THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: MWONDHA, TIBATEMWA-EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOKE, JSC

CRIMINAL APPEAL NO. 49 OF 2017

ODONG MARTIN
LUKWIYA CHARLES SAILE } ..... **APPELLANTS**
OKELLO MOSES

VERSUS

UGANDA .....**RESPONDENT**

(Arising from the judgment and decision of the Court of Appeal at Gulu before Kakuru, Egonda-Ntende and Obura, JJA dated 7th November, 2017)

JUDGMENT OF THE COURT

This is a second appeal. The appellants were dissatisfied with the judgment and decision of the Court of Appeal, and appealed to this Court against sentence, and the compensation order.

The grounds of the appeal were as follows:-

1. The learned Justices of the Court of Appeal erred in law when they sentenced the appellants to 28 years and 10 months imprisonment which was manifestly harsh and excessive in total disregard of mitigating factors.

2. The learned Justices of the Court of Appeal erred in law when they did not adequately consider the appellants' circumstances thereby wrongly sentenced them to such consecutive terms and ordered compensation of UGX.20 million.

They prayed that:

(1) the appeal is allowed

(2) the orders of serving a consecutive sentence and payment of compensation be set aside.

In the alternative but without prejudice to the above the sentence of 28 years and 10 months imprisonment be reduced to 15 years and be ordered to run concurrently.

Brief Background:

The three appellants were indicted on two charges, Count one of murder C/S 188 and 189 of the Penal Code Act and Count two, Aggravated Robbery C/S 285 and 286 (2) of the Penal Code Act. They were sentenced to 30 years imprisonment each on Count (1) of murder and 15 years imprisonment each on Count (2) of Aggravated Robbery. The sentences were to run consecutively and they were ordered to pay the owner of the vehicle, jointly and severally, compensation of Uganda Shillings twenty million. Dissatisfied with the above decision they appealed to the Court of Appeal. The Court of Appeal partially allowed the appeal. They were dissatisfied by the Court of Appeal decision hence this appeal.

Representation:

At the hearing, Mr. Mooli Albert Sibuta represented all the appellants.

Ms. Happiness Ainebyona Chief State Attorney holding brief for Asst. DPP Caroline Nabasa appeared for the respondent.

Submissions:

Both counsel had filed written submissions.

Ground 1

The appellants' counsel submitted that the appellants exhibited remorse when they pleaded guilty to the offences as indicted. They were first offenders, and they had wives and children. They showed that they were ready to be re-integrated in society. Counsel submitted that the learned Justices of the Court of Appeal only considered the period spent on remand and did not consider mitigating factors. He relied on the case of **Magala v.**

Uganda SCCA 1 of 2014, where the appellant killed two people and was sentenced to 14 years imprisonment after Court taking into account mitigating factors. Counsel also relied on **Mawazi Malinga v. Uganda SCCA No 43 of 2018** where the appellant had been sentenced to life imprisonment but the sentence was reduced when the Court considered mitigating factors after deducting the period spent on remand. Counsel submitted that A_1 Odong Martin was only 38 years old, A_2 Lukwiya Charles was only 43 years old and A_3 Okello Moses was only 25 years old. He submitted that the age was worth taking into consideration.

Counsel submitted that 28 years and 10 months imprisonment is near 30 years so the Court reached it in disregard of the mitigating factors which was an error in law.

Ground 2

Counsel faulted the learned Justices of the Court of Appeal for ordering the sentences to run consecutively which caused a miscarriage of justice and erred in law. Counsel submitted that Section 2(2) of the Trial on Indictment Act (T.I.A.) Cap 23 gives discretion to Court to determine whether the sentences should run consecutively or concurrently. He argued that section 2 (2) of TIA was interpreted in **Magala Ramathan v. Uganda (Supra)** and the Court stated, *inter alia*, that the general rule is for the High Court to impose a consecutive sentence and a convict will only serve sentences concurrently out of distinct offences if the Court so directs. Counsel submitted that reasons for the choice of whether consecutive or concurrent have to be given. Counsel relied on **Ndwaude v. Rex [2012] SZSC 39** where the Supreme Court of Swaziland considered the judicious exercise of sentencing. That it was trite law and principle that in ordering a consecutive sentence the total sentence must be proportionate to the offence and the circumstances surrounding each case. That the said principle is reflected in Guideline 8 of the Constitution (sentencing guidelines for Courts of Judicature (Practice Directions 2013) which provides *inter alia*;

1. "Where Court imposes a consecutive sentence the Court shall first

identify the material part of conduct giving rise to the commission of offence and determine the total sentence to be imposed."

2. The total sum of the cumulative sentence shall be proportionate to the culpability of the offence."

Counsel submitted that in the case of **Magala v. Uganda (Supra)** the justification was given by the trial judge when he imposed the consecutive running of the sentence, as being punitive and deterrent which made it valid.

Counsel added, that the 28 years and 10 months to be served for each of the appellants consecutively was an error in law as there was no justification given by the Court of Appeal. The discretion was hence not exercised judicially. Counsel prayed that this Court varies and reverses the order of the 1st Appellate Court and substitutes it by ordering concurrent sentences, and set aside the order for compensation.

Respondent's submissions:

Ground 1

Counsel submitted that this ground complained about severity of sentence. Counsel submitted that S.5(3) of the Judicature Act provides **"in the case of an appeal against sentence or order other than one fixed by the law, the accused person may appeal to the Supreme Court against sentence or order on a matter of law, not including severity of sentence.**

Counsel contended that the case of **Kifamunte v Uganda SCCA No. 10 of 1997** was misapplied in the instant case and therefore it was a misdirection. Counsel submitted that the **Kifamunte case (Supra)** held, *inter alia*, that the second appellate Court can only interfere with the conclusions of the 1st appellate Court if the Court failed in its duty to re-evaluate and reconsider the evidence on record before coming to its independent conclusion. That this ground was about severity of sentence as opposed to re-evaluation and reconsideration of evidence on record on a matter of law.

Counsel further submitted that the learned Justices of the Court of Appeal considered mitigating factors in favour of the appellants when, they stated:- "...However there are mitigating factors in favour of the appellants. The appellants pleaded guilty hence saving Court's time and resources, they were remorseful, they were all first offenders, they had each spent 3 years and one months on remand,"

Counsel submitted that the learned Justices of the Court of Appeal considered aggravating factors as well before imposing the sentence.

Counsel argued that the case of **Mawazi Malinga v. Uganda SCCA 43 of 28** relied on by Counsel for the appellants was distinguishable from the facts of the instant case. That in the **Mawazi Malinga case** this Court stated *inter alia* "... while the sentence of life imprisonment against all other appellants is maintained the sentence of the youngest appellant A_2 who was 18 years of age at the time of arrest is set aside ... the sentence of life imprisonment in respect of A_2 is replaced with a term of imprisonment of 21 years."

Whereas in the instant appeal at the time of the commission of the offence A_1 was 38 years old, A_2 was 43 years old then A_3 was 25 years old. Counsel relied on the case of **Sekandi Hassan v. Uganda SCCA No 25 of 2019**, and submitted that in the instant case the record indicated that the re-sentencing considered both mitigating and aggravating factors advanced by the appellants' counsel in the submissions The learned Justices in the **Sekandi case** said "we therefore find no valid reason advanced by the appellant to warrant us to depart from the concurrent findings of the lower Courts... as a result we find no merit in this appeal and accordingly dismiss it."

Counsel prayed that this Court finds no merit in this ground and prayed that it fails.

Ground 2

Counsel submitted that the complaint by Counsel for the appellants was that the learned Justices of the Court of Appeal did not adequately consider

the appellants' circumstances when they ordered them to serve the sentences consecutively and imposed an order of compensation of Shs20,000,000/= Counsel noted that the appellants submitted that the above orders caused a miscarriage of Justice.

Counsel for the appellants submitted that the learned Justices considered the circumstances of the appellants before imposing the sentences. That the learned Justices stated "... having taken all the above factors and decided cases into account, we consider a term of imprisonment of 20 years on Count 1 for each of the appellants will meet the ends of justice. We now deduct 3 years and one month from the 20 years, the appellants spent on remand in pretrial detention and order that each appellant serves 16 years an 11 months imprisonment starting from 22nd March, 2016 the day they were convicted in respect of count 1. In respect of count 2, we consider a sentence of 15 years imprisonment to be appropriate from which we deduct 3 years and 1 month the period each spent on remand. Each shall serve 11 years and 11 months. Sentences to run consecutively. Each of the appellants shall therefore serve a total of 28 years and 10 months in prison. The appellants are therefore jointly and severally to pay Shs20,000,000/= as compensation to Mr. Julius Ceaser the owner of the stolen motor vehicle."

Counsel submitted that from the above quotation it is clear there was no error made by the learned Justices of the Court of Appeal and there was no miscarriage of justice, there was no basis for interfering with the concurrent conclusions of the lower Courts.

Counsel prayed that this ground too fails and the appeal be dismissed.

Consideration of the Appeal:

This was a second appeal by the three appellants A_1 Odong Martin, A_2 Lukwiya Charles, A_3 Okello Moses. The three were indicted on two charges. Count one they were indicted on a charge of murder C/S 188 and 189 of the Penal Code Act. On count 2 they were indicted on a charge of Aggravated Robbery C/S 285 and 286 (2) of the Penal Code Act.

It is trite law that, **"a second appellate Court is not expected to re-evaluate the evidence or question the concurrent finding of facts by the High Court and Court of Appeal. However where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings or fact the Court is obliged to do so and to ensure that justice is properly and truly served."** (See **Areet v Uganda (Criminal Appeal No 20 of 2005, Kifamunte Henry v. Uganda SCCA 10 of 1997**)

S.5 (3) of the Judicature Act provides, **"in the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law not including severity of sentence."**

The general powers of this Court are provided in Rule 31 of this Court Rules. It provides inter alia **"On any appeal the Court may, so far as its jurisdiction permits, confirm, reverse or vary the decisions of the Court of Appeal with such directions as may be appropriate ..."**

We shall bear the above principles of law in mind to determine this appeal.

Ground 1

Counsel for the appellants' contention was that the learned Justices of the Court of Appeal did not consider mitigating factors like age of the appellants. A1 was 38 years old, A2 43 years old and A3 was 25 years at the time of commission of the offences. Counsel submitted that, the appellant would be useful to society in other capacities if they were offered a more lenient sentence.

We carefully perused the Court record and we found that the learned Justices did not only consider mitigating factors but considered aggravating factors as well. In the judgment of the Court of Appeal, it was stated, *"the appellants premeditated the killing of the victim, they killed him and tied his body to a tree. They took the motor vehicle he was driving. The victim was a young man aged 30 years. He was a father and husband, these are serious*

aggravating factors. However there are mitigating factors in favour of the appellants. The appellants pleaded guilty hence saving Courts time and resources. They were remorseful, they were all first offenders. They had each spent 3 years and one month on remand.

The above shows that both mitigating and aggravating factors were considered including their age. We accept the submissions by the respondent's Counsel that the case of **Mawazi Malinga v. Uganda (Supra)**, relied on by learned Counsel for the appellants is distinguishable from the facts of the instant case. The sentence that had been imposed on the appellants was life imprisonment (rest of their life) whereas in the instant case the punishment was shorter. The youngest convict/appellant in the case of **Mawazi Malinga (Supra)** was just 18 years at the time of the commission of the offence. And it was only in respect of the very youngest appellant who was 18 years that the sentence was varied by the Court, from life imprisonment to 21 years imprisonment.

The Court of Appeal in its judgment, further stated: *"Having taken all the above factors and decided cases into account we consider that a term of 20 years imprisonment on Count 1 will meet the ends of justice. In respect of count 2, we consider a sentence of 15 years imprisonment to be appropriate." The Court of Appeal went ahead and stated, in respect of the count 1 we deducted from 20 years three years and one month for each appellant which they spent on remand in pre-trial detention and order that each serves 16 years and 11 months imprisonment.*

In respect of count 2, the Court of Appeal stated: *"We deduct 3 years and 1 month from each of the appellants the period spent on pretrial detention. Each appellant shall serve 11 years and 11 months on Count 2. The sentences to run consecutively starting from 22nd March 2016 the date at each was convicted for the offences and to serve a total of 28 years and 10 months."*

We found no reason to fault the Justices of the Court of Appeal so ground 1 would fail.

However, before we take leave of this ground, we wish to point out that the application of **Rwabugande Moses v. Uganda SCCA No. 25 of 2014** decision was a misapplication. The **Rwabugande Moses (Supra)** has no retrospective effect or application. In the case of **Bwerenga Adonia v. Uganda SCCA No 45 of 2016** where the appellants counsel complained that the sentence imposed by the Court of Appeal was illegal as it did not take into account the period of the appellant spent on remand in an arithmetical manner as set out in the **Rwabugande Moses case (Supra)**. This Court stated, among others' "by a Court taking into account a period spent on remand is necessarily mathematical because the period is known with certainty and precision..."

To be precise, we shall reproduce what was held in the **Bwerenga Adonia case (Supra)** which said, this Court held:-

"In our view, the taking into account of the period spent on remand by a Court is necessarily mathematical. This is because the period is known with certainty and precision, consideration of the remand period should therefore be reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

Also in the **Abelle Asuman v. Uganda SCCA No. 6 of 2016** this Court pointed out as follows:-

"We find also that this appeal is premised on a misapplication of the decision of this Court in the case of Rwabugande (Supra) which was decided on 3rd March, 2017."

In its judgment, This Court made it clear that it was departing from the earlier decision in ***Kizito Senkula v. Uganda SCCA No. 24 of 2001, Kabuye Senvewo v. Uganda SCCA 2 of 2002, Katende Ahamed v. Uganda SCCA 6 of 2004 and Bukenya Joseph v. Uganda SCCA 17 of***

2010 which held that **"taking into consideration the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula."**

This Court and the Courts below before the decision in **Rwabugande (Supra)** were following the law as it was in the previous decisions above quoted since that was the law then.

So obviously following the above, the Court of Appeal in the instant appeal as far as applying the **Rwabugande case** is concerned in ground one was premised on a misapplication of the **Rwabugande** decision.

The trial Judge had taken into account the period the appellants had spent on remand in accordance with the law and judicial precedent at the time. The trial Court could not have been faulted. There was no reason to fault the Court of Appeal on the varied sentence imposed as there was no miscarriage of justice as sentencing is entirely at the discretion of the Court.

Ground 2

Counsel submitted that the complaint was that the learned Justices of the Court of Appeal erred in law when they failed to consider the circumstances of the appellants adequately which resulted into ordering the sentences to run consecutively.

We considered Section 2(2) of the Trial on Indictment Act T.I.A. and it provides:-

"When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to several punishments prescribed for them which the Court is competent to impose, those punishments when consisting of imprisonment to commence one after the expiration of another, in such order as the Court may direct, unless the Court directs that the punishment shall run concurrently."

Counsel for the appellant submitted that the Court of Appeal Justices did not state reasons why they chose to order the sentences to run consecutively contrary to what was provided in the Constitution (sentencing guidelines for Courts of Judicature (Practice Directions 2013) already reproduced in this judgment.

We have already found and stated in this judgment what the learned Justices based on to take the decision they took. When the learned Justices considered both the aggravating and mitigating factors, and took into account all factors and decided cases, they were justifying the reasons for their exercise of discretion which in our view was exercised judicially. We find no error done by the Court of Appeal to require us to vary or reverse their decision. We also have to point out that the guidelines remain guidelines and they cannot be used to fetter the Courts discretion.

The sentence imposed of 28 years and 10 months imprisonment in total for each of the appellants and the order of jointly and severally paying compensation of Shs20,000,000/= to the victim and the sentences to run consecutively were proper in law.

In the result both grounds fail. We uphold the decision of the Court of Appeal as stated in this judgment.

The appeal is dismissed.

Dated at Kampala this ....15th..... day of ....November..... 2023

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MWONDHA
JUSTICE OF THE SUPREME COURT

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PROF. TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREM COURT

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TUHAISE
JUSTICE OF THE SUPREME COURT

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CHIBITA
JUSTICE OF THE SUPREME COURT

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MUSOKE
JUSTICE OF THE SUPREME COURT

The other one Justice of the Coram did not sign pursuant to rule 32(1) of this Court Rules
15/11/2023