THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORTPORTAL

(Coram: F.M.S Egonda-Ntende, Hellen Obura & Christopher Madrama, JJA)

CRIMINAL APPEAL NO. 201 OF 2014

1. **MARAHI RAYMOND**
2. **BWAMBALE FRIDAY**
3. **BWAMBALE AGANATIA**
4. **BALUKU ROGERS::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Justice Akiiki Kiiza holden at Fortportal High Court in Criminal Session Case No. 148 of 2012 delivered on 25/04/2014)

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court sitting at Fortportal delivered on 25th April, 2014 by Akiiki Kizza, J in which the appellants were convicted of the offence of murder contrary to sections 188 & 189 of the Penal Code Act. The 1st appellant pleaded guilty and was sentenced on his own plea of guilty to 35 years imprisonment whereas the 2nd, 3rd and 4th appellants denied the offence and upon a full trial, each of them was sentenced to 45 years imprisonment.

Background to the Appeal

The facts giving rise to this appeal as found by the trial Judge are that on 21/4/2012 in the morning, PW2, Mbarihu Revenia was at home and she heard her husband, Marahi Zephania (the deceased) making an alarm from where he was digging a pit latrine. When she went to

find out, she found all the appellants and their father, Sele Nteleba armed with pangas, spears and knives, cutting the deceased. She made an alarm which was answered by PW3 and the appellants fled but the deceased was already dead. PW3, Basemya Godfrey called the police which came and took away the deceased's body for a post mortem examination. The appellants were subsequently arrested and charged with the offence of murder. The 1st appellant pleaded guilty and was sentenced on his own plea of guilt to 35 years imprisonment whereas the other appellants denied committing the offence. They were tried, convicted and each of them sentenced to 45 years imprisonment

Being dissatisfied with the decision of the trial Judge, the appellants with the leave of this Court granted under section 132 (1) (b) of the Trial on Indictments Act (TIA) appealed against sentence only on the ground that;

> *"The learned trial Judge erred in law and fact when he imposed a sentence on the appellants without complying with the Constitution of the Republic of Uganda and in the result rendering the sentence illegal.*
>
> *In the alternative, the sentence imposed on the appellants was unfair, harsh and excessive in the circumstances."*

At the hearing of this appeal, the appellants were represented by Mr. Acellam Collins on state brief while Mr. Bwiso Charles, a Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Counsel for the appellant informed court that he had filed written submissions which he prayed be adopted by the court. He submitted that whereas the learned trial Judge stated that he would deduct the remand period from the sentence imposed, it is not clear from his sentencing whether the said period was taken into account. He argued that it was not sufficient for the trial Judge to simply say "I deduct" but he ought to have arrived at the

sentence and made a deduction of the period spent on remand. He relied on the case of ***Rwabuganda Moses vs Uganda SCCA No. 25 of 2014*** to support his submission. Counsel prayed that this Court finds the sentences imposed upon the appellants illegal and it invokes its powers under section 11 of the Judicature Act to impose appropriate sentences.

Regarding the alternative ground on severity of sentence, counsel submitted that although the offence committed was serious in nature, a very long custodial sentence is harsh, unfair and defeats the purpose of reformation of the offender. He pointed out that the 1st appellant was 18 years old at the time of committing the offence, he had an elderly mother, 7 siblings and 2 children. He readily pleaded guilty to the offence thus saving court's time and resources. Citing the case of ***Mwesige Peter vs Uganda, CACA No. 527 of 2014*** in which this Court reduced a sentence on a plea of guilty for the offence of murder from 35 years to 15 years imprisonment, counsel prayed that this Court sets aside the sentence of 35 years imposed on the 1st appellant and imposes a sentence of 15 years imprisonment. Regarding the 2nd, 3rd and 4th appellants, counsel prayed that court imposes an appropriate sentence.

In response, counsel for the respondent conceded that the trial Judge did not comply with Article 23 (8) of the Constitution since he was not sure of the period the 2nd, 3rd and 4th appellants had spent on remand. As regards the alternative ground, counsel submitted that the sentences imposed were appropriate and they should be maintained by this Court.

Resolution by the Court

As a first appellate court we are enjoined to re-evaluate the evidence on record and come to our own conclusion on findings of fact and Law. *See; Rule 30(1) of the Judicature (Court of Appeal Rules) Directions,* and the Supreme Court decision in ***Bogere Moses vs Uganda, SCCA No. 1 of 1997.***

This being an appeal against sentence, we are also mindful of the principle upon which an appellate court can interfere with a sentence imposed by a trial court. In ***Kamya Johnson Wavamuno vs Uganda, Criminal Appeal No. 16 of 2000***, the Supreme Court stated that;

> *"It is well settled that the Court of Appeal will not interfere with the exercise of discretion, unless there has been a failure to exercise discretion, or a failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the court would have exercised their discretion differently."*

See also ***Kyalimpa Edward vs Uganda, SCCA No. 10 of 1995*** where the Supreme Court referred to the decision in ***R vs Haviland (1983) 5 CR. App.R 109*** and held that;

> *"...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 court is satisfied that the sentence imposed by the trial court was manifestly so excessive as to amount to an injustice; Ogalo s/o Owoura vs R (1954) 21 EACA 126 and Rvs Mohamedali Jamal (1948) 15 EACA 126"*

In the instant appeal, we have carefully studied the court record, the submissions of both counsel and the authorities cited to us. We have been urged to set aside the sentences imposed on the appellants for being illegal because Article 23 (8) was not complied with. Counsel for the respondent conceded to this ground.

While sentencing the appellant, the trial Judge stated as follows;

> *"A1 is a first offender. He pleaded guilty, this has saved court's time, and showing his remorsefulness and sincerity. He has been on remand for about 2 years, which I deduct from his indictment/sentence. He has prayed for leniency. The rest of the accused are also allegedly first offenders. They have been on remand for between 1-2 years. I also deduct the remand period from the sentence I will impose on them...*

Putting into consideration, I sentence A1, who pleaded guilty to 35 (thirty five) years. For A2, A3 and A4, to 45 (forty five) years imprisonment. Right of appeal explained."

We note two things from the sentencing record. Firstly, that the trial Judge stated that the 2nd, 3rd and 4th appellants are allegedly first offenders. It would appear from the use of the word "allegedly" that the trial Judge did not believe that the appellants were 1st offenders and yet there was no information to the contrary. By use of the word "allegedly" we doubt whether he took that mitigating factor into consideration. Secondly, we note that the period spent on remand by the 3 appellants which the trial Judge took into account is ambiguous and uncertain. Similarly, for the 1st appellant the trial Judge also said he had been on remand for about 2 years which means he was also not certain of the exact period the 1st appellant had spent on remand. We find that this contravened Article 23 (8) of the Constitution which enjoins court to take into account the period a convict has spent on remand, while sentencing the convict. According to the case of ***Rwabugande Moses vs Uganda (supra)*** the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

We therefore find the sentence of 35 years imposed on the 1st appellant and 45 years imprisonment imposed on the 2nd, 3rd and 4th appellants was illegal and we set them aside. We now invoke the provisions of section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of the trial court to impose a sentence of its own which it considers appropriate. In so doing, we shall consider both the mitigating factors and the aggravating factors presented by counsel during re-sentencing.

In mitigation, it was submitted for the 1st appellant that; he is a first offender, he was 18 years at the time of committing the offence, he is remorseful and repentant, and he was on remand for 2 years. For the 2nd, 3rd and 4th appellants it was submitted that they are first offenders, they are all young and can be useful to the community, the 2nd and 3rd appellants spent 2

years on remand, whereas the 4th appellants spent 1 year. A lenient sentence was prayed for. In aggravation, it was submitted that murder attracts a death sentence, the victim was their relative, violence was involved, the deceased lost his life and it will never be replaced. A sentence of 60 years was prayed for.

In order to determine the appropriate sentence, we have looked at the range of sentences for similar offences of murder in the cases below.

With regard to the 1st appellant who pleaded guilty, we take note of the case of ***Mwesige Peter vs Uganda (supra)*** cited to us by counsel for the appellant in which this Court reduced a sentence of 35 years to 15 years on a plea of guilty for murder. We also consider the following cases of similar nature.

In ***Emeju Juventine vs Uganda, CACA No. 095 of 2014*** where the appellant killed his wife with an axe and he was convicted of the offence of murder on his own plea of guilty and sentenced to 23 years imprisonment. On appeal, this Court reduced the sentence to 18 years imprisonment.

In ***Anguyo Robert vs Uganda, CACA No. 048 of 2009***, the appellant assaulted his uncle on the head using a hammer. He was convicted of murder on his own plea of guilty and sentenced to 20 years imprisonment. On appeal to this Court, the sentence was substituted with 18 years imprisonment.

We note that the range of sentences for murder of a plea of guilty in the above cases is between 15-18 years.

In regard to the 2nd, 3rd, and 4th appellants who pleaded not guilty, we take the following cases of similar nature into consideration.

This Court in ***Mboinegaba James vs Uganda, Criminal Appeal No.511 of 2014*** reduced a sentence of 40 years imprisonment to 30 years. The appellant had gruesomely killed his mother alleging that she refused to give him land.

In ***Tumwesigye Anthony vs Uganda, Court of Appeal Criminal Appeal No. 046 of 2012,*** the appellant had been convicted of murder and sentenced to 32 years imprisonment. The Court of Appeal sitting at Mbarara set aside the sentence and substituted it with 20 years imprisonment.

In ***No. 14459 SPC Oneti Dante vs Uganda, Court of Appeal Criminal Appeal No. 0007 of 2014 w***here the appellant was convicted of murder and sentenced to life imprisonment. On appeal, this Court substituted the sentence of life imprisonment with a sentence of 20 years imprisonment.

In the instant case, the 1st appellant who pleaded guilty was said to be a first offender who was 19 years old at the time he was committed for trial. He had just crossed into adulthood a few months prior to committing the offence, 10 months earlier. We also take note of the aggravating factors. In the circumstances, we find a sentence of 14 years imprisonment appropriate for the 1st appellant. In compliance with Article 23 (8) of the Constitution, we deduct the period of 2 years he spent on remand and sentence the 1st appellant to 12 years imprisonment to be served from the date of conviction, which is 25/04/2014.

As for the 2nd appellant, we note that he was also a young person at the time he committed the offence. The amended charge sheet dated 21/2/2013 indicates that the 2nd appellant was 18 years old. The offence was committed 10 months earlier on 21/4/2012. This implies that the 2nd appellant was below 18 years at the time of committing the offence. There is no Police Form 24 on record and so we were not able to see the 2nd appellant's age as found by the medical officer who examined him (If at all it was done). We also note that during his evidence in defence, the 2nd appellant's age was stated to be 18 years and this was on 11/2/2014 which

was after a period of 2 years and 1½ months from the date the offence was said to have been committed.

From the above record, it is clear that the 2nd appellant was a minor at the time he committed the offence. Had this fact been within the knowledge of the trial Judge, he would have convicted the 2nd appellant and remitted him to the Family and Children Court for an appropriate order under section 104 (2) of the Children Act.

The maximum penalty for an offence punishable by death under section 94 (1) (g) of the Children Act is 3 years. This means that the maximum sentence that could have been imposed on the 2nd appellant was 3 years and if the period of remand of 1 year 10 months is deducted, he would have been sentenced to 1 year and 2 months. The 2nd appellant has already served a period of over 5 years from the time he was convicted and sentenced. Overall, he has been in custody for a total of over 7 years if the period he spent on remand is considered. In the circumstances, we set aside the illegal sentence of 45 years imposed against the appellant and order for his immediate release unless he is held on other charges.

We regret the poor handling of this case by both counsel for the defence and the prosecution which resulted into an illegal sentence being imposed upon the 2nd appellant to his prejudice. We note that it is now common practice that no efforts are made to establish the age of the accused persons when they are arrested and even when they appear in court. If this is done such cases of miscarriage of justice would be avoided.

Turning to the 3rd and 4th appellants, we note that they were all adults of youthful age who can reform and be useful to society when given opportunity. They were both first offenders. The 3rd appellant spent 2 years on remand and the 4th appellant 1 year.

We are also alive to the aggravating factors presented by the prosecution at the trial namely that; violence was used on the deceased who was a relative of the appellants and the offence attracts a maximum penalty of death. Considering all these factors, we find a sentence of 22

years appropriate for both appellants. We deduct the 2 years the 3rd appellant spent on remand and sentence him to 20 years. We also deduct the period of 1 year spent by the 4th appellant on remand and sentence him to 21 years. The sentences are to be served from the date of conviction that is 25/04/2014.

This ground disposes of the alternative ground on severity of sentence.

We so order.

Dated at **FortPortal** this.....20th.....day of.....June.....2019

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F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Christopher Madrama

JUSTICE OF APPEAL