THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0134 OF 2012

MWESIGYE FRED:::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Nakawa before Mwonda, J. (as she then was) delivered on 28th May, 2012 in Criminal Session Case No. 156 of 2012)

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

Background

On 28th May, 2012, after he had pleaded guilty, the High Court (Mwonda, J. (as she then was)) convicted the appellant of the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act, Cap. 120**. The appellant was sentenced to 25 years imprisonment.

The appellant had been presented to be tried by the High Court on an indictment that alleged that, together with an accomplice, the two had, on 11th November, 2010 at Kikalala Village in Kiboga District murdered Wagaba George (the deceased).

The facts as read by prosecution counsel and accepted by the appellant are as follows. In the night of 11th November, 2011, as the deceased was sleeping at his home in Kikalala Village in Kiboga District, the appellant and an accomplice forced their way into the deceased's house and strangled him with a rope, until he died. The duo, both workers at the deceased's home, had earlier seen him carry money to his house and devised a plan to kill him and steal that money. The appellant's attempt to cover up for the murder was unsuccessful and he was subsequently arrested. While in police custody, he made a charged and caution statement in which he confessed to the killing of the deceased.

On acceptance of the above facts, the learned trial Judge convicted the appellant as charged and thereafter sentenced him as stated earlier. He now appeals against the sentence imposed, after this Court granted him leave to do so. The sole ground of appeal is as follows:

> **"The learned trial Judge erred in law and fact by imposing a manifestly harsh sentence on the appellant."**

The respondent opposed the appeal.

Representation

At the hearing, Ms. Awelo Sarah, learned counsel on State Brief appeared for the appellant. Ms. Margaret Nakigudde, learned Assistant Director of Public Prosecutions, appeared for the respondent.

In accordance with then existent Prison Regulations to prevent the exposure of inmates to COVID-19, the appellant followed the hearing via video link enabled by Zoom Conferencing Technology, while he remained at Luzira Government Prison.

Written submissions filed for both sides, were, with leave of the Court adopted in support of their respective cases.

Appellant's submissions

Counsel started by reiterating the applicable principles in an appeal against a sentence imposed by the trial Court, as restated in the authority of **Abaasa Johnson vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (unreported).** An appellate Court will only interfere if the sentence imposed is illegal; where the sentence was founded on a wrong principle of law; where the trial Court failed to consider a material factor; or if the sentence imposed by the trial Court is harsh and excessive in the circumstances of the case.

In the present case, counsel submitted that there were grounds to justify this Court to interfere with the sentence that the trial Court imposed. First, the sentence was illegal for having been imposed without taking into account the period that the appellant spent on remand yet the trial Court was enjoined to do so by the provisions of **Article 23 (8)** of the **1995 Constitution**. Counsel cited the authority of **Rwabugande Moses vs.**

Uganda, Supreme Court Criminal Appeal No. 24 of 2014 (unreported) for the holding that taking into account under the provisions of Article 23 (8) requires the trial Court to conduct an arithmetical deduction of the precise period spent on remand from the sentence it has imposed. He submitted that the trial Court erred when it did not make an arithmetical deduction in the present case and merely mentioned the remand period.

The second ground is that the mitigating factors submitted for the appellant justified imposition of a lesser sentence. The appellant was first offender and had pleaded guilty at the earliest opportunity which showed that he was repentant and remorseful. In view of the above mitigating factors, counsel urged this Court to set aside the sentence that the learned trial Judge imposed and impose a shorter sentence. She referred to similar previously decided Murder cases of **Margaret Opii vs. Uganda, Court of Appeal Criminal Appeal No. 123 of 2008 and Korobe Joseph vs. Uganda, Court of Appeal Criminal Appeal No. 243 of 2013 (both unreported)** where this Court imposed shorter sentences. In Margaret Opii, this Court substituted a sentence of 20 years imprisonment for the death sentence that the trial Court had imposed. The appellant was found to have killed an infant by drowning her body. In Korobe Joseph, this Court imposed a sentence of 14 years imprisonment it found appropriate and set aside a sentence of 25 years imprisonment that the learned trial Judge had imposed. Counsel concluded by praying this Court to set aside the sentence imposed by the trial Court and substitute a sentence of 10 years imprisonment.

Respondent's submissions

Counsel for the respondent cited the authority of **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported)** for the applicable principles in an appeal against sentence. An appellate Court will not normally interfere with the discretion of the sentencing Judge unless the sentence imposed is illegal or unless the appellate Court is satisfied that the relevant sentence is manifestly so excessive as to amount to a miscarriage of justice. Counsel also cited the authority of **Abaasa (supra)** for the principle highlighted by counsel for the appellant. She submitted that there was no ground to justify this Court to interfere with the sentence imposed by the trial Court, which was neither illegal nor manifestly harsh or excessive. Instead, she invited this Court to

find that the learned trial Judge considered the aggravating and mitigating factors as well as the relevant remand period before arriving at the sentence she imposed. The appellant was convicted of a very serious offence which attracted the maximum death sentence. Considering the manner in which the deceased was killed, the appellant was only spared from the death sentence because he pleaded guilty. Counsel urged this Court not to interfere with the sentence that the learned trial Judge imposed and to uphold it.

Resolution of the appeal

We have carefully studied the Court record, considered the submissions of counsel for both sides and the law and authorities cited. We have also considered other relevant law and authorities that were not cited.

We are mindful that this is a first appeal from the sentence imposed by the trial High Court, and therefore the duty of a first appellate Court is worth emphasizing. A first appellate Court has a duty to reappraise the evidence and all the other materials placed before the trial Judge and come up with its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10; and the authority of Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)).**

We are also cognizant of the applicable principles in an appeal against the sentence imposed by the trial Court. In **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported)**, it was stated:

> **"As Dunn L.J observed in Re Haviland's case (supra) at page 114, 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/her discretion. It is the practice that an appellate Court will not normally interfere in the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 EACA 270 and R v. Momedali Jamal (1948) 15 EACA 126."**

The appellant makes two points on this appeal. First that the sentence imposed on him was illegal as the learned trial Judge did not take into account the period he spent on remand as she was obliged to do under the

provisions of Article 23 (8) of the 1995 Constitution. Secondly, that the sentence was in any case harsh and excessive in the circumstances. We shall consider each point in turn.

Article 23 (8) of the 1995 Constitution enjoins a sentencing Court to take into account the period that a convict has spent on remand when sentencing him/her. The provision states:

> **"(8) 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 sentencing the appellant, the learned trial Judge had this to say at page 7 of the record:

> **"Convict is a first offender who pleaded guilty at (sic) his own motive. He appears repentant and remorseful. He has been on remand since 2010. However, the offence he was convicted of carries a maximum sentence of death. Taking all the above into account. He is sentenced to 25 years imprisonment."**

The learned trial Judge mentioned the fact that the appellant had at sentencing, been on remand since 2010. This shows that she took into account the relevant remand period. However, it has been argued that it was not enough for the learned trial Judge merely to mention the remand period. It was stated that on the basis of the holding in **Rwabugande (supra)**, she was required to conduct an arithmetic exercise and deduct the remand period from any sentence she deemed appropriate to impose. However, the Rwabugande case was decided on 3rd March, 2016, over 4 years after the trial Court sentenced the appellant. The learned trial Judge could not have been expected to apply a precedent that had not come into being when she sentenced the appellant.

At the time of the appellant's sentencing, the most authoritative interpretation of **Article 23 (8) of the 1995 Constitution** had been given in the Supreme Court decision of **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported),** where the Court stated:

> **"As we understand the provisions of Article 23 (8) of the Constitution, they mean that when a trial Court imposes a term of imprisonment as**

sentence on a convicted person, the Court should take into account the period which the person spent on remand prior to his/her conviction. Taking into account does not mean arithmetical exercise."

Therefore, at the time of sentencing the appellant, a sentencing Court complied with Article 23 (8) if it clearly demonstrated that it was alive to the relevant remand period and that that period weighed on the sentencing Judge's mind as he/she imposed the relevant sentence. From the learned trial Judge's sentencing remarks set out earlier, we find that she was alive to the fact that at sentencing, the appellant had been on remand since 2010. We therefore reject the submission for the appellant that the learned trial Judge omitted to consider the relevant remand period.

We shall now consider the second point that the sentence imposed on the appellant was harsh and excessive. In doing so, we have found it necessary to refer to sentences imposed in previously decided murder cases. In **Abaasa and Another vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (unreported),** this Court imposed a sentence of 35 years imprisonment on the murder count after it set aside the sentence of life imprisonment that the trial Court had imposed. The appellant had murdered and murdered a soldier attached to the presidential Guard Brigade.

In **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)**, the Supreme Court imposed a sentence of 30 years imprisonment after it set aside a death sentence imposed by the trial Court and confirmed by the Court of Appeal. The appellant was found to have murdered her husband whose mutilated body was discovered with the arms and legs dismembered from the rest of his body.

In **Akbar Godi vs. Uganda, Court of Appeal Criminal Appeal No. 62 of 2011 (unreported)**, this Court upheld a sentence of 25 years imprisonment imposed by the trial Court. The appellant was found to have used a gun to shoot and kill his estranged wife.

In **Margaret Opi (supra)**, this Court substituted a sentence of 20 years imprisonment for one of life imprisonment that the trial Court had imposed. The appellant was found to have murdered an infant by drowning it.

The sentencing range in the above highlighted previously decided cases is between 20 years and 35 years imprisonment. Thus the sentence imposed in the present case fell within that range. Although the appellant pleaded guilty which was indicative of his remorse for killing the deceased, the learned trial Judge still had to consider a sentence appropriate to the gravity of the offence. The appellant his accomplice forced their way into the home of the deceased and strangled him with a rope tied to his neck. The deceased died a very painful death. Even taking into account the young age of the appellant, and the fact that he was a first offender, we are unable to conclude that the sentence of 25 years imprisonment that was imposed on him was manifestly harsh and excessive to justify us to interfere with it, and therefore, we shall uphold it.

In conclusion, we find that this appeal has no merit and we dismiss it.

We so order.

Dated at Kampala this ..11th.. day of ..Jan.. 2021.

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Richard Buteera

Deputy Chief Justice

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal