THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL No.181 OF 2013
TUMWESIGYE RAUBEN::APPELLANT
VERSUS
UGANDA::RESPONDENT

(*An appeal from the decision of the High Court of Uganda at Rukungiri before His Lordship Mr. Justice Joseph Murangira in High Court Criminal Session Case No. 057 of 2011 delivered on 6th December, 2013*)

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

JUDGMENT OF THE COURT

Introduction:

This is an appeal from the decision of Joseph Murangira, J in High Court Criminal Session Case No. 057 of 2011 at Rukungiri wherein the appellant was convicted of the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 120 and sentenced to 40 years' imprisonment on 6th December, 2013.

The facts as accepted by the learned trial Judge are that on 22nd August, 2009, at Katojo Central village, Buyanja Sub-County in Rukungiri District, the appellant, Tumwesigye Rauben and another murdered Ainesaasi Aloysius. The deceased and others while coming from a night club went to the appellant's sugar cane plantation to steal the sugar cane. The appellant got hold of the deceased and beat him to death. He then took the rest of the group members to the Chairman LC1, Kitojo and reported a case of theft of his sugarcanes. The body of the deceased was found

lying in the farm of one Bagagaire and when a post mortem report was conducted on the body of the deceased, the body was found with multiple bruises, abrasions and deep stab wounds all over the body. The appellant was charged, convicted and sentenced to 40 years imprisonment arising from the said murder.

Being dissatisfied with the decision of the trial Court, the appellant sought leave of Court to amend the memorandum of appeal under Rule 45(1) of the Rules of this Court and Section 132(1)(b) of the Trial on Indictments Act Cap 23. He now appeals against sentence only stating that:-

> ***"The learned trial Judge erred in law and fact when sentenced the appellant without considering the time he had spent on remand thus rendering the sentence illegal.***

In the alternative,

> ***The learned trial Judge erred in law when he passed a harsh and excessive sentence of 40 years imprisonment upon the appellant in the circumstances of the case."***

Appearances:

When the appeal came up for hearing, *Ms. Maclean Kamugisha*, learned Counsel appeared for the appellant on State Brief, while *Ms. Barbra Kawuma*, learned Principal State Attorney represented the respondent. The appellant was present.

Appellant's case

Counsel submitted that while passing sentence, the learned trial Judge, did not take into account the period the appellant had spent on remand.

She submitted that the appellant was arrested in 2009 according to the record and sentenced in 2013, after 4 years. The failure to consider this period rendered the sentence passed illegal and contravened Article 23(8) of the Constitution. Counsel further referred Court to **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 025 of 2014 (unreported)** to support his argument.

Counsel asked Court to find that the sentence was illegal and to set it aside as well as invoke **Section 11 of the Judicature Act cap 13,** and in its discretion impose an appropriate sentence in the circumstances.

Counsel asked this Court to take into account the mitigating factors to wit that the appellant was a first offender who prayed for lenience, he had a wife and five children who had dropped out of school, his parents were sickly and they needed his care.

In the alternative, Counsel submitted that the sentence of 40 years was harsh and excessive. Counsel prayed that the same be set aside and substituted with an appropriate sentence which she considered to be 20 years imprisonment, taking into account the aggravating and mitigating factors cited above.

Counsel concluded by referring Court to **Atiku Lino vs. Uganda, Court of Appeal criminal appeal No.018 of 2007** where the appellant's sentence of 32 years was set aside and a term of 20 years imposed in a case of murder.

The respondent's reply:

Counsel for the respondent conceded that the learned trial Judge erred when he imposed a sentence of 40 years imprisonment upon the appellant without taking into account the period the appellant had spent on remand as required by Article 23(8) of the Constitution.

However, the learned Principal State Attorney submitted that there existed aggravating factors in this case that required Court to impose a deterrent sentence such as the fact that when the appellant found people stealing his sugar canes, he had an option to take them before the authorities but he did not, instead, he chose to beat the victim to death.

Counsel contended that a sentence of 25 years in the circumstances would be appropriate because the deceased was killed in cold blood under while meting out mob justice and in as much the deceased was allegedly stealing sugarcane(s) from the appellant, a message has to be sent out to the public that they should not engage in acts of mob justice which have become rampant to this day.

Decision of the Court

We have considered the submissions of Learned Counsel on either side and carefully perused the court record and the Judgment of the trial Court. We are alive to the duty of this Court as the 1st appellate court being to re-appraise the evidence adduced at trial and draw inferences there from, bearing in mind that we did not have the opportunity to hear and observe the demeanor of witnesses at the trial. **(See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry Versus Uganda, Supreme Court Criminal**

Appeal No.10 of 1997, Bogere Moses Versus Uganda, Supreme Court Criminal Appeal No.1 of 1997).

We note that this court can only interfere with a sentence of the trial Court if that sentence is illegal or is based on a wrong principle or the Court has overlooked a material factor, or where the sentence is manifestly excessive or so low as to amount to a miscarriage of Justice. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. **See Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24/2001 and Ogalo s/o Owuora versus R [1954] 21 EACA 270.**

Both Counsel agree that, the sentence of 40 years imprisonment imposed by the learned trial Judge ought to be set aside as he did not take into account the period which the appellant had spent on remand. This omission, both Counsel are in agreement, renders the sentence a nullity as it contravenes Article 23(8) of the Constitution.

While passing the sentence, the learned trial Judge stated as follows:-

> ***"In consideration of the mitigation factors that were advanced by Counsel for the State which I hereby adopt as my reasons for the sentences I am to pass, each accused person deserved the death sentence.***
>
> ***For A2, as indicated above, the factors I have considered, the convict (A1) is sentenced to 40 years imprisonment."***

It is evident from the above that, the learned trial Judge did not, while passing sentence take into account the periods the appellant had spent on remand 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."

Further still, in **Rwabugande Moses versus Uganda, Supreme Court Criminal Appeal No. 025 of 2014,** the Supreme Court stated that, taking into account was necessarily an arithmetical exercise. In **Abelle Asuman vs. Uganda, Supreme Court Criminal Appeal No. 066 of 2016**, the Supreme Court accepted the previous position of the law of considering or taking into account the period spent on remand without necessarily applying a mathematical formula. We find that either option complies with Article 23(8) of the Constitution. Therefore, the period the appellants had spent in pre-trial detention ought to have been considered and/or deducted from the sentence. Since the trial judge neither considered it, nor made any deduction, the sentence imposed is a nullity. The sentence is, therefore, hereby set aside.

Having held as we have, we now invoke the provisions of **Section 11** of the Judicature Act Cap 13, which grants this Court the same powers as that of the trial Court, to impose a sentence we consider appropriate in the circumstances of this appeal.

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 yet another case of **Tumwesigye Anthony vs. 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 Turyahika Joseph vs. Uganda, Criminal Appeal No. 327 of 2014, the Court of Appeal sitting at Mbarara held that sentences ranging from 20 to 30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lower sentence. In that case the appellant had caused death by running over the deceased using a grader after she had refused to engage in a sexual act with him. This Court imposed a sentence of 26 years imprisonment, the gruesome conditions of the murder notwithstanding. The deceased in that case was 15 years and she had been killed by a roller compactor operated by the appellant.

We note that mob action in this case was a mitigating factor. In **Kamya Abdullah and 4 others vs. Uganda, Supreme Court Criminal Appeal No. 024 of 2015**, the appellants had been sentenced to 40 years in the High Court for murder which involved mob justice. The Court of Appeal upheld the conviction on appeal and reduced the sentence to 30 years imprisonment. There was a further appeal to the Supreme Court which held that:-

"In sentencing, a Judge should consider the facts and all the circumstances of a case. Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree, Furthermore, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording the suspects the right to defend themselves in a formal trial.

Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.

The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death. Police managed to arrest only a few who included the appellants as identified bnby the prosecution witness."

The Supreme Court further held that in the circumstances of this case, a sentence of 30 years was excessive and reduced the same from 30 to 18 years imprisonment.

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 the appellant in the circumstances of this case. From that sentence we now deduct 4 years which the appellant spent on pre-trial detention.

The appellant will, therefore, serve a sentence of 16 years in prison. The sentence shall run from 6th December, 2013, the date of conviction.

For the foregoing reasons, the appeal against sentence is allowed.

We so order.

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

.....

Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL

.....

Hon. Mr. Justice Cheborion Barishaki
JUSTICE OF APPEAL

.....

Hon. Mr. Justice Christopher Madrama
JUSTICE OF APPEAL