THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT FORT PORTAL

CRIMINAL APPEAL No. 004 of 2018

(CORAM: Egonda, Bamugemereire and Mugenyi, JJA)

BAITWABABO PETER :: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(An appeal against the decision of Batema NDA J in High Court Criminal Session Case No. 126 of 2013 at Fort Portal dated 7thNovember 2013)

JUDGMENT OF THE COURT

The appellant was convicted of two counts of murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120. On count one, it was alleged that the appellant on the 14th day of April 2007 at Rwitano village in Kyenjojo district killed Gertrude Nankya. On the second count, it was alleged that the appellant on the 14th day of April 2007 at Rwitano village in Kyenjojo district killed Immaculate Nsungwa.

Background

The appellant and the deceased were husband and wife. It was the prosecution's case that on the 14th day of April 2007 the appellant developed a misunderstanding with his wife, Nsungwa Immaculate and in the ensuing scuffle the appellant pierced her with a spear. She made an alarm, which attracted her mother, Gertrude Nankya

who came running to the scene. The appellant stabbed Nankya, his mother-in-law around the ribs, killing her instantly. The appellant then dragged his wife to a nearby potato garden. The alarm from the deceased's sister attracted neighbours who responded as the appellant made. His injured wife was rushed to hospital but later succumbed to the injuries. The appellant was arrested and indicted with two counts of murder. He pleaded guilty and was subsequently convicted and sentenced to 50 years' imprisonment on each count to run concurrently. Dissatisfied, the appellant sought leave of this court to appeal against sentence only, which was granted.

Grounds of appeal

1. **The learned trial Judge erred in law and fact when he failed to consider the pre-conviction period spent by the appellant on remand prior to his conviction which caused a miscarriage of justice.**
2. **The learned trial Judge erred in law and fact when he sentenced the appellant to 50 years imprisonment on each count which rendered the sentence manifestly harsh and excessive.**

Representation

At the hearing of the appeal, the appellant was represented by Mr. Richard Mugisha Rwakatooke on State Brief while the respondent was represented by Ms. Amy Grace a Senior State Attorney from the Office of the Director of Public Prosecutions. The appellant made a physical appearance in court. Both counsel filed their

written submissions and asked court to rely on the same in considering this appeal. Court granted the prayer.

Submissions for the Appellant

Regarding Ground No. 1 Counsel for the appellant submitted that the trial Judge while passing out the sentence of 50 years' imprisonment on each count did not consider the mandatory requirement of taking into account the period of 1 year and 6 months that the appellant had spent in lawful custody which rendered the sentence illegal. Counsel argued that where the sentencing court fails to comply with the constitutional imperative, a subsequent sentence imposed is rendered unlawful and ought to be quashed on appeal.

Counsel further submitted that crediting the appellant with the remand period is a constitutional requirement under **Article 23 (8) of the Constitution**.

He relied on **Rwabugande Moses v Uganda SCCA No. 25 of 2014** where the Supreme Court emphasized that taking the remand period into account is necessarily arithmetical.

Counsel invited this court to rectify the error of the trial Court by imposing a new sentence that gives effect to **Article 23 (8) of the Constitution**. He prayed that this ground succeeds.

Ground No. 2: The learned trial Judge erred in law and fact when he sentenced the appellant to 50 years imprisonment on each count which rendered the sentence manifestly harsh and excessive.

Counsel submitted that the sentence of 50 years' imprisonment on each count imposed upon the appellant was manifestly harsh and excessive. Counsel submitted that the trial Judge did not consider the mitigating factors as required by law, which occasioned a failure of justice. He relied on **Attorney General v Suzan Kigula Constitutional Appeal Petition No. 3 of 2006,** in which **State v Makwanyane (1995) 3 South Africa 391** was cited with approval for the proposition that the trial court has a duty to consider the mitigating and aggravating circumstances prior to sentencing of an accused person.

Counsel submitted that the appellant's age and capacity to reform are relevant mitigating factors. He argued that these were not considered by the learned trial Judge. He alluded to **Adama Jino v Uganda CACA No. 50 of 2006** in which this court set aside the sentence of death imposed by the High court and substituted it with a sentence of 15 years' imprisonment after taking into account the fact that there was room for the offender to reform. He also relied on **Kabatera Steven v Uganda CACA No. 123 of 2002** where the age of an appellant was found to always be a material factor which ought to be taken into account before a sentence is imposed. The court maintained that failure to consider the age of the appellant is a failure of justice.

Counsel invited this court to find that the appellate courts have severally reduced sentences imposed by the trial courts upon taking the mitigating factors into consideration. He cited **John Kasimbazi & 6 Ors v Uganda CACA No. 167 0f 2013** where appellants who had

been charged with the offence of Murder c/s 188 and 189 were sentenced to Life Imprisonment. However, on considering the mitigating factors, this court reduced the sentence to 12 years. He further relied on **Muwonge Fulgensio v Uganda CACA No. 0586 of 2014** where the appellant raped and strangled a girl to death but where this court reduced the sentence of Life Imprisonment to 25 years' imprisonment. Counsel implored this court to allow the appeal and set aside the sentence of 50 years' imprisonment on each count.

Submissions for the Respondents

Counsel for the respondent conceded that failure by the trial Judge to consider the mitigating factors as well as the period spent on remand as required under **Rwabugande (supra)** rendered the sentence illegal.

Counsel implored this court to invoke its powers under **section 11 of the Judicature Act** to impose a sentence that was appropriate in the circumstances. It was counsel's submission that in determining the appropriate sentence, this court should note that the trial Judge did not consider the aggravating factors. Counsel submitted that the appellant was convicted on two counts of murder. He submitted that the appellant unlawfully caused the death of his wife and mother-in-law. He submitted that his heinous act was premeditated as could be inferred from the degree of harm occasioned to the deceased persons and the part of the body

targeted. Counsel argued that these were all aggravating factors that call for a deterrent and retributive sentence.

On the principle of uniformity and consistency in sentencing he cited **Turyahebwa Deus v Uganda CACA No. 172 of 2014** where this court held that:-

> "The Supreme Court and this court have emphasized the need for consistency in sentencing. In this regard both courts have in the recent past established a range, within which sentences for murder of a single person where the appellant is a first offender, the murder was not related to ritual sacrifice, was not pre-mediated and was not coupled with any other offence. The sentences now range between 20 years imprisonment at the lower end of the scale to 35 years imprisonment at the upper end."

Counsel submitted that the current case calls for a sentence outside the range of 20-35 years. Counsel added that penal sanctions are attached to each crime committed and the purpose is to ensure that each crime is addressed.

It was counsel's submission that the Supreme Court and the Court of Appeal have previously maintained sentences of death, Life imprisonment and 50 years' imprisonment in murder cases. He cited **Bahemuka William & Anor v Uganda CACA No. 4 of 2003 and Kalyamagwa Samuel v Uganda CACA No. 189 of 2012** where this court did not interfere with the death sentences passed by the trial Courts in cases of murder. Counsel also cited cases where a

sentence of life imprisonment was upheld by this court and the Supreme Court where the appellants had committed murder. These are **Sebuliba Siraje v Uganda CACA No. 0319 of 2009 and Opolot Justine & Anor v Uganda SCC No. 31 of 2014.**

Counsel further cited **Ssemaganda Sperito & Anor v Uganda CACA No. 456 of 2016** where this court upheld a sentence of 50 years' imprisonment for the appellants who hacked a relative to death.

Counsel prayed that basing on the authorities submitted, this court should consider concurrent sentences of Life Imprisonment or 50 years imprisonment as the most appropriate given the circumstances under which the murders were committed.

Resolution of the Appeal

We have considered the submissions by both parties and the laws and authorities relied on. We have also looked at other authorities not cited but are relevant to this appeal.

This being a first appeal, it is our duty as a first appellate court to rehear the matter on appeal by re-examining and re-evaluating all the materials that were before the trial court and make up our own mind. We alive to our roles and handicaps as a first appellate court. (See **Kifamunte Henry v Uganda SCCA No.10 of 1997).**

This appeal is against sentence only. The appellant argued that the trial Judge did not take into account the period the appellant had spent on remand and that he did not consider the mitigating factors while sentencing the appellant. The respondent conceded these arguments.

As an appellate court, we warn ourselves not to interfere with a sentence imposed by the trial Judge merely on account that we would have imposed a different sentence. However, we acknowledge that we have latitude to interfere with a sentence where it is found to be illegal, or founded upon a wrong principle of the law, or premised on the trial court's failure to consider a material factor, or where it is harsh and manifestly excessive in the circumstances of the case – **(See Kizito Senkula v Uganda SCCA No.24 of 2001** and **Bashir Ssali v Uganda SCCA No.40 of 2003).**

In **Kyalimpa Edward v Uganda SCCA No. 10 of 1995,** the Supreme Court noted that:

> **'An appropriate sentence is a matter of discretion of the sentencing Judge. Each case presents its own facts upon which the appellate court will not normally interfere with 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 excessive.'**

We have had the opportunity to re-appraise the sentencing notes of the trial Judge where he remarked as follows:

> **"The accused murdered his wife and mother-in-law without any reasonable justification. If he was not a first offender, I would have sentenced him to death. I now sentence him as follows;**

Count 1: Sentenced to 50 years imprisonment.

Count2: Sentenced to 50 years imprisonment.

Orders Sentence to run concurrently."

Article 23 (8) of the Constitution of the Republic of Uganda (1995) requires courts to take into account the period a person has spent on remand before sentencing him or her. For ease of reference, **Article 23 (8) provides** as follows: -

> **"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spend in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."**

The prerequisite of **Article 23 (8)** is that subsequent to a conviction, any period that the convict has spent in lawful custody before conviction, in respect of the offence, ought to be intentionally taken notice of and deducted from a sentence.

In **Rwabugande Moses v Uganda: (supra)** it was held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory Constitutional provision. **(Article 23 (8) of the Constitution of the Republic of Uganda).**

From the record, it is clear that the trial Judge in this case did not make an effort to credit the appellant with the time he had spent

on pretrial remand, which is in violation of **Article 23 (8) of the Constitution**. We therefore find the sentence illegal and set it aside. Having set aside the sentence, we do not have to consider the alternative ground. Exercising the powers of this court under **section 11 of the Judicature Act, Cap 13** we now proceed to impose an appropriate sentence after considering the circumstances and judicial precedents in similar cases.

It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime; it is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation. **(See Aharikundira Yustina SCCA No. 27 of 2015).**

In Francis Bwalatum v Uganda CACA No. 48 of 2011 the appellant was charged and convicted with two counts of murder and was sentenced to 50 years imprisonment. He appealed and this court having considered the mitigating and aggravating factors allowed the appeal and reduced the sentence to 20 years imprisonment on each count to run concurrently.

In **Rwahire Ruteera v Uganda CACA NO. 72 of 2011** the appellant was convicted of two counts of murder; a wife and stepdaughter and he was sentenced to 20 years imprisonment on each count to be served consecutively, which in effect meant he was to serve 40 years in prison. He appealed against sentence on ground that the period spent on remand had not been deducted. This court considered that

the appellant was a first offender, 42 years old at the time he committed the brutal murders and found the sentence of 20 years' imprisonment on each count appropriate. The court deducted the 5 years he had spent on remand from each count and re-sentenced the appellant to 15 years imprisonment on each count to be served consecutively. Cumulatively, the sentence amounted to 30 years' imprisonment.

In **Ading Andrew v Uganda CACA No. 769 of 2014** the appellant was found guilty of two counts of murder and sentenced to 45 years imprisonment on each count to run concurrently. On appeal against sentence only, the court considered that he was a first offender, was remorseful but had committed a gruesome offence against two vulnerable citizens. A sentence of 30 years imprisonment, on each count, was found appropriate. The period of 2 years, 9 months and 21 days that he had spent in lawful detention was deducted thereby sentencing him to serve 27 years, 2 months and 9 days imprisonment on each count.

In the instant case, we have considered that the appellant was a first offender, he pleaded guilty from the onset and saved court's time, he was of youthful age of 32 years at the time he committed the offence. However, he committed two gruesome murders on his own wife and his mother-in-law. He took away lives of two people in the same household on the same day.

Basing on the above factors, we consider a sentence of 20 years imprisonment, on each of Count I and Count II, to be appropriate in the circumstances. The appellant was charged on 17th April 2007. He was convicted and sentenced on 7th November 2013. There is no indication that he was on bail. We take it that he has been on remand for a period of 6 years 6 months and 2 weeks. We therefore deduct this remand period from the 20 years meted out onto the appellant on each count.

On each of Count I and Count II the appellant is sentenced to 15years 6 months and 2 weeks' imprisonment, effective 7th November 2007. The sentences are to be to be served consecutively. This appeal therefore succeeds.

Dated at Fort Portal this..... day of.....2023

Fredrick Egonda-Ntende
JUSTICE OF APPEAL

Catherine Bamugemereire
JUSTICE OF APPEAL

Monica K. Mugenyi
JUSTICE OF APPEAL