THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

(Coram: Buteera, DCJ; Mulyagonja & Mugenyi, JJA)

CRIMINAL APPEAL NO. 285 OF 2017

1. KAMWANGA JOHN
2. KITAMIRIKE MOSES ..... APPELLANTS

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Iganga (Luswata, J) in Criminal Session Case No. 26 of 2013)

JUDGEMENT OF COURT

A. **Introduction**

1. Messrs. John Kamwanga and Moses Kitamirike ('the Appellants') were indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. The facts as accepted by the trial court are that following the death of Teddy Guna, wife of Ali Ikoba of Bukuku village in Masese district, her body was taken to Nawansega village in Luuka district for burial. On 21st January 2013, thirty of her in-laws travelled to Bukuku village for her burial but upon arrival were attacked by her relatives for allegedly bewitching Teddy, leading to her death. The attack left Lukeman Maganda alias Arahuman ('the deceased') dead.

2. The Appellants, as well as Abudu Masimbi, Ronald Isabirye and Yeseri Kalogo and were charged with the deceased's murder. Following a full trial, the Appellants were convicted of the offence as charged and sentenced to 15 years and 16 years' imprisonment respectively, while their co-accused were acquitted.

3. Dissatisfied with the sentence imposed by the trial court, the Appellants lodged the present appeal against sentence only on the singular ground that '***the learned trial judge erred in law and fact when she meted out an illegal, manifestly harsh and excessive sentences against the Appellants***.'

4. At the hearing, Mr. Norman Pande holding brief for Mr. Henry Kunya represented the Appellant on state brief, while Ms. Happiness Ainebyoona, a Chief State Attorney appeared for the Respondent.

B. **Parties Legal Arguments**

5. The Appellants contend that this having been a mob justice case, the sentence imposed by the trial court was manifestly harsh and excessive given the legal position that perpetrators of mob justice should not be put on the same pedestal as those who plan their crimes and execute them in cold blood. It is argued that there is a very high probability that such offences arise out of spontaneous reactions without any premeditation.

6. It is further argued that the Appellants were first offenders, had immense family responsibilities, had been on remand for four and a half years and the First Appellant was of advanced age at sentencing; and therefore had the trial judge considered those compelling mitigating factors she would not have handed down the sentences she imposed on the Appellants. In any case, the sentences are alleged to be unclear as to whether the period spent on remand had been deducted. Counsel invites this Court to allow the appeal, set aside the contested sentences and substitute them with more appropriate sentences.

7. Conversely, State Counsel cites this Court's decision in **Adupa Ronald & others vs Uganda, Criminal Appeal No. 327 of 2019** where a 25-year sentence for murder was upheld, and **Bayo Sunday vs Uganda, Criminal Appeal No. 414 of 2019** where a 30-year sentence for murder was similarly upheld, for the proposition that the 15- and 16-year sentences handed down by the trial court were neither harsh nor excessive. It is argued that the trial judge took into account both the mitigating and aggravating factors before arriving at the sentences meted out against the Appellants. She considered that it was a mob justice case and that the First Appellant was of advanced age, of ill health and with many dependents, while the Second Appellant had a large family. She further observed that the Appellants were remorseful and had spent 4 ½ years on remand.

8. State Counsel nonetheless concedes that the trial judge did not take into account the period spent on remand as required by Article 23(8) of the Constitution and propounded in **Rwabugande Moses vs Uganda Criminal Appeal No. 25 of 2014**, and invites the Court to deduct the remand period from the sentences imposed by the trial judge in accordance with section 11 of the Judicature Act.

C. **Determination**

9. This being a first appeal, it is the duty of this Court to reconsider all material evidence that was before the trial Court and reach our own conclusions but bearing in mind that we did not have the opportunity to see and hear the witnesses testify. See rule 30(1) of the Judicature (Court of Appeal Rules) Directions, **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Bogere Moses vs Uganda Supreme Court Criminal Appeal No 1 of 1997**.

10. This Court additionally recognises trial judges' discretion at sentencing as captured in **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995** as follows:

> An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the Trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the Trial Judge was manifestly so excessive as to amount to an injustice: **Ogalo s/o Owousa vs. R (1954) 21 EACA 270 and R vs. Mohammed Jamal (1948) 15 EACA 126**.

11. The same principle has since been reiterated in **Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000** and in **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001**.

12. It is abundantly clear from the record of appeal that the trial judge did take into account all the mitigating factors applicable to the Appellants. We therefore find no merit in that line of argument. Given that the Respondent concedes the non-consideration of the period spent on remand, it becomes our inescapable duty to set aside the sentences handed down by the trial court and, pursuant to section 11 of the Judicature At, Cap. 13, undertake the re-sentencing of the Appellants. *See* ***Livingstone Kakooza vs. Uganda, Criminal Appeal No.17 of 1993*** *(SC) and* ***Jackson Zita vs. Uganda, Criminal Appeal No. 19 of 1995*** *(SC).*

13. We are alive to the need for consistency in sentencing as stated in clause 6(c) of the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines'), which enjoins a sentencing court to '**take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances**.'

14. In **Kamya Abdullah & Others vs Uganda, Criminal Appeal No. 24 of 2015**, the Supreme Court reduced a 30-year term sentence for murder to 18 years' imprisonment for each Appellant in an appeal that related to mob justice. It was held:

> Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, **such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood**. The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death. Police managed to arrest only a few who included the Appellants as identified by the prosecution witness. *(Our Emphasis)*

15. Relatedly, in **Mudwa vs Uganda, Criminal Appeal No. 363 of 2017,** this Court held that it was injudicious to sentence the Appellant as though the offence he had been convicted of had not been committed in circumstances of mob justice involving other offenders. The Court reduced his sentence from 30 years to 20 years, exclusive of the remand period. Furthermore, in **Tumwesigye Rauben vs Uganda, Criminal Appeal No 181 of 2013**, this Court similarly reduced a 30-year custodial sentence to 20 years exclusive of the remand period in respect of an Appellant that had together with others beaten the deceased to death. Further reference is made to **Adiga vs Uganda (2021) UGCA 2** where this Court set aside a life sentence for murder and substituted it with a sentence of 19 years and 3 months imprisonment.

16. We might have been disinclined to reconsider the sentences imposed upon the Appellants given the foregoing sentence range, but take due cognisance of the First Appellant's very advanced age. He was 73 years old at sentencing, while the Second Appellant was 39 years old. The sentencing principle of parsimony posits that '**the sentence must be no more severe than is necessary to meet the purpose of sentencing**.'[1] Stated differently, punishment should not be more severe than is necessary.

17. We do recognise that the purpose of sentencing in Uganda is '**to promote respect for the law in order to maintain a just, peaceful and safe society**.' *See clause*

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[1] See Report of the Sentencing Advisory Committee of Australia at https://www.sentencingcouncil.voc.gov.au/about-sentencing/sentencing-principles-purposes-factors

5(1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 ('the Sentencing Guidelines'). Nonetheless, we are equally mindful of the duty upon a sentencing court to consider an offender's personal and family background, the circumstances pertaining to him/ her at the time the offence was committed or indeed any other circumstances that the court considers to be relevant. *See clause 6(e), (g) and (i) of the Sentencing Guidelines.*

18. Clause 9 of the Sentencing Guidelines provides specific direction on the applicability of custodial sentences. For ease of reference, clause 9(3) and (4)(a):

> (1) .....
> (2) .....
> **(3) The court shall before imposing a custodial sentence consider—**
> **(a) Whether the purpose of sentencing cannot be achieved by a sentence other than imprisonment;**
> **(b) the values, norms and aspirations of the people within the community;**
> **(c) the character and antecedents of the offender;**
> **(d) the circumstances and nature of the crime committed;**
> **(e) the ruthlessness with which the offender committed the offence;**
> **(f) the health and mental state of the offender;**
> **(g) previous conviction record;**
> **(h) the age of the offender;**
> **(i) remorsefulness or conduct of the offender;**
> **(j) whether the offender may be a danger to the community;**
> **(k) views of the victim's family or community; or**
> **(l) any other matter that court considers relevant.**
> **(4) The court may not sentence an offender to a custodial sentence where the offender—**
> **(a) is of advanced age;**
> **(b) has a grave terminal illness certified by a medical practitioner;**
> **(c) was below 18 years at the time of the commission of the offence; or**
> *(d)* **is an expectant woman.** *(Our emphasis)*

19. Mindful as we are of the discretion that was available to the trial court at sentencing, it seems to us that the lower court did not take into account the First Appellant's advanced age and the caution in clause 9(4)(a) above. To compound matters, we are alive to the unenviable position in which he found himself of having just lost his

daughter whose death he believed to have been caused by her in-laws and was thus susceptible to extreme emotions that could have impacted his sense of judgment. We do consider this, as well as his advanced age be to be strong mitigating factors. We would, however, balance that consideration with the values, norms and aspirations of the community that would certainly not condone the primitive deprivation of life. In our view, the totality of these circumstances would render a long custodial sentence unduly punitive but warrant a relatively shorter sentence.

20. In **John Kasimbazi & Others vs Uganda, Criminal Appeal No. 167 of 2013** a sentence of life imprisonment for murder was on appeal substituted with a 12-year sentence by this Court. We take the view that an 11-year sentence would be more appropriate to the circumstances of this case as highlighted above, from which the period spent on remand would be deducted to yield a sentence of 6 ½ years. However, the 16-year sentence imposed on the Second Appellant is maintained.

D. **Disposition**

21. The First Appellant was convicted on 1st August 2017 therefore as at February 2024 he would have fully served the 6 ½ year sentence.

22. In the result, the Appeal against sentence is partially allowed in the following terms:

    I. The sentence of 15 years' imprisonment handed down to the First Appellant is hereby substituted with a custodial sentence of 11 years, from which the period of 4 ½ years spent on remand is deducted to yield a sentence of seven (6) years and six (6) months to run from the date of conviction.

    II. Having fully served his custodial sentence, it is ordered that the First Appellant be discharged forthwith unless held on any other lawful charges.

    III. The Second Appellant's sentence of 16 years is upheld, from which the period of 4 ½ years spent on remand is deducted to yield a sentence of eleven (11) years and six (6) months to run from the date of conviction.

It is so ordered.

Dated and delivered at Kampala this 21st day of FEB, 2024.

Richard Buteera

Deputy Chief Justice

Irene Mulyagonja

Justice of Appeal

Monica K. Mugenyi

Justice of Appeal