THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram; Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO 184 OF 2014

KALANGWA HENRY:: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

(Appeal from the decision of Ibandha Nahamya, J. dated 1st October 2013 in Nakawa High Court Criminal Session Case No. 101 of 2011)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for murder c/t sections 188 and 189 and aggravated robbery c/t sections 285 and 286 of the Penal Code Act. He was convicted on his own plea of guilty and sentenced to 23 years' imprisonment on each count, to run concurrently.

Background

The facts that were admitted by the appellant were that the appellant and the deceased, Serwada Noah, were friends having met as inmates at Mwera Prison. On 6th March 2010, the appellant visited the deceased at his home. And while there he was introduced to the deceased's brother, Kibuuka, but the latter left the two friends together who then proceeded to the Trading Centre in the neighbourhood. The following day, 7th March 2010, Kibuuka got

concerned because his brother was nowhere to be seen. He began to search for him. On the 8th March 2010, Kibuuka went to the deceased's house and on opening the door, he found him (Noah Serwada) dead. His motorcycle, Suzuki Registration No. UDE 819, an electronic inverter and Lasonic radio were also missing.

Being the last person that was seen with the deceased, the appellant was traced and arrested by the Police. In a charge and caution statement, he admitted to killing the deceased and stealing his property. The body of Noah Serwada was examined and was found to have deep cut wounds on the head and face. It was also found that he died of internal and external haemorrhage from the wounds. The appellant was also examined and his mental status was found to be normal. He was indicted and convicted on his own plea of guilty and sentenced as it is stated above. He now appeals, with leave of this court, against sentence only on the following ground:

1. The learned trial judge erred in law and fact when he dispensed a harsh and excessive sentence to the appellant of 20 years' imprisonment, hence occasioning a miscarriage of justice.

He prayed that the appeal be allowed and the sentence of 20 years be reduced. The respondent opposed the appeal.

Representation

At the hearing of the appeal on 5th September 2022, the appellant was represented by learned counsel, Mr Chan Geoffrey Masereka, on Sate Brief. Ms Angutoko Immaculate, Chief State Attorney and Ms Prisca Boonabana, State Attorney from the Office of the Director of Public Prosecutions, represented the respondent.

Counsel for both parties filed written arguments before the hearing of the appeal as directed by court. They each prayed that these arguments be adopted by court as their submissions in the appeal and their prayers were granted. This appeal was accordingly disposed of on the basis of written submissions only.

Submissions of Counsel

In his submissions that were filed in court on 19th August 2022, Mr Masereka referred to section 34 (1) of the Criminal Procedure Code Act and submitted that it empowers this court to reduce a sentence imposed on a convict. He referred us to the decision of the Supreme Court in **Rwabugade Moses v Uganda, Criminal Appeal No. 24 of 2014** and pointed out that the appellant's sentence for murder in that case was reduced from 23 years to 21 years' imprisonment. He submitted that this was because the appellant had mitigating factors in his favour which the court had not considered. He asked us to consider the mitigating factors that were advanced in favour of the appellant, at page 17 of the record of appeal, which the trial judge did not do but instead stated that the appellant was a habitual offender. He further asserted that the trial judge was vindictive when she stated that people like the convict should not be tolerated in society, which he opined, showed that she was *'hell bent'* on passing a harsh sentence because she had already made up her mind that the appellant should not be tolerated in society.

Counsel further submitted that the trial judge went on to state that the convict should be put away *"for a very long time."* That this went to show that despite the mitigating factors, which should have substantially reduced the sentence, the trial judge instead passed a

sentence that was manifestly harsh and excessive in the circumstances. He prayed that this court considers the mitigating factors and hands the appellant a more lenient sentence.

In reply, Ms Angutoko submitted that it is a settled principle that sentence is within the discretion of the trial court. She relied on the decisions in **Blasio Sekawoya, Supreme Court Criminal Appeal No. 107 of 2007** and **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001** to support her submission. Further, that the trial court will only interfere with the sentence imposed by the trial court if it is evident that the lower court acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly harsh and excessive, or so low as to amount to a miscarriage of justice.

With regard to the contention that the trial judge did not pay much attention to the mitigating factors, she submitted that at page 18 of the record of appeal it was evident that the trial judge considered both the mitigating and aggravating factors. Further, that the trial judge took into account the period spent on remand when she stated that it would be deducted from the final sentence, but she did not do so. She referred to the decision of the Supreme Court in **Kyalimpa v Uganda** (supra) for the proposition that sentence is a matter in the discretion of the trial judge and reiterated the circumstances under which the appellate court may interfere with it.

Counsel for the respondent emphasised that the trial judge took into account the period that the appellant spent on remand, though she did not arithmetically deduct it from her final sentence. She relied on the decision of the Supreme Court in **Nashimolo Paul Kibolo v**

Uganda, Criminal Appeal No 46 of 2017, where it was held that since the decision in the often cited case of **Rwabugande** (supra) was delivered on 3rd March 2017, it would not apply to the decision in this case which was handed down before that date. She asserted that as it was held in **Kizito Senkula v Uganda, Supreme Court Criminal Appeal No, 24 of 2011,** at the time that the sentence was imposed *"taking into account"* within the meaning of Article 23 (8) of the Constitution did not mean an arithmetical exercise. That the trial judge took the period of remand into account and as a result, the sentence that she imposed on the appellant was legal.

Counsel went on to submit that in the unlikely event that the court finds that the period spent on remand was not taken into consideration by deducting it from the final sentence, the sentence that was imposed was still appropriate in the circumstances of the case; it was within the range of sentences meted out by this court for similar offences.

Counsel for the respondent went further to refer us to the decision of the Supreme Court in **Omongole Peter v Uganda, Criminal Appeal No. 34 of 2017**, where the court while confirming a sentence of 35 years' imprisonment found that the trial judge considered the mitigating and aggravating factors. She pointed out that the court held that at that level, it would not reconsider these factors because they were considered by the trial court. The court then found that the sentence of 32 years' imprisonment was legal and not so high as to amount to an injustice justifying interference.

Counsel also referred us to the decision in **Kato Kajubi Godfrey v Uganda, Supreme Court Criminal Appeal No. 173 of 2012,** where

a sentence of life imprisonment for murder was upheld by the Supreme Court. She pointed out that the court observed that the right to a fair hearing should not only apply to an accused person in sentencing but also to the victims of the crime and the public interest. That the Justices of the Supreme Court also found that due to the gruesome, horrendous, callous and unjustifiable killing of an innocent and defenceless 12 years old child by decapitation and cutting off his private parts, it was unreasonable for anyone to contend that a sentence of life imprisonment was either harsh or disproportionate. She went on to draw the attention of court to the decision in **Sebuliba Siraji v Uganda, Criminal Appeal No. 319 of 2009,** where the appellant who pleaded guilty to killing the victim by cutting him on the head, neck and hand, was sentenced to life imprisonment by the trial court and this court upheld the sentence. She prayed that this court upholds the sentence of 23 years' imprisonment that was imposed by the trial court; and that in the event that it does not, the court does deduct the period of 3 years that was spent on remand from the same.

Resolution of the appeal

The duty of this court as a first appellate court is set out in rule 30 (1) of the Court of Appeal Rules, SI 13-10. It is to reappraise the whole of the evidence on the record of the trial court and come to its own findings, both on the facts and the law. We have therefore carefully considered the contents of the record of appeal that was set before us and shall be guided by the dictates of rule 30 (1) of the Rules of this Court in the resolution of this appeal.

We have carefully considered the submissions of counsel for both parties and the authorities that they cited. We accept the submissions of counsel for both parties that the time honoured principles as to when the appellate court may interfere with the sentencing discretion of the trial court were restated in **Kiwalabye Bernard v Uganda** (supra).

We observed that the appellant's complaints in this appeal were threefold: i) that the trial judge did not consider the mitigating factors that were raised for the appellant; ii) that the trial judge omitted to deduct the period that the appellant spent on remand from the sentences she imposed on both counts against him, as she stated in the sentencing ruling, and iii) that as a result the sentence of 20 years' imprisonment was harsh and excessive and it occasioned a miscarriage of justice. We shall address the three issues in the same order.

With regard to the complaint that the trial judge did not seriously consider the mitigating factors, section 108 of the Trial on Indictments Act provides as follows:

> **108. Mitigation of penalties.**
>
> **(1) A person liable to imprisonment for life or any other person may be sentenced for any shorter term.**
>
> **(2) A person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment.**

The Supreme Court in **Susan Kigula & Others v Uganda, Constitutional Appeal No 1 of 2014,** held that the death sentence is no longer a mandatory sentence for offences specified in the Penal Code Act, including murder. It is therefore our view that section 108

of the TIA now also applies to the death sentence in that a trial court sentencing a convict for murder may mitigate the penalty of death and impose a lesser sentence. However, from reading the provision, there appears to be no legal obligation upon the court to mitigate sentence; it is at the discretion of the court to consider these factors as it was held by the Supreme Court in the often cited case of **Rwabugande** (supra). The Supreme Court in that case distinguished the remand period from other factors developed under common law such as age of the convict, the fact that the convict is a first time offender, remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together.

We note that taking these other mitigating factors into account is a practice that appears to have ceased to be discretionary for it had been carried on by the courts for a long time. It seems it is for that reason that it was included in the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013 where, among others, paragraph14 (5) refers to the 2nd Schedule which lists the factors that courts are required to take into consideration while sentencing. Paragraph 21 of the Guidelines then specifically provides for factors mitigating a sentence of death as follows:

> **In considering imposing a sentence of death, the court shall take into account the following mitigating factors—**
>
> **(a) lack of premeditation;**
>
> **(b) a subordinate or lesser role in a group or gang involved in the commission of the offence;**
>
> **(c) mental disorder or disability linked to the commission of the offence;**
>
> **(d) some element of self-defense;**

(e) plea of guilt;

(f) the fact that the offender is a first offender with no previous conviction or no relevant or recent conviction;

(g) the fact that there was a single or isolated act or omission occasioning fatal injury;

(h) injury less serious in the context of the offence;

(i) remorsefulness of the offender;

(j) some element of provocation;

(k) whether the offender pleaded guilty;

(l) advanced or youthful age of the offender;

(m) family responsibilities;

(n) some element of intoxication; or

(o) any other factor the court considers relevant.

We observed that in her ruling on sentence, at page 18 of the record of appeal, the trial judge observed and ruled, in part, as follows:

> *"The convict committed two grave offences, that is, murder and aggravated robbery. The convict is a habitual offender. There was an element of intoxication which is an aggravating factor for Count II (aggravated robbery). The convict has a previous criminal record much as the previous conviction is not murder or aggravating (sic) robbery. He used a dangerous weapon that is a hammer to kill the deceased. The state has proposed 40 years.* ***I have also considered the mitigating factors. The convict is of youthful age and was 24 years old at the time of the offence. He has 3 children and wife to look after. There was an element of intoxication which mitigates the offence of murder. The convict readily pleaded guilty and has saved Court's time and resources.*** *The Defence has prayed for 18 years. However, people like the convict should not be tolerated in society. ..."*
>
> ***{Emphasis supplied}***

It is clear to us from her ruling that the trial judge honoured the rule that we reproduced above and considered all the mitigating factors

that were relevant to the case, as they are stated by the appellant's advocate. She therefore cannot be faulted on that account.

In addition, much as the trial judge *did* state, as counsel for the appellant pointed out, that the appellant should be kept away from society for "a very long time," the comment was only relative considering that the maximum sentence for the offence of murder is still death. Therefore, we do not agree that the statement reflected the intention to impose a sentence that is manifestly harsh or excessive in the circumstances.

Neither do we agree with counsel for the appellant that the trial judge was vindictive in a manner that was personal in respect of the appellant. We express this opinion because the word *"vindictive"* according to the Cambridge Dictionary,[1] means *"having or showing a wish to harm someone because you think they wish to harm someone or because you think they harmed you, or being unwilling to forgive."* The trial judge, certainly, was not handing down a sentence to the appellant on her own behalf; she did so as her duty because she took an oath to carry out such duties on coming into office as a judge.

On the contrary, we find that the trial judge *did* state at the end of her sentencing ruling that though she could not be lenient in the circumstances of the case, she would exercise mercy and spare the appellant the death penalty and instead put him away for *"for a very long time."* We find no fault at all on the part of the trial judge in that regard for she clearly stated that her intention was to ensure that

[1] https://dictionary.cambridge.org/dictionary/english/vindictive

the appellant is deterred from committing further offences. We also observed that deterrence is one of the principles that the courts must follow in sentencing, according to paragraph 5 (2) of the Sentencing Guidelines for the Courts of Judicature.

With regard to the submission that this court should follow the principles that were set out in **Rwabugande** (supra) and reduce the appellant's sentence of 20 years' imprisonment to a lesser sentence, we note that the appellant was sentenced to 23 years' imprisonment for each of the counts in respect of which he was convicted, not 20 years as stated in the memorandum of appeal.

In the case of **Rwabugande** (supra) the appellant's complaint was that the learned justices of this court erred in law when they confirmed the sentence of imprisonment of 35 years which was imposed by the trial judge, and which sentence was illegal. This alternative ground of appeal in that case was based on the complaint that neither the trial court nor this court considered the period that the appellant spent on remand before he was convicted and sentenced, contrary to Article 23 (8) of the Constitution. Finding for the appellant in that case, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with Article 23 (8) of the Constitution. Further, that because this court failed to take into account the period spent on remand, it upheld an illegal sentence. The court went on to hold that:

> *"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or*

subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. ***Article 23 (8) of the Constitution (supra)*** *makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision."*

This court and other sentencing courts are bound to follow the decision above by the doctrine of precedent. It was further emphasised by the Supreme Court in **Abelle Asuman v. Uganda, Criminal Appeal No. 66 of 2016,** that this court and other sentencing courts must not only follow the decision in **Rwabugande** (supra), but they must also arithmetically deduct the period spent on remand from the final sentence imposed.

As to whether we must now deduct the period of 3 years that the appellant spent on remand from his sentence, as well as reduce the sentence that was imposed upon him, we must first consider what the effect of the trial judges' sentence was before we come to our own decision. At page 19 of the record of appeal, the trial judge noted thus:

"In the circumstances, I hereby sentence you Kalangwa Henry as follows:

Court I - 23 years

Count II - 23 years

Both sentences to run concurrently. The period spent on remand will be deducted from each sentence."

We note that the sentences were imposed on the appellant on 1st October 2013. The 1st day of October was 5 days before the day of the month on which the offence was committed, the 6th March 2010. The appellant had therefore been on remand for a period of 3 years.

However, because he was sentenced before the decision in the case of **Rwabugande** (supra), the trial judge could not follow the dictum in that case as a precedent, because it had not yet been delivered by the Supreme Court. We therefore cannot declare that the sentence imposed on the appellant was illegal. All that we can find is that the trial judge on her own volition chose to comply with the requirements of Article 23 (8) of the Constitution by crediting the period that the appellant had spent on remand to him in an arithmetical manner. However, she forgot to deduct the period of 3 years, so that the resultant sentence on the record was 23 years' imprisonment on each of the counts in respect of which he was convicted.

We are of the view that this is the kind of error that was envisaged by section 139 of the TIA which provides as follows:

139. Reversibility or alteration of finding, sentence or order by reason of error, etc.

(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or

during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

We note that the error made by the trial judge could have been drawn to her attention at the time of sentencing by counsel for the appellant, but he did not do so. Had he done so, perhaps the trial judge would have corrected the error. The resultant record therefore may be confusing to the prison authorities and to the parties.

To make the situation worse, it is not clear to us what was stated in the Commitment Warrant that was sent to the Prison. Section 106 TIA requires that where a sentence of imprisonment is imposed, a warrant under the hand of the judge by whom any person is sentenced ordering that the sentence shall be carried out in any prison within Uganda, shall be issued by the judge. We found it strange that contrary to section 106 of the TIA, there seems to have been no warrant issued. If at all it was, it was not included in the record placed before us as is usually the practice on appeal.

However, we observed that the period of remand seems to have been deducted from the sentences because in his Notice of Appeal, at page 1 of the record of proceedings, it was stated that the sentence that was imposed on the appellant was 20 years' imprisonment. He therefore proposed to appeal against that sentence.

In view of the law and the facts on the record, it is our opinion that there is no need to set the sentence aside for failure to comply with

the requirements of Article 23(8) of the Constitution. The trial judge complied with Article 23 (8) by deducting the period of 3 years that the appellant spent on remand before he was convicted though she did not immediately record the resultant sentence but she did so in the commitment warrant. We therefore find that the appellant was sentenced to 20 years' imprisonment on the counts of murder and aggravated robbery, respectively, both sentences to run concurrently.

The final issue that was raised by the appellant was that the sentences of 20 years' imprisonment were harsh and excessive in the circumstances of the case. Both counsel presented authorities for and against the sentences and we have considered them.

We take cognisance of the principles of consistency and proportionality which all sentencing courts are bound to observe, as it is set out in paragraph 6 (c) of the Sentencing Guidelines for the Courts of Judicature. The Supreme Court explored the concept in some detail in **Aharikundira Yustina v Uganda, Criminal Appeal No. 27 Of 2017**. The court relied on a passage from Ashworth A. in his article, *Techniques of Guidance on Sentencing* [1984] Crim LR at 521, where he stated thus:

> *"... judgments of appellate courts are often substantial and consider sentencing for a whole category of similar offences including the particular offence committed by the accused, it sets down factors which are appropriately considered to be aggravating or mitigating the seriousness of the offence and state the proper range of sentences for the relevant offence. It is therefore the appellate court to consider interrelationships of sentences between the different forms of an offence. Secondly, instead of having to deal with a series of potentially conflicting appellate decisions, sentences in the lower*

courts are given a specific frame work to operate within."

The Supreme Court agreed with this position and pointed out that its duty while dealing with appeals regarding sentencing is to ensure consistency with cases that have similar facts. Further, that consistency is a vital principle of a sentencing regime and is deeply rooted in the rule of law which requires that laws be applied with equality and without unjustifiable differentiation. We respectfully agree with this guidance and shall apply it to the grievance in this case.

We have accordingly considered the authorities that were cited by counsel for both parties for our consideration but we do not find them useful for a multiple offender such as the appellant was. Therefore, we considered others that were not cited but are more relevant to the decision that we have to make.

In **Ntambi Robert v Uganda, Court of Appeal Criminal Appeal No 334 of 2019**, the appellant was convicted for the offences of murder and aggravated robbery on his own plea of guilty. The trial court sentenced him to 20 years and 18 years' imprisonment for murder and aggravated robbery, respectively, to run concurrently. On appeal to this court, it was observed that considering the mitigating, aggravating factors and the precedents set by this court and the Supreme Court, the sentences were neither manifestly harsh nor excessive. Further that according to the sentencing range laid down in the Third Schedule of the Sentencing Guidelines, sentences for both offences range from 35 years' imprisonment to the death sentence, after considering the mitigating and aggravating factors.

The court thus found no reason to interfere with the sentences imposed by the trial court and they were upheld.

In **Lusamba Alex v Uganda; Court of Appeal Criminal Appeals No. 74 and 159 of 2012** (delivered on 14th March 2022) the appellant was convicted of the offence of murder on his own plea of guilty and sentenced to 25 years' imprisonment. On appeal, this court found that the sentence of 25 years' imprisonment was within the range of similar offences and fell squarely within the principle of uniformity and consistency. It was neither harsh nor excessive so the court upheld it.

In tom **Sande Sazi alias Hussein Sadam v Uganda; Court of Appeal Criminal Appeal No. 127 of 2009**, delivered on 24th March 2014, the appellant was convicted of the offence of murder on his own plea of guilty. He was sentenced to 25 years' imprisonment but he appealed on the ground that the trial judge did not deduct the period that he had spent on remand, as it is required by law, on sentencing.

The court found that it was not true that the trial judge just alluded to the period spent on remand and therefore did not consider it while passing sentence; that taking into account at the time did not mean subtracting the period spent on remand. The court thus upheld the sentence of 18 years' imprisonment. We find that this is what happened in the case now before us. The trial judge showed that she was alive to the fact that the appellant spent time on remand before his trial was completed. She actually deducted that period from the sentence that she imposed because the appellant's appeal was to challenge the sentence of 20 years' imprisonment; not the 23 years first stated by the trial judge during the sentencing process.

In **Oyita Sam v Uganda, Court of Appeal Criminal Appeal No 3-7 of 2010,** this court substituted the sentence of death imposed by the trial judge with a sentence of 25 years' imprisonment, where the appellant pled guilty to the offence of murder. This court found the sentence of death to be harsh and excessive in the circumstances of the case considering that the appellant pled guilty and was a first time offender.

In the appeal now before us, the appellant pled guilty and was a first time offender. In view of the circumstances of the case and in the light of the authorities that we have reviewed, the sentences of 20 years' imprisonment imposed by the trial judge for the offences of murder and aggravated robbery, moreover to run concurrently, was neither harsh nor excessive . We therefore uphold the sentences.

In conclusion, this appeal has substantially failed and it is dismissed. The appellant shall continue to serve the sentence of 20 years' imprisonment on each of the counts for which he was convicted.

It is so ordered.

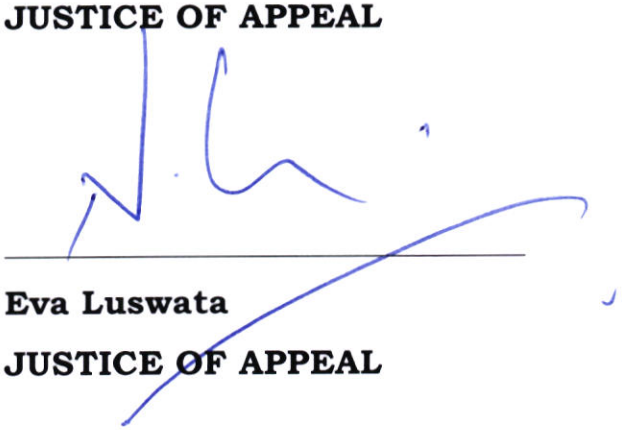
Dated at Fort Portal this 12th day of Dec 2022

Richard Buteera

DEPUTY CHIEF JUSTICE

Irene Mulyagonja

JUSTICE OF APPEAL



Eva Luswata

JUSTICE OF APPEAL