THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

CRIMINAL APPEAL NO. 523 OF 2014

KAFERO PAUL ::APPELLANT

VERSUS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

Introduction

This appeal is against sentence only arising from the decision of the High Court (Joseph Murangira, J) delivered on 22/11/2013 in which he re-sentenced the appellant to 29 years imprisonment for the offence of murder contrary to Sections 188 and 189 of the Penal Code Act.

Background

The brief background to this appeal as ascertained from the court record is that Mukabana Rose (the deceased) and the appellant were both village mates at Kyanika "B" Zone in Rakai District. On the night of 16/01/2002 while the deceased was in her grass thatched hut, an unknown person entered it and strangled her. Her dead body was discovered in the morning of 17/01/2002 by a one Nakate Sofiya who had gone to greet her. She made an alarm and the residents gathered at the scene including the area LC1 Chairman and the matter was reported to police and investigations were

carried out. Subsequently, the deceased's daughter found a belt fastening metal on the deceased's bed which the residents suspected belonged to the appellant, Kafeero Paul. As a result, the area Defence Secretary a one Lukyamuzi, went in search of the appellant who was asked to produce his belt but it was discovered that it had no fastening metal and he could not satisfactorily explain where it was. The appellant was arrested and taken to Kabira Police Post and a post mortem examination was carried out on the deceased's body which revealed that the cause of death was suffocation after strangulation, though this postmortem report was not tendered in court. The appellant was indicted, tried and convicted of the offence of murder and sentenced to death which was a mandatory penalty for murder at the time.

Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing. Having heard the submissions of both counsel in the mitigation proceedings, the Judge sentenced the appellant to 29 years' imprisonment.

Being dissatisfied with the decision of the High Court, he appealed to this Court against sentence only faulting the learned re-sentencing Judge for imposing an illegal sentence against him.

Representation

At the hearing of this appeal, Mr. Mooli Albert Sibuta represented the appellant on state brief while Ms. Annet Namatovu Ddungu, Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

Counsel for the appellant sought leave of this Court to appeal against sentence only under section 132 (1) (b) of the Trial on Indictments Act, which was granted. He submitted that after a re-sentencing hearing, the appellant was sentenced to 29 years and the re-sentencing Judge said that the sentence was without remission. Counsel argued that this sentence is illegal as was held by the Supreme Court in ***Wamutabaniwe Jamil vs Uganda, (SC) Criminal Appeal No. 74 of 2007*** where it was stated that an appellant is not to be denied remission which he is entitled to under the Prison's Act.

Counsel also added that the trial Judge erroneously included the post-conviction period to the period the appellant had spent on remand and deducted 11 years instead of 3 years. Counsel prayed that this Court sets aside the sentence and invokes section11 of the Judicature Act and sentences the appellant to an appropriate sentence. He invited this Court to look at the mitigating factors which include; the age of the appellant at the time he committed the offence, he was 20 years old then, and he was a first offender, which the sentencing court ought to have considered. He was remorseful and had learnt a lot while in prison and seeks for leniency of this Court. He also undertook some training and acquired some skills specifically in carpentry and basket weaving while in prison and if given opportunity he will be able to make a living for himself. In conclusion, counsel prayed that the sentence of 29 years imprisonment be set aside and the appellant be sentenced to 20 years less the 3 years he spent on remand.

Case for the Respondent

Conversely, counsel for the respondent conceded that the sentence was illegal for not including remission and she prayed that the same be quashed and substituted with a proper sentence provided for under the laws. However, she contended that the sentence of 29 years imprisonment was proper considering the circumstances of the case. Counsel submitted that the aggravating factors included the fact that; the appellant targeted a delicate part of the body which is one of the aggravating circumstances under guideline 20(b) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013; the appellant demonstrated hostility based on gender; and the victim was an elderly lady staying on her own. She prayed that in consideration of those aggravating factors, this Court considers the sentence of 29 years imprisonment as appropriate.

Court's findings

We are aware of our duty as the first appellate Court under **Rule 30 of the Judicature (Court of Appeal Rules) Directions** to re-appraise the evidence on record and draw inferences of fact. See also Supreme Court decision in ***Narsensio Begumisa vs Eric Tibebaga, SCCA 17/2002; [2002] UGSC 18*** in which this duty was elaborately explained.

We have heard the submissions of both counsel and considered the authorities cited to us. We have also carefully perused the court record especially the sentencing proceedings. This Court can only interfere with a sentence of the trial court, if there is an illegality, that is, where the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which

ought to be considered while passing sentence or where the sentence imposed is wrong in principle. See: ***Kiwalabye Bernard vs Uganda, SCCA No.143 of 2001 (unreported)***.

In the instant appeal, the re-sentencing Judge while passing the sentence stated thus;

> *"Considering the above mitigating factors, the convict deserved a death sentence. However, this particular case, pursuant to Guideline 17 of the Constitution Sentencing Guidelines (supra), and within my discretion, the convict would be sentenced to 40 years. Thus I subtract the 11 years he has been in prison since he was remanded in prison till to date. Therefore the convict is sentenced to 29 (twenty nine) years imprisonment in prison….*
>
> *And the word "in prison" is emphasized, the remission as provided under the Prison's Act will not apply. It means in prison. "*

It is clear from the above excerpts of the sentencing proceedings that the re-sentencing Judge passed a sentence without remission. Counsel for the respondent conceded that there was indeed an error.

Section 84 of the Prison's Act provides for remission as follows:

> *(1) A convicted prisoner sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences.*
>
> *(2) For the purpose of giving effect to subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he or she would be entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission.*

The circumstances under which a convict can lose his remission are provided for under section 85 of the Prison's Act as follows:

> *'A prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period spent in*

hospital through his or her own fault or while malingering, or while undergoing confinement as a punishment in a separate cell."

From the above provision of the law, remission is neither given nor taken away by courts of law during sentencing. We therefore accept counsel for the appellant's submission that the sentence by the re-sentencing Judge which excluded the appellant's right to remission was illegal.

We also note that the re-sentencing Judge deducted a period of 11 years which he said the appellant had spent on remand. However, the records show that the appellant was arrested on 16/01/2002 and convicted on 6/6/2005. This means the appellant spent 3 years, 4 months and 21 days on remand. The 11 years the re-sentencing Judge erroneously referred to as the period spent on remand included the period of 8 years, 5 months and 15 days the appellant was on death row awaiting execution. That period could not be deducted from the sentence to be imposed as sentences start running from the date of conviction. We therefore find that the re-sentencing Judge also erred by treating it as part of the period the appellant spent on remand and deducting it from the final sentence.

We accordingly set aside the sentence for being illegal and invoke section 11 of the Judicature Act which gives this Court the power, authority and jurisdiction as that of the trial court to impose a sentence of its own. In arriving at an appropriate sentence, we have considered both the mitigating and aggravating factors which were presented as highlighted herein above by counsel. We shall also consider the sentencing range in cases of a similar nature.

On range of sentences, in ***Latif Buulo vs Uganda, Court of Appeal Criminal Appeal No. 0323 of 2014***, the appellant was convicted of murder and sentenced to death. Following the decision in ***Attorney General vs Susan Kigula and 417 ors (supra),*** the High Court at

Kampala re-sentenced the appellant to 30 years imprisonment. He appealed to this Court and his sentence was reduced to 25 years imprisonment.

In ***Mbunya Godfrey vs Uganda, SCCA No. 004 of 2011,*** the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

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.

Taking into consideration the sentencing range in the cases cited above and those not cited and the aggravating and mitigating factors, we are of the considered view that the ends of justice will be met by sentencing the appellant to 25 years imprisonment in the circumstances of this case. We deduct the period of 3 years, 4 months 21 days the appellant had spent in lawful custody and sentence him to a period of 21 years, 7 months and 9 days imprisonment to be served from the date of conviction, which is 06/06/2005.

We so order.

Dated at **Kampala** this 25th day of June 2019

.....

Elizabeth Musoke

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL

Ezekiel Muhanguzi

JUSTICE OF APPEAL

25/6/19.

Appellant present.
Mr. [illegible] for the Resp.
No counsel for the appellant.
Court: Judgment delivered in open court in the presence of the above.

25/6/19