THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CRIMINAL APPEAL No.495 OF 2015
(Coram: Egonda-Ntende, Bamugemereire & Mugenyi JJA)

HASSAN TUMUSIIME ASAFANI :::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court of Uganda holden at Masindi in Criminal session No.0011 of 2013 before Hon. Justice Byabakama Mugenyi Simon dated 1/12/2014)

Criminal Law –Murder c/s 188 & 189 of the Penal Code Act - Mob Justice - Appeal against sentence

JUDGMENT OF THE COURT

Introduction

The appellant, **Hassan Tumusime** was indicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120 Laws of Uganda. He was convicted and sentenced to 28 years' imprisonment.

Background

The brief facts as derived from the record are that on 28th December 2011, at Kitindura Village Buhimba Sub- County in Hoima District, the appellant and others still at large murdered Edward Kazaana. The deceased grievously wounded his wife, Faridah Nsungwa, by cutting her in the head. She returned to her parent's home following misunderstandings with the deceased. The appellant was identified as a member of the mob which assaulted and later brunt the deceased. He was arrested and charged while the

other suspects disappeared from the village. In his defence the appellant raised an alibi and called two witnesses. He denied participation in the murder of Kazaana. He was tried and found guilty of murder and sentenced to 28 years' imprisonment. Dissatisfied with the sentence, the appellant appealed to this honourable court on only one ground:

Ground of Appeal

That the learned trial judge erred in law and fact when he passed a harsh and manifestly excessive sentence of 28 years' imprisonment.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Samule Muhumuza, while the respondent was represented by Mr. Simon Semalemba, the Assistant DPP. The court granted the appellant leave to appeal against sentence only. Both counsel proceeded by way of written submissions which submissions this court relied on to arrive at its decision.

Submissions for the Appellant

Counsel was critical of the learned trial Judge for what he termed as lack of consistency in sentencing resulting into a harsh and excessive sentence of imprisonment for 28years. Counsel also faulted the learned trial Judge for failure to compute and offset the period the appellant spent on remand.

He relied on **Naturinda Tamson v Uganda CACA No.13 of 2011** which accentuated the duty of a trial court to compute the pre-trial period a person remains on remand and to offset this period from the sentence. **Naturinda** (supra) underscored the weakness of the courts in relying on the prison authorities to compute the time spent on remand. Counsel invited this Court to set aside the sentence of 28 years' imprisonment and replace it with one of imprisonment for 10 years.

Submissions for the Respondent

Counsel for the respondent contended that the appeal had no merit or substance. He submitted that during the sentencing process, the learned trial judge considered both mitigating and aggravating factors and that the sentence of 28 years was appropriate. He reinforced the principle that an appropriate sentence was a matter of judicial discretion. To bolster his arguments, he relied on **Turyahabwe Ezra & 12 Others v Uganda SCCA No.50 of 2015** in which the Supreme Court upheld a sentence of life imprisonment for appellants found guilty of murder resulting from mob justice. He also relied on **Kariisa Moses v Uganda SCCA No.23 of 2016** where again, the Supreme Court upheld a sentence of life imprisonment for murder.

Counsel cited section 189 of the Penal Code Act which sets out the maximum penalty for the offence of murder, to argue

that the 28 years meted against the appellant was neither harsh nor excessive. He argued that imprisonment for 28 years' imprisonment was a far cry from the ultimate the appellant may have received. His submission was that the learned trial Judge correctly appraised the law and the facts. Counsel drew the attention of this court to the fact that the learned trial Judge considered the time spent on remand and applied it the sentence. Finally, counsel implored this court to uphold the sentence and dismiss the appeal.

Consideration of the Appeal

We have carefully taken into consideration the submissions of both counsel the laws and judicial precedents relied upon by counsel. We thank both counsel for their effort. We, however, took the liberty to look further than the authorities cited by counsel and have therefore included other cases from our own research.

This being a first appeal we are alive to our duty to re-appraise the evidence and make our own inferences and to arrive at our own conclusions on issues of law and fact. We are cognisant of the handicap that we did not have the opportunity to see witnesses testify, first hand see **rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10,** Kifamunte **v Uganda SCCA No. 10 of 1997.**

This appeal is on sentence only. The Supreme Court in **Kyalimpa Edward v Uganda SCCA No. 10 of 1995** while referring to **R v Haviland (1983) 5 Cr. App. R(s) 109** laid down the principles upon which an appellate court may interfere with a sentence passed by the trial sentencing Court as follows:

> "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. It is the practice that as an appellate court, this Court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice".

See also; **Kamya Johnson Wavamuno v Uganda, SCCA No.16 of 2000**, **Kiwalabye Bernard v Uganda, SCCA No. 143 of 2001**, **Livingstone Kakooza v Uganda, SCCA No. 17 of 1993** and **Jackson Zita v Uganda, SCCA No. 19 of1995.**

The sole ground of appeal was that the Learned Trial Judge imposed a harsh and excessive sentence of 28 years' imprisonment without considering the principle of consistency and that he did not arithmetically subtract the time spent on remand. While passing sentence, the learned trial Judge remarked as follows:

"... From the evidence, the Police Officers who rushed to the scene to maintain law and order seem to have been overpowered. To say that the accused and others were wild is almost an understatement. They were not satisfied with attacking the deceased with all manner of weapons, they also set him on fire. Such ugly bizarre incidents are common nowadays. The law-abiding members of society are looking to the courts to restore some sanity in the minds of would-be offenders by dealing firmly with convicted offenders. The maximum penalty for murder is death. However, at 26 years the convict is still young who, after undergoing reform, he may still be useful to his community. He has been on remand since 5/6/2012, a period of 2 ½ years. He is reportedly a person with several responsibilities. Considering all the factors and circumstances of this case, I sentence the convict to 28 years' imprisonment taking into account the period spent on remand. Right of appeal against conviction and sentence explained."

From the above extract, it is clear that the learned trial Judge mentioned the mitigating and aggravating factors. Had the learned trial judge appreciated the complexities and caution around the question of mob justice, he would have found that during mob justice, a crown is under incitement, has a misguided sense of retribution and acts without much thought. This was well-articulated in **Kamya Abdullah & 4**

Others v Uganda SCCA No.24 of 2015 where the Court found that:

> "In sentencing a judge should consider the facts and all the circumstances of the case. Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree, furthermore, a mob in its perverted sense of justice thinks its administering justice while at the same time ignoring the importance of affording suspects the right to defend themselves in a formal trial.
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> Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot and should not be part on the same plane in sentencing as those who plan their crimes and exercise them in cold blood."

We note that in case, the deceased attempted to murder a relative of some members of the pack that then set upon him. They set upon him, mindlessly, with sticks and clubs and stones and whatever they could lay their hands upon. The habit of taking the law it one's hand is deplorable and must be condemned in the strongest terms possible. Be that as it may, we take into consideration the fact that acting as an

excited mob is quite separate from individually premeditating, designing and executing a crime.

Following **Kamya v Uganda** (supra), this court will consider the element of mob justice as a mitigating factor to personal offending.

The appellant avers that the learned trial Judge did not give thought to the principle of consistency. In more recent decisions involving offences of murder based on similar facts, courts have decided in the manner we shall analyse below. In **Semanda Geoffrey Mwesige v Uganda CACA No.72 of 2016**, the appellant was sentenced to 10 years' imprisonment for the offence of murder which occurred out of mob justice. On appeal to this court, this court increased the sentence to 13 years' imprisonment. Upon considering the time spent on remand, the appellant was sentenced to 9 years and 5 months' imprisonment.

In **Kamya Abdullah & 4 Ors v Uganda SCCA No.24 of 2015** the deceased was killed by a mob and the appellants were sentenced to 40 years' imprisonment. The appellants appealed to this court and this court substituted the sentence of 40 years' imprisonment with one of imprisonment for 30 years. The appellants appealed to the Supreme Court and the sentence was reduced further to 18 years' imprisonment.

In **Atukwasa Jonan & 6 Others v Uganda CACA No.168 of 2018**, the appellants were convicted for the offence of murder that was a result of a mob justice. They were sentenced to 25 years' imprisonment. On appeal to this court, their sentences were substituted with 14½ years of imprisonment.

Bearing in mind the fact that the offending in this appeal happened as a result of mob justice and that the learned trial Judge did not consider this fact, we are of the view that the sentence of 28 years was harsh and excessive and not in line with similarly placed appeals.

In the matter before us, the learned trial Judge did not deduct the period that the appellant had spent on remand. We find that the sentence was in violation of Article 23 (8) of the Constitution of the Republic of Uganda and set it aside.

In the exercise of the powers of this court under section 11 of the Judicature Act, we find a sentence of 13 years' imprisonment appropriate, in the circumstances. The appellant was on remand for a period of 2 ½ years. From the sentence of 13 years' imprisonment, we now deduct the period of 2 years and 6 months as time spent on remand. We sentence the appellant to 10 years and 6 months' imprisonment with effect from the date of conviction which was 11th December 2014.

Signed at Fort Portal this..... 02nd day of ..... October .....2023.

Fredrick Egonda- Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica Mugenyi
Justice of Appeal

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