IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI CJ, ODOKI, JSC, and ODER JSC)

CRIMINAL APPEAL NO. 17 OF 1993

BETWEEN

LIVINGSTONE KAKOOZA::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal against conviction and sentence of the High Court of Uganda at Masaka. (Mukasa-Kikonyogo J.) dated 16th October, 1991.

IN

CRIMINAL SESSIONS CASE NO. 69 OF 1991)

REASONS FOR THE JUDGMENT OF THE COURT:

The appellant was indicted with murder contrary to section 183 of the Penal Code, but he was convicted of manslaughter contrary to section 182 of the Penal Code. He was sentenced to 18 years imprisonment. He has appealed against the sentence only. We heard and allowed the appeal. We set aside the sentence of 18 years and substituted a sentence of 10 years. We reserved the reasons for our judgment which we now give.

The facts as found by the trial judge were that the appellant was the son of the deceased, Veronica Nabayinda.

The appellant lived adjacent to the deceased's house which was on a kibanja left for her by her husband who had died a little earlier. The appellant had been arrested and detained on suspicion of having been involved in his death, but he was released in June 1989. There was evidence that the appellant used to threaten the deceased that he would kill her and take over the kibanja.

On 2nd July, 1989 at 9. P.m. the appellant went to the deceased's house where he ordered his son to open for him. He entered the house, assaulted his son, and grabbed the deceased and threw her outside the house. He kicked her in the stomach and beat her feet. He knelt on her while holding a panga against her neck. As he was doing so, his nephew who answered the alarm, came and separated him from the deceased and removed the panga from him. The appellant swore that he would kill the deceased because he wanted her to leave the kibanja so that he could sell it.

The deceased was bleeding from her private parts and her intestines were protruding from her anus. She was eventually taken to Masaka Hospital where she was admitted but later discharged when condition became hopeless. She died three days later after discharge. The cause of death was bleeding from the ruptured spleen. The appellant denied assaulting his mother but the trial judge found that the deceased had died as a result of injuries inflicted by the appellant.

She convicted him of manslaughter because she was doubtful whether the appellant kicked the deceased with intention to kill her. Before the Court passed sentence, the appellant stated:

> "I ask the court to be lenient especially as I did not commit the offence I have been convicted of."

In sentencing the appellant the trial judge said,

> "***The conduct of the accused before, during and after the commission of the offence was shocking. He has not ever shown the slightest remorse for having killed his mother in the circumstances in which her death occurred. He appears to be the hardened type.***
>
> ***I agree with both the learned principal State Attorney and the learned defence counsel that a deterrent sentence but commensurate with the offence committed the accused should be imposed on him.***
>
> ***Mindful of the two years the accused has spent on remand I sentence him to 18 years' imprisonment."***

Mr. Ladwar, learned counsel for the appellant submitted that the sentence of 18years' imprisonment was harsh and manifestly excessive. He argued that since life imprisonment is about twenty years, the learned judge intended to impose it on the appellant who had been on

remand for two years. He contended that this sentence was excessive in view of the fact that the appellant was a first offender and a younger man aged 36 years.

Secondly, Mr. Ladwar, submitted that the learned judge erred in taking into account the conduct of the appellant before, during and after the commission of the offence. He criticized the learned judge for holding that the appellant appeared to be the hardened type when there was no evidence to establish that fact. He contended that the appellant did not have to show remorse in order to expect leniency from the court. He relied on the case of Mattaka v Republic (1971) E.A. 495.

Mr. Wamasebu, learned counsel for the State submitted that there was material to justify the imposition of the maximum sentence of life imprisonment. He contended that the appellant deliberately kicked the deceased on the abdomen which is a vulnerable part of the body, and he was lucky not to be convicted of murder. He maintained that the appellant had bad character before the trial caused by his conflict with his family for which he was detained.

An appellant 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 considerations: see Ogala s/o Owoura v. R (1954) 21 E.A.C.A. 270.

In the present case, while the learned judge was entitled to consider all the circumstances of the case, we do not think that she was justified in concluding from the conduct the conduct of the appellant before, during and after the commission of the offence that he was the hardened type. The fact that the appellant was previously arrested on suspicion of having been involved in the death of his father, but later released and his persistent claim of innocence in the commission of the offence were not sufficient material upon which to conclude that the Appellant was a hardened person.

According to the prosecuting counsel, the Appellant had no previous record and was therefore a first offender as the learned judge so found. We are of the view that the learned judge misdirected herself on the principles of sentencing when she took into account the fact that the

Appellant and not shown remorse for having killed his mother by insisting on his innocence. As the Court of Appeal for East Africa said in Mattaka v. Republic (1971) E.A. 495 at page 512,

> "***A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would found guilty may believe himself innocent, as a matter of fact or law, and that belief may be upheld by an appellate court. If however lack of repentance would be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency."***

We agree with the learned counsel for the Appellant that the sentence of 18 years was harsh and manifestly excessive. The Appellant had been on remand in custody for two years and the learned judge took this factor in passing sentence. In effect the Appellant received a life sentence which is twenty years according to section 49(7) of the Prisons Act, Cap. 313, which provides,

> ***"(7) For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment."***

It is unusual to impose maximum sentence on a first offender and it is wrong to depart from that rule of practice because he might have been convicted of a graver offence: See Josephine Arisol V.R. (1957) E.A. 447. Taking into account the circumstances of this case especially the long standing family dispute over land, the manner in which the Appellant assaulted the deceased, the fact that the Appellant was a first offender, and the sentences imposed in similar cases by the courts in this country, we were satisfied that the sentence of 18 years imprisonment imposed by the trial judge was based on wrong factors so as to warrant interference by this court.

Dated at Mengo this 8th day of November 1994.

S.W.W. WAMBUZI

CHIEF JUSTICE

B. J. ODOKI

JUSTICE OF THE SUPREME COURT.

A.H. ODER

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

J. MURANGIRA

For REGISTRAR SUPREME COURT.