THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 137 OF 2011

1. MUTATINA PATRICK

2. KIKOMBE EPHRAIM :::::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbarara Before His Lordship Hon. Justice Akiiki Kiiza dated 21st June 2011, in Criminal Session Case No. 045 of 2008)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court at Mbarara in Criminal Case No. 045 of 2008 delivered on the 21st day of June 2011, by Akiiki Kiiza, J in which the appellants were convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 120 and sentenced to 25 years imprisonment.

Background to the appeal

The facts giving rise to this appeal as they appear on court record are that the deceased (Kichweka Johnson) and members of his family were sleeping on the night of 16th November, 2007, when they heard a person knocking on their door. When they questioned the intruder, he introduced himself as

Mujurizi (an elder brother to the deceased), and believing the person to be Mujurizi, the deceased's wife, PW1, Dina, opened the door. Upon opening the door, she realized that it was not Mujurizi but rather two intruders and she tried to lock the door in vain but was overpowered by the two intruders whom she recognized as the appellants.

A2 grabbed Dina and assaulted her, while A1 moved straight to the deceased's bed and pounced on him. He removed a knife from his pocket and stabbed the deceased on the chest. A1 was a brother to the deceased. The deceased died en-route to hospital after revealing to people that he had recognized A2 as one of his attackers. The two appellants were subsequently arrested and charged with murder. They were convicted and sentenced to 25 years imprisonment each, hence this appeal.

The appellants now appeals against sentence only having obtained leave of this Court to do so under Section 132(b) of the Trial on Indictments Act Cap 23, and Rule 45 of the Court of Appeal Rules. The single ground of appeal states:-

> ***"The learned trial Judge erred in law and fact in sentencing the appellants to 25 years imprisonment which was harsh and manifestly excessive in the obtaining circumstances."***

Representations

At the hearing of this appeal, Mr. Bwatota James, learned Counsel appeared for the appellants on state brief while Ms. Immaculate Angutuko, learned Senior State Attorney, appeared for the respondent. The appellants were in Court.

Appellant's case

Counsel for the appellants submitted that the appellants were first time offenders who should ordinarily not have been given such a long term sentence. He argued that, the sentence of 25 years imprisonment which amounted to life imprisonment at that time was harsh and manifestly excessive in the circumstances of the case. He referred Court to **Atiku Lino vs. Uganda, Court of Appeal Criminal Appeal No. 041 of 2009**, where a sentence of 32 years imprisonment imposed in a murder case was reduced to 20 years by this Court since the trial court had not taken into consideration the time spent on remand.

Counsel further referred Court to **Bwalatum Francis vs. Uganda Court of Appeal, criminal Appeal No. 48 of 2011**, where the appellant had been convicted on two counts of murder and sentenced to 50 year imprisonment. On appeal his sentence was reduced to 20 years and yet this was a double homicide.

Counsel contended that the appellants had learnt from their mistakes during the time of their incarceration. Further, that during mitigation, they pleaded for leniency and were still young men who were capable of reforming and being useful in society, and that even though the learned trial Judge considered those mitigating factors, he still imposed a harsh sentence. He accordingly asked court to reduce the sentence from 25 years to 15 years.

Respondent's case

Counsel for the respondent did not agree. In reply, she submitted that the trial Judge properly exercised his sentencing discretion in sentencing the appellants and the sentence of 25 years imprisonment fell within the law. She further submitted that since the offence of murder attracts a maximum sentence of death, the term of 25 years imprisonment imposed was lenient in the circumstances.

The learned Senior State Attorney contended that the term of 25 years imprisonment imposed did not amount to life imprisonment as submitted by Counsel for the appellants. She referred Court to **Tigo Steven versus Uganda, Supreme Court Criminal Appeal No. 08 of 2009 (unreported)**, for the proposition that life imprisonment meant imprisonment for the natural life of a convict, not a period of 20 years, and that the then Section 47(6) of the Prisons Act, now Section 86(3) of the Prisons Act No. 017 of 2006, is for purposes of remission by Prisons and not for the Court to determine sentence.

Counsel distinguished the case of **Atiku Lino vs. Uganda (supra)** and submitted that whereas the period spent on remand was not considered in that case, the learned trial Judge considered it in this present case. She then referred Court to **Ogalo Son of Owora vs. Reginum (1954) 21 EACA 270** and **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 010 of 1995** for the proposition that an appropriate sentence was a matter for the discretion of the sentencing Judge, and since each case presented its own facts upon which a Judge

exercised his/her discretion, the appellate Court would not normally interfere with the discretion of a sentencing Judge unless the sentence was illegal and/or unless Court was satisfied that the sentence imposed was manifestly excessive.

She invited this Court not to interfere with the discretion of the trial Judge and uphold the sentence of 25 years. She prayed that this appeal be dismissed.

In rejoinder, Counsel for the appellants submitted that by the time the appellants were sentenced, the term of 25 years imprisonment was within the life sentence bracket. He re-iterated his earlier submissions.

Decision of the Court

We have carefully listened to the submissions of Counsel on either side. We have also perused the Court record and the authorities cited to us and those that were not cited.

We have a duty as a first appellate Court to re-appraise all the evidence adduced at the trial and to come up with our inferences on issues of law and fact. **See:-Rule 30(1) of the Rules of this Court and Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 001 of 1997.**

The circumstances under which this Court may interfere with the sentence of a trial Court are limited. Before this Court can interfere with a sentence of the trial Court, the factors must exist which were set out by the

Supreme Court in **Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2011** as follows:-

> ***"The appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignore to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."***

Therefore, before this Court interferes with the severity of a sentence of the trial Court, that sentence must be legal. In this case the legality of the sentences is in issue. We note that Counsel for the appellants argued that there was uncertainty in the sentence since the term of 25 years imprisonment which was imposed by the trial judge amounted to life imprisonment and it was not appropriate for the appellants. On this issue, we find that the decision of the Supreme Court in **Tigo Steven vs. Uganda (Supra)** clarified the position of the law as regards the meaning of 'life imprisonment' and as such we do not see any confusion or uncertainty created by the sentence in the instance case as contended by Counsel for the appellants. Life imprisonment means imprisonment for the remainder of the appellant's natural life. There is no doubt that the learned trial Judge sentenced the appellants to spend 25 years in prison and we cannot fault him for exercising his discretion as he did in the circumstances of this case.

Be that as it may, while passing sentence the learned trial Judge stated as follows:-

> ***"The accused persons are allegedly first offenders. They have been on remand for 3 and ½ years, which period I take into consideration while determining the sentence to impose on them. They are said to have dependants and they are relatively young people. Also take into consideration for the need for them to look after their children and other dependants. There is also need to be merciful to them and they say they are remorseful and prayed for leniency. However, accused committed a serious offence. Upon conviction the maximum sentence to be imposed could be up to a death penalty. Hence the law is harsh to convicted murderers. Accused persons in this case wantonly attacked a law abiding person who was sleeping at his home. He was mercilessly stabbed in the chest which resulted in his death soon thereafter. No doubt his family will miss him forever.***
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> ***Such behavior cannot be tolerated by Court. It is my considered view that the accused persons should receive such a sentence that fits the crime. Putting everything into consideration, I sentence A1 to 25 (twenty five) years imprisonment, and A2 to 25 (twenty five) years imprisonment."***

It is evident from the above that, while the learned trial Judge considered the mitigating and aggravating factors as well as the period spent on remand in this case as required by Article 23 (8) of the Constitution, which provides as follows:-

> ***"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."

This Court has considered aware of the decision in **Rwabugande Moses versus Uganda, Supreme Court Criminal Appeal No. 025 of 2014, where** the Supreme Court stated that, taking into account was necessarily an arithmetical exercise. However, the same Court in **Abelle Asuman vs. Uganda, Criminal Appeal No. 066 of 2016,** while discussing the case of Rwabugande (supra) stated that before it became a precedent, this court and the courts below were following the law as it was in the previous decisions which held that taking into consideration of the time spent on remand did not necessitate a sentencing court to apply a mathematical formula.

Looking at the sentencing order by the trial Court, it is clear that the trial Court in arriving at its conclusion took into account the period spent on remand though it did not state that the period had been deducted. In light of the foregoing, we find that the trial Judge complied with provisions of Article 23(8) of the Constitution.

Be that as it may, in **Kasaija David vs. Uganda, Court of Appeal Criminal Appeal No. 128 of 2008,** the appellant was convicted of murder and sentenced to life imprisonment. On appeal, this Court reduced the sentence to 18 years imprisonment.

In **Epuat Richard Vs Uganda Court of Appeal Criminal Appeal No. 0199 of 2011,** the appellant was convicted of murder and sentenced to 30 years. On appeal, this Court set aside the sentence and substituted it with 15 years imprisonment.

In **Okecha Mugumba & 3 Others vs. Uganda, CACA No. 183 of 2009**, the appellants cut a 78 years old woman with a panga and also beat her with clubs leading to her death. The woman was carrying her one year old grand-daughter on her back who was cut with a panga and she died instantly. The appellants were arrested and indicted for two counts of murder, tried, convicted and each sentenced to 20 years on every count. On appeal to this Court, the appeal was dismissed and sentence upheld.

In another case of **Tumwesigye Anthony versus Uganda, Criminal Appeal No. 046 of 2012**, this Court set aside a sentence of 32 years imprisonment and substituted it with one of 20 years. The appellant in that case had been convicted of murder. The deceased had reported him for stealing his (deceased) employer's chicken. The appellant killed him by crushing his head after which he buried the body in a sandpit.

In yet another case of Francis **Bwalutum vs. Uganda, Court of Appeal criminal Appeal No. 048 of 2011**, the appellant was convicted of murder leading to the loss of two lives and sentenced to 50 years imprisonment. On appeal, this sentenced was reduced to 20 years' imprisonment on each count to run concurrently.

It is clear from the above previous decisions of this Court that the sentence for murder ranges between 15 years to 20 years depending on the circumstances of each case. Taking into account all the aggravating and mitigating factors of this case and the above cited cases of this Court and those of the Supreme Court, we find that a sentence of 20 years imprisonment would be appropriate for each appellant in the circumstances. We set aside the sentence of 25 years imprisonment and substitute there for a sentence of 20 years imprisonment. The sentence shall run from 21st June, 2011, the date of conviction.

We so order

Dated at **Mbarara** this 2nd day of October 2018

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Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL

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Hon. Mr. Justice Cheborion Barishaki
JUSTICE OF APPEAL

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Hon. Mr. Justice Christopher Madrama
JUSTICE OF APPEAL