THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Gashirabake & Kihika, JJA*]

CRIMINAL APPEAL NO. 60 of 2013

(Arising from High Court Criminal Session Case No.0107 of 2012 at Mbale)

BETWEEN

Kawuli Robert ==========Appellant

AND

Uganda==========Respondent

(*An appeal against the Judgement of the High Court of Uganda [Musota, J] at Mbale delivered on 3rd April 2013*)

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal against sentence only. The appellant was convicted on the 3rd April 2013, of the offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act, by the High Court of Uganda (Musota, J.) (as he then was), on his own plea of guilty. The particulars of the offence for manslaughter were that on 27th November 2011 at Kapyani village in Kibuku district unlawfully caused the death of, his wife, Nankoma Lukia. He was sentenced to 18 years' imprisonment on 4th April 2013.

[2] The appellant has appealed against the sentence on the sole ground,

> 'That the learned trial judge erred in law and fact when he passed a manifestly harsh and excessive sentence of 18 years' imprisonment which occasioned miscarriage of justice.'

[3] The respondent supported the decision of the court below and opposed the appeal.

[4] The appellant was represented by Mr. Geoffrey Nappa while the respondent was represented by Ms. Immaculate Angutuko, Chief State Attorney, in the Office of the Director of Public Prosecutions. Both Counsel filed written submissions in the matter upon which this court has proceeded to consider this appeal.

Brief facts of the case

[5] The appellant lived together with the deceased as husband and wife. On 11th November 2011 at 9:00 a.m., the deceased came from the garden and took their baby into the house to sleep. The appellant followed her, cut her with a panga on the neck and she died instantly. The appellant moved out of the house and hid in a nearby pit latrine. The residents found him attempting to break the floor of the pit latrine so he could fall and drown in the pit latrine. They arrested him, but he escaped from them and went to his uncle's home. He informed him how he had killed his wife and asked him to escort him to the police. The uncle instead went to the scene of the crime to confirm whether the appellant had killed the deceased. The appellant went to Kasasira Police Post and informed the police officers that he had killed his wife. He was then charged with manslaughter, convicted on his plea of guilty and sentenced to 18 years' imprisonment.

Submissions of Counsel

[6] Mr. Geoffrey Nappa Counsel for the appellant, relied to Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2001 (unreported) for the principles under which an appellate court can interfere with a sentence imposed by the trial court. He submitted that the sentence imposed by the trial court was illegal because the trial judge did not arithmetically deduct the period of 2 years 4 months the appellant had spent on remand. He referred to Article 23(8) of the Constitution and referred to Rule 15(1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 and Rwabugande Moses v Uganda [2017] UGSC 8. He prayed that this court set aside the sentence and impose an appropriate sentence in accordance with the law. He contended that the trial judge did not consider the mitigating factors.

[7] He further submitted that the sentence of 18 years imposed against the appellant is manifestly harsh in the circumstances of this case. He contended that the learned trial judge did not consider mitigating factors, which were that the appellant pleaded guilty, he was 29 years of age at the time of committing the crime, reported himself to police and was a first offender.

[8] He relied on Aharinkundira Yusitina v Uganda [2018] UGCS 4 where court stated the trial court should consider all the mitigating factors and pre-sentencing requirements provided for in the Constitution, statutes, practice Directions and general principles of sentencing. Counsel for the appellant cited Regulation 21(k) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 and submitted that the trial court should have considered that the appellant pleaded guilty and give him a reformative sentence.

[9] He also argued that according to Regulation 6 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, courts are enjoined to consider consistency in sentences for similar offenses committed in similar circumstances. Counsel relied on Nisiima Gilbert v Uganda [2014] UGCA 65, Kajunga Emmanuel v Uganda [2016] UGCA 58, and Mbunya Godfrey v Uganda Supreme Court Criminal Appeal No. 04 of 2011 (unreported) for his submissions that there is a need for consistency and uniformity in sentencing in cases with similar circumstances.

[10] He relied on Ainobushobi Venencio v Uganda [2014] UGCA 50, where the appellant was convicted of manslaughter and sentenced to 18 years. On appeal, the sentence was reduced from 18 years to 12 years' imprisonment. In Ahimbisibwe Solomon v Uganda [2016] UGCA 82, the appellant, who pleaded guilty of manslaughter, was sentenced to 16 years of imprisonment, and on appeal, the sentence was reduced to 13 years' imprisonment.

[11] He also referred us to Nkurunziza Julius v Uganda [2022] UGCA 65, where an appellant was convicted on his own plea of guilty and sentenced to 17 years' imprisonment. On appeal, this court treated the guilty plea as a mitigating factor. In Mumbere Julius v Uganda [2018] UGSC 4, where the appellant was convicted of murder and sentenced to life imprisonment, and on appeal to the Supreme Court, the conviction of murder was substituted with manslaughter and the sentence was reduced to 10 years and 3 months. In Magala Ramathan v Uganda [2017] UGSC 34, where the appellant was

convicted of two counts of manslaughter and sentenced to 7 years' imprisonment on each count to be served concurrently. On appeal to the Supreme Court, the sentence was upheld. In Rwita Tuhuhangire v Uganda [2022] UGCA 88, where the appellant was convicted of manslaughter and sentenced to 23 years of imprisonment. On appeal to this court, the sentence was reduced to 11 years' imprisonment.

[12] In reply, counsel for the respondent restated the duty of the appellate court set out in Kyalimpa Edward v Uganda [2003] UGCA 8, Kamya Jaohnson v Uganda UGSC 12, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2001(unreported). Counsel for the respondent submitted that the sentence of 18 years imposed against the appellant is legal and neither harsh and nor excessive and appropriate in the circumstances of this case

[13] Counsel for the respondent submitted that the sentence was imposed on the appellant 4th April, 2013 and the sentencing regime at the time required a judge to take into consideration the period spent on remand which he complied with. She referred to Kizito Senkulu v Uganda [2002] UGSC 36. She argued that the Supreme Court changed the position of the law on sentencing from taking into consideration the period spent on remand to arithmetically deducting the period spent on remand. She referred to Rwabugande Moses v Uganda [2017] UGSC 8. She argued that the decision Rwabugande is not applicable in this case because precedents do not apply retrospectively. She submitted that the trial judge sentenced the appellant in accordance with the sentencing regime of the time and took consideration the period that the appellants spent on remand. She referred to Abelle Asuman v Uganda [20180 UGSC 10.

[14] Counsel for the respondent submitted that taking into account the period spent on remand is necessarily arithmetical because the period is known with certainty and precision. She was of the view that a sentence couched in general terms in which the court has considered the time the accused spent on remand is ambiguous. She submitted that under Article 23(8) of the Constitution, judicial officers are obliged to consider the period the convict spent on remand and argued that the period the accused spent in lawful custody cannot be placed on the same scale with discretionary mitigating factors developed under common law, such as the age of the convict, the first offender and the convict's remorse.

[15] Counsel for the respondent submitted that the trial judge considered the aggravating and mitigating factors and imposed an appropriate sentence on the appellant. She referred to Byaruhanga okot v Uganda [2022] UGCA 16 for the submission that court is bound to follow the principle of parity and consistency in sentence. She argued that despite the fact that appellant pleaded guilty, court should consider the circumstances surrounding the commission of the offence because a plea of guilty is not condition for imposing a lenient sentence.

[16] She relied on Bacwa Benon v Uganda Court of Appeal Criminal No. 869 of 2014 and Bonyo Abdul v Uganda Supreme Court Criminal Appeal No. 07 2011(unreported). where court confirmed a sentence of life imprisonment for an appellant who had pleaded guilty to aggravated defilement. She also relied on Odoch Sam v Uganda Criminal Appeal No. 340 (unreported) where the justices cited the case of Mwanje Haruna & another v Uganda [2021] UGCA70 where the appellant was convicted of manslaughter and pleaded guilty and sentenced to 20 years' imprisonment.

[17] In rejoinder, counsel for the appellant submitted that the facts in the case of Bacwa Benon (Supra) are distinguishable from the present case. He contended that in the case of Bacwa, the appellant was charged with the offence of aggravated defilement, he pleaded guilty and was sentenced to imprisonment for life whereas in the instant case, the appellant was convicted of manslaughter.

[18] He argued that according to Section 129 (3) & (4) of the Penal Code Act the maximum punishment for a person convicted of aggravated defilement is death whereas the offence of manslaughter with which the appellant herein was charged attracts a maximum sentence of imprisonment for life.

[19] He stated that the appellant also relied on the case of Odoch Sam v Uganda Criminal Appeal No.340 of 2010 where the justices cited the case Mwanje Haruna & another v Uganda [2021] UGCA70 where the appellant was sentenced to 20 years' imprisonment for manslaughter. He contended that in the case of Mwanje (supra), the appellants were charged with 2 counts of manslaughter, they were each sentenced to 15 years of imprisonment which were to run concurrently.

[20] Counsel for the appellant submitted that following the principle of consistency in sentencing this court is inclined to follow precedents of the Supreme Court.

He prayed that we consider the decisions where court imposed a sentence of 10 and 15 years for the offence of manslaughter.

Analysis

[21] The appellate court will only interfere with a sentence, imposed by the trial court, where it is either illegal, or founded upon a wrong principle of law, or is a result of the trial court's failure to consider a material factor, or is harsh and manifestly excessive in the circumstances of the case. See Kakooza v Uganda [1994] UGSC 17, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported); and Bashir Ssali v Uganda [2005] UGSC 21.

[22] The order of the learned trial judge is set out below.

> 'Whereas the convict is a first offender who has readily pleaded guilty to manslaughter, he started by committing a serious offence. He cut his wife's neck like he was slaughtering an animal for no apparent reasons. Mere suspicion that his wife had an extra marital affair was not enough to provoke the convict to this extent. He should not have taken the law in his own hands. He ought to have treated his wife with courtesy. This was an act of domestic violence which is rampant in many homes. This court has a duty to protect society by imposing a deterrence sentence against such callous people as the convict. Although counsel for the convict has pleaded that his client is remorseful, this has come too late when a life has been lost. Considering that the convict has spent 2 years and 4 months on remand, I will sentence him to 18 year's imprisonment. R/A explained.'

[23] The appellant spent a period of 2 years and 4 months on remand. The learned trial judge did not deduct the period of 2 years and 4 months spent on remand from the sentence of 18 years imposed against the appellant. However, in accordance with the accepted practice at the time, (prior to Rwabugande Moses v Uganda [2017] UGSC 8), the learned judge considered the same in arriving at the sentence he did. He cannot be faulted as that was the accepted interpretation of article 23 (8) of the Constitution at the time.

[24] However, this matter has remained in the appellate system since 2013 to date, when the prevailing application of article 23 (8) of the Constitution requires an arithmetical deduction of the period spent on remand from the appropriate sentence determined by the sentencing court. See Rwabugande Moses v Uganda (supra).

[25] In light of the Attorney General v Susan Kigula and 417 Others [2009]UGSC 6 and Duke Mabeya v Attorney General [2023] UGCC 104 which held that where there is a new rule of constitutional interpretation in respect of a penal provision that new rule should apply to all existing matters that have not been finally resolved, it would follow that the matter before us, being still alive in the appellate system this rule should apply to it.

[26] We are aware of course that the Supreme Court in in Nashimolo Paul Kiboko v Uganda [2020] UGSC 24 held that the Rwabugande rule should apply to only those cases that were decided at first instance after the Rwabugande decision was taken on 17th March 2017. This position conflicts with the Supreme Court decision in Attorney General v Susan Kigula and 417 Others (supra) which was a constitutional appeal (with 7 Justices sitting) from a decision of the Constitutional Court which applied the new interpretation to all existing cases that had not been finally resolved. The Supreme Court in Nashimolo Paul Kiboko v Uganda (supra) (a criminal appeal with 5 Justices sitting) did not refer at all to Attorney General v Susan Kigula and 417 others (supra) which in our humble was the controlling authority on this point, which bound both the Supreme Court, and all courts below.

[27] In our humble view, we are constrained to follow, Attorney General v Susan Kigula and 417 others (supra) with regard to the application of the Rwabugande rule, rather than Nashimolo Paul Kiboko v Uganda (supra). It follows that the period spent on remand by the appellant must be deducted arithmetically from the appropriate sentence.

[28] However, that is not the only ground upon which the sentencing decision of the learned trial judge is assailed. The learned trial judge did not consider that the appellant was a youthful offender, only 21 years old, at the time the offence was committed. He also disregarded the fact that the appellant was remorseful, a mitigating factor, in favour of the appellant by stating that it had come too late. Obviously, remorsefulness can only come after the event and not before. We are satisfied that the learned trial judge failed to consider 2

factors he ought to have considered. We are therefore obliged to interfere with the sentence imposed on the appellant.

[29] We note that there is a need for consistency in sentencing. In Livingstone Kakooza v Uganda [1994] UGSC 17, the Supreme Court was of the view that the sentence imposed in previous cases of similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are duty-bound to maintain consistency or uniformity in sentencing while being mindful that cases are not committed under the same circumstances. In that case the appellant had been sentenced to 18 years imprisonment on conviction of manslaughter. This sentence was found to be harsh and manifestly excessive and was reduced to 12 years imprisonment. Conviction was after a full trial and was not on account of a plea of guilty as is the case before us.

[30] In Ojok Michael v Uganda [2018] UGCA 111 the appellant was convicted of two counts of manslaughter, on his own plea of guilty, and sentenced to 25 years' imprisonment. On appeal to this court the sentence was reduced to 8 years of imprisonment.

[31] We are satisfied that sentence imposed upon the appellant was harsh and manifestly excessive in the circumstances of this case where the appellant had readily pleaded guilty. The appeal against sentence succeeds.

Decision

[32] Considering all mitigating and aggravating circumstances in this case, we find that the appropriate sentence in this case would be 8 years' imprisonment. We deduct the period of 2 years and 4 months' imprisonment the appellant spent in pre-trial detention from the sentence. We accordingly sentence the appellant to a term of 5 years and 8 months' imprisonment to be served from 4th April 2013, the date of conviction.

[33] As the appellant has already served the period of the sentence imposed we order his immediate release.

Dated, signed, and delivered at Mbale this 8th day of April 2024

Fredrick Egonda-Ntende

Justice of Appeal

Christopher Gashirabake

Justice of Appeal

Oscar Kihika

Justice of Appeal