THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 0415 OF 2015

(Coram: Egonda-Ntende, Bamugemereire & Madrama, JJA)

1. TUMURAMYE HENRY aka KYAKABALE}
2. MUHUMUZA MILTON} ..... APPELLANTS

VS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda Holden at Mbarara in Criminal Session Case No 088 of 2011 before Bashaija J delivered on 22nd January 2015)

JUDGMENT OF COURT

The Appellants were indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act, Cap. 120 laws of Uganda.

The facts are that the Appellants on 13th December 2010 at Rwanyangwe village in Kiruhura District murdered Simpo Gertrida. The deceased had gone to collect firewood in a nearby forest when she was murdered by the Appellants. The deceased's body was found lying dead in the forest. The Appellants were subsequently arrested and examined and found to be of sound mind.

The Appellants were tried and convicted as indicted and sentenced to 46 years' imprisonment.

Being dissatisfied with the decision of the High Court, the Appellants appealed against sentence only on the following grounds;

1. The Learned Trial Judge erred in law and fact when he sentenced the appellants to 46 years' imprisonment, a punishment which was manifestly harsh and excessive in the circumstances upon the appellant.

2. The Learned Trial Judge erred in law and fact when he sentenced the appellant to 46 years' imprisonment and failed to take into account the time the appellant had spent on remand and hence sentence being illegal.

The Appellants prayed that the appeal is allowed and the sentence set aside and substituted with a lesser sentence.

At the hearing of the appeal, the appellant was represented by learned counsel Mr. Andrew Byamukama on state brief while the respondent was represented by learned counsel Ms Mbaine Eunice; Resident State Attorney. Both counsel addressed court by way of written submissions filed on court record and judgment was reserved on notice.

Submissions of the appellant's counsel

Ground 1 of the appeal:

The appellant's counsel submitted that it is trite law that the court will only interfere with the sentence of the trial court if the sentence is illegal or is based on a wrong principle or the court has overlooked a material factor or where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice (see **Livingstone Kakooza vs Uganda; Supreme Court Criminal Appeal No 17 of 1993**). Secondly, counsel relied on **Kizito Senkula vs Uganda; SCCA No 24 of 2001** for the proposition that sentences imposed in previous cases, though not precedents, afford material for consideration when sentencing convicts. Thirdly, there are numerous authorities where sentences for murder have been greatly reduced and substituted with lesser terms of imprisonment. The appellants counsel relied on **Turyahika Joseph vs Uganda; Criminal Appeal No 327 of 2014** where the Court of Appeal noted that the sentences in murder cases range from 20 to 30 years and where appropriate except where for exceptional circumstances, higher or lesser sentences have been imposed. In the above appeal, death had been caused by running over the deceased using a grader after the deceased refused to engage in a sexual affair with the appellant. The court imposed a sentence of 26 years' imprisonment notwithstanding the gruesome nature of the offence.

Coming to the facts of the appellants' appeal, the appellant's counsel submitted that the deceased was also murdered in a gruesome manner by strangulation. He argued that to maintain consistency in sentences, a sentence of 46 years' imprisonment should be substituted with lesser terms of imprisonment as 46 years was manifestly harsh and excessive.

Ground 2 of the appeal.

The appellant's counsel submitted that in sentencing the appellants, the learned trial judge never complied with the provisions of article 23 (8) of the Constitution which requires the period a convict has spent on pre-trial detention to be taken into account in imposing a fixed term of imprisonment. Counsel relied on **Rwabugande Moses vs Uganda; SCCA No 25 of 2014** for the proposition that failure to take into account the period of pre-trial detention in imposing sentence for a fixed term of imprisonment renders the sentence illegal. He submitted that the appellant spent 4 years on remand which were ignored by the sentencing judge. In the circumstances, the sentence was illegal.

Submissions of the respondent's counsel in reply.

Ground 1

In reply to ground 1, the respondent's counsel submitted that the appellants were seen in the forest with a panga (cutlass) holding the deceased to the ground. The deceased never returned home until when her rotting body was discovered in the forest after many days of search. The head was found detached from other parts of the body and it was established that it had been cut off using a cutlass. The respondent's counsel relied on **Tigo Stephen v Uganda; Criminal Appeal No 08 of 2009** for the holding that the most severe sentences known to the penal system is the death penalty followed by imprisonment for life and thirdly imprisonment for a term of years. He contended that in exercising his jurisdiction, the learned trial judge sentenced the appellants to a term of years which is not comparable to a sentence of death or life imprisonment. Counsel agreed with the principles applied by courts in sentencing submitted by the appellant's counsel and submitted that the learned trial judge considered the aggravating and mitigating factors while sentencing the appellants. He submitted that in the circumstances,

a sentence of 46 years' imprisonment is a lenient sentence because the learned the trial judge did not impose the maximum penalty of death as prescribed by the law.

Counsel further invited the court to consider the reasons given by the trial judge which justified the imposition of 46 years' imprisonment. This included the fact that offence was the worst of the worst and was committed in a barbaric and most heinous manner. It was revolting to society and deserved to be punished severely. On the other hand, the deceased was an innocent girl aged 16 years who was molested to her death and her body left in the bush to rot. Further counsel relied on **Bukenya Stephen v Uganda; Court of Appeal Criminal Appeal No 051 of 2007** where a sentence of life imprisonment was confirmed and the Court of Appeal held that it was not excessive. Further in **Rwabugande Moses vs Uganda; Supreme Court Criminal Appeal No 25 of 2014**, a sentence of 35 years imposed by the trial judge was found not to be illegal, or excessive considering that the maximum penalty for the offence of murder is death. The court upheld the sentence.

In the premises the respondent's counsel submitted that the sentence of 46 years' imprisonment is not harsh or manifestly excessive and it did not occasion a miscarriage of justice when taking into account the nature of the offence and the circumstances under which it was committed.

Ground 2 of the appeal

In reply to ground 2 of the appeal, the respondent's counsel submitted that the learned trial judge took into consideration the period the appellant had spent in pre-trial detention before his conviction and sentence. The statement of the learned trial judge that: "*I have taken into consideration the period the 2 have spent on remand*" complies with article 23 (8) of the Constitution. With reference to the cases of **Kizito Senkula vs Uganda SCCA No 24 of 2001; Kabuye Senveno v Uganda No. 2 of 2002; Bukenya Joseph vs Uganda SCCA No 17 of 2010**, it was held that the words in article 23 (8) of the Constitution "to take into account" does not require a trial court to apply a mathematical formula by deducting the exact number of years spent on remand prior to conviction and sentence. Further counsel submitted that the decision of the Supreme

Court in **Rwabugande Moses** (supra) cannot be said to have retrospective effect because the decision of the trial judge was delivered on 22nd of January 2015 but the decision of the Supreme Court is dated 3rd of March 2017 (a much later date). Further in **Abelle Asuman vs Uganda; SCCA No 66 of 2016** which was decided on 19th of April 2018, it was held that where the court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence cannot be interfered with by the appellate court on the ground that the judge or justices used different words in the judgment.

In the premises, counsel submitted that the learned trial judge considered the period the appellant spent on remand before trial and sentencing them accordingly under the provisions of the law. He prayed that we find that the appeal lacks merit and dismiss the appeal accordingly.

Resolution of appeal

We have carefully considered the appellant's appeal which is against sentence only with leave of court under section 132 (1) (b) of the Trial on Indictments Act, cap 23 laws of Uganda. An appellate court may interfere with a sentence imposed by the trial court if it was arrived at on the basis of a wrong principle or where the court misdirected itself or overlooked a material factor or where the sentence is manifestly excessive or so low as to amount to an injustice. In an appeal against sentence, the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA** held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case...

We will start with the 2nd ground of appeal which is on a point of law that:

> The learned trial judge erred in law and fact when he sentenced the appellant to 46 years' imprisonment and failed to take into account

the time the appellant had spent on remand and hence sentence being illegal.

The question of whether the learned trial judge took into account the period the appellants spent in lawful detention prior to his conviction and sentence is a question of fact that has to be considered from the record and also a question of how it was demonstrated in the judgment. The question of law is obvious and is not in dispute that where a trial judge does not take into account the period the appellants spent in pre-trial detention in imposing a fixed term of imprisonment, such a sentence is illegal as it contravenes article 23 (8) of the Constitution of the Republic of Uganda. The words used by the learned the trial judge are as follows:

> I have taken into consideration the period the two have spent on remand.

Prior to the above sentencing notes, Ms Karungi Loy, Senior State Attorney addressed the court and stated that the convicts had been on remand for 4 years. Similarly, Mr Twinomatsiko Enock the Counsel on state brief who represented the accused stated that the accused had been on remand for 4 years. The decision of the trial judge in sentencing is dated 22 January 2015.

Article 23 (8) of the Constitution of the Republic of Uganda provides that:

> (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.

The respondent's counsel advanced an interesting argument that the decision of the Supreme Court in **Rwabugande Moses vs Uganda** (supra) could not have been binding on the learned trial judge whose decision came earlier. The decision in **Rwabugande Moses** (supra) was meant to provide guidance on application of article 23 (8) of the Constitution and gives directions on how to apply it. It did not amend or change article 23 (8) which came into force on 8th October 1995 and which it sought to enforce. So the question of fact is whether the learned trial judge took into account the period the convict spent in lawful custody in respect of the offence before the completion of his or her trial.

In **Rwabugande Moses v Uganda; [2017] UGSC 8** the Supreme Court *inter alia* held that:

> It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

This decision was revisited in **Abelle Asuman v Uganda; [2018] UGSC 10,** where the Supreme Court held that there ought to be a demonstration by the trial court that the period the appellants spent in lawful custody was taken into account:

> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or justices used different words in the Judgement or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the constitutional obligation in Article 23 (8) of the Constitution.

It is therefore important to demonstrate that the period spent on pre-trial remand had been taken into account to the credit of the convict. It is not apparent how this period of 4 years' imprisonment was taken into account to the credit of the appellants though the learned trial judge stated that he had taken it into consideration. Granted the submissions of the learned Senior State Attorney and counsel for the convict on state brief included an address on the period the appellants had spent in pre-trial detention. Read in context, the decision followed the submissions of counsel and apparently were recorded by the judge. The record shows that the proceedings are dated 22nd of January 2015 under the hand of the judge. Further it is headed sentencing hearing. This was after judgment had been delivered on the same day. However, the sentencing decision itself does not refer to the period the appellants spent in pre-trial lawful custody at all.

The record demonstrates that the appellants were in police custody by 22nd of December 2010 and the statement of offence in the charge sheet

shows that the offence took place on 13th December 2010. By 22nd of December 2010, the appellants had been examined by a medical officer. This suggests that they were already in police custody. There is no evidence that they could have been arrested earlier than 22nd December 2010. The decision of the learned trial judge is dated 22 January 2015. The appellant had spent approximately 4 years and one month in pre-trial detention.

In the premises, we give the appellants the benefit of doubt because the learned trial judge did not demonstrate in any way that he had taken into account the actual period the appellant had spent in lawful custody prior to their conviction and sentence. We allow the appeal against sentence and set aside the sentence for contravention of article 23 (8) of the Constitution of the Republic of Uganda.

Having set aside the sentence, there is no need to consider ground one of the appeal. Exercising the powers of this court under section 11 of the Judicature Act cap 13 laws of Uganda, we would sentence the appellants afresh.

We have considered the aggravating factors as well as the mitigating factors in the sentencing notes of the learned trial judge which were as follows:

> "The convicts are presumed to be first offenders with no previous record of conviction.
>
> The offence is the worst of the worst and was committed in a barbaric most heinous manner. The two strong able-bodied men descended on a helpless young girl of 16 years and molested her to death and left her body to rot in the bushes. These are acts that are revolting to society and deserve to be punished severely.
>
> The convicts do not show any remorse at all. They are more concerned with there being released on short sentence. That shows that a lenient sentence should not reform them; and if they are released they would pose a danger to society again.
>
> I have taken into consideration the period the two have spent on remand.
>
> There is need to protect the society against would-be murderers by keeping convicts away for a longer period.

We have carefully considered the words of the learned trial judge especially the fact that he considered the offence to be the worst of the worst. Ordinarily, the death penalty is reserved for the worst of the worst for persons found guilty of murder. According to the decision of the Supreme Court in **Okello Godfrey v Uganda; SCCA No. 34 of 2014** in terms of severity, the life imprisonment ranks next in severity to the death penalty:

> In terms of severity of punishment in our penal laws, a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.

Secondly, in **Tigo Stephen v Uganda; Criminal Appeal No 08 of 2009 [2011] UGSC 7 (10th May, 2011)** the Supreme Court took note of the absurdity of specific terms of imprisonment of over 20 years taken to be more severe than life imprisonment. They said:

> We note that in many cases in Uganda, courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment.

The issue with life imprisonment sentences is that it ends up being less than 16 years' imprisonment after factoring in remission if earned. The offence was committed before the coming into force of the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendments) Act, 2019** which streamlines the problems with sentencing and allows fixed terms of imprisonment of up to 50 years. We cannot apply this law retrospectively. We agree with the learned trial judge that the appellants deserve a deterrent sentence notwithstanding the fact that they are considered convicts without a previous record of conviction for any offence and also were relatively young. This was an age of 29 years for Tumuramye Henry alias Kyakabale and 25 years for Muhumuza Milton respectively at the time of commission of the offence. There is judicial precedence imposing imprisonment for periods of over 25 years by this court.

In **Bahabwa Gadi v Uganda; Court of Appeal Criminal Appeal No 526 of 2014**, we found that a sentence of 30 years' imprisonment was appropriate in the circumstances. The appellant was only 26 years old at

the time of commission of the offence involving the ritual murder of a boy of 13 years who was beheaded. Similarly, we would find that a sentence of 30 years' imprisonment is appropriate in the circumstances of this case. From that sentence we would take into account the period of 4 years and one month that the appellants spent in lawful custody before their conviction on 22nd of January 2015. We sentence each of the appellants to a term of 25 years and 11 months' imprisonment which term commences from 22nd January 2015.

Dated at Mbarara the 3rd day of March 2022

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal