THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 128 of 2008

Kasaija Daudi==========Appellant

Versus

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

[*On appeal from a judgment of the High Court of Uganda sitting at Kasese (Akiiki-Kiiza, J., in Kas/00/AA/06/2006, delivered on the 15 October 2008*.]

Judgment of the Court

Introduction

1. The appellant was tried and convicted of 2 counts of murder. It was accepted by the trial court that the appellant together with others still at large on the 23 December 2005 murdered one Macho Mujumbi Black at Kanyangeya village, Kasese Town Council in Kasese District. The second count was that the appellant together with others still at large on 23 December 2005 at Kanyangeya village, Kasese Town Council in Kasese District murdered one Baluku. The learned trial judge sentenced the appellant to a term of life imprisonment on each count to run concurrently.

2. The appellant with the permission of this court is appealing against sentence only. He contends under this ground that the sentence given by the learned trial judge was manifestly excessive, harsh and unfair in the circumstances.

3. The facts as accepted by the trial court are that on the 23 December 2005 one Margaret Ithungu a resident of Kanyangeya village in Kasese Town Council was attacked at her residence. She made an alarm. Her neighbours, including the appellant came to her rescue and arrested 2

people, Macho Mujumbi Black and Baluku. This was at 3.00AM. They decided to take the arrested persons to the Chairman Local Council 1. On reaching the compound of the chairperson, the appellant, who was armed with a panga and iron bar, suddenly attacked the two arrested persons with both his weapons killing both suspects. The appellant run away and was not arrested until 29 January 2006 from Majengo Village, Kasese District.

4. After convicting the appellant the trial judge, without holding a sentencing hearing, immediately thereafter made the following sentencing ruling.

> 'The accused has been found guilty of Murder. The only sentence authorised by law is the imposition of a death penalty. However, since the Constitutional Court decision on the Kigula & Others Vs. Uganda, where it was held that, the court had discretion to sentence an accused either to death or pass any other lawful sentence, the mandatory nature of the death penalty on persons convicted of murder, and other Capital offences has been put in doubt and was held to be unconstitutional. I am aware that, the state appealed to the Supreme Court, but their Lordships have not as yet pronounced themselves on the matter. Hence, the ruling of the Constitutional Court is the applicable law at the moment.
> Putting everything into consideration I sentence the accused person to a term of life imprisonment on each of the two counts, to run concurrently.
> Order accordingly'

Submissions of counsel

5. Mr Accellam, learned counsel for the appellant, submitted that the learned trial judge, in sentencing the appellants to imprisonment for life in accordance with Tigo Stephen v Uganda SC Criminal Appeal No. 8 of 2009, the appellants were sentenced to spend the rest of their lives in prison, a sentence that was too severe, harsh and excessive in the circumstances of this case. He prayed that this court should set aside that sentence and sentence the appellants to serve a definite term which is less than life imprisonment.

6. Mr Michael Ojok, the learned Principal State Attorney, appearing for the State conceded that the learned trial judge had not taken into account the period spent on remand by the appellants in contravention of the Constitution. Neither had the trial judge held a sentence hearing and taken the mitigating factors, if any, into consideration before a sentence was imposed. He therefore submitted that this court will have to quash that sentence and sentence the appellants afresh.

7. Mr Ojok submitted that this court should take into account both the mitigating and aggravating factors. He specifically stated that he was not asking for imprisonment for life which meant under Tigo Stephen v Uganda that it was a sentence for the natural life of the appellants. He preferred a lesser sentence of 30 years. Two people were killed in a rather brutal manner. The appellant took the law into his hands and killed 2 suspects under arrest. The court should take into account the period of 2 years he had spent on remand.

Analysis

8. It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa that, in Livingstone Kakooza v Uganda Criminal Appeal No. 17 of 1993 (Supreme Court) [unreported];

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if 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) 21 E.A.C.A. 270.'

9. The foregoing principles are equally applicable in the instant case. Before we consider whether or not the sentence was harsh and excessive in the circumstances it is clear that the learned trial court failed to follow Attorney General v Susan Kigula and others, by failing to hold a sentencing hearing, and providing the appellant with an opportunity to mitigate the punishment that may be imposed upon him. Much as this has not been raised on appeal it is a cardinal constitutional requirement in

terms of the right to a fair trial. The failure to hold a sentence hearing is fatal to the sentencing process.

10. Secondly the learned trial judge did not comply with Article 23(8) of the Constitution of Uganda. The learned judge did not take into account the period spent on remand by the appellant. There ought to have been an inquiry as to what period the appellant had spent on remand so that the court takes it into account in determining the sentence to be imposed on the appellant. Article 23(8) provides,

> '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.'

11. In our view the foregoing provision impose an obligation on the trial court to inquire and determine if the accused about to be sentenced to a term of imprisonment has spent any time on remand during the course of his or her trial. And then to take into account such period in the determination of the appropriate sentence. Failure to comply with the foregoing constitutional provision renders the subsequent sentence a nullity. See Kwamusi Jacob v Uganda COA Criminal Appeal No. 203 of 2009 [unreported]. The sentence imposed upon the appellant is therefore quashed. It is not necessary in the circumstances to consider whether or not the annulled sentence was harsh or manifestly excessive in the circumstances of this case.

12. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Ac. It states,

> '**11. Court of Appeal to have powers of the court of original jurisdiction.**
> For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

13. This court may proceed to impose a sentence in accordance with the law upon the appellant in circumstances such as the foregoing where a sentence by the trial court has been quashed or set aside on appeal.

14. In the instant case the appellant was a first offender. He had spent 2 and 1/2 years on remand prior to his trial and conviction. He was 29 years old, a relatively young man at the time of the commission of offences. Nevertheless he committed very serious offences which led to the loss of a life in each count. This was somewhat a senseless and brutal murder of two suspects already under arrest. No doubt such an act undermined the process of the rule of law which had been set in motion in respect to the suspects.

Decision

15. We are satisfied that a sentence of 18 years imprisonment on each count to be served concurrently from the date of conviction [15 October 2008] will meet the ends of justice in this case. We so order.

Dated, signed and delivered at Fort Portal this day of November 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal