) of the constitution is that the consideration by court of the period spent on remand by a convict is mandatory.

> A sentencing judge is under a duty to consider the exact period spent on remand in upholding the provisions of the supreme law of the land. For avoidance of imposing ambiguous sentences, we hold that the period spent on remand must be arithmetically deduced. This renders justice to a convict. We therefore find that the **Rwabugande case** is the correct position of the law in matters where the Appellant challenged the legality of sentence in relation to whether or not court rightly considered the provisions of Article 23(8) of the constitution."

As noted above, it is not clear whether the trial judge did take into consideration the period spent on remand by the Appellant as required under Article 23 (8) of the Constitution. The judgment in this case was delivered on the 25th of September 2019, by then the legal regime in force was the law in **Abelle** *(Supra)* where the sentencing court was at liberty to either arithmetically deduct the years or just take into consideration the period spent on remand. Considering the fact that the judge just stated that the sentence starts running from the first time the Appellant was on remand was vague. The Judge did not actually take into account the 2 years the Appellant spent on remand.

That said, pursuant to **Section 11 of the Judicature Act** and also in line with **Article 23(8) of the 1995 Constitution,** we proceed to exercise the powers of the trial Court by re-sentencing the Appellant by imposing a sentence we think is appropriate in the circumstances. In arriving at the most appropriate sentence we have considered the mitigating and aggravating factors. We set aside the illegal sentence of 25 years and we replace it with 23 years having deducted the 2 years spent on remand by the Appellant. This sentence starts running from the date the judgment was passed. To be specific 25th September 2019.

We so order.

Dated at Kampala this ..... 25th ..... Of ..... Nov 2022

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ELIZABETH MUSOKE

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

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EVA K. LUSWATA

JUSTICE OF APPEAL