THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata JJA.

CRIMINAL APPEAL NO. 534 OF 2014

5

1. BIRUNGI BEN

2. KATUNGI FARUKU:: APPELLANTS

AND

UGANDA :: RESPONDENT

10 ***(Appeal from the decision of Batema, J. dated 1st October 2013 in Fort Portal High Court Criminal Session Case No. 294 of 2013)***

JUDGMENT OF THE COURT

Introduction

15 This appeal arises from the decision of the High Court in which the appellants were indicted on four counts of aggravated robbery c/t sections 185 and 186 of the Penal Code Act. They were each convicted on their own plea of guilty and sentenced to 20 years' imprisonment on each count, all to be served concurrently.

20 **Background**

The facts that were admitted by the appellants were that on 18th November 2012, the appellants and others still at large who were in a gang, waylaid motor vehicle Registration No. UAR 577R. They had with them *pangas* and toy pistols. They stole money and other personal effects, including telephones

25 from Rwangoma Ignatius, Birungi Ruth, Mubangizi Paul and Businge Mbeingana; and at the time of the thefts, they threatened the victims that they would cut them with the *pangas* that they wielded. Further, none of the

stolen items were recovered on the arrest of the appellants, and their co-accused, Gumisiriza William (A3 at the trial).

The appellants pleaded guilty and were convicted on their own pleas and sentenced as stated above. They now appeal against the sentences only, with leave of court under section 132 (1) (b) of the Trial on Indictments Act (TIA), on one ground of appeal as follows:

> The learned trial judge erred in law in sentencing the appellants to 20 years' imprisonment without due consideration of both the period spent on remand and mitigating factors, which was manifestly harsh, illegal and excessive, thereby occasioning a miscarriage of justice.

The appellants prayed that their appeal be allowed and the sentences of 20 years' imprisonment be substituted with lesser sentences. The respondent opposed the appeal.

Representation

At the hearing of the appeal, the appellants were represented by learned counsel, Mr Chan Geoffrey Masereka on State Brief. The respondent was represented by Ms Fatinah Nakafero, holding the brief for Mr Joseph Kyomuhendo, Chief State Attorney, from the Office of the Director of Public Prosecutions.

Counsel for both parties filed written arguments before the hearing, as directed by court. They each applied to have them adopted as their submissions in the appeal and their prayers were granted. This appeal was thus disposed of on the basis of written submissions only.

Submissions of counsel

In his submissions, Mr Masereka first drew our attention to the provisions of section 34 (1) of the Criminal Procedure Code (CPC) which provides that this

court has the power to reduce the sentence imposed by the trial court. He further submitted that section 11 of the Judicature Act vests the powers and authority of the trial court in this court to impose an appropriate sentence of its own. He went on to submit that in order for an appeal against sentence to succeed, it must be shown that the sentence that was imposed by the trial court was illegal, manifestly excessive or inadequate. He relied on **R v Mohamed Jamal (1948) 15 EACA 126** and **Jackson Zita v Uganda, SCCA No. 19 of 1995** (unreported) to support his submissions.

Mr Masereka went on to draw it to our attention that Article 23 (8) of the Constitution requires a sentencing court to take into account the period that the convict spent in lawful custody before his/her trial was completed. That because of this, the court should deduct the period spent on remand from the intended sentence. He referred us to the decision in **Tukamuhebwa David Junior & Another v Uganda, Supreme Court Criminal Appeal No. 59 of 2016**, in which the appellant had been convicted of the offences of aggravated robbery and rape and sentenced to 20 years and 10 years' imprisonment, respectively, to be served concurrently. He pointed out that the Supreme Court, having taken into account the period of 3 years and 7 months that the appellant spent on remand, reduced the term of 20 years to 16 years and 5 months' imprisonment.

Counsel also referred us to the provisions of paragraph 15(2) of the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013, which provides that the period spent on remand should be deducted from the sentence imposed by the trial court. He asserted that because the trial judge did not deduct the period spent on remand by the appellant, he imposed an illegal sentence. He referred us to the decision of the Supreme Court in **Rwabugande Moses v Uganda, SCCA No 25 of 2014** to support his submissions. He went on to submit that a material factor was overlooked and that as a result, this court should exercise its discretion to

interfere with the sentence imposed by the trial court and hand down a lesser sentence. He also referred to the decision in **Ederema Tomasi v Uganda, Court of Appeal Criminal Appeal No. 554 of 2014,** in which the sentence of 25 years' imprisonment was quashed for being harsh and excessive and substituted with one of 18 years, after taking the mitigating factors into account.

Counsel also referred us to the decision in **Adama Jino v Uganda, Court of Appeal Criminal Appeal No. 59 of 2006**, where this court set aside the sentence of death and substituted it with a sentence of 15 years' imprisonment, after taking into account the capacity of the convicts to reform. He then submitted that in the instant case, the 1st appellant was 32 years old at the time of sentencing and had spent one year in prison. He had during that time obtained a diploma in small scale business management from Makerere University Business School, Uganda Advanced Certificate of Education and Uganda Certificate of Education, among others, and was HIV positive. Further that the 2nd appellant was 25 years old, he readily pleaded guilty and was remorseful. That as a result, this court should consider all the mitigating factors and weigh them against the aggravating factors and impose lesser sentences on the appellants.

He prayed that this court allows the appeal, reduces the sentences that were imposed and substitutes them with lesser sentences.

In reply, Ms Nakafero for the respondent drew our attention to the decisions in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001** and **Kato Kajubi v Uganda, Supreme Court Criminal Appeal No. 20 of 2014,** for the principles upon which appellate courts may rely to interfere with sentences imposed by trial courts. She agreed with the submission that the sentencing court is required to take the period spent on remand into account under Article 23 (8) of the Constitution. She further

submitted that the sentencing regime at the time that the sentences in the instant case were passed required a judicial officer to consider the period spent on remand as it was held in the case of **Kizito Senkula v Uganda, Supreme Court Criminal Appeal No. 24 of 2001**. Further, that taking into account, as it was explained in **Senkula's** case did not require the court to carry out an arithmetical exercise. She added that the term of imprisonment should start on the day of conviction; it should not be backdated to the date when the convict was first admitted into custody.

Counsel went on to agree with the submission that the trial judge neither considered the period spent on remand nor deducted it from the 20 years' imprisonment that he imposed on the appellants. She thus agreed that the resultant sentences were illegal but could be cured by considering the remand period, as it was held in the case of **Kizito Senkula** (supra).

Counsel went on to submit that the decision in the case of **Rwabugande Moses** (supra) which requires sentencing courts to deduct the period spent in lawful custody from the sentence imposed was decided after the sentences in the instant case were imposed. And that as a result, the sentencing regime in **Rwabugande** (supra) cannot be applied retrospectively. She prayed that this court exercises its powers under section 11 of the Judicature Act, confirms the sentence of 20 years' imprisonment imposed on the appellants after taking into account the period that they spent on remand before their trial was completed.

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

We observed that the appellants' complaints in this appeal were threefold: i) that the sentence that was imposed contravened the provisions of Article 23 (8) of the Constitution; ii) that the trial judge did not consider all of the mitigating factors that were advanced for the appellants and as a result of these two omissions, the sentences were illegal; and iii) that the sentences of 20 years' imprisonment imposed on the appellants were manifestly excessive and harsh in the circumstances because they did not reflect parity or consistency with the sentencing levels for similar offences previously imposed by this court and the Supreme Court. We considered the three issues in that order.

With regard to compliance with Article 23 (8) of the Constitution, counsel for the respondent agreed with the submission that the trial judge did not take into account the period that the appellants had spent on remand prior to their conviction. We therefore need not consider that issue in detail. We find that the trial judge failed to take into account the period that the appellants spent in lawful custody before completion of their trial and therefore the sentences that he imposed on them were illegal.

The second issue was that the sentence was illegal because the trial judge did not take into consideration all the mitigating factors that were advanced in favour of the appellant. We observed that at page 10 of the record of appeal, before sentencing, counsel for the respondent stated that both appellants

were first time offenders; they pleaded guilty to an offence that carries the death penalty as the maximum punishment; both had spent one (1) year on remand; and each of them had no previous criminal record. Further that the 1st appellant was 32 years old while the 2nd appellant was 25 years old.

Counsel for the appellants on the other hand stated that the appellants prayed for leniency. They were first time offenders and were remorseful since they pleaded guilty. That they were young people and could still be rehabilitated. That the 1st appellant was HIV positive. Further, that the 2nd appellant was a student in secondary school and he prayed that he was incarcerated in a prison where he could continue his education and take his Ordinary Level Examinations.

The trial judge then recorded his sentence as follows:

> *"Court: Sentence*
> ***Count 1***
> *A2: Sentenced to 20 years' imprisonment.*
> *A4: Sentenced to 20 years' imprisonment.*
> ***Count 2***
> *A2 sentenced to 20 years' imprisonment.*
> *A4: sentenced to 20 years' imprisonment*
> ***Count 3***
> *A2: sentenced to 20 years' imprisonment.*
> *A4: sentenced to 20 years' imprisonment.*
> ***Count 4***
> *A2 sentenced to 20 years' imprisonment.*
> *A4 sentenced to 20 years' imprisonment.*
> *Signed: Judge*
>
> ***Orders***
>
> *Since accused are first offenders (sic) and have pleaded guilty and are remorseful they shall serve sentence concurrently at Luzira Upper Prison."*

There was no detailed sentencing ruling on the record. However, from this summary of sentences we note that the trial judge considered two of the mitigating factors that were advanced on behalf of the appellants, namely: that they were first time offenders and they pleaded guilty.

We note that section 86 of the TIA provides for the judgment in such trials. In subsection (4) thereof, the manner in which the sentence is to be recorded is provided for as follows:

> **(4) The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and *by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence.***

The maximum sentence for the offence of aggravated robbery is still death, according to section 286 of the Penal Code Act. If the trial judge sentenced the appellants to a sentence less than the death sentence, there must have been reasons why he decided to sentence them to 20 years' imprisonment instead. The parties are entitled to know the reasons for the decision and it is our opinion that the trial judge has an obligation to set down those reasons, especially in the trial of a serious offence such as aggravated robbery. The trial judge thus erred when he did not set out the reasons for his sentence in the ordinary manner as is required by section 86 (4) of the TIA.

With regard to the complaint that the trial judge did not consider all of the mitigating factors that were advanced for the appellant, it is important that we point out that the factors that were referred to in the submissions of counsel for the 2nd appellant regarding his academic achievements in prison by the time he was sentenced were not on the record of the trial court. It seems these were achievements that he made from the time of his sentence to the date of the hearing of his appeal. The trial judge therefore could not have considered them.

Counsel for the appellant contended that the omission by the trial judge to take into consideration all of the mitigating factors that were advanced resulted in a manifestly harsh, illegal and excessive sentence. He referred to several decisions where this court and the Supreme Court considered the

mitigating factors on appeal and reduced the sentence that had been imposed by the trial court.

In this regard, section 108 of the TIA provides for the mitigation of penalties 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.**

From the reading of this provision, it appears to us that the mitigation of sentences or penalties is discretionary; it is up to the sentencing court to decide, given the circumstances of the particular case, whether to impose the maximum sentence provided for by law or to impose a lower sentence. Since the Supreme Court made the decision in **Attorney General v. Susan Kigula & 417 Others, Constitutional Appeal No. 3 of 2006**, that the death sentence is no longer mandatory, the provisions of section 108 TIA also apply to the maximum sentence of death.

We are fortified in coming to this conclusion by the decision of the Supreme Court in **Rwabugande Moses** (supra) where the court considered the import of the term *"take into account"* in Article 23 (8) of the Constitution. The court distinguished this constitutional requirement from other mitigating factors in sentencing in the excerpt below:

> *"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."*

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.

This then means that considering the mitigating factors advanced for the appellant was not merely discretionary; it appears it is mandatory to take all of them into account before sentencing, as the Supreme Court did in the case of **Aharikundira** (supra). It is for that reason 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.

The trial judge therefore erred when he omitted to take all the mitigating factors that were advanced in favour of the appellants before imposing sentences on them.

We accept the submission that the trial judge ought to have taken into account the period that the appellants spent on remand before they were sentenced. But in addition to that, we must also consider whether imposing a sentence of 20 years' imprisonment on the appellants was harsh and excessive in the circumstances of the case, as it was contended by their advocate. Counsel argued that this court has the power under section 34 (1) (c) of the CPC, to reduce the sentence imposed by the trial court. However, section 34 (1) (c) of the CPC provides that the appellate court may *"with or without any reduction or increase and with or without altering the finding, alter*

the nature of the sentence." It does not only provide for reduction of the sentence, as counsel for the appellant would have this court believe.

Instead, of the provisions of section 34 (1) (c) proposed by counsel for the appellant, we are mindful of the principle that was set out in paragraph 6 (c) of the Sentencing Guidelines for the Courts of Judicature that every court shall when sentencing an offender take into account 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 Supreme Court emphasised this principle in **Aharikundira Yustina v Uganda (supra)** when it stated 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."*

We observed that though he impliedly argued this point for his clients, counsel for the appellants did not provide us with suitable authorities on the matter. We have therefore considered precedents in which this court and the Supreme Court passed sentence on offenders convicted of aggravated robbery for guidance before we make our decision on this point.

In **Rutabingwa James v. Uganda, Court of Appeal Criminal Appeal No. 57 of 2011**, this court confirmed a sentence of 18 years' imprisonment for the offence of aggravated robbery.

In **Ssenkungu Akim v Uganda, Court of Appeal Criminal Appeal No. 264 of 2015**, this court upheld the sentence of 27 years' imprisonment for the offence of aggravated robbery. The court emphasised that it is the trial judge who hears the case, with the primary role of determining the appropriate sentence. That the trial judge in that case imposed a sentence of 27 years' imprisonment which was well within the sentencing range for aggravated

robbery under the Sentencing Guidelines for the Courts of Judicature. The court found no reason to fault the trial judge and so upheld the sentence.

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.

And 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.

Having found that the trial judge in the instant case did not take the period spent on remand into account and so imposed an illegal sentence, we have no alternative but to set the sentence of 20 years' imprisonment on each count imposed on each of the appellants aside and impose a fresh sentence. We do this pursuant to the provisions of section 11 of the Judicature Act.

We have considered all of the mitigating factors that were advanced for the appellants before sentence. We are of the view that given the sentences for aggravated robbery in cases that we reviewed above, the sentence of 20 years' imprisonment on each of the counts, all to run concurrently was neither

harsh nor excessive. However, in compliance with Article 23 (8) of the Constitution, we now deduct the period of one year that the appellants spent on remand and sentence each of them to a term of 19 years' imprisonment on each count, all to run concurrently.

This appeal therefore partially succeeds and the appellant shall serve the sentence of 19 years' imprisonment on each of the counts for which they were convicted, concurrently. The sentences shall commence on the 7th November 2013, the date on which they were convicted.

Dated at Fort Portal this 23rd day of December 2022

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva Luswata
JUSTICE OF APPEAL