THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT GULU

Criminal Appeal No. 95 of 2016

Coram: Kakuru, Tuhaise, & Kasule, JJA

Okello Denis ..... **Appellant**

Versus

Uganda ..... **Respondent**

(Appeal arising from the judgment of Margaret Mutonyi J, at the High Court of Uganda Holden at Gulu in Criminal Case No. 54 of 2007 delivered on 6th April 2016)

Judgment of the Court

The appellant was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that, the appellant and Onencan Moses, on the 28th day of December 2006 at Kati Kati Village in Amuru District murdered one Anena Scovia.

The appellant was arrested, indicted and convicted of murder. He was sentenced to 30 years imprisonment. The appellant, with leave of Court, appealed against sentence alone, on one ground of appeal, that:-

1. The learned trial Judge erred in law and fact when she passed a harsh and excessive sentence in the circumstances of the offence, thereby occasioning a gross miscarriage of justice to the appellant.

Background

During the night of the 28th day of 2006, the appellant and a one Onencan Moses went to Obiya West sub ward, in Gulu municipality Gulu District, and picked Anena Scovia, the deceased. Onencan Moses and the deceased had an argument in the night, with Onencan Moses accusing the deceased of having stolen his shoes and clothes. Later, the dead body of Anena Scovia, a girl aged 14 years, was found lying along the Gulu – Juba road. Her body was later identified by a relative. The post mortem report indicated that the deceased had been sexually abused before she was murdered. The body had internal and external injuries. The cause of death was believed to asphyxia/suffocation.

The appellant and Onencan Moses, who, together with the deceased, were all residents of Kati –Kati Village, were arrested as suspects. They made statements in which each one accused the other of murdering Anena Scovia.

The appellant and Onencan Moses were subsequently charged with the murder of Scovia Anena and they pleaded not guilty. The case was adjourned repeatedly since 2008, awaiting results of the deceased's vaginal smear examination from the Government Chemist Analytical Laboratory. Onencan Moses was eventually released on a no case to answer, but on 6th April 2016, the appellant was convicted of the murder of the deceased. He was sentenced to 30 years imprisonment.

Representation

Mr. Denis Ochaya Achellam, learned Counsel, appeared on state brief for the appellant. Mr. Moses Onenchan, learned Assistant Director of Public Prosecutions (DPP), appeared for the respondent. The appellant was in Court at the hearing of this appeal.

Submissions for the Appellant

Mr. Achellam submitted that the sentence of 30 years imprisonment imposed upon the appellant on his conviction was harsh and excessive in the circumstances. Counsel referred this Court to the statements of the learned trial Judge on page 70 of the record, where she acknowledged that the accused (the appellant in this appeal) was a young man aged about 20 years when he committed the crime. He submitted that this was a mitigating factor as indicated in the reasons for the sentence. Counsel contended that the appellant should have been given a more lenient sentence that would give him a chance to reform.

Counsel also referred this Court to the *allocutus* proceedings where the convict clearly stated that he had learnt a lesson and that he would not commit any other crime or do wrong. According to Counsel, the learned trial Judge ignored the fact that the appellant was regretting his actions. Counsel argued that the appellant may not have pleaded guilty, but at a later date, he started regretting what had happened.

Counsel further referred this Court to page 11 of the record of proceedings of the trial court, where it was noted that the appellant was a first offender. He submitted that this is a mitigating factor which should have been considered; and that if this had been taken into account judiciously, the sentence would have been less than what was imposed upon the appellant.

Counsel prayed that this Court considers reducing the sentence of 30 years imprisonment imposed upon the appellant to 18 or 20 years imprisonment. He relied on the case of **Turyamushanga**

Kyoma John V Uganda, Court of Appeal Criminal Appeal no. 197 of 2013 to support his submissions.

Submissions for the Respondent

Mr. Onenchan opposed the appeal. He submitted that the sentence that was passed on the 6th of April 2016, by which time the judgment of **Rwabugande V Uganda, Supreme Court Criminal Appeal No. 25 of 2014** that was passed on 3rd March 2016 was in force. According to Counsel, the judgment should have been in line with the ruling in the **Rwabugande** case, much as the judgment in **Rwabugande** was not brought to the attention of the trial court.

Counsel submitted that the learned trial Judge passed a lenient and appropriate sentence, considering the circumstances of the case. He also maintained that the learned trial Judge took into account the aggravating and the mitigating factors before resolving on the sentence. He prayed this Court that it confirms the sentence of the trial Judge.

Resolution of the appeal.

We have addressed our minds to the adduced evidence, the submissions of counsel for both sides, the authorities cited, and the law applicable to the circumstances of this case.

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under rule 30 (1) of the Judicature (Court of Appeal Rules) Directions. It will however be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. See: **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No.10 of**

1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.

This appeal is against sentence only. The law is now well settled on when an appellate court can properly interfere with a sentence passed by a trial Judge. In **Livingstone Kakooza V Uganda, Supreme Court Criminal Appeal No. 17 of 1993**, which cited with approval the case of **Ogalo s/o Owoura V R [1954] 21 EACA 270**, the Supreme Court reiterated the principle that the appellate court is not to interfere with the sentence imposed by a trial court in the exercise of its discretion, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive, or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle. Also see: **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

The record of appeal shows on page 70 that the learned trial Judge gave reasons for the sentence she imposed upon the appellant. She stated;

> *"The convict sexually abused a young girl of about 14 years and also took away her life. In spite of the threatening he claims he got from JLOS while in prison, he never owned up to his heinous and atrocious crime of sexual abuse and murder.*
>
> *The victim did not deserve to be murdered as no person has a right to take away the life of another. In fact, the convict should have been charged with two counts of murder and either*

defilement or rape. He is lucky that state preferred only one count.

Sexual gender based violence directed at women has to be condemned in the strongest term. The dignity of the victim was abused. She was robbed not only of her life but her sanctity as well.

For 10 years, the convict did not find room in his heart to sum up to his gruesome crime which had double abuse and murder. The sexual violence that preceded to murder deserved retribution to protect the women and children out there. Murder is a serious crime punishable by death as maximum. The state had prayed for life imprisonment. This Court however, has observed that the convict committed the crime when he was about 20 years old according to PF 24 A. He was a young man.

But his un-remorseful acts even up to now does not show that given an opportunity he cannot commit rape/defilement and murder.

Accused when given an opportunity to speak from the bottom of his heart, he is more concerned about himself and what he is doing. He could not say he was very ashamed of what he did. And sorry.

Very many young women out there are abused by their stronger male counter parts every day and killed in cold blood.

In the result, he is sentenced to 30 years imprisonment period spent on remand inclusive."

It is clear from the record that the learned trial Judge took into account the mitigating factors and the aggravating factors. However,

though this was not raised by the appellant's counsel, we note that the learned trial Judge's stating that the 30 years imprisonment was inclusive of the period the appellant spent on remand infers that the learned trial Judge added, rather than subtracted, the period the appellant spent on remand.

This rendered the sentence to be illegal, based on Article 23 (8) of the Constitution of Uganda which states that 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. This provision of the Constitution is mandatory, as was held in the case of **Rwabugande**, already cited above. We cannot turn a blind eye on this illegality, in the interests of justice.

This therefore leaves us with no option, other than setting aside the sentence imposed by the learned trial Judge, on grounds that it was illegal for failure to comply with the provisions of Article 23 (8) of the Constitution. We hereby do so.

Consequently, in exercise of our powers under section 11 of the Judicature Act, we proceed to sentence the appellant afresh, which of necessity requires us to address the prevalent circumstances of the case at the time of conviction of the appellant.

The appellant was convicted of murder which carries a maximum sentence of death. He sexually abused a young girl and then killed her. Counsel for the appellant argued that, considering the appellant's age at the time he committed the offence, he should have been given a chance to reform with a lenient sentence. However, the learned trial Judge noted that even after 10 years, the appellant showed no sign of remorse.

In the case of **Turyamushanga Kyoma John V Uganda, Court of Appeal Criminal Appeal No. 197 of 2013**, the appellant was convicted of murder. He was sentenced to death in 2008. His case was remitted to the High Court for re-sentencing pursuant to the decision in **Attorney General V Susan Kigula and 417 Others, Constitutional Appeal No. 3 of 2006**. He was re-sentenced to 26 years imprisonment. He appealed to this Court against sentence alone. The sentence of 26 years imprisonment was set aside and substituted with a sentence of 20 years imprisonment.

In **Ssemanda Christopher & Another V Uganda, Court of Appeal Criminal Appeal No. 77 of 2010,** the appellants were convicted of murder. They were sentenced to 35 years imprisonment by the trial court. This Court upheld the sentence of 35 years imprisonment against each of the appellants.

In **No. 017 LDU Kyarikunda Richard V Uganda, Court of Appeal Criminal Appeal No. 296 of 2009**, the appellant appealed against the death sentence handed down to him by the learned trial Judge for murder. He appealed against sentence alone. This Court set aside the sentence of death and imposed a sentence of 30 years imprisonment against him.

In the circumstances of the case from which this appeal arises, we are of the considered view that, were it not for its illegality, a sentence of 30 years imprisonment is not harsh and excessive. We are therefore interfering with the sentence of the trial Judge purely on the basis of illegality.

It is on that basis that we set aside the illegal sentence of 30 years imprisonment against the appellant, and substitute it with a sentence of 30 years imprisonment. However, the record shows that

the appellant was granted bail on 30th June 2010 having been on remand for 1½ years. His bail was cancelled on 21st March 2016. Considering that the appellant spent 1½ years in detention prior to the time court granted him bail, and an additional 3 years and 9 months after the bail was cancelled in 2016, this period of 5 years and 3 months shall be deducted from the 30 years imprisonment. The appellant is therefore sentenced to 24 years and 9 months imprisonment to run from 6th April 2016 the date of his conviction.

We so order.

Dated at Gulu this ....15-th.... day of ....Jan.....2020.

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Kenneth Kakuru

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal