THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA]

CRIMINAL APPEAL NO. 218 OF 2015

(Arising from High Court of Uganda Criminal Session Case No. 04 of 2013 at Fort Portal)

BETWEEN

Mugabe Joseph=======================================Appellant

AND

Uganda==Respondent

(Appeal from a Judgment of the High Court of Uganda (Okwanga J.) delivered on the 7th June 2010.)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offences of murder contrary to sections 188 and 189 of the Penal Code Act, in count 1 and attempted murder contrary to section 204 (a) of Penal Code Act, in count 2. The particulars of the offence for count 1 were that on the 20th May 2012 at Nkinga I village, Kyenjojo District murdered Kisembo Bridget. The particulars of the offence for count 2 were that the appellant on 20th May 2012 at Nkinga I village, Kyenjojo District attempted to cause the death of Kanyunyuzi Gorret. He was tried and convicted as charged on 15th February 2015. He was sentenced to 27 years' imprisonment on the offence of murder and 19 years' imprisonment on the offence of attempted murder.

[2] Dissatisfied with the sentence, he now appeals against both sentences on the grounds set out below.

> '1. That the learned resentencing judge erred in law in sentencing the appellant to manifestly harsh and excessive term of 27 years' imprisonment on count 1.
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> 2. That the learned resentencing judge erred in law in sentencing the appellant to manifestly harsh and excessive term of 19 years' imprisonment on count 2.

[3] The respondent opposed the appeal.

Facts of the Case

[4] The facts in the matter before us are that the appellant was living with Kanyunyuzi Gorret (PW2) as husband and wife at Nkunga Village, Kigando Parish in Nyabuharo- Kyenjonjo District. The two had a child, Kebisembo Bridget, aged 9 months. PW2 had a misunderstanding with the appellant and the appellant returned to her parent's home. On 20th May 2012 the appellant conspired with Kunihira and his other friend to go to the home of his wife's parents and injure her. He armed himself with a panga, Kunihira with an iron bar and another friend with a knife. The appellant sent two boys to call for him PW2. PW2 refused to come. The appellant decided to go forcefully and pursue her. On reaching the home where PW2 was staying, he found PW2 in the compound carrying the child, Bridget Kebisembo. He struck PW2 with a panga and cut the child in the middle of the head. He also cut PW2 on the hand, striking off 3 of her fingers and thumb. The appellant told PW2 that he had finished her and ran away.

[5] The appellant was convicted of murder of Bridget Kebisembo and attempted murder of Kanyunyuzi Gorret. The appellant was sentenced to 27 years' imprisonment on count 1 and 19 years of imprisonment on count 2.

Submissions of Counsel

[6] At the hearing the appellant was represented by Mr. Cosmos Kateba. The respondent was represented by Mr. Innocent Alelo, Senior Assistant Director of Public Prosecutions, in the Office of the Director of Public Prosecutions. Both counsel filed written submissions upon which this appeal proceeded.

[7] Counsel for the appellant submitted that the principles under which an appellate court can interfere with a sentence imposed by the trial court are set out in Rwabugande Moses v Uganda [2017] UGSC and Kyalimpa Edward v Uganda [2003] UGCA 8. Counsel for the appellant further submitted that courts are enjoined to consider previous sentences passed in similar offences, the consistency of sentences for similar offences and provisions of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013

[8] In support of the appeal, counsel for the appellant referred this Court to Anguyo Rovert v Uganda [2016] UGCA 39 where on appeal this Court set aside a sentence of 20 years and substituted it with 18 years' imprisonment. He also referred to Mutatina Patrick & Anor v Uganda [2018] UGCA 137 where this Court reduced a sentence for murder from 25 years to 20 years' imprisonment. He also referred to Kia Eria v Uganda [2017] UGCA 70 where the appellant was convicted of murder of a 3-year-old child and sentenced to life imprisonment but on appeal the sentence was reduced to 18 years' imprisonment.

[9] Counsel for the appellant relied on Atukwasa Joan & 6 Ors v Uganda [2019] UGCA 159 where the appellants were convicted of murder and sentenced to 25 years but on appeal the sentence was reduced to 18 years. In Nakibinge Eliya v Uganda [2019] UGCA 175 the appellant was sentence to suffer death and the resentencing judge substituted the sentence with 30 years of imprisonment. On appeal it was reduced to 17 years imprisonment. In Okao Jimmy *alias* Baby & 4 Ors v Uganda [2019] UGCA 94 the appellants were convicted of murder and sentenced to 25 years imprisonment and on appeal

the sentence was set aside and substituted it with 18 years' imprisonment on count I and 15 years imprisonment on count 2. In Sekandi Muhammed v Uganda [2020] UGCA 2119, the appellant was convicted of murder and a sentence of 50 years' imprisonment imposed. On appeal this court set aside the sentence and substituted it with 20 years' imprisonment. In Okolimo Stephen & 3 Ors v Uganda [2020] UGCA 2089 a sentence of 41 years was reduced to 18 years.

[10] Counsel for the appellant relied on James Kazungu Aluko v Uganda [2021] UGCA 79 where the appellant was sentenced to 8 years' imprisonment for attempted murder of his wife by the trial Chief Magistrate and the sentence was upheld on appeal to the High Court. However, on appeal to this Court, the sentence was set aside for being illegal given the fact that the period spent on remand wasn't considered and a sentence of 8 years' imprisonment was imposed pursuant to Section 11 of the Judicature Act.

[11] Counsel for the appellant submitted that in light of the above precedents, the sentences of 27 years and 19 years imposed on the appellant were manifestly harsh and excessive considering the range of sentences imposed for similar offences. Counsel prayed that this Court sentences the appellant to 11 years' imprisonment on count 1 and 8 years' imprisonment on count 2 less the period of 2 years and 9 months spent on remand both to run concurrently.

[12] In reply, Counsel for the respondent submitted that the trial judge complied with the principles as were laid in Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2007 (unreported) and argued that they were no grounds to warrant this court to interfere with the sentences. Counsel for the respondent was of the view that the sentences were lenient especially being below 35 years for murder prescribed in the third schedule of the sentencing guidelines and life imprisonment for the offence of attempted murder under the Penal Code Act.

[13] Counsel for the respondent submitted that according to the Constitutional (Sentencing Guidelines for Courts of Judicature) Practice Directions No. 8 of

2013, courts are enjoined to ensure consistence in sentence and argued that courts should also be alive to the unique facts and circumstances each case presents for the ends of justice to be met.

[14] Counsel for the respondent submitted that the sentences of 27 years' imprisonment for murder and 19 years attempted murder were neither harsh nor excessive. She argued that the trial judge exercised his powers judicially. He considered the aggravating and mitigating factors and took into account the period spent on remand. She contended that the trial judge took into account the unique circumstances of the case that the appellant used a panga to hack his child to death and attempted to kill the mother of his child. She submitted that the actions of the appellant were premeditated for he followed up his wife at her father's home with the intention of killing her.

[15] She relied on Ssemanda Sperito & Anor v Uganda Court of Appeal Criminal Appeal No. 456 of 2016 (unreported), where this court upheld a sentence of 50 years' imprisonment for the offence of murder. That in Florence Abbo v Uganda [2023] UGCA 17 this court found the sentence of 40 years' imprisonment for murder neither harsh nor excessive and upheld the same.

[16] In Ssekitoleko Yuda & Ors v Uganda [2017] UGSC 40 the Supreme Court upheld a sentence of 28 years' imprisonment for the offence of murder. In Bakubye Muzamiru &Anor v Uganda [2018] UGSC 5 the Supreme Court upheld a sentence of 40 years for murder and 30 years for aggravated robbery. In Bandebaho Benon v Uganda [2016] UGCA 56 this court found 35 years' imprisonment to be neither harsh nor excessive and in Kyetegereka George v Uganda [2010] UGCA 110 this court upheld a sentence of 30 years for murder.

[17] Counsel for the respondent relied on Wanja John v Uganda Court of Appeal Criminal Appeal No 243 of 2015 (unreported) where this court found 15 years imprisonment being the sentencing range of the offence of attempted murder; Sergeant Solomon v Uganda Court of Appeal Criminal Appeal No 17 of 2018 (unreported) where this court enhanced a 12 year sentence for attempted

murder to 15 years imprisonment; and Okucu Joel & Anor v Uganda [2019] UGCA 182 where this court set aside a sentence of 8 years imprisonment and substituted it with 15 years for the offence of attempted murder. Counsel submitted that in view of the above precedents the sentence of 19 years falls within the range of 15 years for attempted murder which was the appropriate sentence.

Analysis

[18] The general principles regarding the sentencing powers of an appellate court are well established. See Livingstone Kakoza v Uganda [1994] UGSC 17. This court will not interfere with a sentence imposed by the trial court unless the sentence is illegal or founded on wrong principle of law; or where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances.

[19] The sentencing order and reasons for the same are set out below;

> **Sentence and reasons**
> The convict Mugabe is a first offender as there is no previous criminal record before me. He is young now aged 20 years old. He appears to have learnt lessons in prison. He has prayed for leniency. He has been convicted of two very serious offence of murder and attempted murder both of which attract death and life imprisonment as the maximum sentences respectively. He has now spent two years and around 9 months on remand.
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> The circumstances under which he caused the offence calls for stiff deterrence sentence. The convicted killed his own child and also attempted to cause death of said child's mother. The offence of murder is one-way process whereby life of an individual is lost forever. Life being precious the law protects it jealously. Such offences are rampant within the court's jurisdiction. The state has prayed for deterrence sentence.
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> Taking into account all the mitigating factors in this case and the gravity of these offences and the 2 years plus 9 months which period I hereby deduct from my sentence on remand of this convict. I find the sentence of 27 years'

> imprisonment on count 1 and 19 years' imprisonment on count 2 would meet the ends of justice.

[20] The learned trial judge took note of the age of the appellant at the time of the trial as 20 years of age. We are of the view that what is important is the age of a convict at the time he committed the offence in question. In this particular case the appellant was stated to be approximately 18 years of age by the medical report made following his medical examination soon after his arrest. Similarly, when he was first charged in the magistrates court his age was stated to be 18 years of age.

[21] This court has had occasion to discuss somewhat similar circumstances in Ogweng Dennis v Uganda Criminal Appeal No. 170 of 2014 (unreported). It stated in part as follows,

> '[48] The learned trial judge noted that the appellant was 20 years old. We assume that this was the age of the appellant at the time of passing the sentence. We note though that what was material was the age of the appellant at the time the offence was committed. In the medical report it is stated that he was of the apparent age of 18 years old at the time he was examined soon after the offence was committed.
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> [49] It is unfortunate that the age was not properly ascertained by the court in light of the medical report. Considering the medical report, it could mean that the appellant may have been below or above I 8 years of age. If he was below I 8 years of age this was of significant consequence as he had to be, not only tried as a child, but if the charge or offence was proved he would have to be referred to a Family and Children Court for appropriate orders with a cap on detention at not more than 3 years in relation to any proved offence. See section 94 (l)(g) and 100 (3) of the Children's Act.

> [50] We note that the appellant has not raised this matter both in relation to his trial, conviction and or sentence. We would point out that the trial court though was under an obligation under section 88 (5) of the Children's Act to conclusively determine the age of the appellant in light of the medical report of PW4, the medical officer, who examined him.
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> [51] We are inclined to the view that the appellant was hardly an adult, at about 18 years of age, for which he deserved a rather lenient sentence, taking into account that those a day below 18 years of age, which he could well be, would not incur more than 3 years' detention, if proved to have committed a capital offence. We find that the sentence of 18 years' imprisonment in the circumstances of this case was manifestly harsh and excessive. We are inclined to the view that a sentence of 9 years' imprisonment would be adequate punishment for the appellant from which we would deduct the 2 years and 2 months spent on remand.'

[22] We are inclined to a similar view in this case and find that the learned trial judge failed to adequately consider the marginal adulthood of the appellant and thereby imposed a harsh and manifestly excessive sentence of almost 30 years' imprisonment if coupled with the period that the appellant had spent in pre-trial custody which the learned trial judge stated to take note of.

[23] For the aforementioned reason, we are compelled to interfere with the sentences imposed upon the appellant.

[24] The aggravating factors were that the appellant used a panga to hack his child, although he had intended to kill the mother. The actions of the appellant were premeditated. He sought out his wife at her father's home with a motive of killing her. Nevertheless, we do take into account the marginal adulthood of the appellant. He was a first offender who may very well reform and be reintegrated in society.

Decision

[25] This appeal is allowed. We find a sentence of 15 years' imprisonment on count 1 and 5 years' imprisonment on count 2 appropriate. We deduct the period of 2 years 9 months the appellant spent on remand. The appellant is to serve a period of 12 years and 3 months' imprisonment on count 1. He shall serve 2 years and 3 months' imprisonment on count 2. The said sentences shall run from 16th February, 2015 the date of conviction. The sentences shall be served concurrently.

Dated, signed and delivered at Fort Portal this 16th day of October 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica Mugenyi
Justice of Appeal