THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Obura, Madrama, JJA*]

Criminal Appeal No. 80 of 2014

(Arising from High Court Criminal Session Case No.146 of 2013 at Fort Portal)

BETWEEN

Bigirimana Vincent.....Appellant

AND

Uganda ..... Respondent

(An appeal from the judgement of the High Court of Uganda [Kiza Akiiki, J] delivered on 13th March 2014)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted, tried and convicted of the offence of murder contrary to sections188 and 189 of the Penal Code Act, Cap. 120. The particulars of the offence are that the appellant, on the 24th day of January 2013 at Rwamanyonyi village in Kamwenge district murdered Kajambere Stephen. On 13th March 2014, the learned trial judge sentenced the appellant to 35 years' imprisonment.

[2] Dissatisfied with that decision the appellant appealed against the sentence only on the following ground:

> 'That the sentence passed against the appellant was illegal as it contravened **Article 23(8) of the Constitution** or in the alternative the sentence was harsh and manifestly excessive in the circumstances.'

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellant was represented by Mr. Bwiruka Richard and the respondent by Ms. Namazzi Racheal, Senior State Attorney in the Office of the Director, Public Prosecutions. The appellant's counsel adopted his written submissions.

[5] Counsel for the appellant submitted that the sentence of 35 years imposed against the appellants without putting into consideration the 1 year and 1 month, period the appellant spent on remand, is illegal for failing to comply with the constitution. It should be set aside. To support this contention, Mr. Bwiruka cited article 23 (8) of the Constitution of the Republic of Uganda. He submitted that this court has power under section 11 of the Judicature Act to set aside the sentence and substitute it with an appropriate one. The appellant therefore prayed that this court sets aside the illegal sentence and imposes an appropriate sentence.

[6] Mr. Bwiruka Richard also submitted that the period of 35 years' imprisonment is too harsh given the fact that the appellant was 33 years at the time of commission of the offence. He is a young man able to reform and the learned trial judge should have put this into consideration. He further submitted that the offence was committed after a drinking spree and he was not in proper control of his mind. Mr. Bwiruka submitted that the appellant is a sick man whose hand got burnt because of his epileptic condition and that he was a first-time offender. Mr. Bwiruka proposed a period of 15 years' imprisonment less the period the appellant has been on remand because there is need for consistency in sentencing. He relies on the case of Ireeta Hussein v Uganda, Court of Appeal Criminal Appeal No. 528 of 2014 (unreported) where this court after considering other similar offences sentenced the appellant who hit the deceased with a stone on the head to 17 years' imprisonment. The appellant prayed that this court allows the appeal.

[7] In reply Ms. Namazzi submitted that the learned trial judge put article 23 (8) of the Constitution into consideration while sentencing the appellant which can be deduced from the sentencing order. She relied on Abelle Asuman v Uganda [2018] UGSC 10 for the proposition that taking into account the period spent on remand does not necessarily have to be arithmetical. She submitted that this case is a departure from the decision in Rwabugande Moses vs Uganda [2017]

UGSC 8 that required courts to do an arithmetical deduction of the remand period at the end of sentencing.

[8] Ms. Namazzi further contended that the sentence of 35 years imprisonment is neither harsh nor excessive given the fact that this court in several cases has imposed 35 years imprisonment and above for the same offence. She refers to the case of Ssemanda Christopher & Anor. v Uganda Court of Appeal Criminal Appeal No. 77 of 2010 (unreported) where this court upheld the sentence of 35 years' imprisonment for the offence of murder and stated that even 37 years was considered not to be harsh or excessive. She prayed that this appeal be dismissed and the sentence against the appellant be upheld.

Analysis

[9] The facts of this case are that on the 24th day of January 2013, the deceased, his wife Nyirabakobwa Flora (PW2) went with two of their children to the trading centre to buy dry cells for their radio. On their way back, the deceased branched off to a bar owned by a one Besimba Richard where his wife and children were to pick him up from after buying the cells. The deceased's wife found him with the appellant and PW1 taking alcohol in the bar. Nyirabakobwa left the bar at around 8:00 pm with the deceased and the children but the appellant followed the family back to their home. The wife and the daughter managed to enter the house but the appellant pulled the deceased as he was entering the house and started hitting him with a pestle on the head. The deceased's family tried to rescue him but the appellant overpowered them. In the process, many of the family members were injured by the appellant. Meanwhile, the appellant continued hitting the deceased on the head while threatening to kill the family. The deceased's wife raised an alarm and Rukundo Emmanuel (PW1), his son came to their rescue and the appellant ran away. Rukundo found the deceased lying in a pull of blood and he asked him what had happened and he said that the appellant wants to kill him and his family. The deceased was rushed to hospital but he died shortly. A post mortem was carried out and it was revealed that the deceased died from bleeding into the brain caused by severe head injuries. Upon arrest the appellant was examined and found to be of sound mind.

[10] The general principles regarding the sentencing powers of an appellate court are well established and have been set out in numerous cases by the Supreme Court. In Livingstone Kakooza vs Uganda [1994] UGSC 17 the Supreme Court stated that:

> 'An appellate court will only alter a sentence imposed by **the trial court if it is evident it acted on a wrong principle** or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration" See Ogalo S/O Owoura v R (1954) 21 E.A.CA 270, Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995, Kamya Johnson Wavamuno vs. Uganda, Criminal Appeal No.16 of 2000, Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001'

[11] The appellant contended that the sentence imposed against him is illegal because the learned trial judge did not deduct the period he spent on remand as required by Article 23(8) of the Constitution which states:

> '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.'

[12] In our view the foregoing provision imposes an obligation on the trial court to take into account the period a convict has spent on remand in the determination of sentence to be imposed upon the convict. Failure to comply with the foregoing constitutional provision renders the subsequent sentence a nullity. In Rwabugande Moses vs Uganda [2017] UGSC 8, 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.

[13] The sentencing order which is the subject of this appeal appears at page 17 of the judgment of the trial court and is set out as follows:

> **'Court: Sentence and reasons thereof**:
> Accused is allegedly a first offender. He has been on remand for 1 year and I month-which I deduct from the sentence I will impose on him. He has prayed for leniency and says he has orphans. He is said to be still a young man and has epilepsy.
> However Murder is a serious offence. The maximum sentence upon conviction is death. The accused took away the life of our innocent man-the relatives have lost him for ever on this world. They have lost his love and care. The manner in which the accused had attacked the deceased

was brutal and savage. He broke his jaw and also attacked his relatives who had come to his rescue.
This showed that he was determined to destroy the deceased as he had said he would kill all of them.
Such behaviour can not be tolerated by this court. Exemplary sentence must be imposed on convicted murderers. Putting everything into consideration I sentence him to 35 (Thirty Five years) imprisonment.'

[14] The Supreme Court in Abelle Asuman v Uganda [2018] UGSC 10 while discussing its decision in Rwabugande Moses vs Uganda (supra) where it had held that taking into account of the remand period while determining the appropriate term of sentence should be an arithmetical exercise stated:

> 'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
>
> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.'

[15] It is no longer mandatory to apply the mathematical formula as per Abelle Asuman v Uganda (supra). Courts can apply either the non-mathematical formula or apply the mathematical formula in accordance with Rwabugande Moses vs Uganda (supra). However, whichever method court decides to use, it must be shown that this period has been specifically credited to the convict. This period cannot be deducted before an appropriate sentence is determined. It should be reflected in the final sentence.

[16] We are of the view that the learned trial judge in this case did not take into account the time the appellants spent on remand as required by the law. It is not clear whether the trial judge actually deducted the period from the sentence. From the sentencing order it could either be implied that the original sentence was 36 years and 1 month imprisonment from which the trial court removed 1

year and 1 month to arrive at the final sentence of 35 years or the trial court actually did not subtract the period for one reason or another. It is in the interest of justice that sentences imposed by courts should not be ambiguous. In light of the foregoing, we find that the learned trial judge did not comply with the provisions of Article 23 (8) of the constitution.

[17] The sentence against the appellant is set aside. We now invoke Section 11 of the Judicature Act which gives this court power as that of the trial court to impose a sentence of its own.

[18] We note that the appellant spent 1 year and 1 month on remand. We take into consideration the fact that the appellant was a first-time offender. He was of a relatively young age and pleaded for leniency. However, we also note that the appellant committed a grave offence that carries the maximum punishment of death and therefore his sentence must reflect the severity of the offence. Moreover, the offence was committed in a gruesome and inhumane manner to a fellow family member in front of his family. It was somewhat a senseless killing and probably the earlier drinking of the appellant prior to the commission of the offence had something to do with it.

[19] We also note that there is need for parity in sentencing. We have to take into consideration the sentences the Supreme Court and this court have imposed on offenders in similar circumstances. Objective 3(e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to determine the appropriate sentence lies with the Court by weighing all relevant facts and then exercising its discretion judiciously.

[20] In Livingstone Kakooza vs Uganda [1994] UGSC 17 the Supreme Court was of the view that sentences imposed in previous cases of similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are obliged to maintain consistence or uniformity in sentencing as an aspect of the constitutional principle of equality before the law while being mindful that cases are not necessarily committed under the same circumstances

[21] In Tumwesigye Anthony v Uganda [2014] UGCA 61 this court set aside a sentence of 32 years' imprisonment and substituted it with 20 years. The appellant in that case was 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.

[22] In another case before this court, Atiku Lino v Uganda [2016] UGCA 20, the appellant was convicted of murder and sentenced to life imprisonment. The appellant had attacked and cut to death the deceased in the latter's house accusing him of bewitching his son. This Court, citing the case of Tumwesigye v Uganda (supra) observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was reduced and substituted with 20 years of imprisonment.

[23] In Osherura & Anor v Uganda [2018] UGSC 24, where the appellants assaulted the deceased to death with a panga, the Supreme Court upheld a sentence of 25 years' imprisonment that was imposed against the appellant for the offence of murder. In Ndyomugenyi v Uganda [2018] UGSC 20, the appellant was convicted of murder contrary to Sections 188 and 189 of the Penal Code Act and was sentenced to suffer death. Pursuant to the Supreme Court decision in Attorney General v Suzan Kigula and 417 Ors [2009] UGSC 6, the case was referred back to the High Court for mitigation of sentence only. On re-sentencing the High Court substituted the death sentence with a term of imprisonment of 20 years. The appellant appealed against the subsequent sentence to the Court of Appeal. The Court of Appeal upheld the sentence and dismissed the appeal. The Supreme Court confirmed the sentence on appeal.

[24] In Rwabugande Moses v Uganda (supra), the convict's cattle trespassed on the deceased's land and destroyed his crops. The deceased ceased the cattle and took it to his home with the intention of calling the local council chairman of the village to settle the matter. The appellant came to the deceased's home and demanded release of his cows and when the deceased declined, he and his herdsmen beat him to death. The trial court sentenced him to 35 years imprisonment but on appeal, the Supreme Court reduced the sentence to 21 years imprisonment.

[25] In Akbar Godi v Uganda [2015] UGSC 17, the convict shot his wife to death. He had earlier been threatening to kill her. The deceased had informed her relatives and friends that her life was in danger. The convict eventually executed his plan. He was convicted and sentenced to 25 years' imprisonment. This sentence was confirmed on appeal by both the Court of Appeal and Supreme Court.

Decision

[26] We find that a term of 21 years' imprisonment would meet the ends of justice in this case from which we deduct the period of 1 year and 1 month the appellant spent in pre-trial detention. We accordingly sentence the appellant to a term of **19 years 11 months' imprisonment to be served from 13th March 2014, the date** of conviction.

[27] This appeal is therefore allowed.

Dated, signed and delivered at Fort Portal this 30th day of July 2019

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Christopher Madrama
Justice of Appeal