THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0470 OF 2015

(Coram: Obura, Bamugemereire & Madrama, JJA)

DEMBERE SAMSON} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale in Criminal Session Case No 08 of 2012 before Musota, J delivered on 4th March 2013)

JUDGMENT OF COURT

The appellant was charged with the offence of murder contrary to section 188 and 189 of the Penal Code Act. The particulars were that the appellant on 15th June 2011 at Tirinyi trading centre murdered one Kirya John.

The appellant was tried and convicted as charged whereupon he was sentenced to life imprisonment on 4th March 2015. The appellant was aggrieved by the sentence only and with the leave of court appealed to this court on one ground of appeal against sentence namely:

1. That the learned trial judge erred in law and fact when he sentenced the appellant to a harsh and manifestly excessive sentence of life imprisonment.

At the hearing of the appeal, the appellant was represented by learned counsel Mr. Deogratius Obedo while the learned Chief State Attorney Hajjat Fatinah Nakafeero appeared for the respondent. The appellant was present in court.

The court was addressed by way of written submissions which were filed on court record and judgment was reserved on notice.

The appellant's counsel after giving the facts of the case submitted that the sentence was harsh and excessive. The appellant's counsel relied on **John Kasimbazi & others Vs Uganda; Court of Appeal Criminal Appeal No**

167 of 2013 where the appellant was charged with murder and sentenced to life imprisonment and on appeal the court reduced the sentenced to 12 years' imprisonment. Further in **Magala Ramadhan Vs Uganda; Supreme Court Criminal Appeal No 1 of 2014**, the Supreme Court reduced two counts of murder from 14 years to 7 years' imprisonment on each count. The appellant's counsel contended that under the doctrine of stare decisis, the judgments of the Supreme Court are binding on the Court of Appeal. Counsel further submitted that there ought to be consistency in sentencing as held by the Supreme Court in **Mbunya Godfrey Vs Uganda; SCCA No 4 of 2011**. In addition, the appellants counsel submitted that this court has the powers of the trial court under section 11 of the Judicature Act and can set aside an illegal sentence and impose a lawful sentence provided for by the law.

The appellant's counsel invited the court to consider the mitigating factors as outlined in the Sentencing Guidelines applicable to courts of judicature in that the convict is a first offender and has no previous record of conviction. Secondly, the accused is of advanced age at 84 years and the 12 years he has spent in lawful custody both on remand and after conviction have reformed him. That he is a reformed and born again Christian.

The appellant's counsel submitted that in the case of **Odongo Ronald Vs Uganda; CACA No 048 of 2010**, the appellant was convicted of murder of two people by shooting and sentenced to death. On appeal, the Court of Appeal found that the sentence of death was manifestly harsh and excessive and substituted it with a sentence of 18 years and 4 months' imprisonment. The appellant prays that this court allows the appeal and imposes on the appellant an appropriate sentence sufficient to have him released in light of the period of 12 years he has already served.

In reply, the respondent's counsel opposed the appeal and submitted that there are only two elements for consideration by this court which are that the sentence against the appellant was harsh in the circumstances and secondly whether the learned trial judge did not consider other mitigating factors prior to imposing the sentence.

On the first aspect of the controversy, the respondent's counsel submitted that in the two judgments of **Wamutabaniwe Jamiru Vs Uganda; SCCA No 74 of 2007** and **Kamya Johnson Wavamunno vs Uganda; Court of Appeal Criminal Appeal No 16 of 2000**, the courts variously held that an appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion, unless the exercise of the discretion results in the sentence to be imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the 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.

The respondent's counsel referred to other authorities that we do not need to refer to since they advance the same principles. The learned Chief State Attorney submitted that in arriving at a sentence of life imprisonment for the appellant, the trial judge had a comprehensive consideration of both the mitigating factors which were that the appellant was a first-time offender, was of old age and was remorseful and had spent slightly over three years on remand as well as the aggravating factors which were the degree of injury where the deceased was stabbed in the belly and his intestines cut, the cause of death indicating shock due to bleeding. The injury was inflicted on a sensitive part of the body, the appellant planned the premeditated killing, the gruesome circumstances of the instant matter where court took into account the brutality, savagery and terror caused to the deceased and his family.

The respondents counsel relied on **Karisa Moses Vs Uganda; SCCA No 23 of 2016** where a 22-year-old appellant had been convicted of murdering his grandfather. The Supreme Court confirmed the sentence of life imprisonment and found that it is an appropriate sentence. They held that an appropriate sentence is a matter for the discretion of the sentencing judge. That each case presents its own facts upon which a judge exercises his discretion. Further that the practice is that an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice.

The respondent's counsel submitted that a sentence of life imprisonment imposed on the appellant was not harsh and the court rightfully directed itself on the law and applied it to the facts of the case. The respondent's counsel relied on **Bashaha Shariff Vs Uganda; SCCA No 82 of 2018** where the Supreme Court upheld the death sentence and stated that one of the objectives of sentencing is deterrence. They agreed that the manner in which the appellant killed an innocent child and dismembered his body, depicted a depraved person devoid of all humanity. Further in the **Turyahabwe Ezra & 12 Others; SCCA No 50 of 2015** Supreme Court upheld a life imprisonment sentence for murder that arose out of a mob justice killing.

On the question of consistency in sentencing, the respondents counsel invited the court to consider **Kaddu Kavulu Lawrence Vs Uganda; SCCA No 22 of 2018** where the Supreme Court appeared to cast doubt on the application of the consistency principle when it ignored arguments raised for the appellant about the weight to be placed on precedents in sentencing.

Consideration of the appeal.

We have carefully considered the appellant's appeal, the submissions of counsel, the record of appeal as well as the law generally. This is an appeal from the decision of the High Court in the exercise of its original jurisdiction and the duty of this court is to reappraise the evidence and come to his own conclusion on matters of fact. However, in the circumstances of this appeal, the facts are not in dispute at all and there is no need to reappraise the evidence other than to consider the material facts and circumstances on the question of sentence only because the appeal is against sentence only.

In **Kyalimpa Edward Vs Uganda; Supreme Court Criminal Appeal No 10 of 1995** (by that time, the Supreme Court heard appeals from the High Court and it was subsequently renamed the Court of Appeal upon creation of the current Supreme Court which hears appeals from the appellate court hearing appeals from the High Court.) It was therefore a decision of this court when it was the apex court in Uganda and named the Supreme Court. On the question of appeals against sentence, the court held that

an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. The court will not normally interfere with the discretion of the sentencing judge unless the sentences passed is illegal or unless the court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice. The court relied on **Ogalo s/o Owoura Vs R (1954) 21 E.A.C.A 270**. In **Ogalo s/o Owoura v R (1954) 21 EACA 270** the East African Court of Appeal 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 have further considered the decision of the Supreme Court in **Bashasha Sharif Vs Uganda; SCCA No 82 of 2018** where the Supreme Court set out the principles upon which an appellate court may interfere with a sentence of the trial court. An appellate court will not interfere with the exercise of discretion in sentencing by a trial judge unless there has been a failure to exercise the discretion, or a failure to take into account a material consideration or the taking into account of immaterial considerations and an error in principle was made. Lastly it is not sufficient that members of the court could have exercised their discretion differently.

The facts of this case are not in dispute. When imposing sentence, the learned trial Judge stated as follows:

> The convict is said to be a first offender. He however started by committing a heinous crime which took the life of an innocent victim. The deceased was a simple employee and the victim of circumstances. The offence was committed with impunity and as rightly submitted by the prosecution, it was uncalled for. The crime was premeditated in that the convict uttered no word. He appears not remorseful.

> Although the convict is a first offender at his age, he deserves a deterrent sentence.
>
> Considering that he has been on remand for slightly over three years and the state has asked for a custodial sentence instead of the ultimate death penalty, I will sentence the convict to spend the whole of his life in custody for being a danger to society. Dembere Samson is sentenced to life imprisonment.

The facts were that when the deceased was painting the roof of a nearby building, the appellant went and stabbed him and cut his intestines. He then went and reported himself to a nearby police post. He reported to the police with the murder weapon (a knife). He told the police that he had stabbed a person. The offence took place in broad daylight. Upon examination, the appellant was found to be a person aged 70 years.

We have carefully considered the matter, the Prisons Act, under section 86 (3) provides that a sentence of life imprisonment shall be deemed to be a sentence of 20 years' imprisonment for purposes of earning remission. That means that where the appellant earns full remission, he is likely to come to within a period of slightly under 14 years of imprisonment. On the other hand, if he does not earn full remission, he might come out after a period of about 15 years or more. In **Tigo Stephen in Tigo Stephen Vs Uganda; Supreme Court Criminal Appeal Number 08 of 2009 [2011] UGSC 7**, the Supreme Court heard an appeal from the decision of the Court of Appeal confirming the sentence of life imprisonment imposed by the High Court against the appellant who had been convicted of the offence of defilement. The Supreme Court held that life imprisonment does not mean the deemed 20 years under section 47 (6) of the **Prisons Act**. They held that life imprisonment was the next most severe penalty after the death penalty and it means:

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

Further the Supreme Court held that fixed terms of imprisonment should not be considered to be more severe than life imprisonment when 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.

In **Okello Alfred, Odong Bosco, Ocen Sam Oyugi, Okello Tom, Opio James and Odoch Charles v Uganda; Criminal Appeal No 28 of 2016 [2017] UGCA 77**, the Court of Appeal set aside a sentence of 45 years' imprisonment to be served without earning remission imposed by the High court and held that remission is a statutory right under section 47 of the Prisons Act Cap 304 (repealed) now section 86 of the Prisons Act 2006 and such right cannot be taken away by court. In **Wamutabanewe Jamiru v Uganda; Criminal Appeal No 74 of 2007 [2018] UGSC 8 (12TH April 2018)**, the appellant was sentenced to 35 years' imprisonment without remission by the Court of Appeal and the Supreme Court set it aside and held that sentences are contained inter alia in Penal Code Act and jurisdiction to impose them are in the Magistrates Courts Act and the Trial on Indictment Act. On the other hand remission is a function of the penal institution which administers the sentence imposed by court. They held that it was 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.

The Appellant was sentenced in March 2015 for an offence committed on 15th June, 2011. He was arrested the same day and sentenced on 4th March 2015. He has spent about 3 years and 8 months on remand. Because life imprisonment is an indeterminate sentence which depends on the remaining lifespan of the convict, the period the convict spent on remand prior to his conviction and sentence cannot be deducted in compliance with article 23 (8) of the Constitution. It follows that any deemed sentence of 20 years' imprisonment commenced on 4th March 2015 when the appellant was sentenced. That means that the appellant has only served about seven years of the deemed 20 years.

The above notwithstanding, a sentence of life imprisonment is a lawful sentence imposed at the discretion of the trial judge. The age of the appellant at 70 years of age when he committed the offence did not stop him from committing a grave murder in broad daylight when he stabbed the deceased in the stomach leading to the death of the deceased. We find that a fixed term custodial sentence could have been imposed by the learned trial judge and the trial judge did not err in law and did not misdirect himself when he imposed the sentence. The advanced age of the appellant cannot be used as a mitigating factor because he committed the offence at the advanced age of 70 years.

Nonetheless the fact that the appellant does not have a previous record of conviction is a factor in mitigation. Life imprisonment is the most severe penalty after the death penalty. We have carefully considered the mitigating circumstances advanced by the appellant to the effect that he is a reformed person and is even a born again Christian. The post-conviction reformation while in custody is not a material factor to mitigate an offence which should be considered on the basis of factors which were available to the sentencing judge who exercised his discretion. The question on appeal is whether the learned trial judge erred in law or fact or occasioned a miscarriage of justice on the basis of materials which were available to the trial judge. We cannot take into account factors which were not available to the trial judge. The fact that we could have imposed a different custodial sentence other than life imprisonment is not the basis for overturning the decision of the learned trial judge.

In the premises, there is no basis for interference with the sentence of the trial judge except when considering precedents of Higher courts and on the basis of consistency. The maximum penalty for the offence of murder is death. The next penalty is life imprisonment. Nonetheless considering the precedents, the learned trial judge seemed not to have considered the numerous precedents where in similar circumstances, life imprisonment had been discounted for the offence of murder and a custodial sentence less than life imprisonment imposed.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant had been tried and convicted of two counts of murder by the High Court and sentenced to life imprisonment. His appeal to this court against sentence was allowed after taking into account the fact that the appellant was a first offender and had spent 2 ½ years on remand prior to his trial and conviction. He was 29 years old and relatively young at the time of commission of the offence. The Court found a sentence of 18 years' imprisonment on each count to be served concurrently from the date of conviction appropriate in the circumstances.

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 set aside the sentence for being 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 **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 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 took into account the age of the appeal who committed the offence when he was 31 years old.

In the circumstances of this appeal which are stated in the ruling on sentence by the learned trial judge, we note that the appellant did not have any previous conviction for any offence, he was 70 years old and are likely to suffer from prison conditions on account of health issues. In fact, when the appellant appeared in court he was aged about 84 years and looked very frail. He was putting on a dirty shirt and was reported as a sickly person. He had hearing problems and an assistant had to talk close to his ear to enable him comprehend what was being said in court and questions put to him by court. In the premises, we would discount a sentence of life imprisonment and substitute it with fixed term custodial sentence that we deem to be appropriate in the circumstances.

We accordingly allow the appeal against sentence and taking into account the mitigating and aggravating factors we have set out above, we find that a sentence of 19 years' and six months' imprisonment would be appropriate in the circumstances. From this period, we deduct the period of three years and eight months that the appellant had spent in lawful custody prior to his conviction and sentence by the High Court.

In the premises, we sentence the appellant to 15 years and ten months' imprisonment with effect from 4th March 2015, the date of the conviction and sentence by the High Court.

Dated at Mbale the 18th day of January ~~2022~~ 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal