THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0191 OF 2011

OJOK MICHEAL}..... APPELLANT

VS

UGANDA}..... RESPONDENT

(Appeal from the judgment of the High Court sitting at Gulu in Criminal Session Case No. 0114 of 2009 delivered by His Lordship Hon. Mr. Nyanzi Yasin on the 14th July, 2011)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Izama Madrama, JA

JUDGMENT OF THE COURT

Background to the appeal

The appellant was initially charged with two counts of murder contrary to sections 188 and 189 of the Penal Code Act. On the first count, he was charged with the murder of Anena Dora and on the second count he was charged with the murder of Labong Filder and on the 11th July, 2011 before the learned trial Judge Nyanzi Yasin, pleaded not guilty. By amended charge, the two counts were amended to disclose the lesser offence of manslaughter contrary to section 187 (1) and 190 of the Penal Code Act whereupon the appellant pleaded guilty to both counts on the 14th of July 2011 and was sentenced to 25 years imprisonment by the learned trial judge. With leave of court under section 132 (1) (b) of the trial on Indictment Act, the appellant appealed against sentence only

The facts in the amended indictment were that the appellant on the 19th of June, 2008 at Sub – Ward in Gulu District unlawfully caused the death of Anena Dora and Labong Filder.

The facts of the case accepted by the appellant after a plea of guilt was entered were that the two victims were staying together. Anena Dora was a housewife of the deceased and Filder Labong was her mother. On the 17th of June, 2008 the appellant convinced the daughter Anena Dora and took her to his home. At night the appellant beat Anena Dora and injured her. She cried out for rescue and on 18th June, 2008 Filder Labong, went to her rescue. The appellant handed over torn clothing of Anena Dora to Filder Labong and threatened to kill her too. On the 19th of June, 2008, the appellant burnt the victims in their house at Labour Line Sub – Ward in Gulu District. At the time of the offence the appellant was a resident of Layibi Centre, Pece Division, and Gulu District. The bodies of the victims of the offence were pulled out of the scene of crime and taken to Lacor Hospital where on the 21st June, 2008 Anena Dora died and soon thereafter on the 22nd June, 2008 Filder Labong also died. The cause of death of both victims was severe burns.

Representation

At the hearing of the appeal, the learned Counsel Mr. Manzi Paul appeared for the appellant while the learned Senior Assistant Director of Public Prosecutions, Mr. Ndamurani David Ateenyi appeared for the respondent.

Submissions of the appellant

Counsel for the appellant argued that the learned sentencing Judge did not deduct the period the appellant spent on remand which was 3 years. Counsel relied on the Supreme Court decision in **Rwabugande Moses v Uganda Criminal Appeal No. 25 of 2014** where it was held that the

period spent on remand must be arithmetically deducted from the sentence imposed by the trial court.

The appellants counsel further argued that the sentence imposed was harsh and excessive considering the fact that the appellant was a first offender. Secondly, that the appellant was 32 years at the time of conviction and should have been given a lesser sentence to enable him reform and be reintegrated in society. The appellant's counsel further prayed that the sentence is set aside and substituted with an appropriate sentence of 10 years imprisonment after taking into account the period spent prior to conviction.

Submissions of the respondent

In reply, the respondent's counsel submitted that the appellant was charged with two counts of manslaughter involving two victims and the learned trial Judge passed an omnibus sentence of 25 years without specifying for which count of offence and therefore the sentence was vague.

The DPP submitted that the maximum sentence for manslaughter is life imprisonment and prayed that the appellant is resentenced to a term of 35 years imprisonment because of the extremely aggravating circumstances of the case. These were that there were two persons killed, namely; a daughter and her mother. The appellant was found to be sane with no mental problems and the killing was executed in a very gruesome manner. The DPP prayed that the appellant should be resentenced by this court to life imprisonment on each count of manslaughter.

Consideration of the appeal

We have carefully considered the submissions of counsel as well as the facts and circumstances in record of appeal, the law and relevant judicial precedents.

The duty of this Court as a first appellate court from a decision of the High Court in the exercise of original jurisdiction, is spelt out by **Rule 30 (1)** of **the Judicature (Court of Appeal Rules) Directions.** This rule requires the court to reappraise the evidence and to draw its own inferences of fact. According to judicial precedent, in the reappraisal of evidence, the court must caution itself that it has neither seen nor heard the witnesses and make due allowance for that. This was held by the then East African Court of Appeal in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**. The East African Court of Appeal held that the conduct of an appeal from the High Court in the exercise of its original jurisdiction to the Court of Appeal may be by way of a retrial of issues of fact. The Court is not bound to follow the findings of fact of the trial Judge but will review the evidence and may reach its own conclusion:

> "... though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

These principles are also elaborated by the Supreme Court of Uganda in **Kifamunte Henry v Uganda; S.C.C.A No. 10 of 1997.**

The appellant's counsel abandoned the ground of illegality of sentence on the ground of failure to take into account the period of 3 years lawful custody contrary to article 23 (8) of the Constitution, in light of the evidence at page 13 and 14 of the record where the sentencing notes indicate that the learned trial Judge considered the remand period of 3 years at the time of sentence, before imposing a term of 25 years

imprisonment. The second reason is that learned counsel for the DPP who appeared for the respondent conceded that the learned trial judge imposed an omnibus sentence which was an illegality and that the sentence ought to be set aside and this court exercises its jurisdiction under section 11 of the Judicature Act Cap 13 laws of Uganda to impose an appropriate sentence in the circumstances of the case.

An appellate court will not interfere with a sentence imposed by the High Court in the exercise of its original jurisdiction on the mere ground that the members of the court might have passed a 'somewhat different sentence' if they had tried the appellant. The court will *inter alia* only interfere where it is manifestly clear that trial judge acted upon a wrong principle or principles. Secondly, the court will interfere where trial judge overlooked some material factor or factors. Thirdly, the court will interfere with the sentence imposed where it finds that it is manifestly excessive in view of the circumstances of the case or so low as to amount to a miscarriage of justice. These principles were laid out by the East African Court of Appeal in **Ogalo s/o Owoura v R; Criminal Appeal No. 175 of 1954.** In that case, the appellant appealed against a sentence of 10 years imprisonment with hard labour imposed by the trial court for the offence of manslaughter and this is what the Court held:

> "The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case:"

The Supreme Court of Uganda elaborated these principles in **Kyalimpa Edward v Uganda; Criminal Appeal No. 10 of 1995** when they held that:

> "...an appropriate sentence is a matter for the discretion of the sentencing judge; each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: Ogalo s/o Owoura v R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) E.A.C.A. 126"

We have carefully considered the sentencing notes and must point out from the outset that the learned trial judge erred in law to consider the offence as if it was a murder case. This was error in principle. Secondly, there was an error in law and simply because the DPP conceded to a plea of guilty on a charge of manslaughter when the appellant has initially been charged with murder. The considerations that went into that bargain should be in the province and discretion of the Director of Public Prosecutions. The DPP should not bargain for a lesser charge and therefore sentence if he is persuaded that the evidence will easily sustain a conviction for the offence of murder as the learned trial judge presumed in this case. The court cannot go into why the DPP chose to have the charge amended to a lesser offence of manslaughter. Under Article 120 (3) of the Constitution, the DPP has the constitutional mandate to institute, take over, or discontinue any criminal proceedings against any person or authority. This, by necessary implication, incorporates the power to amend any subsisting charge as need be; i.e. in a plea bargain situation where the evidence for instance may not be sufficient to sustain the charge. Thirdly, the DPP can enter into a bargain for purposes of pleas. In this case, the learned trial Judge could only consider mitigating and aggravating circumstances for the offence of manslaughter and not

murder which was not the charge preferred against the appellant. At page 12 of the record, the learned trial judge said that:

> "This was a shocking act. The accused first offence was too grave for him to be considered for being a first offender. I do not have to interfere with the constitutional mandate of the DPP as far as pleas are concerned; however, if the plea had not been changed and the accused stood full trial, he would have suffered death."
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> To the family of the deceased have had a benefit of listening to you. My advice is that there is no amount of punishment that will replace your dear relatives who died for no reason at all. Your pain will long live. You have to accept that in society we have people like the accused that is why these courts exist.

It is clear from the above passage, that the learned trial judge considered the appellant to be a person with malice aforethought before the unlawful causing of death and who ought to have been charged and convicted of the offence of murder. Furthermore, his comment is that the appellant would have suffered death. Malice aforethought cannot be considered in an offence of manslaughter the essence of which is the absence of malice aforethought or premeditation and the aggravating circumstances or mitigating circumstances should be considered to mitigate or aggravate the prescribed offence which carries a maximum of life imprisonment. It must be assumed that the appellant had no malice aforethought. There was therefore misdirection on the part of the learned trial judge to the prejudice of the appellant and this is reflected by the stiff sentence imposed.

In the case of **Kakooza v Uganda; Criminal Appeal No 17 of 1993 Reported in [1994] UGSC 17** (8th of November, 1994), the appellant was indicted for the offence of murder but was convicted of manslaughter and appealed against sentence only. The sentence of 18 years imprisonment

was set aside and substituted with a sentence of 10 years imprisonment. The Supreme Court of Uganda held that the sentence of 18 years imprisonment was harsh and manifestly excessive when one takes into account the fact that the appellant had been in remand custody for two years. They also held that the effect of the sentence was a life sentence as defined by section 47 (7) of the Prisons Act, if remission is taken into account. At that time it was considered that a sentence of life imprisonment for manslaughter meant imprisonment for a maximum of 20 years as defined by the Prisons Act Cap 313 (before revision and as it then was). This decision was followed by the Court of Appeal in the case of **Ainobushobozi Venancio v Uganda; Criminal Appeal No 242 of 2014**. In that case, the appellant had been convicted by the High Court of Uganda for the offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act and sentenced to 18 years imprisonment. With leave of court he appealed against sentence only. It was held that the maximum sentence for the offence of manslaughter is life imprisonment. Secondly, the learned trial judge had imposed a maximum sentence of life imprisonment by giving the appellant who had spent 3 years on remand a sentence of 18 years imprisonment. In that case they noted that that the appellant was 21 years old, a very young man at the time of the commission of the offence, he was remorseful but nonetheless had committed a very serious offence whose maximum penalty was life imprisonment. The offence was incapable of reparation. They noted that the Supreme Court reduced the sentence of imprisonment to 10 years in the case of **Livingstone Kakooza versus Uganda** (supra). Likewise, the Court of Appeal was satisfied that a sentence of 12 years imprisonment from the date of conviction imposed after taking into account the 3 years remand period would meet the ends of justice.

We note that in **Livingstone Kakooza versus Uganda** (supra) and **Ainobushobozi Venancio v Uganda** there was a trial and the appellants

had not pleaded guilty. In the case of **Nkurunziza Julius v Uganda; Criminal Appeal No 12 of 2009,** the appellant had been convicted on his own plea of guilty and sentenced to 17 years imprisonment. On appeal, the Court of Appeal observed that a plea of guilty is normally a mitigating factor.

Last but not least, the learned trial judge at page 12 of the record held that the accused first offence was too grave for him to be considered for being a first offender. Again this was an error of law as being a first offender can be a mitigating factor.

In the premises, we allow the appellant's appeal to the extent stated below. At the time of the commission of the offence the appellant was about 27 years old. The sentence imposed did not indicate for which count or counts it was imposed and is an omnibus sentence which we hereby set aside. Taking into account the gravity of the offence and the mitigating and aggravating factors for the offence of manslaughter as well as judicial precedence on terms of imprisonment for manslaughter, further the period of 3 years the appellant spent on remand before his conviction, we exercise the jurisdiction of this court under section 11 of the Judicature Act and sentence the appellant to a term of 8 years imprisonment on count 1 and 8 years imprisonment on count 2. These sentences shall run consecutively. The first sentence on count 1 shall commence on the date of conviction on the 14th of July, 2011.

Dated at Arua the 28th day of November, 2018

Hon. Justice Kenneth Kakuru

JUSTICE OF APPEAL

Hon. Justice Ezekiel Muhanguzi

JUSTICE OF APPEAL

Hon. Justice Christopher Izama Madrama

JUSTICE OF APPEAL