THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata JJA.

CRIMINAL APPEAL NO 0532 OF 2013

BETWEEN

KWALIJUKA ALEX :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Batema N.D.A, J. delivered on 5th November, 2013 in Criminal Session Case No. 0107 of 2013)

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted for the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, Cap 120. He was convicted on his own plea of guilty and sentenced to 25 years' imprisonment. He now appeals against the sentence.

Background

The facts that were admitted by the appellant were that on the 19th September 2012, at Nyabwina in Kabarole District, the appellant invaded Rose Nyangoma's home. He found her having supper with her children. He demanded that she hands over money and other valuable items. He had a *panga* and threatened her with it, but

thereafter cut her on the head. She then gave in and handed over UGX 300,000 to the appellant. The appellant further stole flour and sugar both valued at UGX 700,000.

The victim raised an alarm but the appellant ran away before he could be restrained. He was later arrested, and indicted for the offence of aggravated robbery. He was convicted and sentenced on his own plea of guilty. He was sentenced as stated above. He now, with leave of this court under section 132 (1) (b) of the Trial on Indictments Act, appeals against the sentence only in a single ground of appeal as follows:

> The learned trial judge erred in law and fact when he passed a very harsh and excessive sentence of 25 years in the circumstances.

Representation

At the hearing of the appeal, on 6th September 2022, Mr. Muhumuza Samuel represented the appellant on State Brief, while Mr. Kyomuhendo Joseph, Chief State Attorney from the Office of the Director Public Prosecutions, represented the respondent.

The parties filed written submissions before the hearing of the appeal as directed by court. Counsel for both parties applied that the court adopts their written arguments as their final submissions in the appeal and the prayers were granted. This appeal has thus been disposed of on the basis of written submissions only.

Consideration of the Appeal

The duty of this court as a first appellate court is stated in rule 30(1) of the Rules of this Court (S1 10-13). It is to reappraise the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious that it did not observe the witnesses testify in cases where they did so.

We have therefore considered the whole of the record that was set before us, the submissions of Counsel and the authorities cited and those not cited that are relevant to the appeal in order to reach our decision in the appeal.

Submissions of Counsel

In his written submissions for the appellant, Mr. Muhumuza stated that the appellant's only issue was with the sentence which was imposed upon him that was harsh and excessive in circumstances where he was convicted on his own plea of guilty. He submitted that during the mitigation statement, it was stated that the appellant was a first time offender who had prior to his trial spent one year on remand. Further that he was remorseful, had readily pleaded guilty, was still young and could reform and be a useful person to his country. He prayed that his sentence be reduced to 10 years' imprisonment.

Counsel further submitted that the trial judge did not consider any of the mitigating factors that were advanced in favour of the appellant. That he simply sentenced the appellant to 25 years imprisonment less the period spent on remand, a sentence he opined was irregular.

Counsel relied on the decision of this court in **Guloba Rogers v Uganda, Criminal Appeal No. 57 of 2013,** where a sentence of 47 years' imprisonment was reduced to 35 years, less the period spent on remand, because the trial judge did not consider the mitigating factors. Counsel submitted that in the instant case, the appellant did not waste the court's time and resources by pleading guilty unlike the convict in **Guloba's** case (supra) where there was a lengthy trial. He also asserted that by pleading guilty, the appellant was remorseful and ready to reform, so the trial judge ought to have passed a lenient sentence.

Counsel further relied on the decision of this court in **Musimenta Amon v Uganda, Criminal Appeal No. 22 of 2017,** where a sentence of 25 years' imprisonment for the offence of aggravated robbery was reduced to 20 years after considering the aggravating and mitigating factors. He prayed that a sentence of 10 years' imprisonment less the period spent on remand be imposed on the appellant.

In reply, Mr. Kyomuhendo Joseph, counsel for the respondent, reiterated the duty of this court as it is laid down in rule 30 (1) of the Judicature (Court of Appeal Rules), **Kifamunte Henry v Uganda SCCA No. 10 of 1997** and **Abdallah Nabulere and 2 others v Uganda Criminal Appeal No.9 of 1978.** He also referred us to the decision in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001** for the circumstances under which an appellate court may interfere with the sentence imposed by a trial court.

He went on to submit that the sentence of 25 years' imprisonment was neither harsh nor excessive and that the trial judge had considered the circumstances under which the offence was committed and weighed them against the appellant's mitigating factors. Further, that the appellant had not done much to mitigate his sentence as he only told the court that he was remorseful since he pleaded guilty. It was counsel's contention that the appellant did not even tell the court how old he was at the time of sentencing but merely mentioned that he was still a young man.

He further emphasised that the offence for which the Appellant was convicted is very serious and attracts a maximum sentence of death. He referred us to the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions 2013 where the parameters for sentencing have been laid down to assit sentencing courts reach appropriate sentences.

He explained that the trial judge was driven by the manner in which the offence was committed because the violence outweighed the mitigating factors. Counsel noted that whereas the appellant pleaded guilty and saved court's time, the offence he committed was serious as it could have led to the death of the victim. Further, that a plea of guilty does not always lead to a lenient sentence as the courts will still consider the circumstances under which the offence was committed. He cited the decision of this court in **Bacwa Benon v Uganda, CACA No. 869 of 2014,** where a sentence of life imprisonment was upheld even when the appellant pleaded guilty. He further referred to **Guloba Rogers v Uganda, Criminal Appeal No. 57 of 2013**, **Abasa Johnson & Anor v Uganda, Criminal**

Appeal No.33 of 2010 and **Ojangole Peter v Uganda, Criminal Appeal No 34 of 2017** where sentences of 33 years' imprisonment were confirmed or imposed for the offence of aggravated robbery. With this, he noted that the sentence in the instant matter was below the sentencing range for the offence of aggravated robbery and prayed that this court maintains it, less the period spent on remand.

With regard to the legality of the sentence of 25 years' imprisonment, counsel for the respondent submitted that though the trial judge stated in the warrant of commitment that the appellant should serve his sentence less the period spent on remand, he did not deduct it from the sentence imposed. He prayed that this court upholds the sentence imposed by the trial judge but deducts the one year that he spent on remand before he was convicted.

Determination

It is a well settled principle that this court is not to interfere with a sentence imposed by a trial court exercising its discretion unless the sentence is illegal or this court is convinced that the trial judge did not consider an important matter or circumstance which ought to be considered when passing sentence. Further, that the court may interfere with such sentence if it is shown that it was manifestly harsh or excessive or so low as to amount to an injustice. **[See Livingstone Kakooza v Uganda, SCCA No.17 of 1993]**

From his submissions, it is evident the appellant's sole complaint in this appeal is that the trial judge omitted to take the mitigating factors that were advanced in favour of the appellant into account

before sentencing him. That because he did not do so, the resultant sentence was harsh and manifestly excessive in the circumstances.

In her address to the court to mitigate sentence at the trial, counsel for the appellant stated that the convict was remorseful, he readily pleaded guilty and was still young. That upon reforming he would be of use to the country. That it would be expensive for the state to keep him in custody for long. He prayed that the trial judge imposes a sentence of 10 years' imprisonment. On the other hand, counsel for the prosecution stated that the convict was on remand for one year, the crime was extremely violent and premeditated. That as a result he deserved a severe sentence.

While handing down the sentence on 5th November, 2013 the trial judge observed and held thus:

> *"The attack upon the victim and her family was so violent and traumatizing. The victim (sic) needs time to be rehabilitated. The maximum sentence is death in this case. However, I sentence him to 25 years' imprisonment. He will serve less the period spent on remand at Mubuku prison farm." (sic)*

The power to hand down a lesser sentence than that which is prescribed by law for offences triable under the TIA flows from section 108 of the same Act. It provides for the mitigation of penalties and it is stated therein that a person liable to imprisonment for life or any other person may be sentenced for a shorter term. Subsection (2) thereof provides that a person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment. The provision does not state the factors that may result in a lower sentence being imposed, meaning that

according to the law, the discretion as to sentence is left to the court.

The general principles for sentencing were summarised in the Sentencing Guidelines of 2013. Paragraph 6 thereof states that when sentencing an offender, the court shall take into account:

> **(a) the gravity of the offence, including the degree of culpability of the offender;**
> **(b) the nature of the offence;**
> **(c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;**
> **(d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement;**
> **(e) the offender's personal, family, community, or cultural background;**
> **(f) any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case;**
> **(g) the circumstances prevailing at the time the offence was committed up to the time of sentencing;**
> **(h) any previous convictions of the offender; or**
> **(i) any other circumstances court considers relevant.**

We note that the Supreme Court in **Rwabugande Moses v Uganda, Criminal Appeal No 25 of 2014** distinguished between the mandatory considerations that a court should take into account during sentencing and those that are discretionary when it held that:

> ***"Article 23 (8) of the Constitution (supra)*** *makes it mandatory and not discretional (sic) 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 (sic) 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."*

However, in its later decision in **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 27 of 2015 [2018] UGSC 49,** delivered on 3rd December 2018, the Supreme Court found fault with this court and the trial court for failing to take into account the mitigating factors that were advanced in favour of the appellant at her trial. The court found and held thus:

"The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.

The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that the Court of Appeal does not have to handle mitigation and that (the) mitigation process is done only in the trial court as was done in the instant case.

In the instant case, since the trial judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the Court of Appeal to weigh the raised factors (sic).

...

From the foregoing, we find that the Court of Appeal erred in law when it failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as (a) second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See ***Kyalimpa Versus Uganda (supra), Kiwalabye Benard Vs Ug*** *(supra).*

This renders taking the mitigating factors advanced for the appellant into account far from discretionary; it is prudent to take all of them

into account before sentencing, as the Supreme Court did in the case of **Aharikundira** (supra).

We also observed that the Second Schedule to the Sentencing Guidelines for the Courts of Judicature, 2013, lays down a list of 23 factors that a sentencing court must take into account before passing sentence. They include the gravity and nature of the offence, remorsefulness of the offender, age, health, gender, plea of guilty, and any other factor that the court may consider relevant. The Guidelines were issued on 26th April 2013.

We therefore find that the trial judge erred when he took into account only the aggravating factors and failed to consider the mitigating factors that were advanced for the appellant before passing sentence on him.

Counsel for the appellant referred us to decisions of this court in which sentences imposed by the trial court were reduced after taking the mitigating factors into account. We are persuaded by the decisions that he commended to us on that point. But before we conclude, we note that counsel prayed that we do consider the period that the appellant spent on remand before we come to an appropriate sentence.

It is clear to us that counsel for the appellant did not complain about the legality of the sentence that was imposed upon the appellant. However, we observed that the sentence that was imposed on him was not clearly stated by the trial judge. At page 7 of the record of appeal, the trial judge's last words in the sentencing ruling were that,

"... I sentence him to 25 years, imprisonment. He will serve less the period spent on remand at Mubuku Prison Farm."

The trial judge did not refer to the period that the appellant spent on remand anywhere in his ruling. Neither did he refer to it in the Warrant of Commitment. The first paragraph of the Warrant was as follows:

> "Whereas on the 5th day of November, 2013 **KWALIJUKA ALEX alias AHEEBWA** the Prisoner in Criminal Session Case No. 0107 of 2013 was convicted before me **HON. MR JUSTICE BATEMA N.D.A** of the offence of **AGG. ROBBERY** Contrary to Sections 129 (3) and (4) (a) of the Penal Code Act and is sentenced to **25 (TWENTY-FIVE) YEARS' IMPRISONMENT HE WILL SERVE LESS THE PERIOD SPENT ON REMAND." (sic)**

The period of the appellant's imprisonment was therefore not clear in the ruling; neither was it clarified in the Warrant of Commitment. This was contrary to the principle that was stated in **Kibaruma John v Uganda, Criminal Appeal No.225 of 2010; [2016] UGCA 52**, that:

> *"A sentence of court should always be clear and unambiguous. An accused person is entitled to know with certainty the punishment that court has imposed upon him or her."*

The Supreme Court affirmed the decision of this court in **Umar Sebidde v Uganda, Supreme Court Criminal Appeal No 23 of 2002, [2004] UGSC 84,** where it was stated that it is the duty of the court to pass a *"definite and clearly ascertainable sentence."*

With regard to the principles to be observed if the sentence imposed by trial court is to be interfered with, in **Kyalimpa Edward v Uganda, Criminal Appeal No. 10 of 1995**, the Supreme Court

referred to **R v De Havilland (1983) 5 Cr. App. R(s) 109** and held that:

> *"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 trial 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:* ***Ogalo s/o Owora v. R (1954) 21 E.A.C.A. 270*** *and* ***R v. Mohammed Jamal (1948) 15 E.A.C.A. 126****"*

The same principles were given a broader meaning in **Kamya Johnson v Uganda; SCCA No. 16 of 2000**, where the Supreme Court held that:

> *"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently."*

In the appeal now before us, we have established that not only did the trial judge omit to consider the mitigating factors raised in favour of the appellant but he also handed down a sentence that was unclear or ambiguous. For those reasons, we hereby set aside the sentence that was imposed by the trial judge.

The appellant further complained that the sentence of 25 years' imprisonment that was imposed upon him was manifestly excessive and harsh in the circumstances of the case. Counsel for the appellant referred us to two decisions of this court in which sentences that had been imposed were reduced after considering the mitigating factors advanced for the appellant.

We are also mindful of the sentencing principle in guideline 6 (c) of the Sentencing Guidelines for the Courts of Judicature that in the sentencing process, there is need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances. The Supreme Court emphasized this in **Aharikundira Yustina v Uganda** (supra) where it was observed that:

> *"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."*

Since it is our duty to ensure consistency in sentencing, we will now proceed to consider sentences for similar offences that have been handed down by this court and the Supreme Court. We will do so before we exercise our powers under section 11 of the Judicature Act to impose a fresh sentence upon the appellant.

In **Ojangole Peter v Uganda SCCA 34 of 2017**, the Supreme Court found a sentence of 32 years' imprisonment for the offence of aggravated robbery to be legal and appropriate.

In the case of **Basikule Abdu v Uganda, CACA No 516 of 2017**, this court upheld a sentence of 20 years' imprisonment for the offence of aggravated robbery.

In **Lule Akim v Uganda, Criminal Appeal No. 274 of 2015,** this court upheld a sentence of 20 years' imprisonment for aggravated robbery that had been imposed by the trial court, which they found to be neither harsh nor excessive.

In **Rutabingwa James v Uganda Court of Appeal Criminal Appeal No. 57 of 2011**, the court confirmed a sentence of 18 years' imprisonment for aggravated robbery. While confirming that sentence, the Court noted that the Appellant in that case had spent close to 5 years on remand.

In the case of **Twesigye Joseph v Uganda Criminal Appeal No. 0059 of 2014**, this court upheld a sentence of 20 years' imprisonment for the offence of aggravated robbery after a deduction of 5 years that had been spent on remand.

We note that the maximum sentence for the offence of aggravated robbery is death. However, the appellant was a first time offender who pleaded guilty and did not waste the time and resources of the court. We have also taken it into consideration that he was only 18 years old at the time he committed the offence and therefore, he is capable of reforming. Further that counsel for the appellant prayed that we sentence him to a term of 10 years' imprisonment because he readily pleaded guilty and was still young and a first time offender.

However, the fact that he pleaded guilty to the offence does not mean that this court will not consider the aggravating circumstances of the offence. We observed from the facts admitted by the appellant that the attack against the victim was so ruthless and could have resulted in her death or the death of her child. The sentence that we impose must therefore be a deterrent one to send a clear message to would be offenders.

In the circumstances of this case, we are of the view that a sentence of 20 years' imprisonment would meet the ends of justice. We now

deduct the period of one (1) year that the appellant spent on remand before his trial was completed and sentence him to serve a term of 19 years' imprisonment. The sentence shall run from the 5th November 2013, the date of his conviction.

We so order.

Dated at Fort Portal this 23rd day of Decembe 2022.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva K. Luswata
JUSTICE OF APPEAL