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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera, DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 109 OF 2011

KUGONZA KENNETH :: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(An appeal from the decision of Akiiki-Kiiza, J delivered on 18th May, 2011 in Fort Portal High Court Criminal Session Case No. 107 of 2010)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. After a full trial, he was convicted and sentenced to 25 years' imprisonment.

Background

The facts as we understood them from the record were that the deceased, Emmanuel Musinguzi, was a Catholic and a member of the Xaverian Movement in his church. On 24th January 2010, at Katosa Village in Kyenjojo District, at about 7.00 pm, the members of the Xavarian Movement were on the way to Katosa Church to prepare for a function when they met the appellant, Kennth Kugonza and one Karugaba Robert on their way. The two began to taunt the Xaverians by referring to them as prisoners and demanding that they tell them where they were going.

The appellant grabbed their section leader, Robert Muhumuza, and a scuffle ensued to free him.

Unknown to the Xavarians the appellant had a knife with him which he used to defend himself. He used it to stab Muhumuza who fell down in pain. The appellant then grabbed the stave that was held by the deceased and a pole and run away with it. The deceased run after him to get the stave back but the appellant stopped, turned and stabbed him in the neck and fled from the scene. The deceased sustained a massive injury and was taken to hospital but it was too late to save him. He died as a result of his injury.

The appellant was arrested 2 days later and prosecuted for murder together with Robert Karugaba. However, the charges against Karugaba were withdrawn because he escaped from custody and was never found. At his trial, the appellant pleaded not guilty but the trial judge found sufficient evidence to convict him and sentenced him as stated above. Dissatisfied with both his conviction and sentence, the appellant now appeals against the decision on three grounds as follows:

1. That the learned trial judge erred in law and fact by finding and holding that the appellant was properly identified by PW2 and PW3 as the one who killed the deceased.
2. That the learned trial judge erred in law in sentencing the appellant to an illegal sentence in so far as he did not take into account the period spent on remand by the appellant as required by law.
3. Alternatively, that the sentence of 25 years' imprisonment imposed on the appellant was harsh and manifestly excessive in the circumstances.

The respondent opposed the appeal.

Representation

At the hearing of the appeal on 5th September 2022, Mr. Cosma Kateeba, learned counsel, represented the appellant on State Brief. The respondent was represented by Mr. Kulu Idambi John Boniface, Assistant Director of Public Prosecutions, from the Office of the Director of Public Prosecutions.

Determination of the Appeal

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 inferences of fact from it. 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).** We observed these principles in the disposal of this appeal.

Counsel for both parties filed written submissions before the hearing of the appeal as it was directed by court. They each applied to court to consider the submissions as their final arguments in the appeal and their prayers were granted. We considered the related submissions before resolving each of the grounds of appeal. Counsel for both parties addressed the grounds of appeal in their chronological order and we considered them in the same order.

Ground 1

The appellant's grievance in this ground was that the trial judge erred when he found that the appellant was properly identified by PW2 and PW3.

Submissions of counsel

Mr. Kateeba, for the appellant submitted that the incident wherein the deceased met his death took place at night. That the only evidence implicating the appellant for the murder of the deceased was the testimony

of PW2 who stated that he saw the appellant stabbing the deceased. And that though the incident took place at night there was still some light. Counsel for the appellant contended that this was a case of a single identifying witness because PW1 and PW3 did not witness the attack on the deceased. Further, that PW2 did not know the appellant prior to the incident and he testified that it was a little girl who witnessed the incident that told them that the appellant killed the deceased. Counsel added that this girl was never brought to court to testify. Relying on **Abudala Nabulere v Uganda; Court of Appeal Criminal Appeal No. 9 of 1978**, counsel submitted that the trial judge relied upon the uncorroborated evidence of PW2 to convict the appellant and that therefore the conviction was unsafe because the conditions for identifying the assailant were difficult.

In reply, Mr. Idambi for the respondent submitted that the appellant was properly identified because PW1 and PW2 stated that it was 7:00 pm when the incident occurred and it was not yet dark. He relied on **Abasi Kato v Uganda; Court of Appeal Criminal Appeal No. 63 of 2000** where this court held that at 7:00 pm it is still day time. On the issue of proximity and duration, counsel submitted that the incident took place for about 10 minutes. That therefore PW2 clearly saw the appellant stab the deceased. Further that both PW2 and PW3 saw the appellant at the scene of the crime.

Counsel further submitted that it was from the young girl who stated that, *"Kenneth has killed someone,"* that they got to know the appellant's name as Kenneth and that the said Kenneth stayed at her home. Counsel further stated that the girl was too young to testify in court and so was not called to do so.

Resolution of Ground 1

The principles that courts rely upon to establish whether a single witness properly identified the suspect have been settled for a long time. They were restated in **Abdalla Nabulere** (supra) in the often cited passage below:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came (to) be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger."*

The evidence on the record that is challenged by counsel for the appellant is that of PW2 and PW3 who claimed to have seen the appellant at the scene of the crime. It is that which we must focus on to come to a conclusion on this first ground of appeal.

Ategeka Richard testified as PW2. His testimony was that he was in the group of *"Bazaveri"* on 20th January 2010, who were going to Katosa Parish for a pilgrimage. That he was present when they met the appellant and another called Robert who was not in court at the time that he testified. That it was the appellant who taunted them saying they were prisoners and asked them where they were going. That he then grabbed their section leader, Muhumuza Robert, by the robe worn by Xaverians and that was when he and others in his section went back to find out what was happening. That a scuffle ensued with Muhumuza telling the appellant to release him but unbeknown to them, the appellant had a

knife. He swung the knife and he (Ategeka) evaded it and instead it stabbed Muhumuza Robert in the abdomen. That the appellant then grabbed a stave and pole that the Xaverians were using and fled from the scene. However, the deceased chased the appellant to try and get the stave back. PW3 followed the two and called out to the deceased to stop chasing the appellant, but the appellant stopped, got his knife and stabbed the deceased in the neck. After that the appellant and his colleague run into the bush.

PW2 further testified that he and his colleagues met the appellant at about 7.00 pm. That it was still bright because it was January when the light from the sun stays on for some time. He added that the incident took about 10 minutes. He explained that the appellant was arrested after 2 days and he went to the Police Station to identify him. That he was able to identify him as the person who killed the deceased.

In cross-examination, PW2 stated that he did not know the appellant before the incident. That he got to know his name from a little girl who came to them, about 5 minutes after the incident, and told them that the assailant was called Kenneth at home. He insisted that though there were two people that attacked them, it was the appellant who stabbed the deceased. In his re-examination PW3 stated that he saw the knife used by the appellant and described it.

The court asked for clarification about the distance between PW2 and the assailant at the time he stabbed the deceased. He explained that he was about 3 metres away from them.

The testimony of PW3, was that he was among the group of about 100 Xaverians on 24th January 2010 who were on their way to Katosa to prepare for a function. He confirmed that the appellant taunted them and

called them prisoners. That he saw the appellant pull the deceased by his robe. That since he was one of the leaders of the group he told the appellant that God should forgive him. That the deceased also told the appellant not to tarnish the name of the Xaverians. PW3 further stated that since he was in a different group, he turned to go back to where the appellant had grabbed the deceased's robe to establish what was going on but the appellant got a knife and stabbed him in the stomach. That he fell to the ground in pain but he saw the appellant grab the stave that was held by the deceased and ran away with it.

PW3 further stated that the deceased chased the appellant to get the stave back. That later on, PW2 (Ategeka) informed him that the appellant stabbed the deceased. He described the instrument that the appellant used to stab him as a knife with a metallic blade and red handle. He stated that the whole incident took about 10 minutes and the time was 7.00 pm. That after the appellant stabbed them, the group called for PW1, Moses Mutangirizi, a priest attached to Katosa Catholic Church, who came to the scene and took them to Virika Hospital. He added that he got to know the name of the appellant from a young girl who was standing nearby, who was about 4-5 years old, that it was Kenneth who killed a person.

In cross examination, PW3 stated that he did not see the appellant stab the deceased, but he thought it was him because the deceased followed him to try and get his stave back. He also explained that there was a child who told them that Kenneth who was resident at her home is the one who killed a person. However, he did not know how the child came to the scene for she was alone, by the roadside. That he was able to identify the appellant at the Police Station because he saw him at the scene when he stabbed him and recalled his face which he had seen then because it was still light.

The appellant gave an unsworn statement in which he stated that in the afternoon of 30th January 2010, two men, one armed with a gun went to his home and asked him to go with them but he refused. That he told the men that he did not commit any offence but they arrested him and forced him into a motor vehicle and took him to the Parish. That they met PW1, Father Moses Mutangirizi, who asked him whether he was Kenneth. That they then started kicking and beating him and asking why he killed a person, which resulted in him losing a tooth. That after the beating he was taken to the Police Station from whence he was taken to court and charged.

The trial judge believed the testimony of PW2 and PW3 and found, at page 5 of his judgment, that:

> *"I am satisfied that the conditions prevailing at the scene were conducive for both PW2 and PW3 to see clearly and recognize the accused person. The Court of Appeal held in* ***ABASI KATO VS UGANDA UCA CR. APPL. NO. 390/2001*** *that in Uganda by 7.30 p.m., it is still twilight and that it was possible for someone to see properly. The prosecution witnesses in this case said that it was around 7 p.m.*
>
> *In the premises therefore I dismiss the accused person's defence of alibi as false and that he was at the scene at the time of crime."*

We note that the trial judge relied on the testimony of PW3 as one of two people who saw the appellant stab the deceased. However, PW3 cannot be said to have seen this because he himself was injured and was on the ground in pain when the deceased was attacked. We must therefore establish whether it was the appellant who carried out the attack on the deceased that resulted in his death, and the only evidence that we have on the record is that of PW2.

The evidence of PW2 laid out above shows that he was only 3 metres away from the spot at which the appellant stabbed the deceased. That though

he did not know his name, he clearly saw him by the light of the sun which was still present for it was around 7.00 pm. The trial judge defined the time of the incident at twilight. According to Time and Date, a website on time,[1] *"Twilight"* is the time between day and night when there is light outside, but the sun is below the horizon. Twilight occurs when the earth's upper atmosphere scatters and refracts sunlight which illuminates the lower atmosphere. A number of atmospheric phenomena and colours can be seen during twilight.

The authors further explain that there are three types of twilight: civil, nautical and astronomical. *"Civil twilight"* is defined as the brightest form of twilight where there is enough natural sunlight so that artificial light may not be required to carry out outdoor activities. Only the brightest celestial objects can be observed by the naked eye during this time. This definition of civil twilight is used to make laws related to aviation, hunting, and the usage of headlights and street lamps on the streets. Generally, in Uganda, the hours of day and night are equal. In Kyenjojo, sunset in January is said to occur at 7.10 pm. The length of civil twilight in Kyenjojo is given by meteogram[2] as: the *"Golden Hour, 18:30-18:58, 28 minutes."* Therefore, there is a period of 28 minutes after sunset, around 7.10 pm, when there is still sufficient light where no artificial light is needed outdoors to see clearly.

We therefore find that the trial judge correctly found that there was sufficient light for the witnesses to observe the occurrences at the scene of the crime.

[1] https://www.timeanddate.com/information/
[2] https://meteogram.org/sun/uganda/kyenjojo/

Counsel for the appellant further submitted that PW2 was a single identifying witness who purported to have seen the appellant stab the deceased yet he was neither present nor near the scene of the crime. Further that PW2 had never seen the appellant before the incident.

The testimony of PW2 was very clear. He witnessed the incident from its beginning to the end. He described it, including the period of time that it all took to happen, which was 10 minutes. He also explained that he was only 3 metres away from the spot at which the appellant stabbed the deceased. He further admitted that much as he did not know the name of the appellant before the incident, he got information from a child by the road side who knew him before, that it was Kenneth that stabbed the deceased. The evidence that he later identified Kenneth at the Police Station as the assailant then becomes crucial.

The child who informed PW2, PW3 and others that it was Kenneth that stabbed the deceased did not testify. However, it is stated that her information resulted in the arrest of the appellant who both PW2 and PW3 identified as the person who stabbed PW3 and the deceased. We note that PW3 was stabbed in the stomach. The assailant must have been close to him and in front of him in order for him to achieve this. At such close range or proximity and given that there was still sufficient light of the day, there could not have been a mistaken identification of the assailant by PW3.

There is also no doubt that the attack on the deceased by the appellant was one part of a series of actions in the same transaction where the appellant insulted and taunted the Xaverians, who were peacefully going about their own business, and then proceeded to stab PW3 and the deceased. PW3 saw the appellant as he accosted the Xaverians, insulted

them and after stabbing him (PW3) the assailant grabbed a stave from the deceased. PW3 further witnessed the appellant ran away with the stave and the deceased chase him to try and get it back, though he was not able to see him stab the deceased. Given the evidence of PW2 the person who stabbed PW3 had a knife which he used to do so. PW2 also saw the appellant grab the stave, as PW3 did so after he stabbed him.

There is therefore no doubt in our minds that the knife that PW3 saw was in the hands of the appellant and he used it to stab him. It was also near the time that he stabbed PW3 that the appellant also stabbed the deceased. We therefore find that the trial judge made no error when he found that it was the appellant that stabbed the deceased, which led to his death, and so found him guilty of murder.

Ground 1 of the appeal therefore fails.

Grounds 2 and 3

The appellant's grievance in ground 2 was that the trial judge imposed an illegal sentence upon him contrary to Article 23(8) of the Constitution. In Ground 3, which was in the alternative, counsel for the appellant submitted that the sentence imposed by the trial judge was harsh and manifestly excessive in the circumstances.

Submission of counsel

Relying on **Rwabugande Moses v Uganda; SCCA No. 25 of 2014,** counsel for the appellant contended that the sentence imposed and the reasons thereof were ambiguous, which offends Article 23 (8) of the Constitution. Further that it was erroneous of the judge not to take into account the period spent on remand before making a decision about the term of imprisonment. He referred to **Tumanyane Garasiano v Uganda; CACA**

No. 16 of 2010, to support his submission. He then prayed that this court be pleased to set aside the sentence for not complying with Article 23(8) of the Constitution.

With regard to the contention that the trial judge imposed a sentence that was manifestly harsh and excessive in the circumstances, counsel for the appellant referred to **Kia Erin v Uganda, CACA No. 172 OF 2013, Epuat Richard v Uganda; CACA No. 199 of 2011** and **Ariko Francis v Uganda, CACA No. 2241 of 2011** and concluded that the sentencing range for the offence of murder is 15 to 20 years' imprisonment. He went on to submit that the trial judge ignored the mitigating factors and did not consider them before coming to his sentence. He invited court to set aside the sentence and impose its own under section 11 of the Judicature Act, taking into account the period which the appellant spent on remand.

In reply, Mr. Idambi for the respondent submitted that the trial judge considered the period spent on remand and was not obligated to make an arithmetic deduction because the decision in this case was handed down on 18th May 2011. That this was before the decision of the Supreme Court in the case of **Rwabugande (supra)** referred to by counsel for the appellant. In reply to the contention that the sentence was manifestly harsh and excessive in the circumstances, counsel for the respondent submitted that the cases relied on by the appellant to support the principle of uniformity of sentence were not similar to the instant case. He contended that the sentence imposed by the trial judge was lenient since he spared the appellant the maximum sentence of death. Further, that the sentence imposed was aimed at sending a message to deter would be offenders. And that contrary to the appellant's claims, the trial judge considered the mitigating factors but found that the aggravating factors outweighed them. He relied on the decision in **Blasio Ssekawooya v Uganda; Criminal**

Appeal No. 107 of 2009, and urged this court to uphold the sentence of 25 years' imprisonment or to revise it upwards.

Resolution of grounds 2 and 3

The principles upon which this court may interfere with a sentence imposed by the trial court are settled. They are that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion unless the exercise of discretion is manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important circumstance which ought to be considered in passing the sentence, or where the sentence imposed is wrong in principle. [See **Kiwalabye Bernard v Uganda**; **SCCA No. 143 of 2001**]

Before we considered whether the sentence was harsh and excessive in the circumstances of the case, we addressed the issue whether the trial judge observed the constitutional imperative in Article 23 (8) of the Constitution. We analysed the sentencing ruling in which, on 18th May 2011, the trial judge observed and held thus:

> *"Accused is allegedly a first offender.* ***He has been on remand for 1 year and 3 months. I take this period into consideration while considering the sentence to impose on him.*** *He has prayed for leniency and he is said to be suffering from T.B. he is also a young man of only 20 years. However, accused committed a serious offence. He wantonly stabbed the deceased, after provoking him, by taking away his stave and after insulting them as prisoners. The accused acted as a bully. The family of the deceased will never see their loved one in this world. They lost his love and company. The accused's action deserves severe punishment to fit his behaviour. Putting everything into consideration I sentence the accused to 25 (twenty-five) years imprisonment."*

It is clear from his ruling that the trial judge considered the period of 1 year and 3 months that the appellant had spent on remand before he was

convicted. As to whether he was under the obligation to make a mathematical deduction of that period from the sentence he imposed as it was required by the Supreme Court in the case of **Moses Rwabugande** (supra), the decision in that case was handed down on 3rd March 2017. The Supreme Court held that:

> *"We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence.* ***Article 23 (8) of the Constitution (supra)*** *makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision.*
>
> *We note that our reasoning above is in line with provisions of* ***Guideline 15*** *of the* ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** *which provides as follows:*
>
> ***(1) The court shall take into account any period spent on remand in determining an appropriate sentence.***
>
> *(2)* ***The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.***
>
> *(Emphasis added)*

Though the decision requires courts to deduct the period spent on remand from the sentence imposed, it could not be applied by the trial court because it had not been handed down yet. The trial judge thus applied the principles that were set out by the Supreme Court in earlier decisions such as **Kizito Senkula v Uganda SCCA No.24/2001; Kabuye Senvewo v Uganda, SCCA No.2 of 2002; Katende Ahamed v Uganda, SCCA No. 6**

of 2004 and **Bukenya Joseph v Uganda, SCCA No. 17 of 2010,** in which it was held that taking into consideration the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

We therefore find that the trial judge made no error when he did not arithmetically deduct from the sentence the period of 1 year and three months that the appellant spent on remand before his conviction.

As to whether the trial judge ignored the mitigating factors that were advanced on behalf of the appellant before sentence, we note that the trial judge, took into consideration some mitigating factors before he did the aggravating factors. He considered the youthful age of the appellant which was only 20 years, the fact that he was a first time offender and he was said to suffer from Tuberculosis.

In the instant case, the appellant was sentenced to 25 years' imprisonment. Notably, the maximum penalty for murder is death. Counsel for the appellant cited authorities where the courts have handed down sentences that are lower than 25 years. On the other hand, counsel for the respondent referred court to cases where sentences that are higher than 25 years' imprisonment were imposed.

In **Aria Angelo v Uganda; CACA No 439 of 2015** the appellant was convicted on his own plea of guilty for the offence of murder under a plea bargain agreement. He was sentenced to 36 years and 8 months' imprisonment on each count, on four counts of murder. This court found no reason to interfere with the sentence.

In **Sebuliba Siraji v Uganda, Criminal Appeal No 319 of 2009** in which the appellant attacked the deceased and cut him with a panga on his head, neck and hand thereby causing his death, the appellant was convicted on

his own plea of guilty and sentenced to life imprisonment. This court upheld the sentence.

In **Kazarwa Henry & Others v Uganda; SCCA No 17 of 2015**, this court upheld the sentence of life imprisonment and it was later confirmed by the Supreme Court.

In **Tusingwire Samuel v Uganda, Criminal Appeal No 110 of 2007 [2016] UGCA 53**, this court found the sentence of life imprisonment imposed against the appellant for the offence of murder to be harsh and manifestly excessive and reduced it to 30 years' imprisonment.

In **Magezi Gad v Uganda, SCCA No 17 of 2014**, the appellant was convicted of murder and sentenced to life imprisonment. His appeal against sentence was dismissed.

In **Bakubye Muzamiru v Uganda, SCCA No 056 of 2015**, the court held that 40+ or 30+ years imprisonment terms were neither premised on wrong principles of law nor were they manifestly excessive since the offence of murder attracts a maximum sentence of death.

In **Aharikundira Yustina v Uganda, SCCA No 27 of 2015**, for the appellant who brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the sentence of death imposed on her and substituted it with a sentence of 30 years' imprisonment.

In **Kisitu Majaidin alias Mpata v Uganda; CACA No 028 of 2007**, this court upheld a sentence of 30 years' imprisonment for murder. The appellant was convicted of killing his mother.

We find that although some courts have imposed lower sentences in cases of murder, on the whole the cases cited above demonstrate that there are cases to support the sentence of 25 years' imprisonment. They prove that the sentence was not in any way extraordinarily out of range.

Besides, in the Third Schedule to the Constitution (Sentencing) Guidelines) the sentence range for murder is from 30 years' imprisonment to death, which is the maximum penalty upon consideration of the mitigating and aggravating factors. In the absence of a cogent reason for reducing the sentence of 25 years' imprisonment, the sentence is upheld.

In conclusion, this appeal had no merit and it is dismissed. The appellant shall continue to serve the sentence of 25 years' imprisonment that was imposed upon him by the trial judge.

Dated at Fort Portal this 18th day of July 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva K. Luswata
JUSTICE OF APPEAL