THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[CORAM: Kakuru, Egonda-Ntende & Obura, JJA]

Criminal Appeal No.413 of 2014

(Arising from High Court Criminal Session Case No. HCT-02-CO-SC-035 of 2005 and No.192 of 2013 at Gulu)

Between

NYAMWA JUSTO OTTO==========Appellant

And

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

(On Appeal from the decision of the High Court of Uganda [Joseph Murangira, J.,] sitting at Gulu and delivered on the 22nd November 2013)

JUGDEMENT OF THE COURT

Introduction

1. This appeal is against sentence only. The appellant was indicted and convicted of 3 counts of murder, contrary to sections 188 and 189 of the Penal Code Act and 5 counts of attempted murder contrary to section 204 (a) of the Penal Code Act. The particulars of count 1 were that on the 14th day of August 2004 the appellant, at Lacekocet IDP Camp in Pader District murdered Abur Lucy. The particulars of count 2 were that on the same date and place the appellant murdered Laker Betty. The particulars of count 3 were that on the same date and place the appellant murdered Ojok Morris.

2. The particulars of the 1st count of attempted murder are that on the 14th day of August 2004 the appellant attempted unlawfully to cause the death of Akwero Irene. The particulars of the 2nd count of attempted murder are that the appellant on the same date and place attempted unlawfully to cause the death of Oyell Sharon alias Fivi. The particulars of the 3rd count of attempted murder are that the appellant on the same date and place unlawfully attempted to cause the death of Adong Judith. The particulars

of the 4th count of attempted murder are that the appellant on the same date and place unlawfully attempted to cause the death of Ayat Vicky. And the last count of attempted murder was that the appellant, on the same date and place, unlawfully attempted to cause the death of Owilli Denis.

3. The appellant was convicted of the above counts and sentenced to 22 years imprisonment on each of counts 1, 2 and 3. He was sentenced to 7 years imprisonment on counts 4, 5, 6, 7 and 8. All sentences were to run concurrently.

4. The appellant now appeals to this court only against the sentences imposed upon him.

5. The facts of the case was that an ex girl friend and mother of a child of the appellant was living with her mother and siblings in an internally displaced people's camp at Lacekocet, Pader District. On the fateful day in the evening the appellant went to the home of the mother of his ex-girl friend. He was in army uniform and was armed with a sub machine gun. He found members of the family eating dinner in the house. There was a light in the house. He squatted at the entrance and fired into the house where the family was eating. He then run away back to the nearby barracks.

6. Abur Lucy and Laker Betty died instantly at the scene. Ojok Morris died in hospital the following day. Akwero Irene, Oyell Sharon alias Fivi, Adong Judith, Ayat Vicky and Owilli Denis suffered gunshot wounds and suffered debilitating injuries.

Submissions of Counsel

7. Mr Lloyd Ochorobiya appeared for the appellant and Ms Rose Tumuheise, Principal State Attorney, in the Office of the Director, Public Prosecutions, appeared for the respondent. Mr Ochorobiya abandoned ground 1 and submitted on ground 2 which was that, 'the learned trial judge had ignored important matters [age, appellant being a first offender, need to reform] when passing sentence rendering the sentence harsh and manifestly excessive in the circumstances.'

8. Mr Ochorobiya referred this court to the decision of Mboinegaba James v Uganda C A Criminal Appeal No. 511 of 2014(unreported) and Kiwalabye Bernard v Uganda S C Criminal Appeal No 143 of 2001 (unreported) for the principle that an appellate court was not to interfere

with the sentencing decision of the trial court unless it was either manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignored an important matter or circumstances that ought to have been taken into consideration, or the sentence was wrong in principle. In the instant case he submitted that the court below had not considered the age of the appellant and the fact that he was a first offender. He prayed that the sentence imposed upon the appellant be reduced taking into account all mitigating factors.

9. Ms Rose Tumuheise opposed the appeal. She submitted that she was in agreement with the principle of law set out by her learned friend with regard to when an appellate court may interfere with a sentence of the trial court. She submitted that the trial court had taken into account all mitigating and aggravating factors and imposed an appropriate sentence given that the appellant had committed 3 murders and 5 attempted murders. She submitted that this court should not interfere with the sentence imposed by the trial court.

Analysis

10. The law with regard to consideration of an appeal against sentence is well settled. In the case of Kiwalabye Bernard v Uganda S C Criminal Appeal No. 143 of 2001(unreported) the Supreme Court stated,

> 'The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so law as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.'

11. In the instant case after taking into account all mitigating and aggravating factors brought to the attention of the court by submissions of counsel the trial court stated,

> 'I sentence the convict to custodial sentences as shown here below:
> (a) Count1—the convict would have been sentenced to 30 (thirty) years imprisonment in prison. However, [I] subtract 8 years the convict has spent in prison. Thus, I sentence the convict to 22 (twenty two) years imprisonment in prison.

(b) On count 2 – using the same formula as on Count 1, I sentence the convict to 22 (twenty two) years imprisonment in prison.

(c) On Count 3 – using the same formula as on Count1, I sentence the convict to 22 (twenty two) years imprisonment in prison.

(d) On Count 4, 5, 6, 7 & 8 on the offence of attempted murder, I would have sentence[d] (sic) the convict to 15 years imprisonment on each count.

However, the convict has been in prison for a period 8 years thus by subtracting 8 years from the proposed sentence of 15 years; I do sentence the convict on each count as aforesaid to 7 years imprisonment in prison. The sentences on the 8 eight sentences shall be carried out by the convict concurrently.'

12. The learned trial court appears to have with prescience conformed to what the Supreme Court was to hold years later in Rwabugande Moses v Uganda S C Criminal Appeal No. 25 of 2014(unreported) save for the fact that the period he deducted from the sentence combined both the period spent in pre-trial custody and the period after conviction but before sentence. The period spent in pre-trial custody was from 15th August 2004 to 28th November 2008 which is 4 years 3 months and 2 weeks. The trial court thus erroneously applied article 23 (8) of the Constitution which mandates deduction only of the period held in custody prior to the completion of the trial.

13. Secondly by subtracting 8 years the appellant was prejudiced as the period between conviction and sentence could not attract remission when only 4 years 3 months and 2 weeks should have been deducted allowing the appellant to enjoy remission on the 3 years 8 months and 2 weeks.

14. We are satisfied that the trial court erred to warrant this court to interfere with the sentences imposed by the trial court. We set aside the said sentences and proceed to determine appropriate sentences in the circumstances of this case.

15. The accused is a first offender. At the time he committed these offences he was a young man aged 27 years old. He is remorseful. Nevertheless he committed triple murders and 5 offences of attempted murder in what was a most gruesome manner. The victims of the offences of attempted murder are permanently disabled in varying degrees. The maximum

punishment for murder is the death penalty. Taking into consideration all the foregoing factors we would have sentenced the appellant on each of counts 1, 2, and 3 to a sentence of 20 years from which we deduct the period spent on remand of 4 years 3 months and 2 weeks. We therefore sentence the appellant to a sentence of 15 years, 8 months and 2 weeks on each of Count 1; Count 2 and Count 3.

16. We would have sentenced the appellant to 10 years imprisonment on each of the counts following; Count 4, Count 5, Count 6, Count 7 and Count 8. We deduct from the said sentence the period spent in pre-trial custody of 4 years, 3 months and 2 weeks and sentence the appellant to 5 years, 8 months and 2 weeks on each of the foregoing counts.

17. To meet the ends of justice in this case we order the sentences on Count 1 and Count 4 to run consecutively while the rest of the sentences would run concurrently. He will therefore serve a total sentence of 21 years and 5 months in prison. The sentences shall run from 28th November 2008, the date of conviction.

Dated, signed and delivered at Gulu this 7th day of November 2017

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal