THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

(Coram: Elizabeth Musoke, JA, Christopher Gashirabake, JA, Eva K. Luswata, JA)

CRIMINAL SESSION APPEAL NO. 051 OF 2018

BETWEEN

KAYONDO EMMANUEL:: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the Judgment of Masalu Musene, J, sitting at Nakawa delivered on 22nd October, 2014)

JUDGMENT

Introduction

1] The appellant was charged and convicted on his own plea of guilty on two counts for the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 in count one, and aggravated robbery contrary to Sections 285 & 286(2) of the Penal Code Act in count two. The appellant was sentenced to 22 years and 18 years of imprisonment respectively. Both sentences running concurrently.

2] The facts the appellant admitted at the trial were that on the 19/5/11, the deceased Kiwalabye Vicent left his home for work and never returned. On 25/5/11, his body was recovered decomposing

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in Nakatongoli swamp. Police investigations led to the arrest of the appellant who was found in possession of the motorcycle UDS 966T which the deceased had been riding. Investigations revealed that the vehicle's registration plate No. UDS 966T had been altered but that the engine numbers and chassis numbers were unaltered. It was further established that the appellant was a friend to the deceased and could not account for the motorcycle. The body of the deceased was subjected to medical examination and the cause of death was confirmed to be hemorrhagic shock due to cutting of the throat and suffocation.

3] The matter was forwarded to court and the appellant was convicted by the High Court on his own plea of guilty and sentenced accordingly. The appellant being aggrieved with the conviction and sentence, obtained leave of this Court to lodge an appeal to this court. The appeal is premised on two grounds set out in the memorandum of appeal as follows;

i. The learned Judge erred in law when he failed to consider ingredients of offence legal steps (sic) which plea of guilty should be confirmed before convicting the appellant occasioning substantive justice.

ii. The learned trial Judge erred in law when he based on wrong principle overlooked material factors and sentenced appellant to a manifestly harsh and excessive sentences. (Sic)

Representation

4] At the hearing of the appeal, the appellant was represented by learned counsel Mr. Seth Rukundo on state brief while the respondent was represented by learned counsel Ms. Kabajungu Ann a Chief State Attorney who held the brief of Ms. Ahimbisibwe Winnifred.

Grounds one and two

Submissions for the appellant

5] Appellant's counsel opted to submit on the two grounds concurrently.

6] We consider this ground as badly drafted. Even so, we were able to discern from counsel's submissions that the objection was against the manner in which the trial Judge conducted the appellant's plea of guilty. Mr. Rukundo, appellant's Counsel gave a preamble to his submissions by narrating the chronical events of the appellant's arrest and arraign in court. He also referred to the Human Rights Enforcement Act 2019. However, he did not develop any arguments in line with those particular submissions.

7] With regards to the grounds raised, counsel argued that the Judge acted on a wrong principle after the plea of guilty was recorded. He contended that during trial, the indictment was read and explained to the accused, however the state attorney narrated facts which were not consistent with the ingredients of the offences of murder and aggravated robbery, and in his opinion, the appellant was not

guilty of the offences charged. He argued further that even where the appellant pleaded guilty, the prosecution still had the burden to prove his guilt by stating facts containing the ingredients of the offences charged. That by failing to do so, the trial judge never came to know the manner and circumstances of the commission of the offences charged. He concluded that had trial Judge been in possession of all facts consistent with the required ingredients, he would have reached a contrary decision.

8] Mr. Rukundo submitted further that the learned trial Judge sentenced the appellant to an excessive sentence of 25 years' imprisonment on count 1 and 21 years on count 2 basing on a wrong principle, because his record as a first offender was not considered. He sought in the appeal for the sentence to be set aside or reduced by 15 years on each count.

Submissions for the respondent

9] As a precursor to her submissions, Ms. Kabajungu raised a preliminary objection that the grounds of appeal offend Rule 66(2) of the Judicature (court of appeal) Rules as the grounds do not specify the exact points of law or facts or mixed law and fact wrongly decided by the trial Judge. Citing the decision of **Seremba Dennis v Uganda CA Cr. Appeal No. 480/2017**, she prayed for both grounds to be struck out.

Ground one

10] In particular response to the grounds of appeal, Ms. Kabajungu submitted that on pages 9, 10 and 11 of the record of appeal, the trial Judge read and explained the charges of murder and aggravated robbery to the appellant before he pleaded guilty to both charges. She relied substantially on the decision of this Court in **Sebuliba Siraj v Uganda CA Cr Appeal No. 0319/2009** (which followed **Adan v R (1973)EA 445)** that explain the process of plea taking. In her opinion, the facts as read by the prosecution on page 10 of the Record gave sufficient information as to the essential elements of each of the offences with which the appellant was charged. Ms. Kabajjungu continued that the facts were not only read but explained to the appellant and his answers in all the stages of the proceedings indicate that he understood what was said to him, its consequences and what the proceedings were all about. That there was no protest in the record of appeal to indicate that the appellant did not understand the proceedings.

11] In conclusion counsel prayed that this Honourable Court be pleased to find that the plea of guilty was properly taken and that the ground should fail.

Ground 2

12] In response to ground 2, Ms. Kabajungu argued that the sentences of 22 years' imprisonment on count I and 18 years imprisonment on count 2 were not manifestly harsh and excessive. Counsel submitted that the learned trial Judge considered the

mitigating and aggravating factors of the case and the fact that the appellant had pleaded guilty. She continued that the appellant was spared of the maximum sentence of death after pleading to two grave and very serious offences. whose maximum sentence is death of which he was spared.

13] In conclusion, Ms. Kabajungu submitted that the trial Judge exercised his discretion judiciously and prayed that this honourable court be pleased to find that the sentences imposed are legal and uphold them.

Our Decision

Preliminary objection

14] We agree with Ms. Kabajungu that a memorandum of appeal must comply with the provisions of Rule 66(2) of the Rules of this Court, which provides in part as follows:

The memorandum of appeal shall set forth concisely and under distinct heads, numbered consecutively without argument or narrative, the grounds of objection to the decision appealed against, specifying the case of a first appeal, the points of law or fact or mixed law or fact .....which are alleged to have been wrongly decided.....”

In our view, the requirement for specificity when drafting grounds of appeal is a matter of law, and is mandatory. However, the fault in the memorandum here is more to do with irresponsible drafting which we note extended to Mr. Rukundo’s submissions as well. This cannot be blamed on the appellant and even then, we note that the appellant attacks what he considers material factors and failure by the trial Judge

to take certain legal steps when taking plea. Going by the decision of the Supreme Court in **Bogere Moses & Anor V Uganda SC Cr Appeal No. 10/1997,** we are would still be mandated to consider the appeal. It was decided there that:

> *"....where a material issue of objection is raised on appeal, the appellant is entitled to receive adjudication on such issue from the appellate court even if the adjudication be handled in summary form....it is the duty of the first appellate court to rehear the case on appeal by reconsidering all materials which were before the trial court and make its own mind...."*

15] Therefore, with respect, the objection is rejected and we shall proceed to consider the merits of the appeal.

Determination of the Appeal

16] The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**). Thus, alive to that duty, we shall proceed to resolve the grounds of appeal as presented

Ground 1

17] The record confirms and it is not in dispute that the appellant was on 22/10/2014 convicted and sentenced on his own plea of guilty.

The TIA provides for the procedure to be followed on the taking of the plea on an indictment in section 60 thereof as follows:

60. Pleading to indictment.

The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.

The appeal is against the legality of the plea.

18] The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where **Spry V.P. at page 446** stated it in the following terms:

"*When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material*

respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

19] It was the appellant's case that the facts related by the state attorney at page 2 of the proceedings of the record are not consistent with the particulars of the offence on both counts and do not make the appellant guilty of the offences charged. Mr. Rukundo further contended that the ingredients of the offence were not read to the appellant. On the other hand, it is the respondents' case that the trial Judge read and explained the charges to the appellant and the prosecution then narrated the facts of the case after which the appellant respondent confirmed as true.

20] We have examined the proceedings in the trial court and established that the Appellant was charged with two counts. The proceedings show that the charges were read and explained to the accused. Plea was taken on 22/10/14 at page 9 of the record, and we quote:

"Court: Charges read and explained.
Count 1:
It is true I participated in the murder of the deceased.
Court: Plea of guilty entered.
SIGNED: Hon. Justice Wilson Masalu Musene
IUDGE"

"Count II:
It is true I robbed the complainant.
Court: Plea of guilty entered"
SIGNED: Hon. Justice Wilson Masalu Musene
JUDGE"

21] The requirement is that the charges are read in full to the accused in a language that he understands after which an explanation is given of each ingredient of the offence before a conviction. The purpose is to ascertain the fact that the plea of guilty indeed constitutes an understanding and admission of all the legal ingredients of the offence. It is intended to rule out the possibility of the convict misunderstanding the nature of the offence and also to ascertain that the plea is unequivocal. When the plea is accompanied by any qualification indicating that the accused is unaware of its significance, then it can be qualified as wrongly administered.

22] In this case, the record indicates that both charges were read and then explained. Although not specifically provided for in the law, it would have helped if the Judge had recorded more detail of how the explanations were made. However, the appellant's response to both charges indicate that he understood the import of both charges. For Count one he stated *"I participated in the murder of the deceased"* and for count 2 he responded *"It is true I robbed the complainant"*. Both were responses indicating that he understood the specifics of the charges. We therefore find that the manner in which the plea was taken, did not result into any substantive injustice to the appellant.

23] In the same vein, a narration of the facts to the accused following a plea of guilty confirms that what the prosecution is presenting to the court, is a true and correct reflection of what the accused understands them to be. The Court should invite the accused to confirm or dispute the facts as narrated. Where it becomes apparent to the Court, for whatever reason, that the accused person's version

of facts is materially inconsistent with the plea, or what has been related by the prosecution, the court should give the accused the opportunity to withdraw the plea, and enter a plea of not guilty.

24] The facts as read out by prosecution on page 10 of the record of appeal were that:

"On 19 March, 2011, the deceased, Kiwalabye Vincent left home in Mityana for work and never returned. A search was mounted. On 25.5.2011, his body was recovered decomposing in Nakatongoli swamp. Police investigations led to the arrest of the Accused who was found in possession of motor cycle UDS 966T, which the deceased had been riding. Investigations revealed that Reg. No. UDS 966T had been altered from UDS 966Z, the engine numbers and chassis numbers had not been altered. Chassis No. was MD2DDDM22T WM-27306. The: engine number was DUMBTN91462. It was further established that Accused was a friend to deceased and could not account for the motor cycle. The body of the deceased was subjected to medical examination cause of death was hemorrhagic shock due to the cutting of the throat and suffocation. The motor cycle was, exhibited. Accused was examined on PF24 and found to be of normal mental status. He was accordingly charged."

The appellant responded immediately that *"...the facts as narrated by the prosecution are true and correct"*. He did not disprove or offer a different version of facts. It was thus his confirmation that the facts presented by the prosecution were true and correct.

25] We therefore find that proper steps were followed while recording the appellant's plea of guilty.

26] Counsel for the appellant further contended the facts as read out by the prosecution were not consistent with the offences of murder and aggravated robbery. We however note that counsel did not point out the specific contradiction. We are of the considered view that the manner in which an offence is committed and other relevant factors will dictate the nature of the facts explaining the ingredients of the offence. Facts will differ on a case to case basis. In this case, the deceased's body was found with injuries that indicated an unlawful death caused with violence and malice aforethought. The appellant who was found in possession of the deceased's motor cycle, a stolen article, could not account for how he received it. He admitted in Court that he had robbed and then murdered the deceased, which confirmed his participation in both offences. In our view, the facts clearly stipulated the essential ingredients of the offences committed by the appellant. We do not see any inconsistence as alleged by counsel for the appellant.

27] In view of the above, this case passed the test set out in **Adan Versus Republic (Supra)** and several decided cases of this court that have previously followed the settled principles of law which protect a fair trial. We find that the appellant understood the charges against him and pleaded guilty to both counts and that there was no inconsistency in the facts that were read to the appellant.

28] We therefore uphold the decision of the trial court for convicting the accused on his own plea of guilty.

29] Ground one fails.

Ground two

30] The issue for determination is whether the learned trial judge erred in law when he based his sentence on wrong principle and overlooked material factors resulting into a manifestly harsh sentence.

31] The established position is that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentence unless the sentence is illegal or the appellate court is satisfied that in the exercise of its discretion, the trial court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence. It will also interfere if the sentence was manifestly so excessive or so low as to amount to an injustice. **See Livingstone Kakooza versus Uganda Supreme Court Criminal Appeal No. 17 of 1993.**

32] It is the appellant's case that the learned trial Judge sentenced the appellant to a manifestly harsh and excessive sentence of 25 years' imprisonment on count one, and 21 years' imprisonment on count two. He further contended that court ought to have referred to the mitigating factors.

33] On the other hand, learned counsel for the respondent submitted that the learned trial judge considered the mitigating factors of the

case, and considered the fact that since the appellant had pleaded guilty, he would not be sentenced to the maximum sentence of death.

34] The sentencing ruling is found at page four of the record. The Judge stated that:

"Under the sentencing guidelines, Court is supposed to hear from relatives of deceased before sentence. However, the guidelines are not mandatory and this is an old case of 2011, whereby the convict should be sentenced and he serves.

I have considered the mitigating factors as well as aggravating factors. Much as the convict readily pleaded guilty, the offences in question are serious. Each of them carries a maximum penalty of death. But because of pleading guilty, the convict will not be sentenced to death. Nevertheless, a long period in custody is called for to serve as a lesson that people should value lives of others, other than slaughtering them like goats. In the premises, I sentence you as follows;

Count I:
Instead of 25 years imprisonment, I subtract 3 years of remand and sentence you to serve 22 years imprisonment.

In count II:
I sentence you to serve 18 years instead of 21 years after reducing 3 of remand imprisonment.
Both sentences to run concurrently"

35] Stemming from the above, it is clear that the trial court while sentencing the appellant equally considered the mitigating and aggravating circumstances presented by counsel. He in addition considered the period spent on remand. The sentence was legal and we decline to interfere with it on that account.

36] Although crimes are not identical or committed under identical circumstances, there is always need for Court to maintain consistency or uniformity when exercising its sentencing discretion. Under **Paragraph 19(1)** of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 (Sentencing Guidelines), the court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence. According to the third Schedule, the sentencing range for murder and aggravated robbery after considering both the aggravating and mitigating factor, is 30 years to death, as the maximum sentence.

37] In addition, subject to **Paragraph 6(c)** of the Sentencing guidelines, the Court should be guided by the principle of consistency of sentences of similarly placed cases. while passing a sentence to a convict. This Court has in her decision of **Kajungu Emanuel V Uganda CA Criminal Appeal No. 625/2014,** held that one of the principles of appropriate sentencing is the need to maintain uniformity of sentences. In practice, the sentence ranges for the offences of aggravated robbery that are committed simultaneously with murder has often not been different from the sentencing range for murder convictions. There is a wealth of authority in this regard and we proceed to consider a few previous decisions for guidance and consistency.

38] In **Ssemanda Christopher & Another V Uganda** CA Criminal Appeal No. 77/2010 this Court confirmed a 35-year sentence for murder. Yet in **Guloba Rogers V Uganda CA Criminal Appeal No. 57/2012,** where the cause of death of the deceased was multiple organ failure due to damage to the brain and the cervical spinal cord, this Court set aside the sentence of 47 years' imprisonment imposed on the appellant for the offences of murder and aggravated robbery, and substituted it with a sentence of 33 years and 7 months' imprisonment. Yet in **Budebo Kasto V Uganda CA Criminal Appeal No. 0094/2009**, this Court upheld a sentence of life imprisonment for the offences of aggravated robbery and murder.

39] While sentencing the appellant, the Judge noted that by his actions, the appellant did not value the deceased's life and thereby deserved a long sentence. We agree that the circumstances were grave. The appellant stole the motor cycle of his friend, and then murdered him in a gruesome manner. He took both his life and livelihood. Taking guidance from the authorities above, we find that sentences of 25 and 22 years (respectively) fitted the circumstances of the case. Since the Judge carried out the statutory deductions for the period spent on remand, it cannot be stated that the sentence he imposed was illegal, harsh or excessive. We find no reason to interfere with the decision of the trial Judge and we accordingly confirm the sentences.

40] Ground two accordingly fails as well.

42] We consequently find no merit in the appeal, and it is dismissed.

Dated at Kampala this 11th day of January 2023

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HON. ELIZABETH MUSOKE
JUSTICE OF APPEAL

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HON. CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL