THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEALS NO. 06 OF 2011 AND 508 OF 2017

1. ALI KIPANDA
2. ISMAIL LUYIMA::APPELLANTS

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Nakawa, before Hon. Lady Justice Elizabeth Ibanda Nahamya, delivered on 22nd December, 2010)

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This is an appeal against sentence arising from the decision of Hon. Lady Justice Elizabeth Ibanda Nahamya, delivered on 22nd December, 2010. The appellants were convicted on three counts of aggravated robbery contrary to Sections 285 and 286(2) of the Penal code Act, murder contrary to Sections 188 and 189 of the Penal Code Act, and attempted murder contrary to Section 204 of the Penal Code Act. Each of the appellants was sentenced to 25 years imprisonment on the count of aggravated robbery, 25 years imprisonment on the count of murder and 15 years imprisonment on the count of attempted murder. The imprisonment sentences were to run consecutively.

The facts of the case were that on 18th October, 2009, a one Mukasa Micheal Katende (PW4) a night watchman and Charles Byabashaijja (the deceased) spent the night at a Farm Diary Factory in Kisimu Zone, Nabweru Sub-county, Wakiso District, which was their usual routine. PW4 had earlier opted to sleep outside the premises due to security concerns. At about 2:00 am, PW4 went into the house where the deceased was sleeping

as it was threatening to rain. PW4 then heard voices of people talking and suspected that there were intruders in the premises. He tried to wake up the deceased to no avail. PW4 left the deceased still sleeping and moved around the house. Thereafter, he heard voices from the direction he was coming from. He heard the 1st appellant telling the 2nd appellant that the askari (PW4) was not in the room and that he should look for him. PW4 threw an arrow at the 2nd appellant and held him tightly in order to restrain him. The 2nd appellant then called the 1st appellant for help. The 1st appellant came and threw PW4 down and started cutting him with a knife on the head, hit him with an iron bar at the back of the head and pierced his ear. Thereafter, PW4 heard the 1st appellant telling the 2nd appellant that PW4 was dead and that they should take him to the mattress. When the two appellants left, PW4 asked the deceased to give him water but the latter did not respond. It was in the morning that PW4 heard voices saying that the deceased had been killed.

PW4 was taken to hospital and the deceased was taken to the mortuary. The deceased's tongue had been cut, his eye was out and he had been injured on the lower part of the neck. PW4 was hospitalized from 19th to 28th October 2009, for a skull wound.

The appellants stole three metallic doors, two metallic window frames and a bag of cement.

The appellants were charged in the High Court and they denied having participated in the commission of the crime. They were convicted and sentenced as indicated above.

The appellants then appealed to this Court against sentence on a single ground that:

"The trial Judge erred in law and fact when she failed to properly evaluate all the facts of the case and sentenced the appellants to a very harsh sentence totaling to 65 years".

At the hearing of the appeal, the appellants were represented by Ms. Janet Nakakande and Mr. George William Byansi appeared for the respondent.

For the appellant, Counsel George William Byansi submitted that in principle, the trial Judge did not give the appellants the maximum punishments of death and life imprisonment as this was never her intention. However, she turned against her own sentencing intention when she awarded a total of 65 years sentence to the appellants.

Counsel further submitted that considering that life expectancy in Uganda was approximately 45 years of age, the appellants were most likely going to serve the maximum sentences of life imprisonment and death.

It was counsel's further submission that at the time the appellants committed the offence, they were only 27 and 30 years respectively. They were youthful with chances of reforming and becoming resourceful persons in society if they had been given a lighter sentence. In counsel's view, the lessons learnt in being punished for crime would not be of any value as the appellants would never come out of prison alive.

Counsel further submitted that the trial Judge was not consistent in sentencing and asked for this Court to harmonize the sentence to match the intention of the trial Judge. He prayed that the unintended life imprisonment and death sentence be reversed by turning the three consecutive sentences of 25 years imprisonment for aggravated robbery, 25 years for murder and 15 years for attempted murder to be served concurrently.

In reply, counsel for the respondent submitted that the trial Judge fully evaluated the relevant facts in sentencing the appellants. There was no error in law or fact when the reasons given by the trial Judge are considered. It was counsel's view that the trial Judge properly discharged her discretion and gave appropriate reasons like brutality with which the crimes were committed, use of deadly weapons and the effect of the crimes on the victim's families.

Counsel for the respondent prayed for the appeal to be dismissed and sentences confirmed accordingly.

We have carefully considered the submissions of either counsel and perused the record of the lower Court.

It is trite law that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. ***(See Kiwalabye Bernard Versus Uganda, Supreme Court Criminal Appeal No.143 of 2001)***.

In the present case, the trial Judge sentenced each of the appellants to a term of imprisonment for 25 years for the offence of aggravated robbery, 25 years for the offence of murder and 15 years for the offence of attempted murder. She was faulted for ordering that the said sentences would not run concurrently but consecutively. In principal, each of the appellants was to serve a total of 65 years imprisonment for the offences with which they were convicted.

While sentencing the appellant, the trial Judge stated;

> *"The manner in which the deceased was killed was very brutal. The attempted murder against the complainant's askari, Micheal Katende Mukasa, was done in a gruesome manner. The aggravated robbery incident in which deadly weapons i.e. a panga and a metallic iron bar were used was also despicable. I agree with the State Attorney that because of their acts, the deceased's family is disadvantaged. They have lost their loved ones and have to rely on the brother of the deceased for their upkeep. The children have turned into orphans and the wife into a widow, a sad state indeed.*
>
> *The effect of attempted murder has been adverse to Mr. Katende Mukasa Micheal:- He cannot do his job well and needs bed rest. It also has financial implications to the complainant. The convicts were merciless to the victim. They do not need any mercy. Although the Court will spare their lives, it will not heed to their request to be*

given a chance to come out and look after their own families. If they deprived the deceased chance to look after his family, they should not ask for any different treatment. This is not a case where I can consider any other principle but deterrence despite the youthful age of the convicts who are cold murderers. They should be put away from society for good. I cannot have sympathy on them".

It appears to us that the trial Judge took into consideration the aggravating and mitigating factors during sentencing. From the above extract, we also deduce that the trial Judge intended for the appellants never to come out of prison. She indicated that the appellants would not be given a chance to come out of prison and look after their families and that they should be put away from society for good. Logically, this meant that the trial Judge intended for the appellants to stay in prison forever. Probably for reason that imposing life imprisonment would be harsh in the circumstances of the case, she decided to order for the sentences to run consecutively.

We take note that the offences were committed by the appellants in the same series of facts. The offences were committed in quick succession in one transaction. In our view, an order for the terms of imprisonment to be served consecutively was uncalled for. While we find that the sentence passed on each count of the offences was appropriate, an order that the terms of imprisonment should be served consecutively and not concurrently was harsh in the circumstances of the case.

Accordingly, we find merit in the appeal. The trial Judge's order that the sentences imposed upon the appellants should run consecutively is set aside. The sentences shall run concurrently.

Dated at Kampala this ..... 03rd ..... day of ..... January 2023

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Richard Buteera
Deputy Chief Justice

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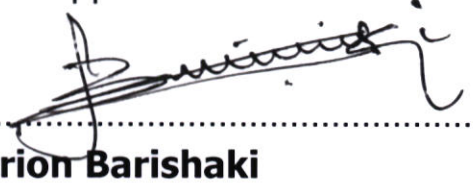
Elizabeth Musoke

Justice of Appeal



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Cheborion Barishaki

Justice of Appeal