

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 542 OF 2015

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

ORIKIRIZA YORAM BOAZ.....APPELLANT

6

VERSUS

UGANDA. RESPONDENT

*[Appeal from the Decision of the High Court of Uganda at Kabale before Hon.
Justice Micheal Elubu dated 30th May 2014]*

JUDGMENT OF THE COURT

12 The Appellant was indicted for the offence of Murder contrary to sections 188 and 189 of the Penal Code Act. The particulars are that the Appellant on the 21st day of May 2012 at Kijorero cell, Bukora Parish, Kitumba Sub-County in Kabale district, murdered **Katabazi Samuel**.

Background

18 The facts of the case are that on 20th May 2012, the deceased approached his children and informed them that he intended to sell a piece of land situated at Omukibungo to take care of his ailing health. The deceased sold the land at 1,700,000/= and was paid cash of 1,000,000/= with the balance to be paid later. The family members including the Appellant witnessed the above transaction. On the 21st
24 May 2012, the deceased's wife had momentarily left him on his own at home. The facts as accepted by the trial Court were that the appellant finding him alone and vulnerable, pounced on him, tied both hands

and legs with a sisal rope, in 'execution' or 'kandoya style' and chopped his neck using a panga, killing him instantly. The Appellant grabbed the deceased's money UGX1,000,000/=, placed the panga and disappeared.

6 On 5th June 2012, the Appellant turned himself in at Kabale police station and confessed that he was responsible for the death of his father. Apparently he had been hiding in Kampala. He was arrested and detained. The Appellant recorded an extra-judicial statement confessing to have committed the said offence. He was convicted and sentenced to 40 years imprisonment. Dissatisfied with the decision, he
12 sought leave to appeal against sentence only on two grounds namely;

1. That the Learned Trial Judge erred in law when he convicted the appellant to 40 years, a punishment which was manifestly harsh and excessive in the circumstances upon the appellant..
2. That the learned trial judge erred in law when he sentenced
18 the appellant to 40 years imprisonment and failed to take into account the time the appellant spent on remand, hence the sentence being illegal.

Appearances

24 At the hearing of the Appeal, the Appellant was represented by Mr. Andrew Byamukama on state brief while the Respondent was represented by Ms. Samalie Wakooli, Asst. DPP from the Office of the

Director of Public Prosecutions. The Appellant appeared via an online video link from Mbarara main prison due to the prevailing covid-19 conditions.

Submissions for the Appellant

6 Concerning Ground No. 1 Counsel submitted that the sentence of 40 years imposed on the Appellant was manifestly excessive and harsh. He added that there are a variety of authorities where murder sentences have been greatly reduced and substituted with lesser years of imprisonment. He referred to **Turyahika Joseph v Uganda Court of Appeal Criminal Appeal No. 327 of 2014** where this court held that;
12 ‘...sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence...’

Counsel also relied on **Tumwesigye Rauben v Uganda Court of Appeal Criminal Appeal No. 181 of 2013** where the appellant was sentenced to 40 years and on appeal, the sentence was reduced to 20
18 years.

Counsel contended that there is need to maintain uniformity and consistency in the sentencing of convicts. He prayed that this court quashes and sets aside the sentence imposed on the Appellant, as it was manifestly harsh and excessive or in the alternative invoke the powers under **S.11 of the Judicature Act**, to use its discretion and
24 impose an appropriate sentence in the circumstances.

Regarding Ground No. 2, counsel submitted that the trial judge while handing down the sentence the trial Judge, never considered nor complied with the provisions of Article 28 (3) of the Constitution which requires court to take into account the period spent on remand. Counsel argued that the trial judge while sentencing the appellant
6 noted that the period spent on remand will be considered but he never asked the appellant or his counsel the time that the appellant had spent on remand, which was illegal.

The Respondent's case

Counsel submitted that for the offence of murder upon conviction, the
12 accused is liable to suffer death. She argued that a sentence of 40 years is less than the death penalty and life imprisonment. That it is neither manifestly harsh nor excessive in the circumstances of this case. She cited the case of **Okello Geoffrey v Uganda S.C.C.A No. 34 of 2014**, where court was of the view that sentences of more than 20 years imprisonment cannot be said to be illegal because they are less than
18 the maximum.

Counsel added that sentencing is a discretion of the trial Judge and that an appellate court will only interfere with a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material fact or its manifestly harsh and excessive.
24 She sprayed that court dismisses this ground of appeal.

In regard to Ground No.2, counsel submitted that at the time the decision of the instant case was made in 2014, the requirement of mathematical deduction was not a priority. She contended that the requirement of mathematical deductions in **Rwabugande** was decided on 3rd March 2017 thus cannot be said to operate retrospectively.

6 Counsel submitted that from the court record, the trial judge took into consideration the period the Appellant spent on remand thus the allegation that **Rwabugande** was not considered is unfounded.

The Duties of the Court at Sentencing

12 Where an appeal is only against sentence, it is not in doubt that this court has wide latitude in the law to vary or confirm or reverse such a sentence. Several laws grant this mandate. To start with, **Section 11 the Judicature Act, CAP 13** recognises the jurisdiction of the Court of Appeal.

It states as follows:

18 *“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.”*

24 The Trial on Indictments Act lays down both the law and the procedure of handling criminal appeals from the High Court to the Court of Appeal. **Section 132 (1) (b) of the T.I.A, Cap 23**, states as follows:

(1) *Subject to this Section;*

b) *An accused person may, with leave of Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law;*

and the Court of Appeal may-

- 6 (d) *Confirm, vary or reverse the sentence and conviction,*
 (e) *In the case of an appeal against the sentence alone, confirm or vary the sentence;*

The Court of Appeal can also lawfully alter, increase or decrease a sentence under **S. 34(2) of the Criminal Procedure Code Act cap 116.**

12 All these sections of the law are procedurally justified under **Rule 32 (1) of the Judicature (Court of Appeal) Rules**, which states, that;

'On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.'

18 In matters of sentence as noted in **Kamya Johnson Wavamuno S.C.C.A No. 16 of 2000** it has been variously accepted and *'...It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently.'*

This court has a duty to review the circumstances of each case and to see whether it can, vary, alter or confirm the sentence passed against the Appellant. Indeed while meting out the sentence of 40 years imprisonment, the learned Trial Judge had this to say;

6 *"The convict shall be treated as a first offender. The court has taken consideration of the family situation of the accused person. No remorse for his action. The period spent on remand will be taken into consideration. He tied him with a rope cutting his neck. This court cannot think of more cruel act by a son. The offence of murder is rampant in this region and this court must punish it and send out a deterrent message to all of a like mind. The acts of the convict must therefore be severely punished. The actions of the convict have had an obviously adverse effect and it has gone ahead to continue*
12 *to bring misery by threatening those at home. I have taken the remand period into consideration and sentence the convict to serve 40 years in prison."*

We note that, the sentencing regime in Uganda is guided by the **Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal notice No. 8 of 2013** the purpose of which is *inter a lia*; to provide principles and guidelines to be applied by courts in
18 sentencing; to provide sentencing ranges and other means of dealing with offenders; to provide a mechanism for considering the interests of victims of crime and the community when sentencing and to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.

Paragraph 19 (2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) 2013, enjoins a sentencing
24 court in the offence of murder to consider the aggravating and mitigating factors in paragraph 20 and 21 of the guidelines and to

determine the appropriate sentence in accordance with the sentencing range.

The sentencing range in determining an appropriate sentence for murder after considering the aggravating and mitigating factors is 30
6 years and up.

In the instant case, the trial judge considered the mitigating and aggravating factors and sentenced the appellant to 40 years.

The Supreme Court in **Aharikundira v Uganda S.C.C.A No.27 of 2015**, Court noted that;

12 *“It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.”*

18 A similar principle was laid down in **Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001**

24 ‘the appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.’

In **Uganda v Uwera Nsenga, Criminal Appeal No. 312 of 2013** where the accused ran over her husband with a car, at their gate and eventually killed him. She was sentenced to 20 years imprisonment and in **Akbar Hussein Godi v Uganda Supreme Court Criminal Appeal No. 3 of 2013** where the appellant shot his wife dead he was
6 sentenced to 25 years imprisonment to mention but a few.

In the interest of justice, fairness and consistency, we are of the view that the sentence of 40 years appears harsh and excessive in the circumstances. It is hereby set aside. Ground No. 1 therefore succeeds.

12 Regarding Ground No. 2, it is correct as submitted by counsel for the respondent that at the time the sentence was passed, case of Rwabugande was not yet authority, however, a court was still required to deduct the period spent on remand. Indeed we agree that this should not be just a mechanical, mathematical deduction but that it should be about the period spent on remand in compliance with
18 **Article 23 (3) of the Constitution.** *Devi*

The trial judge in this case noted that he had taken the remand period into consideration but did not mention the specific period that the appellant had been on remand. This created doubt as to whether the trial judge really did take into account the said period before passing
24 sentence. We find this failure by the trial Judge to be a fundamental error and requires the setting aside of the whole sentence.

Having found as above that the sentence of 40 years was harsh and excessive and that it was not compliant with article 23(8) we now proceed under s.11 of the Judicature Act to impose a fresh sentence on the appellant. We consider that a sentence of 25years will meet the ends of justice. On this we now set off the period of 1 year, 11 months and 25 days the appellant spent on remand. The appellant is sentenced to 23 years, 1 month and 5 days to be served w.e.f the date of sentence. The appeal is hereby allowed.

Dated and Signed this 24th Day of March 2022

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Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

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Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

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Hon. Mr. Justice Christopher Madrama
Justice of Appeal

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