

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL HOLDEN AT KAMPALA
(CORAM: BUTEERA DCJ, LUSWATA AND KIHICA,JJA)
CRIMINAL APPEAL NO. 277 OF 2010

BYABALIHO FABIAN:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda held at Luweero before Hon. Justice Benjamin Kabiito delivered on the 17th day of October, 2010 in Criminal Session Case No. 311 of 2010)

JUDGMENT OF COURT

INTRODUCTION

The appellant was indicted on two counts. In count one he was indicted with the offence of murder contrary to Sections 188 and 189 of the Penal Code Act (Cap 120). In count 2, he was indicted with the offence of aggravated robbery contrary to Sections 285 and 286 of the Penal Code Act (Cap 120).

BACKGROUND

The facts of this case as can be ascertained from the record are that, the appellant on 14th August, 2009 hired Mawerere Julius a boda rider from Mukokowe stage to take him to Nalungo in Buntuntumula sub-county, Luweero District. This was done in the presence of Katende Edward. Mawerere Julius accepted to take the appellant to his destination on motor cycle TV Star blue in colour Reg. No. UDJ 191T.

Along the way in Nanga Forest located in Yandwe, the appellant stabbed the deceased in the chest with a knife and also beat him in the chest and thigh. The deceased suffered broken ribs following the beating. Mawerere Julius died as a result of the assault. The motor cycle was stolen.

The police was informed about the presence of a dead body of an unknown person by the residents of Yandwe village. The police took the body to Luweero Health Centre IV where a post mortem examination was conducted. The body was identified by another boda boda rider as that of Mawerere Julius.

The appellant took the deceased's motorcycle and kept it at the home of his uncle Tibenderena Fuderi in Isingiro District from where it was recovered on 8th September, 2009.

The appellant was arrested. He admitted to having committed both offences. He recorded a charge and caution statement to that effect. He led the police to where he had kept the motorcycle.

At the trial, the appellant pleaded guilty to both counts. He was convicted and sentenced to 28 years' imprisonment on each count. The sentences were to run concurrently.

The appellant was dissatisfied with the sentence of the trial Court and appealed to this Court on one ground:

- 1. The learned trial Judge erred in law and fact when he imposed an illegal sentence on the appellant in the circumstances when he failed to take into account the period spent on remand and sentenced him to 28 years in prison on each count that is harsh and excessive thereby occasioning a miscarriage of justice.***

The respondent opposed the appeal.

REPRESENTATION

At the hearing, the appellant was represented by Mr. Muhammed Mbalire on state brief.

The respondent was represented by Ms. Immaculate Angutuko, Chief State Attorney and Mr. Asimwe Anord, State Attorney both from the office of the Director of Public Prosecutions.

Counsel for the parties filed written submissions. They applied to Court and were granted leave to adopt and rely on them as their final submissions.

Counsel for the appellant sought leave of the Court to appeal against sentence only under Section 132 (1) (b) of the Trial on Indictments Act (Cap 123). The prayer was granted.

APPELLANT'S SUBMISSIONS

Counsel for the appellant submitted that the duty of the Court of Appeal when hearing a first appeal as provided for in Rule 30 (1) of the Court of Appeal Rules, is to avail to the parties its own decision on issues of fact and law.

The cases of ***Oryem Richard vs. Uganda, (S.C.Cr. App. No. 22 of 2014)***, ***Henry Kifamunte vs. Uganda, (S.C.Cr. App. No. 10 of 1997)*** and ***Kyalimpa Edward vs. Uganda, (S.C.Cr. App No. 10 of 1995)*** were cited by counsel for the appellant in support of the submission that an appellate Court may interfere with the sentencing discretion of the trial Court where the sentence is illegal, there was an error in principle, or where Court is satisfied that the sentence imposed by the trial Judge was manifestly too low, or too harsh as to amount to an injustice.

Counsel for the appellant submitted that this Court should exercise its powers under Section 11 of the Judicature Act to sentence the appellant afresh. He added that the trial Judge erred in law and fact when he failed to take into account the period the appellant had spent on remand.

Counsel submitted that the appellant had spent one (1) year and two (2) months on remand which period should have been deducted from the sentence the Court imposed on the appellant. That a sentence arrived at without taking into consideration the period spent on remand, is illegal.

Counsel cited the case of ***Rwabugande Moses vs. Uganda, (S.C.Cr. App. 14 of 2015)*** which emphasised the mandatory requirement of Article 23 (8) of the 1995 Constitution.

It was submitted for the appellant that the trial Court should meticulously consider all mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, practice

directions and general principles of sentencing laid down in case law. The case of **Aharikundira Yustina vs. Uganda, (S.C.Cr. App No. 27 of 2015)** was cited to support the above proposition.

Counsel for the appellant further submitted that in allocutus, the appellant prayed for leniency on several grounds to wit; the appellant was a first offender, had saved court's time by pleading guilty, was young, quite repentant and could still be useful to society.

That he was a family man with four (4) children aged between ten (10) and one (1) and half years, was the sole bread winner for his family, and the nine (9) children of his late brother.

Counsel submitted that the trial Judge only considered one mitigating factor to the effect that the appellant pleaded guilty and saved Court's time and resources, and as a result the sentences meted onto the appellant were manifestly harsh and excessive.

Counsel submitted that this Court should re-evaluate the mitigating factors and re-sentence the appellant in the exercise of its powers under Section 11 of the Judicature Act.

Counsel contended that Objective 3 (e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, is to the effect that the guidelines are to provide mechanisms that will promote uniformity, consistency and transparency in sentencing.

Counsel cited further the case of **Kalangwa Henry vs. Uganda, (C.A.Cr. App. No. 184 of 2014)** where the appellant's sentence of 20 years' imprisonment was confirmed on charges of murder and aggravated robbery.

Counsel in addition cited the case of **Onyango Bosco vs Uganda, (C.A.Cr. App. 737 of 2014)** where this Court reduced sentences of 45 years' imprisonment for murder to 20 years' imprisonment and reduced a sentence of 45 years' imprisonment for aggravated robbery to 18 years' imprisonment.

Counsel further cited **Mayinja Peter & 7 Ors vs. Uganda, (C.A.Cr. App. 278 of 2017)**, where a sentence of 28 years' imprisonment for aggravated robbery was reduced to 20 years' imprisonment on appeal. He then prayed that Court considers the authorities cited and re-evaluates the mitigating factors and aggravating factors and re-sentences the appellant to 15 years' imprisonment.

RESPONDENT'S SUBMISSIONS

It was submitted for the respondent that sentencing is a matter of discretion for the trial Court and an appellate Court will only interfere with a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive or too low in view of the circumstances of the case as was held in **Kiwalabye Benard vs. Uganda, (S.C.Cr. App. 143 of 2001)** and **Karisa Moses vs. Uganda (S.C.Cr. App. 23 of 2016)**.

Respondent's Counsel cited the case of **Kyalimpa Edward vs. Uganda, (S.C.Cr. App. 10 of 1995)** was cited where Court held that an appropriate sentence is a matter of discretion for the sentencing Judge and each case presents its own facts upon which a Judge exercises his discretion.

Counsel conceded that there was no indication on the record that the period the appellant had spent on remand was considered when sentencing him pursuant to Article 23 (8) of the Constitution either arithmetically or by any form of consideration as was required in the sentencing regime at the time as per **Kizito Senkula vs. Uganda, S.C.Cr. App. 24 of 2011** thus making the sentence illegal.

Counsel submitted that Court should exercise its powers under Section 11 of the Judicature Act and sentence the appellant to an appropriate sentence and deduct the period of one (1) year and two (2) months that the appellant had spent on remand.

The Respondents Counsel suggested 15 years' as well. The cases she cited do not reflect that submission.

As a way of reference, Respondents Counsel cited the following cases to support her position.

- a) ***Bakubuye Muzamiru & Anor vs. Uganda, (S.C.Cr. App. 56 of 2015)*** where sentences of 40 years' and 30 years' of imprisonment for murder and aggravated robbery were confirmed by the Supreme Court.
- b) ***Magero Patrick & Anor vs. Uganda, (S.C.Cr. App. 76 of 2019)*** where a sentence of 45 years' imprisonment was confirmed for convictions of murder and aggravated robbery.
- c) ***Nakalyaka Fabiano vs. Uganda, (C.A.Cr. App. 141 of 2018)*** where a term of 30 years' imprisonment less 4 years spent on remand was considered appropriate for the offence of murder.

RESOLUTION BY THE COURT

We have given due consideration to the record of appeal and studied the written submissions of both counsel. We have also taken into account the law and authorities cited as well as other authorities relevant to the determination of this appeal.

Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 vests the Court of Appeal with jurisdiction to re-appraise the evidence on record in the trial Court and draw its own inferences of fact.

This position has been affirmed by the Supreme Court in ***Henry Kifamunte vs. Uganda, (S.C.Cr. App. 10 of 1997)***. Court held that:

"The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

This duty shall be borne in mind while considering this appeal.

It is trite law that sentencing is a matter of discretion of the sentencing Judge. The Supreme Court and this Court have laid down principles where an appellate Court can interfere with the discretion of a sentencing Judge in a number of authorities.

In **Kamya Johnson Wavamuno vs Uganda, S.C.Cr App. 16 of 2000**, the Supreme Court held:

"It is well settled that the Court of appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion, or a failure to take into account a material consideration, or taking into account material consideration or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently."

In **Kiwalabye Benard vs Uganda, (S.C.Cr. App. 143 of 2001)**, the Supreme Court held:

"The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence, or where the sentence imposed is wrong in principle."

The appellant's first complaint about his sentence is that the trial Judge did not consider the period the appellant had spent on remand before sentencing him.

Counsel for the State conceded to this fact.

Article 23 (8) of the 1995 Constitution of the Republic of Uganda (As amended) provides as follows:

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends 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."

This is a mandatory provision of the law that has been applied by the Supreme Court and this Court in a number of authorities.

In **Rwabugande Moses vs Uganda, SCCA NO.25, 2014** the Supreme Court held:

“Article 23(8) of the Constitution makes it mandatory and not discretionary that a sentencing judicial officer accounts for the remand period.”

The principle has been elaborated by the Supreme Court in **Kizito Senkula vs Uganda, SCCA NO.24 2001; Kabuye Senvewo vs Uganda, SCCA NO.2 2002; Katende Ahamad vs Uganda, SCCA NO.6 2004 and Bukenya Joseph vs Uganda, SCCA NO.17 2010.**

We find that the sentences of 28 years imprisonment imposed on the appellant are illegal for failure to comply with a mandatory constitutional provision. We accordingly set the sentences aside.

We now invoke Section 11 of the Judicature Act which gives this Court power as that of the trial Court to impose a sentence it considers appropriate.

In arriving at an appropriate sentence we shall be guided by the sentencing range in cases of a similar nature and we shall consider the aggravating and mitigating factors.

The Supreme Court and this Court have had the opportunity to consider sentences in cases where appellants have been convicted of murder and aggravated robbery.

In **Bakubye Muzamiru & Anor vs Uganda, SCCA NO 56 2015**, the appellants were convicted of murder and aggravated robbery and sentenced to 40 years' imprisonment on a count of murder. On appeal to this honourable Court, the Court deemed the sentence neither harsh nor excessive. On further appeal, the Supreme Court confirmed the sentence.

In **Magero Patrick & Anor vs Uganda, CACA NO 076 2019** the appellant was indicted on four counts. Two counts of aggravated robbery C/S 285 and 286, murder C/S 188 and 189, and two counts attempted murder C/S 204 of the Penal Code Act. He was convicted of one count of murder and sentenced to 45 years imprisonment. This

honourable Court upheld 45 years' imprisonment imposed by the trial Court.

In **Nakalyaka Fabiano vs Uganda, CACA NO 141 2018** the appellant was convicted of murder but acquitted of aggravated robbery. This honourable Court recently deemed a sentence of 30 years' imprisonment to be appropriate from which it deducted 4 years' period spent on remand.

The appellant was convicted on two counts of murder and aggravated robbery. He was sentenced to 28 year's imprisonment in either count. The sentences were to run concurrently.

The appellant planned his attack. He stabbed the victim with a knife. He beat a defenceless man who died as a result of the assault. At 32 years the victim was youthful. He left a wife and a six months old baby. The acts of the appellant were gruesome and wanton in nature. The offences were clearly premeditated by the appellant who intended to steal the deceased's motorcycle.

It is noteworthy that the appellant who pleaded guilty, was remorseful and this is a mitigating factor. He indicated that he had a large family and was the bread winner. He prayed for a lenient sentence.

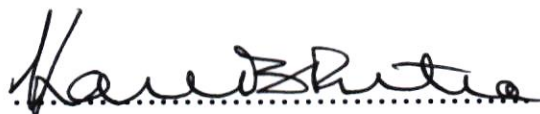
We have weighed the mitigating against the aggravating factors in this case which we have enumerated above. We find that the aggravating factors outweigh the mitigating factors. We find that the conduct of the appellant requires a deterrent punishment to act as a lesson to would be offenders and to also protect society from persons with intentions similar to those of the appellant.

We shall sentence the appellant to 28 years' imprisonment in each count.

We shall only deduct the period of one (1) year and two (2) months that the appellant had spent on remand before being sentenced. The appellant shall serve a sentence of twenty-six (26) years and 10 months' imprisonment on each count. The sentences are to run concurrently from 17th October, 2010.

We so order.

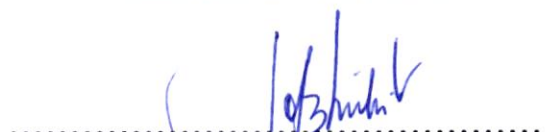
DATED AT Kampala this..... day of.....2024.



RICHARD BUTEERA
DEPUTY CHIEF JUSTICE



EVA K. LUSWATA
JUSTICE OF APPEAL



OSACK JOHN KHIKA
JUSTICE OF APPEAL