THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
AT MBARARA

CRIMINAL APPEAL N0. 0327 OF 2014

TURYAHIKA JOSEPH .....APPELLANT

VS

UGANDA.....RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE SIMON BYABAKAMA MUGENYI, JA
HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA

JUDGMENT OF THE COURT

The appellant was on 18th September 2002, convicted of murder by the High court of Uganda at Kabale presided over by *Hon. Lady Justice Mary I.D.E Maitum* J and sentenced to suffer death. At that time, the death penalty was the only sentence prescribed by the law for the offence of murder.

On 25th September 2002 he appealed to this Court against conviction and sentence. The appeal was heard on 2nd December 2004 and dismissed on 21st March 2005. The appellant then appealed to the Supreme Court *vide* ***Supreme Court Criminal Appeal N0. 13 of 2005***. We have not been able to ascertain from the Court records whether or not his appeal was heard and determined by the Supreme Court. What we ascertained is that the

Supreme Court sent the file back to the High Court for mitigation proceedings and sentencing following the decision in ***Attorney General Vs Suzan Kigula and 417 others: Constitutional Petition Appeal No. 03 of 2006,*** in which the Supreme Court upheld the decision of the Constitutional Court annulling the mandatory death penalty. In that case, ***Attorney General Vs Suzan Kigula (supra),*** the Supreme Court directed that all the cases in which persons had been convicted of capital offences and sentenced to the mandatory death penalty be re-returned to the High Court for mitigation proceedings and re-sentencing.

Following the said directive and order of the Supreme Court, the file in the instant case was returned to the High court and on 18th November 2013, mitigation proceedings were held before Hon. Justice David K. Wangutusi .

Hon. Justice Wangutusi on 22nd November 2013 re-sentenced the appellants to 36 years imprisonment. This appeal is in respect of the severity of that sentence only. The ground of the appeal is set out as follows;-

> ***"The learned trial Judge erred when he imposed a harsh and excessive sentence of 36 years in prison when there were mitigating factors that called for a lesser sentence.***

Representations.

At the hearing of this appeal, **Mr. Boniface Ngaruye Ruhindi** learned counsel appeared for the appellant on state brief, while **Ms. Jacqueline Okui** Senior State Attorney appeared for the respondent. The appellant was in court.

Appellant's case.

It was submitted for the appellant that the sentence of 36 years imprisonment imposed upon him was harsh and manifestly excessive. Further, that the learned trial Judge mis-directed himself on sentence. Counsel argued that the manner in which the sentence was arrived at and set out by the trial Judge was ambiguous and did not comply with the law. In the result, Counsel argued, it was unclear whether the appellant had been sentenced to serve a term of 50 or 36 years imprisonment.

Counsel asked this Court to set the sentence aside and to substitute it with a lesser and a more appropriate sentence. Without prejudice to the above, counsel also submitted that the appellant had been charged and convicted of causing death by reckless driving and had already served a two year jail term for that offence, resulting from the same facts. He argued that the trial and conviction on murder charges arising from the same facts amounted to double jeopardy. He asked Court to take that factor into account considering the sentence.

The Respondent's case

Ms. Okui for the respondent conceded that the learned trial Judge mis-directed himself on sentence when he considered the post conviction period together with the remand period and deducted the total from 50 years he intended to impose upon the appellant. Counsel nevertheless submitted that a sentence of 36 years for the offence of murder which carries a maximum penalty of death was neither harsh nor manifestly excessive and fell within the established sentencing range for the offence.

She referred this Court to ***Mutatiina Mushaiji Vs Uganda: Court of Appeal Criminal Appeal No. 55 of 2013,*** in which this Court set aside a sentence of 40years for murder and substituted it with that of 36 years. She further argued that in the ***Mutatiina case*** *(supra),* the circumstances were not as grave as the ones in this case. Counsel submitted that the Court of appeal had heard the arguments of the appellant in respect of the issue of double jeopardy and dismissed them.

She asked Court to maintain the sentence.

Resolutions

We have listened carefully to the submissions of counsel. We have also read the Court record and the authorities cited to us. As a first appellate Court, we are required to

re-appraise the evidence adduced at the lower Court and to make our own inferences. See **Rule 30(1) of the Rules of this Court** and ***Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997.*** We shall therefore proceed to do so.

This Court may not interfere with the trial Judge's discretion on sentence except only in limited circumstances. Those circumstances were set out by the Supreme Court, following earlier decisions of its predecessors, the Court of Appeal of East Africa, in ***Kiwalabye Bernard versus Uganda: Criminal Appeal No. 143 of 2001*** as follows:-

> ***"The appellate Court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence 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 circumstances which ought to be considered while passing the sentence or while the sentence imposed is wrong in principle"***

In this case, it is conceded by the respondent's counsel that the learned sentencing Judge misdirected himself on

sentence. The learned trial Judge while passing the sentence stated as follows;-

> ***"If this matter was to lie within the expected time spans of expedited prosecution, it would have appropriately called for the death penalty. The convict in this matter has however, been in detention for 14 years out of which 3 are post conviction, to sentence him to death after he has been under sentence of death for so many years would be unconscionable. Pratt & Morgan Vs Attorney General of Jamaica [1994] AC 1."***
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> ***Because of the foregoing aggravating factors, the prison term will be raised from 35 years to 50 years. It is from these 50 years that I deduct the 14 years he has spent in detention and sentence him to 36 years imprisonment. He is so sentenced."***

From the above excerpt, it is apparent that the Judge had intended to impose on the appellant a 50 year sentence. He then considered the period of 3 years the appellant had spent in lawful custody prior to his conviction and the period he had spent in custody from the time of conviction to the time of re-sentencing which was 11 years. He then deducted the total period of 14 years of the 50 years and then sentenced the appellant to 36 years imprisonment. It appears to us that the learned trial Judge used the 35 year

jail term which is the minimum jail period recommended under the sentencing guidelines for a person convicted of murder. ***See: 3rd Schedule of The Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions Legal Notice No. 8 /2013***. Taking 35 years as the starting point he then increased it by 15 years because of the aggravating factors he had found. This is not very clear from the excerpt, it is only what we could infer.

We find that the sentence was ambiguous and we set it aside on that account. We also find that the learned Judge mis-directed himself on the sentencing procedure. **Article 23(8) of the Constitution** stipulates 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."***

From the above constitutional provision, it is clear to us that the only period to be taken into account before passing a sentence is the pre-conviction period. In this case, the learned trial Judge should only have taken into account the pre-conviction period and not the period after conviction. He should then have imposed an appropriate

say this because it is evident from the cases that come to the Courts of law. Many other cases do not make it to the Courts.

The appellant was only 22 years old. He is likely to reform. He is a first offender with no previous record of conviction . He deserves an appropriate sentence, which is within the now established range for first time offenders. We also note that in this case, there was one loss of life and the murder was not coupled with any other offence(s). We consider also that the appellant had spent 3 years on remand.

In similar circumstances, this Court and the Supreme Court have confirmed or imposed sentences ranging from 20 to 30 years. In exceptional circumstances, the sentences have been lower or higher.

In ***Aharikundira Yustina Vs Uganda: Court of Appeal Criminal Appeal NO. 104 of 2009***, this Court confirmed a sentence of death for murder.

In ***Sunday Gordon Vs Uganda: Court of Appeal Criminal Appeal NO. 0103 of 2006***, this Court confirmed a sentence of life imprisonment for murder.

In ***Tusigwire Samuel Vs Uganda: Court of Appeal Criminal Appeal NO. 110 of 2007*** this Court reduced a sentence of life imprisonment to 30 years for murder.

In ***Bandebaho Benon Vs Uganda: Court of Appeal Criminal Appeal 319 of 2014,*** this Court reduced a sentence from 35 years to 30 years for murder.

In ***Kajungu Emmanuel Vs Uganda: Court of Appeal Criminal Appeal NO. 625 of 2014,*** this Court confirmed a sentence of 30 years imprisonment for murder.

In ***Kyaterekera George William Vs Uganda: Court of Appeal Criminal Appeal NO. 0113 of 2010,*** this Court upheld a sentence of 30 years imprisonment for murder.

In ***Hon. Godi Akbar vs Uganda: Supreme Court Criminal Appeal No 3 of 2013,*** the Supreme Court confirmed a 25 year imprisonment for murder.

In ***Kisitu Majaidin alias Mpata vs Uganda: Court of appeal Criminal Appeal No. 28 of 2007,*** this Court upheld a sentence of 30 years imprisonment for murder. The appellant had killed his mother.

In ***Suzan Kigula vs Uganda Supreme: Court Criminal Appeal No 1 of 2014,*** the Supreme Court reduced the sentence from death to 20 years imprisonment.

In ***Atuku Margret Opii vs Uganda: Court of Appeal Criminal Appeal No. 123/2008,*** this Court reduced the sentence from death to 20 years imprisonment. The appellant was a single mother of 8 children. She killed a neighbour's 12 year old daughter by drowning her in a well.

Taking into account the above factors, we now sentence the appellant to 26 years imprisonment. The sentence shall run from 18th September, 2002 the date he was convicted.

Dated at Mbarara this.....day of November 2016.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE SIMON BYABAKAMA MUGENYI
280 **JUSTICE OF APPEAL**

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285 **HON. JUSTICE ALFONSE C. OWINY-DOLLO**
JUSTICE OF APPEAL

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