THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama JJA*]

CRIMINAL APPEAL NO. 384 OF 2017

(*Arising from High Court Criminal Session Case No0107 of 2017at Kabale*)

BETWEEN

Manige Lamu ==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court of Uganda [Kazibwe, J] delivered on 5th October 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act on count 1 and attempted murder contrary to sections 187 and 190 of the Penal Code Act on count 2. The particulars of the offence in count 1 were that the appellant on the 11th day of August 2017 at Rwabirundo cell in Kabale district unlawfully killed No.1323 Warder Kitonga Gerald. For count 2, the particulars were that the appellant on the 11th day of August 2017 at Rwabirundo cell in Kabale district unlawfully attempted to murder Uzabakirirho Yohana.

[2] The appellant was convicted of the offence of murder and sentenced to 44 years and 10 months' imprisonment. For count 2, the appellant was convicted of the lesser offence of causing grievous harm contrary to section 216 of the Penal Code Act and sentenced 5 years' imprisonment to run concurrently.

[3] The appellant now appeals against the sentence for the offence of murder on the following ground:

> '1.That the learned trial judge erred in law when he convicted the appellant to 44 years and 10 months (Forty Four years and ten months) imprisonment on count 1, a punishment which was manifestly harsh and excessive in the circumstances upon the appellant.'

[4] The respondent opposed the appeal.

[5] At the hearing, the appellant was represented by Mr. Andrew Byamukama and the respondent by Mr. Moses Onencan, Assistant Director of Public Prosecutions.

Submission of Counsel

[6] Counsel for the appellant stated the principles upon which an appellate court can interfere with a sentence imposed by a trial court as was stated in Kakooza v Uganda [1994] UGSC 1. He submitted that in Kizito Senkula v Uganda [2002] UGSC 36, the supreme court stated that courts ought to take into consideration sentences imposed in previous cases while sentencing. He then referred to Turyahika Joseph v Uganda [2016] UGCA 83 where it was held by this court that sentences ranging from 20 to 30 years' imprisonment are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence. Counsel also referred to Tumwesigye Rauben v Uganda [2018] UGCA 91 where the appellant was convicted of murder and sentenced to 40 years' imprisonment. On appeal to this court, the sentence was reduced to 20 years' imprisonment.

[7] Counsel for the appellant urged this court to take into consideration the above authorities and the need for uniformity and consistence in sentencing. He prayed that this court finds the sentence imposed against the appellant harsh and manifestly excessive and accordingly set it aside. He prayed that this court invokes its powers under section 11 of the Judicature Act to impose an appropriate sentence.

[8] On the other hand, counsel for the respondent submitted that the learned trial judge considered the aggravating and mitigating factors and exercised leniency by not sentencing the appellant to the maximum penalty which is death. Counsel contended that there are authorities with facts similar to this instant case were this court imposed imprisonment for life. He referred to Bukenya v Uganda [2014] UGCA 88 and Sebuliba Siraji v Uganda [2014] UGCA 55. He contended that given these precedents, the learned trial judge properly exercised his discretion in arriving at the sentence of 44 years and 10 months' imprisonment.

[9] Counsel concluded by asserting that the sentence against the appellant was not based on a wrong principle and no material factor was overlooked in sentencing. The sentence was neither harsh nor manifestly excessive. He prayed that this court upholds the sentence and accordingly dismisses this appeal.

Analysis

[10] The facts of this case are that the appellant was on remand at Ndorwa prison in Kabale district on a charge of causing grievous harm. On 11th August 2017, Yeko Issa and Kitonga Gerald (the deceased) both prison warders attached to Ndorwa prison picked up 10 prisoners on remand and took them to Kitumba to dig. Among the prisoners were the appellant and a one Uzabakiriho Yohana. An argument ensued between the appellant and PW3 at around 1:00 pm whereupon the appellant cut Yohana with a hoe on the head. When the deceased intervened, the appellant also cut him on the head, and he fell. The appellant proceeded to cut the deceased on the chin and the collar bone. Yeko Issa shot in the air and the appellant tried to run away. He then shot the appellant twice injuring a finger and his left leg which disabled him and the other inmates disarmed him. The deceased and Uzabakiriho

Yohana were thereafter taken to a nearby health centre for treatment but later transferred to Kabale hospital. The deceased died later that day at 8:00pm. A post mortem report was carried out and the cause of death was sharp force trauma or hacking. The deceased had sustained cut wounds on the scalp, chin and jaw.

[11] As an appellate court, we can only interfere with sentence where it is either illegal, or founded upon a wrong principle of the law, or a result of the trial court's failure to consider a material factor, or harsh and manifestly excessive in the circumstances of the case. See Kakooza v Uganda [1994] UGSC 1, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported).

[12] In Aharikundira v Uganda [2018] UGSC 49, the Supreme court stated:

> 'There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.'

[13] While sentencing the appellant, the learned trial judge stated:

> **'SENTENCING AND REASONS FOR THE SENTENCE**
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> - I have heard and considered the submissions of Counsel relating to sentencing the convict.
> - There are some mitigating factors this court considered to wit; the fact that the convict is a young man of 23 years who can still reform and be useful to himself and the society.
> - I have also considered the fact that the convict has spent 60 days on remand which days am required to deduct from the imposed sentence by Article 23(8) of the Constitution.
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> The aggravating factors are;

- In respect of the murder charge, the deceased was a law enforcement officer killed during the performance of his function as a prison warder. It is the duty of this court to pass a sentence to send a message to respect law keepers for the orderly and peaceful governance of society.
- Murder is a grave offence and the sentence passed must reflect the sanctity of human life which should not be taken away in any circumstances save those authorized by the law.
- The convict has no criminal record as he is still on remand on a charge of causing grievous harm to his brother and the manner in which the offence was committed was gruesome.
- In respect of the count on attempted murder which court reduced to causing grievous harm, it is not disputed that the victim had injuries, but he has to learn to exercise self restraint.
- Prosecution urged one to involve the death penalty or life imprisonment for life in regard to the count one and to 5 years in respect of count two.
- Given the circumstances of this case and taking into account all the aggravating and mitigating factors, I don't believe death penalty is commensurable. I will consider a long term imprisonment of 45 years on count one. I will reduce it by the 60 days the convict has been on remand, he will serve 44 years, 10 months.
- I sentence him to 5 years on count two.
- Both sentences are to run concurrently.'

[14] The appellant's mitigating factors were that he was a first offender, a young man of 23 years capable of reform and that he sustained injuries. He prayed to be given an opportunity to reform through a lenient sentence. On the other hand, the aggravating factors were that the appellant was already on remand on a charge of grievous harm, that the offence of murder carries the maximum penalty of death and that the deceased was murdered in a gruesome and cruel manner. The deceased was not armed. Counsel for the state also stated that the deceased was only 24 years of age survived by a two-year-old child. The deceased was a sole bread winner and the only educated person in the family. Ms. Inzikuru prayed for the death penalty as a deterrent sentence. She also stated that the appellant was not remorseful.

[15] There is one aspect about this case that was neither considered at the trial nor raised on appeal. From the facts of this case the appellant was on remand in prison. He was not convicted prisoner. The circumstances were not explained why the appellant and 9 other remand prisoners had been taken out of prison to go and dig in an undisclosed person's garden. According to Regulation 104 of the Prison Rules, 304—4, which were continued in force (after the repeal of Cap 304,) by section 125 (2) of the Prisons Act, 2006, an un convicted prisoner can only be employed when he has requested for or consented to the employment.

[16] It states,

> '**Unconvicted prisoners.**
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> (1) Unconvicted prisoners may be permitted during their periods of exercise to associate together in an orderly manner under such conditions as the commissioner may direct. They shall be kept apart from other classes of prisoners.
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> (2) When in the opinion of the officer in charge it is practicable and safe, employment may be provided for unconvicted prisoners, in case they desire it, and an account of the daily value of the labour of those accepting it shall be kept by the officer in charge, and a sum equal to that value shall be paid to each such prisoner upon his or her discharge. Further employment may be refused to any such prisoner in case of misconduct during employment.
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> (3) An unconvicted prisoner on remand or awaiting trial shall be allowed to see a registered medical practitioner appointed by himself or herself or by his or her relatives or friends or advocate on any weekday during working hours in the prison, in the sight, but not in the hearing of the officer in charge or an officer detailed by him or her.'

[17] On the facts available to us it would then appear that the appellant, and 9 other remand prisoners, were unlawfully employed to dig in someone's garden and this continued through 1.00pm when this incident occurred. The remand prisoners were being subjected to unlawful activity, probably amounting to hard labour, unless they had consented to it. There is no

evidence that this was being carried out at their request. While it could not vitiate the wrong doing of the appellant it is a matter that ought to have been considered in sentencing as a mitigating factor for the appellant.

[18] Secondly it appears that this was an offence committed in the heat of the moment with no premeditation which is a mitigating factor that was not considered in favour of the appellant. Failure to take these 2 elements in account would warrant this court to interfere with the sentence of the trial court.

[19] Bearing in mind the need for parity in sentencing, in Turyahika v Uganda [2016] UGCA 83, the appellant was convicted of murder and sentenced to death. Following the directive of the Supreme court in Attorney General v Susan Kigula & 417 Ors [2009] UGSC 6, the case was returned to High court for mitigation proceedings whereupon the appellant was resentenced to 36 years' imprisonment. On appeal to this court on severity of sentence, the sentence was reduced to 26 years' imprisonment. This court noted that in cases of murder, this Court and the Supreme Court have confirmed or imposed sentences ranging from 20 to 30 years. In exceptional circumstances, the sentences have been lower or higher.

[20] In Aharikundira Yustina v Uganda (supra), the Supreme Court substituted a death sentence with 30 years' imprisonment for the appellant who had been convicted of the offence of murder. The court took into consideration the fact that the appellant was a first offender, of advanced age, the fact that she did not bother court on second appeal regarding her conviction and displayed remorsefulness.

[21] In Attorney General v Susan Kigula & 417 Ors (supra), this court reduced the death sentence imposed on the appellant to 20 years' imprisonment while in Godi v Uganda [2015] UGSC 17, the appellant was sentenced to 25 years' imprisonment for the offence of murder.

[22] In Tusigwire Samuel Vs Uganda [2016] UGCA 53, this court found the sentence of life imprisonment imposed against the appellant for the offence of murder harsh and manifestly excessive and reduced the sentence to 30 years' imprisonment. In this case, the appellant had attacked and killed an old woman of 60 years without provocation. He inserted a sharp object into

her vagina pushing it deep into her abdomen. The intestines were protruding through her birth canal when she died. While arriving at the sentence, this court took into consideration the fact that the appellant was a young man of 23 years capable of reform. The appellant had been remorseful at the time of conviction and sentence. He was capable of reform.

[23] In Atiku v Uganda [2016] UGCA 20, the appellant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to life imprisonment. On appeal, this court reduced the sentence to 20 years' imprisonment.

[24] In Tumwesigye Anthony vs. Uganda [2014] UGCA 61 this court substituted the sentence of 32 years' imprisonment with that of 20 years for the offence of murder. In this case, deceased had reported the appellant for stealing his employer's chicken and the appellant killed him by crushing his head after which he buried the body in a sand pit. This court while reviewing the sentence was of the view that a lesser sentence ought to have been imposed against the appellant given the fact the appellant was a first offender, a young man aged only 19 years with a chance to reform, was a father of two children and supported two orphans.

[25] Considering the above, we find that the sentence of 44 years and 10 months' imprisonment imposed against the appellant was harsh and manifestly excessive in the circumstances of this case. We shall accordingly interfere with this sentence.

[26] We find that a sentence of 21 years' imprisonment would be appropriate in the circumstances of this case from which we deduct the 60 days that the appellant spent on remand.

[27] We therefore sentence the appellant to a term of 20 years and 10 months' imprisonment from 5th October 2017, the date of conviction. This shall be served concurrently with the sentence on count 2 of 5 years' imprisonment.

Signed, dated and delivered this 3rd day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal