THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 905 OF 2014

*(Coram: Obura, Bamugemereire & Madrama, JJA)*

BULOLO REUBEN} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

*(Appeal from the judgment of the High Court Kawesa, J at Mbale delivered on 10th September 2014 in Criminal Session Case No 55 OF 2012)*

## JUDGMENT OF COURT

The appellant and 4 others with other suspects who were at large at the time of the High Court trial were charged with 1 count of murder and 7 counts of aggravated robberies whereupon they pleaded not guilty and were tried. On count 1 the appellant and 4 others were charged with the offence of murder contrary to section 188 and 189 of the Penal Code Act. It was alleged that the appellant and 3 others on the 11th day May 2011 at Nasasa village in Mbale District murdered Wanambisi Geoffrey. On counts 2 to 8, appellant and others were indicted of aggravated robberies contrary to section 285 and 286 (2) of the Penal Code Act. It was alleged that on the 11th day of May 2011 at Nasasa village in Mbale the appellant and 4 co-accused and others at large robbed Mafabi Francis, Mafabi Abasa, Mafabi Charles, Weteya Keneth, Kitutu Fred, Nakito Philipo and Wanyere Isaac of various items and at the time of the robberies immediately before or after used deadly weapons to wit a gun and a cutlass (a panga) against the victims of the robberies.

On count 1 of murder the appellant and another were found guilty and were convicted and sentenced to 15 years' imprisonment. On Count 2, Count 5, Count 6 & Count 8 the appellant and another were found guilty and convicted of aggravated robberies and were sentenced to 2 years' imprisonment on each count and ordered to pay compensation of 50,000/= to each of the victims of the robbery on counts 2, 5, 6 and 8. The

co-accused of the appellants particularly A3 and A,4 were acquitted on all the counts and set free.

The appellant was dissatisfied with the decision of Hon. Justice Henry I Kawesa delivered on the 10th day of September, 2014 appealed to this court with leave of court against sentence only together with the order of compensation. The sole ground of appeal is that:

1. The learned trial judge erred in law and fact when he passed a harsh (sentence against the) appellant of 15 years' (imprisonment) on one count of murder and 2 years for each count 2, 5, 6 and 8 and ordered that to (sic) 2 years have a consecutive impact.

At the hearing of the appeal, the respondent was represented by the learned Assistant DPP Mr. Alex Ojok while the appellant was represented by the learned counsel Ms Faith Luchivya on state brief. The appellant was present in court. With leave of court the time was enlarged to file the memorandum of appeal out of time and the memorandum of appeal on record was validated. Secondly leave was granted for the appeal to proceed against sentence only under section 132 (1) (b) of the Trial on Indictment Act cap 23. The court was addressed in written submissions and judgment reserved on notice.

The appellant's counsel submitted that the learned trial judge had the discretion to pass a fair sentence but in the circumstances of the sentence imposed was harsh. She submitted that it was at the discretion of court to order a concurrent sentence. She prayed that the court allows the appeal and varies the sentence of the High Court. The Appellant's counsel relied on **Bandebabo Benon Vs Uganda; Crim Appeal No. 319 of 2014**. In that appeal, the appellant had been convicted of murder and sentenced to 35 years' imprisonment whereupon he appealed against sentence only on the ground that it was a harsh and excessive. The court found that the sentence of 35 years' imprisonment was neither harsh nor excessive in the circumstances where the appellant was convicted of murder of his wife in the manner he did. However the court found that the learned trial judge had ignored an important mitigating factor that the appellant was a first offender. The appeal was partially allowed and sentence reduced to 30 years' imprisonment.

The respondents counsel opposed the appeal and submitted that an appellate court can only interfere with a sentence imposed by a trial court in very limited circumstances. He referred to **Nashimolo Paul Kibolo Vs Uganda; Criminal Appeal No 26 of 2017** where it was held that an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which the judge exercises his or her discretion. It is therefore the practice that as an appellate court, the Court of Appeal will only interfere with the discretion of the sentencing judge where the sentence passed is illegal or where the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice. With reference to the submissions of the appellant's counsel, the respondent's counsel submitted that the appellant had brought nothing before the court to justify interference with the sentencing discretion of the trial judge.

## Consideration of appeal

This is an appeal against sentence only with the leave of court under section 132 (1) (b) of the Trial on Indictment Act. The grounds upon which court may interfere with sentence is very limited.

The basis for setting aside a sentence imposed by a trial court were generally set out by the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270.** In the appeal, the appellant appealed against a sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. On the relevant principles to interfere with sentence, 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

An appropriate sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser

offences in terms of aggravation attracting less severe penalties. Courts have also added another principle of consistency in terms of equality before the law so that offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding factor.

The appellants counsel had relied on **Bandebabo Benon Vs Uganda; Crim Appeal No. 319 of 2014** in support of the appeal but we do not see how relevant the decision is to the facts of this appeal or how it helps the appellants appeal. The first place, in that case, there was one count of murder whereupon the appellant was sentenced by the trial court to 35 years' imprisonment. In this case, the appellant was sentenced to 15 years' imprisonment for murder. Secondly, the above decision had one count whereas in the appellant's case, there was not only a count of murder, but several other counts of aggravated robberies.

We noted that the appellant's counsel submitted that the sentences of two years each for the counts of robbery ought not to run consecutively but gave no basis for such a submission. Sentences of imprisonment imposed in trials by the High Court are governed by section 122 of the Trial on Indictments Act, in cases where there are several counts of offences or several offences on which a prisoner has been convicted. Section 122 of the RTA provides that:

> 122. Sentences cumulative unless otherwise ordered.
>
> (1) Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part of it; but it shall not be lawful for the court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 110(c)(i) or any part of it.
>
> (2) Where a person is convicted of more than one offence at the same time and is sentenced to pay a fine in respect of more than one of those offences, then the court may order that all or any of such fines may be noncumulative.

Under section 122 (1) of the TIA, the legislature has provided for consecutive sentences where several offences are committed and the accused is convicted on more than one count or of more than one offence. The default position is therefore the serving of the sentences for various offences consecutively. For the court to otherwise order a concurrent sentence, reasons have to be given. The appellant has advanced no reasons or grounds for serving the sentences concurrently. The court is bound to impose the sentence as stipulated in the law unless for good cause, it orders that the sentences have to be served concurrently for two or more counts on which the convict was convicted. The matter is not only at the discretion of the trial judge which discretion has to be used judicially but also as dictated by the law.

We accept the submissions of the respondent's counsel that no grounds have been advanced for the submission that sentences for the 4 counts have to be served concurrently. In the premises, the trial judge did not err in law or in principle to impose sentences to be served consecutively and we find no merit in the appeal. We hereby dismiss the appeal.

Dated at Mbale 18th day of February ~~2022~~ 2023

**Hellen Obura**

**Justice of Appeal**

**Catherine Bamugemereire**

**Justice of Appeal**

**Christopher Madrama**

**Justice of Appeal**