

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 48 OF 2009

[Arising from Criminal Session Case No. 0014 of 2008 before Hon. Justice John Wilson Kweiga at Arua]

ANGUYO ROBERT :::::::::::::::::::::::::::::::::::APPELLANT

VS

UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: Hon. Justice Remmy Kasule, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Justice Simon Byabakama Mugenyi, JA

JUDGMENT OF THE COURT

This appeal is only against sentence only of the High Court of Uganda at Arua before Hon. Justice Kwesiga on 6-8-2008. The appellant was convicted of murder contrary to **Sections 188 and 189 of the Penal Code**

Act on his own plea and sentenced to 20 years imprisonment.

The facts as narrated by the prosecution and admitted by the appellant were that, the deceased Yose Bayo Akua was the appellant's uncle. On the 12th of January 2006, the deceased was at his place of work repairing bicycles when the appellant arrived. The deceased asked him where he had disappeared to for the last two days but he gave no response.

Shortly after, he picked a hammer among the deceased's tools and assaulted the deceased on the head. The latter fell down unconscious bleeding from the head.

When the people tried to intervene, the appellant threatened to assault them as well. As more people gathered, he threw down the hammer and ran to Oruku sub county headquarters where he was arrested and detained.

A Post-mortem examination on the body of the deceased revealed the cause of death was brain damage with intracranial hemorrhage due to head injuries arising from the assault.

The appellant was examined on PF 24 and found to be of the apparent age of 27 years and mentally sound but having speech difficulty. He was subsequently charged, indicted, tried, convicted and imprisoned for a term of 20 years.

The appellant's only ground of appeal is to the effect that the sentence is harsh and excessive. He seeks the same to be reduced by this Court. This Court granted leave to the appellant to proceed with this ground against sentence only.

The appellant was represented by Mr. Komakech Denis Atine and Ms. Adubango Harriet, Senior State Attorney appeared for the respondent.

Learned counsel for the appellant submitted that the learned trial Judge did not consider the period the appellant had spent on remand and the fact that he pleaded guilty. In counsel's view, the sentence imposed by the trial Judge was harsh and excessive in the circumstances. He implored court to substitute it with a reduced sentence.

Counsel for the respondent opposed the appeal. She submitted that the sentence of 20 years was neither harsh nor excessive considering the circumstances of the commission of the offence. If anything, she argued, the trial Judge exercised utmost leniency. She prayed the sentence to be upheld.

We have listened carefully to the submissions of both counsel and have also perused the court record.

It was submitted before the learned trial Judge that the convict was a first offender who had readily pleaded guilty, was the only child of his elderly parents and had spent 1 year 6 months and 26 days on remand. When sentencing the appellant, this is how the trial Judge expressed himself:

“Taking into account the mitigation submitted by the accused’s counsel and the fact that the accused pleaded for forgiveness and looked repentant, I do hereby sentence the accused to 20 years imprisonment

It is clear from the above excerpt that the learned trial Judge did not specifically state that he had taken into account the period the appellant had spent on remand.

Although the learned trial Judge did state that he had taken into account the mitigation submitted by the appellant’s counsel, we do not think, this was in

Consonance with the requirement of **Article 23(8) of the Constitution** which 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.”

The Supreme Court, in **Kizito Semakula Vs Uganda, Cr. Appeal NO. 24 of 2001**, held that in **Article 23(8)**, the

words **“to take into account”** does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused on remand from the sentence to be imposed by the trial court.

The same Court in **Kabwiso Issa Vs Uganda, Cr. Appeal NO. 7 of 2002**, held:

“This Court has on a number of occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the court pronounces the term to be served When sentencing a person to imprisonment, the trial Judge or Magistrate should say;

“ Taking into account the period ofyears (months or weeks whichever is applicable) which the accused has already spend in remand, I now sentence the accused to a term ofyears, months or weeks, as the case may be. In such an event the sentence imposed shall be definite and be treated as excluding the period spent in custody on remand”.

The foregoing position was reiterated by the said Court in **Katende Ahamad Vs Uganda Cr. Appeal NO. 6 of 2004**,

where it was held the trial Judge erred in sentencing the appellant without expressly stating she had taken the remand period into account.

In **Kwamusi Jacob Vs Uganda, Cr. Appeal NO. 0203 of 2009**, this Court set aside the sentence of 10 years imprisonment on grounds that the trial Judge did not take into account the period spent on remand by the convict.

The Court then proceeded to determine and substitute it with the appropriate sentence. We must emphasise that a trial Judge ought to clearly state that the period of remand has been taken into account before passing sentence of imprisonment. In the instant case, the trial Judge did not.

We accordingly, find that the learned trial Judge erred when he sentenced the appellant to 20 years imprisonment without taking into account the period he had spent on remand as required under **Article 23 (8) of the Constitution**. The sentence is therefore illegal and a nullity. We hereby set it aside. This appeal therefore succeeds to that extent.

Having set aside the sentence, this Court has a duty to impose a sentence of its own as if it were the trial court. **Section 11 of the Judicature Act** provides that:

“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”

In the instant case, the Court is enjoined to take into account not only the remand period but also the aggravating and mitigating factors. In so doing we take into account the gravity of the offence so that whatever sentence is passed is appropriate with the offence.

In this respect, it is observed that the offence of murder carries a maximum penalty of death and the deceased was assaulted on the head with a hammer for no apparent reason. Although the deceased was his uncle, the appellant showed no scant regard for his life.

We also take into account, that the appellant pleaded guilty, an indication that he was remorseful and had come to realise the folly of his conduct.

We further note that the appellant was aged 29 years at the time of sentence and clearly still young. Once reformed, he could still be productive to his community and society at large.

In view of the foregoing and, considering that the appellant was on remand for almost 1 year 7 months before conviction, we consider a term of 18 years imprisonment to be commensurate with the gravity of the offence. We order accordingly.

Dated at ARUA this 6th day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon.Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon.Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL

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