IN THE REPUBLIC OF UGANDA

IN THE

SUPREME COURT OF UGANDA

HOLDEN AT KAMPALA

CRIMINAL APPEAL NO.67 OF 2019

(ARISING OUT OF COURT OF APPEAL CRIMINAL APPEAL NO. 189 OF 2017)

CORAM: OPIO AWERI; FAITH MWONDHA, PAUL MUGAMBA, NIGHT PERCY TUHAISE; MIKE CHIBITA; JJSC

1. SSELUWAGI EWUSTAKO
2. TAMALE HASSAN
3. NTEGE JAMIL :::::::::::::::: **APPELLANTS**

VERSUS

UGANDA :::::::::::::::::::::::::::::::::: **RESPONDENT**

(An appeal arising from a decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No. 189 of 2017 before Hon. Justice Elizabeth Musoke, JA, Hon. Justice Ezekiel Muhanguzi, JA, Hon. Justice Remmy Kasule, JA dated 20th November, 2019.)

JUDGMENT OF THE COURT:

This is an appeal against the whole judgment and decision of the Court of Appeal on the following grounds:

1. That the learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence on record and as a result came to a wrong conclusion.
2. That the learned Justices of Appeal erred in law and fact when they relied on the 1st Appellant's charge and caution statement which was not on court record and thereby wrongly convicted the Appellants.
3. That the learned Justices of Appeal erred in law and in fact when they failed to consider the fact that A2 was a child during the time of his arrest but was held and treated like an adult throughout the trial.
4. That the learned Justices of the Court of Appeal erred in law and fact when they imposed an illegal and manifestly excessive sentence of 35 years and 20 years for A1 and A3 and A2 respectively.

REPRESENTATION

At the hearing, the appellants were represented by Learned Counsel Emmanuel Muwonge from KATS Advocates.

The respondent was represented by Chief State Attorney Ann Kabajungu and State Attorney Joanita Tumwikirize.

BRIEF BACKGROUND

The appellants were tried in the High Court of Uganda sitting at Masaka and convicted of murder and sentenced to 80 years' imprisonment. They appealed to the Court of Appeal, which

sustained the conviction but reduced the sentence to 35 years' imprisonment for the 1st and 3rd appellants and to 20 years' imprisonment for the 2nd appellant.

The appellants, being aggrieved by the decision of the Court of Appeal filed this appeal. They prayed that the sentences be set aside and substituted with legal and fair sentences.

GROUNDS 1 AND 2

Learned Counsel for the appellants argued grounds 1 and 2 together.

He referred court to **Kifamunte Henry vs U SCCA No. 10 of 1997, Musoke vs R 1958 EA 715** and **Bogere Moses and Anor vs U SCCA No. 1 of 1997** to explain the duties of the second appellate court.

This duty being to decide whether the first appellate court applied or failed to review the evidence. The first appellate court also has a duty to re-evaluate the evidence adduced at the trial court.

Counsel argued that the convicts were convicted mainly based on the charge and caution statement of the 1st appellant, which had been repudiated. The particulars of repudiation were that A1 claimed to have been on remand at the time the charge and caution statement was made.

He referred court to **Tuwamoi vs Uganda (1967) 1 EA 84** for the definition of a repudiated statement as being one which an accused person avers that he never made.

Furthermore, Counsel added, there was no record of the impugned statement on the Court of Appeal record of proceedings. The absence

of the impugned statement, he continued, denied their Lordships of the Court of Appeal the opportunity to exhaustively re-evaluate the evidence as required by **Kifamunte Henry** (supra).

He proceeded to distinguish the case of **Christopher Kasolo vs Uganda SCCA No. 15 of 1978,** which the Court of Appeal had relied on in upholding the charge and caution statement.

He therefore asked court to decide grounds 1 and 2 of appeal in the affirmative.

GROUND 3

Learned Counsel for the appellants submitted that the 2nd appellant was 17 years of age when he was arrested hence a juvenile.

He therefore faulted the Court of Appeal for failure to discharge its duty to re-evaluate the evidence of the 2nd appellant being a minor and thereby occasioning a miscarriage of justice.

Counsel concluded this ground by asking court to find this ground in favour of the appellant.

GROUND 4

Counsel cited the case of **Livingstone Kakooza vs Uganda SCCA No. 17 of 1993** and **Kiwalabye Bernard vs Uganda SCCA No. 143 of 2001** to contend that court can alter a sentence if it is evident that court acted on the wrong principles or overlooked material factors, or, if the sentence is manifestly excessive.

He referred court to **Tigo Steven vs Uganda SCCA No. 8 of 2009** to contend that a sentence of life imprisonment and 20 years are among the most severe.

He further argued that the mitigating factors of the appellants were never taken into account by both the trial court and the Court of Appeal.

Counsel also contended that the time spent on remand by the appellants was never taken into account by the Court of Appeal.

He therefore prayed that ground 4 of appeal succeeds and that all the prayers in the Memorandum of Appeal are granted.

In reply, Counsel for the respondent also argued grounds 1 and 2 together.

GROUNDS 1 AND 2

Counsel clarified that while it was true that the first appellant had been remanded prior to making the charge and caution statement, at the material time of making the statement he had escaped from prison and it was upon re arrest that he made the charge and caution statement while in Police custody.

She further informed court that the statement was properly and legally admitted in evidence after a trial within a trial. She conceded however that thereafter the statement went missing from the court record.

She submitted that at the time the trial court made the decision, it had seen and considered the charge and caution statement because

it was in court at the material time. The Court of Appeal therefore was alive to the fact that the trial judge had access to the charge and caution statement at the time of the hearing.

Citing the case of **Christopher Kasolo vs Uganda** (supra) she concluded that the learned justices of appeal reached the right decision regarding admission of the charge and caution statement.

She therefore asked court to dismiss grounds 1 and 2 of appeal.

GROUND 3

Counsel for the respondent objected to the raising of the issue of age at this stage. She argued that the issue of age was never raised and no proof of age was ever tendered. She contended that there was no decision of the Court of Appeal that the appellants were appealing against. She therefore asked court to strike this ground out.

GROUND 4

Learned Counsel for the respondent referred court to section 5(3) of the Judicature Act to argue that the appellants cannot appeal against severity of sentence. Further, she cited **Okello Geoffrey vs Uganda SCCA No. 34 of 2014** to bolster her position.

She submitted that the only issue for consideration was the legality or otherwise, of the sentence. She agreed with Counsel for the appellants that their Lordships at the Court of Appeal did not take into account the period spent on remand as required by article 23(8) of the Constitution.

She therefore asked the Supreme Court to sentence the appellants afresh.

As *allocutus* she invited court to consider the fact that the deceased was a young man whose life was cut short by this heinous murder. She submitted that there was premeditation and intricate planning by the appellants who were gang members.

She further submitted that the 1st appellant was not a first offender and had escaped from prison and was charged for it.

She referred court to **Mutatina Godfrey & Another vs Uganda SCCA No. 61 of 2015** where a sentence of 36 years' imprisonment was maintained.

In **Wafula Robert vs Uganda SCCA No. 42 of 2017** 25 years was upheld as being proper exercise of discretion.

Counsel also cited **Nashimolo Paul Kibolo vs Uganda SCCA No. 46 of 2017** where the sentence of 30 years and 6 months' imprisonment was imposed after deducting the time spent on remand.

She prayed that court be pleased to sentence the 1st appellant to 35 years, 2nd appellant to 20 years and the 3rd appellant to 35 years of imprisonment after deducting the time spent on remand.

CONSIDERATION OF THE COURT

This appeal was premised on four grounds.

GROUNDS 1 AND 2

Both Counsel agreed to merge grounds 1 and 2 into one ground. The issue that arises from those two grounds can be summarized into whether the Court of Appeal rightly held that the trial judge was right to base his decision on the charge and caution statement of A1.

Counsel for the respondent informed court that the statement was properly and legally admitted in evidence after a trial within a trial. She conceded however that thereafter the statement went missing from the court record.

We find that this is the correct statement of the situation. The trial judge indeed had access to the charge and caution statement of A1. Otherwise on what basis would he have conducted a trial within a trial?

We therefore agree that at the time the trial court made the decision to convict, it had seen and considered the charge and caution statement because it was in court at the material time. The Court of Appeal therefore was alive to the fact that the trial judge had access to the charge and caution statement at the time of the hearing.

The Court of Appeal did not have to have access to the charge and caution statement to determine whether the trial judge rightly relied on it. All they had to ascertain was whether the trial judge had access to the statement at the time he was taking it into consideration, which he did. The Court of Appeal judgment extract below is evidence of that conclusion:

"The criticism levied on the trial judge that he considered a charge and caution statement which was not on record is, therefore, without merit. The amount of detail in the judgment on the contents of that charge and caution statement cannot have been arrived at as a result of creative innovation of the trial court. Moreover, the charge and caution statement was indicated as P.E6 in the list of exhibits at page 47 of the record.

"We, therefore, make a finding that the 1st appellant's charge and caution statement was at the disposal of the learned trial judge who relied on it to reach his decision."

The issue of whether the charge and caution statement was made by the appellant at the time when he was already on remand was properly explained by the fact that he had escaped from prison and was later re arrested.

The charge and caution statement was therefore made after the time of re arrest. Had he not escaped, indeed the appellant would have been on remand but he was not. Instead he was in police custody having been re-arrested after escaping from prison.

Grounds 1 and 2 of this appeal therefore fail.

GROUND 3

Counsel for the appellants contended that he raised the issue of the 2nd appellant being a juvenile throughout the trial and at the Court of Appeal but the issue was ignored. Counsel for the respondent

contested this allegation. She submitted that the issue of the 2nd appellant being a juvenile was never raised and therefore was never canvassed at the Court of Appeal.

She therefore asked court to strike this ground out since there was no decision of the Court of Appeal on it and therefore no appeal lay.

On page 48 of the Record of Proceedings, it was observed as follows:

> **"The 2nd appellant shall serve a term of imprisonment of 20 years. He had just crossed into adulthood at the age of 19 years when he participated in the murder of the deceased."**

In a Memorandum of Appeal received by the Court of Appeal and which formed part of the Record, the appellants submitted written submissions, duly signed by all the three appellants and duly commissioned by the Officer in Charge of Peace.

At page 11 of the submissions and page 20 of the Record, they stated thus:

> **"...A2 was 19 years old**
>
> **"As such, our youthful ages 25, 19 and 29 respectively, at the time of the offence, meant that we retained the capacity to reform."**

From the foregoing it is clear that the issue of age was never an issue. The 2nd appellant himself acknowledged that he was of the majority age of 19.

Counsel for the appellants bears the burden of telling court where in the judgment of the Court of Appeal, or, anywhere else in the Record of Proceedings, the issue of A2 being a juvenile was raised and canvassed. All available evidence shows that the appellant in question was of majority age and that the issue of his being a juvenile was never alleged, was never raised and as such was never canvassed.

Counsel for the appellants is guilty of raising a matter of fact from the bar.

The Court of Appeal never made a decision on it and therefore it cannot make a ground of appeal.

Ground three of appeal is, therefore, struck out.

GROUND 4

Counsel for the appellants raised the issue of severity of sentence. In reply to this particular issue, Counsel for the respondent rightly pointed out the position of the law as being that severity of sentence cannot be a ground of appeal in a second appeal.

The correct ground of appeal in ground four is the issue of whether their Lordships took into consideration the time spent on remand by the appellants or not.

Counsel for the respondent conceded that the learned justices of the Court of Appeal did not take into consideration the time spent on remand. Yet they had observed that the learned trial judge omitted to take into consideration the time spent on remand. The Court of

appeal therefore rightly declared the sentences imposed on the appellants illegal.

Unfortunately, they themselves sentenced the appellants without taking into consideration the time spent on remand.

The Court of Appeal decision fell short of the requirement for consideration of the period spent on remand in the judgment as provided for under Article 23(8) and the case of **Bukenya Joseph vs. Uganda** SCCA No. 17 of 2010. This in itself renders the sentence an illegality.

This, therefore, brings the appellants' appeal within the operation of this court's decisions in **Kyalimpa Edward vs. Uganda**, SCCA No. 10 of 1995, **Kamya Johnson Wavamuno vs. Uganda**, SCCA No. 16 of 2000, **Kiwalabye Bernard vs. Uganda**, SCCA No. 143 of 2001, **Wamutabanewe Jamiru vs Uganda**, SCCA No. 74 of 2007, **Karisa Moses vs. Uganda,** SCCA No. 23 of 2016, **Rwabugande Moses vs. Uganda** SCCA No. 25 of 2014, **Nashimolo Paul Kibolo vs. Uganda** SCCA No. 46 of 2017), which cases permit the court to interfere with the discretion of the sentencing court, only, where the sentence is illegal or the court is satisfied that there was a failure of discretion, or failure to take into account a material consideration or an error in principle.

We would therefore, nullify the sentences imposed by the court of Appeal.

This Court would have to impose new sentences on the appellants. In so doing, the scope of power of the Court as provided for under section 7 of the Judicature Act is similar to that vested under any written law in a court from the exercise of the original jurisdiction of which the appeal emanated. This position has been reiterated in cases such as **Rwabugande Moses vs. Uganda** (supra) and **Nashimolo Paul Kibolo vs. Uganda** (supra).

We therefore set aside the illegal sentence of 35 years' imprisonment imposed on A1, 20 years' imprisonment imposed on A2 and 35 years' imprisonment imposed on A3.

We have re-evaluated both the mitigating and aggravating factors including the fact that the 2nd and 3rd appellants were 1st offenders, and A2 is a young man with prospects for rehabilitation.

Unfortunately, neither Counsel helped court by establishing the amount of time the appellants spent on remand. Court therefore has to go the extra mile to establish the actual time spent on remand.

Judgment in the High Court was delivered on 31st May, 2017 and sentencing was on 5th June, 2017, according to the record of proceedings.

The available information is that the appellants were remanded on 8th November, 2013. The time spent on remand was therefore from 8th November, 2013 to 5th June, 2017. This adds up to 3 years and 7 months.

We therefore, find that a sentence of 38 years and 7 months' imprisonment will be appropriate under the circumstances for each of the 1st and 3rd appellants. While the 2nd appellant is sentenced to 23 years and 7 months' imprisonment.

In line with the requirement in the case **Rwabugande Moses vs. Uganda** (supra), we arithmetically deduct the 3 years and 7 months that the appellants spent on remand from the sentence of 38 years and 7 months for the 1st and 3rd appellants and the sentence of 23 years and 7 months for the 2nd appellant.

The 1st and 3rd appellants will therefore serve a period of 35 years' imprisonment, while the 2nd appellant will serve 20 years' imprisonment running from the date of conviction.

We so order.

Dated at Kampala this.....24th..... day of .....Sept..... 2021

Hon. Justice Ruby Opio Aweri

JUSTICE OF THE SUPREME COURT

Hon. Justice Faith Mwondha

JUSTICE OF THE SUPREME COURT

Hon. Justice Paul Mugamba

JUSTICE OF THE SUPREME COURT

Hon. Justice Percy Night Tuhaise

JUSTICE OF THE SUPREME COURT

Hon Justice Mike Chibita

JUSTICE OF THE SUPREME COURT

Delivered by the Registrar

28th Sept 2021

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