THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT JINJA

CRIMINAL APPEAL NO.0196 OF 2012

(An Appeal from the decision of Hon. Lady Justice Percy Night Tuhaise dated 6th July 2012 at High Court (Iganga) in Criminal Session Case No. 443 of 2010)

TWALI YAKUBU========== APPELLANT

VERSUS

UGANDA==========RESPONDENT

CORAM:

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J. A

HON. MR. JUSTICE MUZAMIRU M. KIBEEDI, J. A

HON. LADY JUSTICE MONICA K. MUGENYI, J.A

JUDGMENT OF THE COURT

Introduction

This is a first Appeal against both Conviction and Sentence. The Appellant was convicted of Murder contrary to section 188 and 189 of the Penal Code Act.

Background

On 31st December 2009, the Appellant requested the deceased and a one Makubo Eriya to help him harvest his maize. On the 1st of January 2010 around 6am, the deceased, the Appellant and Makubo Eriya harvested the said maize. In the evening they heaped the maize in one place. It started raining before it could be carried away. The Appellant asked the deceased to join him in guarding the maize in the garden at night. After supper the deceased told his family that he was going to guard the said maize.

In the morning, around 10 am Makubo Eriya went to the Appellant's garden to continue with harvesting. He found the Appellant resting on a heap of maize. When he proceeded to the place where they stopped harvesting, Makubo Eriya found the deceased lying down with several deep cut wounds on his head, chest and neck. When he inquired, the deceased told him that he had fought with the Appellant and the Appellant had cut him. The deceased died as he was being taken him home.

The matter was reported to the Local Council (LC 1) officials who went to the Appellant's maize garden where they found him busy harvesting his maize. When asked about the incident, he confessed having assaulted the deceased. The matter was reported to police who arrested the Appellant after which he

was indicted for murder of the deceased. Upon arraignment, the Appellant pleaded not guilty to the charge.

The trial court found the Appellant guilty of murder under section 188 and 189 of the Penal Code Act and sentenced him to 18 years' imprisonment. The Appellant being dissatisfied with both the Conviction and Sentence lodged this Appeal.

Representation

The Appellant was represented by Mr. Ishaq Dhakaba while the Respondent was represented by Ms. Happiness Ainebyona Chief State Attorney.

Grounds of Appeal

1. **That the learned trial Judge erred in law and fact when she convicted the Appellant for murder without proving mens rea hence occasioning a miscarriage of justice.**
2. **That the learned trial Judge erred in law and fact when she imposed a sentence of 18 years' imprisonment a sentence deemed to be manifestly harsh and excessive hence occasioning a miscarriage of justice.**

Duty of the court

This being a first Appellate court it is our duty to give the evidence on the record as a whole that fresh and exhaustive scrutiny which the Appellant is entitled to expect, and then draw our own conclusions of fact. However, as we never saw or heard the witnesses who gave evidence, we must make due allowance in

that respect. **See Rule 30(1) (a) of the Rules of this court, Pandya v R (1957) EA 336, Uganda v George Wilson Simbwa SCCA No. 37 of 2009].**

Ground 1: That the learned trial Judge erred in law and fact when she convicted the Appellant for murder without proving *mens rea* hence occasioning a miscarriage of justice.

Appellant's submissions

Counsel for the Appellant submitted that the death of the deceased was not caused by malice aforethought because the Appellant did not have *mens rea.*

Counsel for the Appellant submitted that the deceased was killed when the Appellant thought that someone was trying to steal his maize and that it was in pursuit of that thief that the deceased was killed.

He argued that the Appellant acted in a bid to protect his property and therefore did not have the time to create the required *mens rea.* He submitted that the Appellant beat up the deceased under a heat of passion.

Counsel for the Appellant concluded his submissions by praying that the Appellant be convicted of manslaughter instead.

Respondent's submissions

Counsel for the Respondent submitted that the Appellant killed the deceased with malice aforethought.

She argued that malice aforethought can be established from an intention to cause death of any person, whether such person is the person actually killed

or not, or if that person had knowledge that the act or omission causing death will probably cause death of some person, whether such person is the actual person actually killed or not, or by a wish that it may not be caused.

She submitted that the Postmortem Report showed that the deceased had multiple cuts of varying sizes on the head and face and deep multiple bruises. She argued that malice aforethought can be deduced from the part of the body which was attacked. She relied on the Supreme Court case of **Nanyonjo Harriet & Another v Uganda** Criminal Appeal No.24 of 2002 for this proposition.

Court's finding

The complaint in this ground is that Appellant did not have malice aforethought when he killed the deceased. This was because the Appellant thought that the deceased was a thief when he assaulted him. On the other hand, the prosecution has submitted that the Appellant had malice aforethought basing on the parts of the body that were attacked by the Appellant.

The trial court found that the Appellant had malice aforethought because of the parts of the body that the Appellant attacked. These were the head, face and neck.

In **Regina v Cunningham [1957] 2 QB 396**, it was held: -

"... that *malice must not be taken in the old vague sense of requiring wickedness in general but requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular*

kind of harm might be done and yet has gone to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured".

Therefore, from this case even though the Appellant did not have any ill will towards the deceased malice aforethought can still be established from the nature of assault that was inflicted on the deceased.

In **Uganda v Kato** (1976) HCB 214, Sekandi J (as he then was) held that it is the duty of the court as far as possible to examine all the surrounding circumstances of the case including the actions of the accused, the conduct which precedes and often the conduct which follows the killing, in particular, the way the killing was carried out, the nature, the number the quality of injuries the nature and the kind of weapon that was used and then ask itself whether it is satisfied that at the time of the killing there must have been an intention to kill. If the court is satisfied that the intention exists, then the accused would be convicted of murder.

For a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act.

According to the evidence of Kasadha Sula PW1 (on page 12 of the record) he testifies that when he went to the garden he found the Appellant with a panga and a stick. The Appellant told him that the deceased was a thief who was stealing his maize. He further testified that -

"*...the deceased was in bad shape. He was bleeding on the forehead, right hand and right ribs.*"

Furthermore, the Postmortem Report also found that the body of the deceased had multiple cuts of varying sizes on the head and face and deep multiple bruises.

The nature of the weapon used which was a panga and stick and the parts of the body which were attacked that is the head, neck and chest are all fragile parts of the body that show that the Appellant had the intention to inflict maximum harm which amounts to malice aforethought. The trial court was therefore correct to find that the ingredient of malice aforethought. This ground fails.

Ground 2: That the learned trial Judge erred in law and fact when she imposed a sentence of 18 years' imprisonment a sentence deemed to be manifestly harsh and excessive hence occasioning a miscarriage of justice.

Appellant's submissions

Counsel for the Appellant submitted that during mitigation of sentence counsel for the Appellant informed court that the Appellant was a family man who has a wife and children and they considered him as a sole provider. He further submitted that the Appellant was defending his property when he killed the deceased.

Secondly, counsel for the Appellant submitted that the trial court did not fully consider the period the Appellant spent on remand while sentencing. He argued that the manner in which the learned trial Judge considered the period on remand was inappropriate and it deserved the intervention of court.

He submitted that the appropriate sentence in the circumstances would have been ten years.

Respondent's submissions

Counsel for the Respondent submitted that the sentence passed against the Respondent was neither illegal nor manifestly harsh and excessive.

She submitted that the Appellant was tried, convicted and sentenced in 2012 before the decision in **Rwabugande Moses v Uganda** SCCA No. 25 of 2014 which enunciated the arithmetic approach of subtracting the period spent on remand from the final sentence was decided.

It was submitted by counsel for the Respondent that the legal regime that was in place as regards to taking into account the period spent on remand was that a trial court did not have to apply a mathematical formula by deducting the exact number of years spent on remand from the sentence awarded by the trial court.

She referred us to the case of **Sebunya Robert and Anor v Uganda** SCCA No. 58 of 2016 for the proposition that the **Rwabuganda decision** did not have retrospective effect on sentences which were passed before it.

Court's findings

Under this ground, the Appellant submitted that the trial Judge erred in the exercise of her discretion when she sentenced the Appellant to 18 years' imprisonment. He argued that the sentence was harsh and excessive in the

circumstances. However, counsel for the Respondent submitted that the sentence neither illegal nor manifestly harsh and excessive.

It has been consistently held in numerous cases by the Supreme Court and specifically in the case of **Livingstone Kakooza v Uganda** SC Criminal Appeal No. 17 of 1993 that: -

"... An appellate court will only alter a sentence imposed by a trial court if it is evident that it acted on a wrong principle or overlooked some material fact, or the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. See **Ogalo S/O Owoura v R** (1954) 21E.A.C. A 270.

The foregoing principles are equally applicable in the instant case.

In the instant case the Appellant killed his own friend. The sentencing order of the Trial Judge read: -

"The offence is very grave and serious punishable with maximum penalty of death. The life of the deceased was ended in a violent manner by the convict who was the deceased's friend. The convict had no right to deprive the deceased of his life and to take the law into his own hands. Senseless murders are on the rise in this country which have rendered life to be regarded so cheap and dispensable even on petty excuses. There is need to send to the public a message that no one should end another person's life."

I sentence the convict to a term of imprisonment for 18(eighteen) years. I have taken into account the years he has been on remand. Otherwise I would have sentenced him to 20 (twenty) years imprisonment."

In the case of **Muhwezi Bayon v Uganda**, Court of Appeal Criminal Appeal No. 198 of 2013, this court held that: -

"Although the circumstance of each case may certainly differ this court has now established that a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to 35 years' imprisonment. In exceptional circumstances the sentence may be higher or lower."

In the instant case a sentence of 18 years is not out of range with sentences for this type of offence.

Secondly, counsel for the Appellant submitted that the manner in which the trial Judge considered the period on remand was inappropriate because she did not deduct the period spent on remand arithmetically. He argued that the appropriate sentence in the circumstances would have been 17(seventeen) years and 7(seven) months.

We agree with counsel for the Respondent that by the time the sentence in the instant case was passed by the trial court the legal regime that was in place was that a trial court did not have to apply a mathematical formula to deduct the exact number of years spent on remand.

In **Abelle Asuman v Uganda Criminal Appeal No.66 of 2016** the Supreme Court clarified on the position laid down by the **Rwabugande** case (Supra). It held as follows: -

"what is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande the remand period should be

credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from the constitution….

"Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate court only because the sentencing Judge or justices used different words in their judgment or missed to state that they had deducted the period spent on remand. These may be issues of style for which a lower court would not be faulted when in effect the court has complied with the Constitutional obligation in Article 23(8) of the Constitution…"

In this matter the trial Judge held: -

"…I have sentenced the convict to a term of imprisonment of 18 (eighteen) years. I have taken into account the years spent on remand otherwise I would have sentenced him to 20 (twenty) years imprisonment…"

The Appellant had spent two years and five months on remand. An arithmetic calculation would have brought the period under remand to 17 (seventeen) years and 7 (seven) months. However, it would appear to us that period the Appellant was on remand was estimated. So the sentence of 18 (eighteen) years is demonstrates that the period on remand was taken into account. In this regard we shall not interfere with it.

This ground also fails.

FINAL RESULT

This Appeal is dismissed and the conviction and sentence of the trial court are upheld.

Dated at Jinja this 3rd day of February 2024

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

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HON. MR. JUSTICE MUZAMIRU M. KIBEEDI, J.A.

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HON. LADY JUSTICE MONICA K. MUGENYI, J.A.