THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CONSOLIDATED CRIMINAL APPEALS NO. 137 of 2017 & *70 of 2020*

(Arising from the decision of Batema N.D.A. J sitting at Soroti dated 13th April 2017 in HCT – 09-CR-SC-0097 of 2014)

1. OKWI PATRICK

2. ELUNGAT SAM

3. MORINYANG ASANASIO

4. ODONGO JAMES:: APPELLANTS

VERSUS

UGANDA:: RESPONDENT

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

The appellants were charged with Murder c/s 188 and 189 of the Penal Code Act and attempted Murder c/s 204 (b) of the Penal Code Act. At the beginning of the trial, the 1st appellant pleaded guilty to all the four counts and was sentenced to fifty two years (52) imprisonment on each count of murder, 3 years for attempted

murder of Emunyeret Sam and 7 years on count 4 for the attempted murder of Sylvia Gorreti whereas Elungant Sam, Morinyange Asanasio and Odongo James who pleaded not guilty were tried, raised the defense of alibi, they were convicted and sentenced to custodial sentences of 52 years for murder of Dr. Emunyeret Sam and 52 years for the murder of his wife Oluka Stella and 3 years for attempted murder of Emuneret Sam and 7 years for attempted murder of Gorreti.

Dissatisfied with the decision of the trial Judge, the 2nd, 3rd and 4th appellants now appeal on the following grounds;

1. *The learned trial judge erred in law and fact holding that the appellants participated in the murder of the deceased persons and the attempted murder of their children thus arriving at a wrong conclusion, prejudicial to the appellants.*
2. *The learned trial Judge erred in law and facts when he imposed a harsh and excessive sentence.*

The 1st appellant filed separate memorandum of appeal from 2nd, 3rd and 4th appellants. He appeals against the sentence only on the sole ground that;

1. *The learned trial Judge erred in law and in fact when he sentenced the appellant to 52 years for count 1, 3 for count 2 and 7 years imprisonment for count 3 which was illegal, harsh and manifestly excessive.*

Background

On the 22nd day of April 2014 at around/between 8:00am to 9:00am, Dr. Emunyeret together with his family members were in their garden located within Kachede village, Bukedea District planting crops when the appellants emerged armed weapons including pangas and hoes. They started cutting the deceased and his deceased wife killing them instantly. They chased the 1st and 2nd survivor with the intention of murdering them too and in the process cut them using pangas. The survivors ran away alarming which alarms were answered by a number of persons who helped to rescue them from the assailants/accused.

At the hearing of the appeal, Counsel Isabirye appeared for the appellants while Malunza appeared for the respondent.

1st appellants` submissions

Counsel sought leave to appeal against sentence only under Section 132(1) (b) of the Trial on Indictments Act which was granted.

It was submitted for the 1st appellant that the learned trial Judge did not consider the mitigating factors of the case before sentencing the 1st appellant and thus passed harsh and excessive sentences. Counsel submitted that the 1st appellant was a first offender with no criminal record. He had spent time on remand and was the sole bread winner of the family with many other responsibilities. Counsel argued that these factors should have been considered in mitigation by the learned trial Judge which he did not. He cited **Naturinda Michael Vs Uganda; Criminal Appeal No. 244 of 2014** cited in **PC Amukun**

John Michael & Another Vs Uganda CA No. 67 of 2011 to say that the trial Judge was obliged to explain both aggravating and mitigating factors being considered by court to arrive at the appropriate sentence.

He further submitted that had the trial judge considered all the mitigating factors and weighed them against the aggravating factors he would have reached a balanced point of view and the 1st appellant would have received a lesser sentence.

He adverted that the sentence was excessive and cited **Wassaja Steven Vs Uganda Criminal Appeal 19/1975** for the preposition that it is manifestly excessive to sentence a first time offender to 15 years imprisonment.

Counsel for the 1st appellant further cited **Article 23(8)** of the Constitution which provides that for a person 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 completion of his/her trial shall be taken into account in imposing the term of imprisonment. He also cited the decision in **Rwabugande Moses vs Uganda; Supreme Court Criminal Appeal No. 25 of 2014** to support the same position.

Counsel prayed that the sentence be set aside for being illegal and that court should pass a sentence that is lawful and appropriate taking into account the mitigating factors.

Respondent`s submissions

The 2nd, 3rd and 4th appellants` appeal.

Counsel submitted for the 2nd, 3rd and 4th appellants that the learned trial Judge failed to properly evaluate evidence on record as a whole by relying on his own opinion in holding that the appellants participated in the murder of the deceased and attempted murder of their children. He submitted that whereas the learned trial judge judge had judicial discretion in making his decisions, he ought not to be influenced primarily by his personal opinion but evidence.

Counsel further adverted that each of the appellants raised an alibi. A2 told court that he went to plant groundnuts in his garden at 6:00am in company of his elder sister Apiot, A3 and two children. A4 also testified on oath that he had spent the night at his second home in Otiokot Village.

He further submitted that A4, Odongo James who had spent the night of 21/04/2014 in Otikot village, in the morning rode his bicycle to his home in Kachade village to show Ikiring Night where to weed in the maize garden.

Counsel submitted that once an accused person puts forward an alibi as an answer to a charge made against him, he does not assume the burden of proving that alibi. It was up to the prosecution to bring evidence destroying the alibi and that if the accused properly accounted for their time and whereabouts away from the scene of crime they must be believed. He concluded on this ground by submitting that the prosecution failed to bring evidence placing the 2nd, 3rd and 4th appellants at the scene of crime.

On ground two, Counsel submitted for the appellants that while arriving at the sentence, the learned trial judge failed to consider the appellants' mitigating factors which included; the fact that the appellants were first time offenders with no previous criminal records since the prosecution had not adduced any evidence to the contrary. That the learned trial judge had exclusively considered the aggravating factors leaving out the mitigating factors and referred to the Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

Counsel argued that it was manifestly excessive to sentence a first time offender to 52 years imprisonment and referred to **Wassaja Steven Vs Uganda** (supra) in support of his argument. That the trial judge in his sentence at page 123 of the record failed to take into account the mitigating factors and cited **Naturinda Michael Vs Uganda** (supra) to say that the obligation is placed on the trial Judge to explain which factors, both aggravating and mitigating were considered to arrive at the appropriate sentence.

The appellants prayed that Court finds the sentences imposed on them by the learned trial Judge to be illegal, harsh and excessive.

In reply, it was submitted for the respondent on ground one regarding identification of an accused person, that it is important to expound the principles and laws governing identification. Counsel cited **Abudala Nabulere and 2 others Vs Uganda; Criminal Appeal No. 9 of 1978** where court held that the trial judge should examine closely the circumstances in which the identification came to be

made, particularly the length of time the accused was under observation, the distance, the source of light and the familiarity of the witness with the accused.

Counsel invited Court to look at the pieces of evidence which squarely placed the appellants at the scene of crime. He submitted that PW1 Emunyeret Ivan at page 20 identified the 2nd, 3rd and 4th appellants in Court by their names, PW1 also identified the appellants at the police station as the attackers a few days after the incident. PW1 in addition identified the attackers as their uncles and immediate neighbor's in the village and informed court he had known them since his childhood. PW2 also corroborated the testimony of PW1 at page 24 of the record and PW3 Opio Solomon told Court how he went to the scene of crime to rescue PW2 and found Stella Oluka still alive and she told him that it was the appellants who had committed the crime.

Counsel submitted that the appellants were positively identified at the scene of crime by PW1 and PW2 and their testimonies corroborated each other.

Counsel further submitted that the distance between the appellants and witnesses was so close since the appellants were using pangas which are known to be short weapons and from the demonstration of PW1, they were in close distance of the courtroom setting where the matter was tried. He cited **Opolot Justin and Agamet Richard V Uganda SCCA No. 31/2014** for the preposition that an alibi can be destroyed by the prosecution evidence which squarely places an accused person at the scene of crime.

He submitted that the conduct of the appellants running away from the scene of crime and their homes after commission of the crime left no plausible explanation other than that of guilt and that the defence they put forth that the relatives of the victims wanted to revenge by killing them is unbelievable since they started by hiding in the bush when nobody thought of harming them.

Counsel further submitted for the respondent that from their testimonies, the appellants learnt of the murder incident early enough but avoided the scene of crime and instead went into hiding in the bush assuming there was a likelihood of revenge which they actually disputed and asserted that the most reasonable thing would have been to immediately seek refuge at the nearest police station. Counsel cited **Uganda V John Wilson Simbwa SCCA No.7/1995** to say that the conduct of running away from their homes and from the scene of crime corroborated the testimonies of PW1 and PW2 that the appellants participated in the crime.

Counsel submitted for the respondent that the dying declaration made by Oluka Stella to PW3 was relevant and admissible under Section 30 of the evidence Act and that the dying declaration corroborated PW1 and PW2's testimonies.

He submitted that there were several glaring contradictions, however, they dealt with the one between DW3 and DW5 about the motorcycle used from police station after reporting the murder incident at police. At page 37 para.4 he stated that they used Odongo's motorcycle from police station whereas DW5 stated that the motorcycle used was the one exhibited at the police and that it was ridden

by a crime preventer. Counsel for the respondent cited **Alfred Tajar vs. Uganda; E.A.C.A Criminal Appeal No. 167 of 169** cited with approval in **Uganda Vs. George Wilson Simbwa SCCA No. 37/1995.**

Counsel for the respondent submitted that the appellants were positively identified at the scene of crime and prayed that this court dismisses the appeal.

Counsel submitted that the sentences the learned trial judge gave were lenient bearing in mind the nature of the crimes which caused a miscarriage of justice. He prayed that sentences be varied and enhanced to imprisonment for life for all the appellants that is; A1 Okwi Patrick, A2 Elungat Sam, A3 Morinyang Asanasio and A4 Odongo James. That Court had power under section 11 of the Judicature Act Cap. 13, section 132(1) (d) of the Trial on Indictment Act and Rule 32 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 to effect the enhancement. That the sentences for murder be substituted with life imprisonment for counts, 1 and 2 of murder and count 3 and 4 for attempted murder be substituted with 15 years imprisonment. He cited **Busiku Thomas vs. Uganda; SCCA No. 33/2011** to demonstrate that the variation was possible

Counsel further submitted that the appellants murdered two persons (husband and wife) and left their two children physically incapacitated due to injuries sustained in an attempt to kill them, that the wanton behavior with which the appellants committed these heinous crimes deserved no mercy and prayed that enhancement of the sentence was the only way to meet the ends of justice.

He referred to **Guidelines 19 of the Judicature (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013**, third schedule part 1 where the sentencing range in murder cases is 30 years up to death and starting point being 35 years. The murder was premeditated, and the deceased persons went through a lot of pain due to injuries because the appellants used pangas. There was deliberate loss of lives caused by a group of persons acting in execution or furtherance of common purpose. Counsel added that murder was a serious offence which carries a maximum sentence of death and the appellants murdered their clan member leaving the surviving children with no parents.

He further submitted that although counsel for the appellants had raised mitigating factors such as; the appellants being first time offenders, the 1st appellant pleaded guilty, the appellants were young and had been on remand for five years and five months, the learned trial judge took into account all those factors but these mitigating factors were outweighed by the fact that two people were killed in cold blood and that the appellants attempted to murder two of the deceased`s children.

Determination of Court.

A first appellate court has a duty to re-evaluate the evidence and come to an independent conclusion on the facts and the law, taking into account that it did not see or hear the witnesses **(See Pandya v. R [1957] EA 336; Okeno v. Republic [1972] EA 32; Charles Bitwire v. Uganda SC Cr. App No. 23 of 1985**

and Kifamunte Henry v. Uganda SC Cr. App. No. 10 of 1997. See also R. 30 of the Court of Appeal Rules)

The 1st appellant's ground of appeal was against sentence only, we shall first determine the same.

The 1st appellant faulted the learned trial judge for meting out an illegal, harsh and manifestly excessive sentence *of 52 years imprisonment for count 1, 3 years imprisonment for count 2 and 7 years imprisonment for count 3.*

While sentencing the 1st appellant at pages 123 and 124 of the record, the learned trial judge clearly made no mention of and never took into consideration the period of 5 years and 5 months the 1st appellant had spent on remand.

Article 23(8) of the Constitution provides 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."

In **Rwabugande Moses versus Uganda** (Supra), 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 a mandatory constitutional provision.

Guideline 15 of Judicature (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 provides;

(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.

Indeed, it is crystal clear that the trial judge didn't consider the said period as he only alluded to the aggravating factors and for the said reason the sentence meted out against the 1st appellant was illegal.

We shall now proceed to sentence the appellant afresh pursuant to **Section 11** of the **Judicature Act,** which provides as follows:

> *"**11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated"*

We are alive to and have taken into account both mitigating and the aggravating factors on record which we need not reproduce here, the principle of uniformity in sentencing and the remand period of 5 years and 5 months, we are satisfied

that a sentence of 32 years imprisonment on counts 1 & 2. On count 3, we shall treat the sentence of 3 years imprisonment as having been served and on count 4, we are of the view that 1 year imprisonment will serve the ends of justice.

Consideration of the 2nd, 3rd and 4th appellants` appeal.

The appellants raised 4 grounds of appeal in their memorandum of appeal but abandoned 2 of the grounds in their submissions and we shall determine the remaining grounds. The 1st ground is in regards to the 2nd 3rd and 4th appellant`s participation.

In a murder charge, the burden lies on the prosecution to prove the following ingredients beyond reasonable doubt;

1. Death of a person.
2. The death was unlawfully caused.
3. The death was caused with malice aforethought.
4. The accused persons participated in or caused the death of the deceased.
5. Where there is more than one accused person, it ought to be proved that there was a common intention among them to execute an unlawful purpose.

In this case, the first four ingredients are not being contested on appeal. The appellants` case is that the prosecution did not prove the participation of the 2nd, 3rd and 4th appellants in the murder.

In proving participation the following requirements for proper identification must be satisfied; familiarity before the incident, sufficient light to enable identification, distance between the witness and the accused and time spent. PW1 Emunyeret Ivan and PW2 Atai Sylivia Gorreti were familiar with the appellants, the appellants were clan uncles and neighbors of the surviving two eye witnesses. The crime was committed in a broad day light in a clear morning at 7am and not dark night.

As regards the proximity, PW1 and PW2 testified that they were surrounded by the appellants and assaulted using pangas which are sharp weapons, the cutting was done at a close range and their distance from the appellants was close enough to aid proper identification.

From the above evidence, it is clear that the 2nd, 3rd and 4th appellants were properly identified by PW1 Emunyeret Ivan and PW2 Atai Sylivia Gorreti (children to the deceased). The appellants were well known to them, because they were neighbors and clan uncles. Above all, there was sufficient light, which ably aided their identification. These were satisfactory conditions by people who knew the appellants before. These facts were not challenged and no question of mistaken identification was raised by the appellants. Therefore the said appellants were ably identified as the assailants.

We also take cognizant of the doctrine of common intention to commit the offence against the witnesses and the deceaseds.

Section 20 of **the Penal Code Act** provides:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

The evidence of PW1 Emunyeret Ivan is that when they were planting maize together with the deceased persons and PW2 Atai Sylivia Gorreti, the appellants approached them driving their cattle and surrounded them, they were told that it was their last day.

The case of **Kisegerwa and Another v. Uganda; Criminal Appeal No. 6 of 1978 (Supreme Court)** elaborates on the above provision thus:

In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence...an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

The 1st appellant, together with the 3 appellants, attacked the deceased persons and the victims at around 7:00am. The evidence of the prosecution shows that the appellants chased the victims with intentions of killing them too and when

the victims made an alarm and people responded to the alarm, the attackers ran away. This action, in our view, was sufficient enough to prove common intention.

It was held in **Kisegerwa and Another v. Uganda** (supra) that common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault. The 1st appellant was with the 2nd, 3rd and 4th appellants when the attack was made and at no point did the 1st- 4th appellants try to stop the assault. This, in our view, amounts to common intention to commit an offence.

We therefore find that the 2nd, 3rd and 4th appellants participated in the commission of the said offences. We find no reason to fault the learned trial Judge's finding of guilt of the 2nd, 3rd and 4th appellants.

On ground 2 the learned trial is faulted for meting out harsh and excessive sentences. That he did not take into account the appellants` mitigating factors that they were first time offenders and that the learned trial judge appeared to have exclusively considered the aggravating factors.

While sentencing A2, A3, and A4 the record shows at pages 47 and 48 that the learned trial judge considered the period they had spent on remand of 5 years and 5months and other mitigating factors such as A2 and A3`s young age, them being first offenders, A4 being aged 40 years, had 12 children and a polio victim and had spent 5 years and 5 months on remand.

In light of the above, we are of the view that that the learned trial judge considered the appellant`s mitigating factors before sentencing them and we find no reason to fault him.

We are however alive to the need to ensure consistency and uniformity in sentencing, The Supreme Court has in **Mbunya Godfrey V Uganda** (Supra), emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court stated that *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

Guideline 6 (c) of Judicature (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2003 provides 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

In **Adupa Dickens Vs Uganda, C.A.C.A. No. 267 of 2017**, where this court upheld the sentence of 35 years imprisonment and held that it was neither harsh nor manifestly excessive to warrant the intervention of the Appellate Court.

In **Semanda Christopher and another versus Uganda CACA 77 of 2010**, the court maintained the sentence of 35 years on the appellant who had been convicted of murder.

In light of the above decisions on uniformity and sentencing, we accordingly set aside the sentences passed by the High Court for being harsh and excessive except on count 3 where the 3 years were taken to have been served. We shall proceed to sentence the appellants afresh pursuant to Section 11 of the Judicature Act, which confers this court with the same powers as the High Court on counts 1, 2 and 4.

Having re-considered both the aggravating and mitigating factors of the case as presented before the trial court as already set out in this judgment, and taking into account the period the appellants spent on remand of 5 years and 5 months and the decisions of the Courts of Judicature for similar offences we sentence the 2nd, 3rd and 4th appellants as follows;

For A2, A3 and A4, we sentence each of them to 40 years' imprisonment in respect of Counts 1 & 2. Since the 3 years imprisonment on Counts 3 were treated as already served at the time of sentencing for A2, A3 and A4, we maintain the sentences on count 3. On count 4, A2, A3 and A4 shall each serve 1 year and 5 months imprisonment.

The sentences for all; A1, A2, A3 and A4 shall run concurrently and to be served from the date of Conviction.

This appeal succeeds in part as regards sentences in the above terms but fails as relates to conviction.

We so order.

Delivered at Jinja this 11th day of February 2022

Elizabeth Musoke

JUSTICE OF APPEAL

Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL