THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 526 OF 2014

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

BAHABWA GADI} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda Holden at Rukungiri in Criminal Session Case No. 15 of 2011 before Joseph Murangira, J delivered on 6th November, 2013)

JUDGMENT OF COURT

The Appellant was indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act, Cap. 120 laws of Uganda. He was tried and convicted as charged by the High Court of Uganda sitting at Rukungiri on the 6th of November 2013 and was sentenced to sixty years' imprisonment. The appellant was aggrieved by the sentence only and with leave of this court appealed against the sentence.

The facts accepted by the trial judge are that the Appellant and others on 16th January, 2010, at Mushorero Cell in Kanungu District murdered Tukwasibwa Salvan, (a boy aged 13 years). The deceased's body was found chopped to pieces, with parts put in a sack and thrown into a pit latrine. A bloodstained machete was recovered at the home of the appellant and the deceased's head was recovered from the appellant's kitchen where it had been hidden in a basket tied to the roof. Further blood was found in a basin of the accused. The murder was reported to Butogota police station and the Appellant was arrested. A medical examination of the appellant showed that he was of sound mind. The appellant was tried and convicted as charged whereupon he was sentenced to 60 years' imprisonment.

The appellant being aggrieved by the sentence only appealed to this court against sentence on two grounds of appeal that:

1. The learned trial Judge erred in law and fact in imposing the sentence of 60 years' imprisonment on the Appellant which is manifestly excessive and harsh in all circumstances.

2. The sentence imposed was illegal.

The Appellant prays that the appeal is allowed and the sentence set aside and replaced with a lesser and appropriate sentence.

At the hearing of the appeal, the Appellant was represented by learned Counsel Mr. Dhabangi Samuel on state brief while the Respondent was represented by Ms Angutoko Immaculate, Chief State Attorney. Both counsel addressed court by way of written submissions and judgment was reserved on notice.

The appellants counsel submitted that the trial judge's opening remarks in his reasons for sentence left a lot to be desired. The trial judge stated that he considered all the mitigating factors for the sentence that were advanced by (1) the prosecution and (2) the defence counsel. Mr Dhabangi noted that this consideration was omnibus, perfunctory and too passing to have any reasonable impact or influence on the mind of the trial judge in passing sentence. He contended that the entirety of the considerations amounted to a lopsided consideration of factors advanced by the state. He relied on **Guloba Rogers v Uganda Criminal Appeal No 57 of 2013** where it was held that the trial judge did not give adequate weight to the fact that the appellant was a first offender and was of a youthful age of 20 at the time the offence was committed and therefore had to reform. In that case the sentence for 47 years' imprisonment on both counts was found to be excessive in the circumstances.

Further the appellants counsel submitted that on the basis of the above consideration, the sentence was rendered illegal because the trial judge did not mention reduction of the sentence imposed in light of the period of 3 years the appellant spent on remand. He relied on **Rwabugande Moses v Uganda; SCCA No 25 of 2014**; and **Kawooya Joseph v Uganda; Criminal Appeal No 0512 of 2014** where it was 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

(Article 23 (8) of the Constitution of the Republic of Uganda). The appellants counsel contended that the lopsided manner of consideration of the aggravating factors advanced by the prosecution among other factors moved the learned trial judge to impose a harsh and manifestly excessive sentence in all circumstances of the case because the appellant was 25 years with life expectancy in Uganda of 45 years. Further counsel submitted that there is little, if any, difference in essence and outcome between a sentence over 60 years' imprisonment imposed on the 25-year-old appellant and a sentence of life imprisonment. In essence the trial judge denied the appellant the slightest chance for rehabilitation, reconciliation with society and the fact that the appellant was hurt and traumatised too. He further submitted that the law demands a custodial sentence but justice demands that even society learns to be forgiving and kind. He proposed a sentence of 20 years' imprisonment in the circumstances.

In reply Ms Angutoko submitted that it is trite law that sentencing is at the discretion of the trial judge. On the question of legality of the sentence, the learned trial judge considered the mitigating and aggravating factors advanced by the prosecution and by the defence. On the question of legality of sentence, the learned trial judge clearly stated that the appellant had spent 3 years in lawful detention before his conviction. The appellant was sentenced on 16 November 2013. She relied on **Rwabugande Moses v Uganda SCCA No 25 of 2014** which requires arithmetic deduction of the period spent on remand. However, in **Kizito Senkula v Uganda; SCCA No 24 of 2011**, it was held that the taking into account under article 23 (8) of the Constitution does not mean an arithmetical exercise. This position was reinforced by the decision in **Abelle Asuman v Uganda SCCA No 66 of 2016** and in **Nashimolo Paul Kibolo v Uganda; SCCA No 46 of 2017** where it was held *inter alia* that the decision in **Rwabugande Moses** (supra) was delivered on 3 March 2017 and in accordance with the principles of precedent, the courts have to follow the position of the law from that date henceforth. Finally, in **Abelle Asuman v Uganda** (supra) it was held *inter alia*, that all that the court has to do is to demonstrate that it is taken into account the period on remand to the credit of the convict and the arithmetical method is merely a

method of doing that. In the premises the sentence did not contravene article 23 (8) of the Constitution and is lawful.

On the question of whether a sentence of 60 years' imprisonment is not manifestly excessive and harsh, the respondents counsel submitted that consistency in sentencing is neither a mitigating nor an aggravating factor. The sentence imposed lies at the discretion of the trial court. Counsel noted that life imprisonment was a more severe penalty than imprisonment for a term of years and relied on several authorities where a sentence of life imprisonment was upheld by the Supreme Court.

Resolution of appeal

We have carefully considered the appeal and would start with the issue of legality of sentence which is a point of law. This is based on the second ground of appeal which is that:

> The sentence imposed was illegal.

Where the sentence imposed is illegal, it would be set aside and there would be no need to consider the first ground of appeal which is whether the learned trial judge erred in law and fact in imposing the sentence of 60 years' imprisonment on the applicant which is manifestly excessive and harsh in the circumstances.

The learned trial judge in imposing sentence stated that the following factors are put into consideration namely:

All the mitigating factors for the sentence that were advanced by (i) the prosecution (ii) the defence counsel. The learned trial judge went ahead to consider the aggravating factors. Going back to the mitigating factors, in mitigation of sentence counsel for the convicts submitted that the convict is the first offender, he is aged 25 years and spent on remand 3 years. He prayed for a sentence that is commensurate with the offence. The prosecution did not mention the period spent by the appellant in lawful detention before his conviction. The question that comes to mind is whether the pre-trial period the appellant was in detention is a mitigating factor. The pre-trial period does not mitigate any offence but only has to be taken into account as mandated by article 23 (8) of the Constitution. This article only applies to a determinate period and does

not apply to a sentence of life imprisonment or a sentence for the convict to suffer the. Article 23 (8) of the Constitution 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.

Article 23 (8) of the Constitution was considered by the Supreme Court in **Rwabugande Moses v Uganda; [2017] UGSC 8** where the Supreme Court stated that the period spent on remand before conviction should be deducted from the sentence the trial court intends to impose:

> 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 method was of taking into account the period the convict spent in lawful detention before his conviction was considered in **Abelle Asuman v Uganda; [2018] UGSC 10,** where the Supreme Court considered other methods of taking into account the period the convict spent on remand before his conviction. 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 and this is a question of style. They stated that:

> 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.

While the learned trial judge could have taken into account the period by making reference to the mitigating factors advanced by the defence counsel, which factors he stated that he had taken into account and the factors are any merit it in the submissions which were recorded by the court, we have noted that the period the appellants spent in the remand is not a mitigating factor. A mitigating factor, is a factor that may lessen the sentence that would be imposed while article 23 (8) of the Constitution is a provision that requires the sentence that would be imposed to be imposed after considering the period the convict spent on remand before his conviction. The facts of this case are that the learned trial judge sentenced the appellant to 60 years' imprisonment. This cannot by any stretch of the imagination show that the period of 3 years the appellant had spent in pre-trial remand was taken into account.

While this engages the first ground of appeal about the harshness or severity of sentence, there is another factor to be considered. The respondents counsel could not point to any precedent where a sentence of over 45 years' imprisonment has been upheld by this court or the Supreme Court.

Before the amendment of the law by the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendments) Act, 2019** which law came into force in November 2021 and is therefore not relevant to this matter which was decided in November 2013, life imprisonment sentences had been considered by the Supreme Court and this Court. They are by definition the most severe penalty after the death penalty. Yet in practice a prisoner on a sentence of life imprisonment may come out of prison after serving less than twenty years. Other terms of imprisonment are supposed to be less than life imprisonment which ranks next in severity to the death penalty. In the new law namely the **Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendments) Act, 2019** under section 4 thereof life imprisonment or imprisonment for life in any enactment is defined as:

> "life imprisonment or imprisonment for life means imprisonment for the natural life of a person without the possibility of being released."

This is consistent with decisions of the Supreme Court before the enactment starting with **Tigo Stephen v Uganda; Criminal Appeal No 08 of 2009 [2011] UGSC 7 (10th May, 2011).** The Supreme Court defined life imprisonment as:

> ... imprisonment for the natural lifetime of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

The Supreme Court was critical of any notion that life imprisonment meant 20 years' imprisonment as deemed under section 46 (6) of the Prisons Act Cap 304 2000 laws of Uganda which provides that:

> For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be 20 years' imprisonment.

This section was retained by section 86 (3) of the Prisons Act, 2006 which repealed the Prisons Act, Cap 304. In **Tigo Stephen v Uganda** (supra) the Supreme Court ranked the death penalty as the most severe penalty followed by life imprisonment and thereafter a term of years. The Supreme Court stated that:

> The most severe sentences known to the penal system include the death penalty, imprisonment for life and imprisonment for a term of years. Imprisonment for life which is the second gravest punishment next only to the death sentence is not defined in the statutes prescribing it. It seems to us that it is for that reason that the Prisons Act provided that for purposes of calculating remission, imprisonment for life shall be deemed to be twenty years. It is noteworthy that the Act is clear that twenty years is only for purpose of calculating remission. The question remains whether there are purposes for which life imprisonment means something more than 20 years, e.g. imprisonment for life.

Because life imprisonment was ranked as the second gravest sentence next to the death sentence, the effect of a sentence of imprisonment of over 60 years is that the convict will remain in prison for over twice the period deemed of 20 years to be the life imprisonment for purposes of remission.

To make it much more consistent, the Supreme Court in **Wamutabanewe Jamiru v Uganda; Supreme Court Criminal Appeal No. 74 of 2007 [2018] UGSC 8 (12th April 2018)** struck down a holding that the term of imprisonment shall be without remission. This meant that the Prison

Authorities were free to deem life imprisonment to be 20 years' imprisonment and give a convict the benefit of remission. That meant that a prisoner sentenced to life imprisonment may walk out of prison in less than 16 years. The Supreme Court held that:

> We note that the maximum penalty for the offence of murder, which the Appellant was convicted of, is death and that the sentence he is appealing is less severe than the death penalty he had earlier been handed. Nevertheless, given that remission is a function of the penal institution which has to exercise it in accordance with the Prisons Act I find it illogical for any court, let alone the Court of Appeal in the instant matter, to ordain that the Appellant shall serve his sentence without remission.

In an earlier decision of the Supreme Court in **Lawrence Kakooza v Uganda [1994] UGSC** the Supreme Court had taken the contrary view that life imprisonment amounted to 20 years' imprisonment in light of section 49 (7) of the Prisons Act cap 302 (repealed in 2006). This decision was not discussed or expressly overruled in the seminal decision of **Tigo v Uganda** (supra). In effect there were two conflicting approaches by the Supreme Court. We raise this merely for completeness of the picture around this subject.

Turning to the ranking of punishments starting with the worst of the worst cases attracting the death penalty and the next severe penalty being life imprisonment or imprisonment for life, a sentence of 60 years' imprisonment which purports to be less severe than life imprisonment is not only absurd but unlawful.

This is conclusion can be based on precedent where the Supreme Court in **Okello Godfrey v Uganda; SCCA No. 34 of 2014** the Supreme Court held that:

> 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;** (supra) the Supreme Court took note of the absurdity of specific terms of imprisonment (of over 20 years) being 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.

Our conclusion is that a term of imprison of 60 years cannot pretend to be less severe than life imprisonment. It is therefore untenable in law.

We allow ground 2 of the appeal and set aside the sentence of 60 years' imprisonment for breach of article 23 (8) of the Constitution and for being a sentence unknown in law or precedent.

Having set aside the sentence we do not need to consider ground one of the appeal which is against the severity of sentence. Exercising our jurisdiction under section 11 of the Judicature Act, we will sentence the appellant afresh.

We have considered the facts and circumstances of this murder. It was a gruesome murder and we agree with the sentencing notes of the trial judge that the brutal actions of the convict caused trauma and psychological torture to the victim's parents. Secondly the death of the victim was a big loss to his family, relatives, friends, in-laws and the entire community. The victim was a small boy who was robbed of his life at the tender age of 13 years in what appears to be a ritual murder. He was beheaded had his body dumped in a latrine. Parts of his body were also dismembered and some were kept in a basket. The head was detached and smeared with millet flour. The intestines were out. The learned trial judge noted that the people who attended court were traumatised by the conduct of the appellant was not remorseful.

We however note that the convict does not have a previous record as stated by the prosecution. Secondly, he committed the offence at the age of 25 years and the society can make an effort to have him reformed. He had spent 3 years on remand which we would take into account by deducting it from the sentence that we would have imposed on him.

We have further considered a few sentences where a life imprisonment sentence was reduced to a term of years. In **Tumwesigye Anthony v Uganda; Court of Appeal Criminal Appeal No 46 of 2012 [2014] UGCA 61 (18th December 2014)** the Appellant had been convicted of the offence of murder and sentenced to 32 years' imprisonment. The Court of Appeal agreed that the sentence was harsh and manifestly excessive in light of

the fact that the appellant was a first offender and 19 years old at the time of commission of the offence and reduced the sentence to 20 years' imprisonment to run from the date of conviction.

In **Kasaija v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant had been convicted of two counts of murder and sentenced to life imprisonment by the High Court. His appeal against sentence was allowed on the ground that the sentence was harsh and manifestly excessive. The Court of Appeal considered the mitigating factor that the Appellant was a first offender and was 29 years old at the time of commission of the offence. On the other hand, he had committed a very serious offence leading to the loss of life in each count of a senseless and brutal murder of two suspects who had been arrested. Finally, the court took into account the period of two and a half years the appellant spent in remand prior to his trial and conviction. He was resentenced to 18 years' imprisonment on each count to be served concurrently with effect from the date of conviction.

In **Atiku Lino v Uganda; Criminal Appeal No 0041 of 2009 [2016] UGCA 20 (6th June 2016)**, the Appellant used a cutlass and cut the deceased several times causing her death. He was deluded that the deceased had bewitched his ailing son. He was convicted and sentenced to life imprisonment and on appeal from the High Court, the sentence was reduced from life imprisonment to 20 years' imprisonment. The court *inter alia* took into account the age of the appeal who committed the offence when he was 31 years old.

In the premises, we consider a sentence of 30 years' imprisonment would meet the ends of justice.

The medical examination report shows that the appellant was in custody by 2nd January 2010. He was tried and convicted on 6th November 2013 giving a period of 3 years and 10 months.

We accordingly take this period into account and sentence the appellant to 26 years and 1 month's imprisonment which period commenced on the date of his conviction on 6th of November, 2013.

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