THE REPUBLICOF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 42 OF 2017

(Coram: Opio Aweri, Mwondha, Buteera JJSC; Nshimye, Tumwesigye AG. JJSC)

BETWEEN

WAFULA ROBERT...APPELLANT

AND

UGANDA...RESPONDENT

(Appeal against the Judgment of the Court of Appeal, at Kampala delivered on the 22nd August, 2017 by Musoke, Barishaki and Mugamba JJA)

JUDGMENT OF THE COURT

This is a second appeal against sentence only arising from the Judgment of the Court of Appeal. The appellant was indicted for murder contrary to section 188 and 189 of the Penal Code Act. He was arraigned before the High Court, convicted and sentenced to twenty five (25) years imprisonment. Being dissatisfied with the sentence passed by the High Court, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and upheld the trial Court sentence, hence this appeal.

Back ground

The background as summarised by the Court of Appeal is that the appellant was charged with the murder of Nandecha Esther, his paternal grandmother. He was charged under sections 188

and 189 of the Penal Code Act. Upon conviction, he was sentenced to 25 years imprisonment.

The prosecution case was that on the 23rd of July 2009 at Magoli village, Bande Sub-county in Bugiri District, the accused murdered Nandencha Esther. It was alleged that on the day of the offence, the accused was sent by his father, Nyongesa Wilfred to the market. He returned at around 1pm. He quietly entered his house and packed all his household items before he left for an unknown place. At around 8pm, the accused went to the house of Auma Betty, a wife to his brother, and tried to strangle her but she made an alarm which caused the accused to flee.

Later that night, the accused while in his house with his two brothers, Okumu Robert and Simiyu Julius, swore to kill the deceased who was his grandmother. It was not the first time he said he would kill her. The following day, at around 7am, Nyongesa Wilfred, father to the accused, went to the deceased's house and called her thrice but got no response. He then called his wife and when both checked inside the house, they found the old woman dead. The two made an alarm which was answered by several people. The accused was traced and later arrested in the home of Masiga Jessica. The appellant was convicted of murder and sentenced to 25years imprisonment. Being dissatisfied with the sentence, he appealed to the Court of Appeal. The Court of Appeal dismissed his appeal and he appealed to this Court on the following ground:

> **The learned Justices of the Court of Appeal erred in law when they confirmed a 25(twenty five) year sentence of**

the appellant which sentence was based on wrong legal principles and which was manifestly harsh and excessive given the circumstances of the case.

Representation

Mr. Andrew Sebugwawo represented the appellant and Ms. Fatima Nakafeero, Senior state Attorney represented the respondent.

Appellant's submissions

In his submissions, counsel for the appellant faulted the learned Justices of Appeal for not taking into account the period the appellant spent on remand or in legal custody as required by Article 23(8) and this Court's decision in the case of **Rwabugande Moses Vs Uganda SCCA No. 25 of 2014.** Counsel argued that the period spent on remand should have been specifically credited on the accused/appellant by subtracting it from the final sentence.

Counsel further submitted that the Court of Appeal did not consider other mitigating factors while confirming the trial court sentence of 25 years imprisonment. Counsel argued that the appellant was a first time offender, remorseful and a young man of 22 years who is extremely useful to the community and also capable of reforming. Counsel cited the authorities of **Livingstone Kakooza Vs Uganda VOL.54 (1994) KALR, Uganda VS Nakayita Criminal session case No. 33 of 2014, Sande Vs Uganda Criminal Appeal No. 127 of 2009 and Tumwesigye Anthony Vs Uganda** and opined that in those cases, sentences

were significantly reduced owing to the mitigating factors as are available in the appellant's case.

Counsel faulted the learned Justices of Appeal for upholding a sentence that is not consistent with the sentences meted out in the aforementioned cases and prayed that this Court be pleased to substitute the sentence with a lesser one of not more than 10 years.

Respondent's submissions

Counsel for the respondent supported the decision of the Court of Appeal and submitted that in arriving at the sentence of 25 years, the trial Court considered the period the appellant had spent on remand as required by Article 23 (8) of the Constitution. Counsel invited this Court to follow its reasoning in **Abelle Asuman Vs Uganda SCCA No. 66 of 2016** where the sentence was not interfered with after it had been shown that the sentencing Judge had taken into account the remand period before arriving at the final sentence.

Counsel argued that the trial court also considered both the mitigating and aggravating factors before arriving at the sentence. That since the trial court had rightly discharged its role and followed the sentencing principles, the learned Justices of Appeal did not find any reason to interfere with the sentence and therefore confirmed the same.

Counsel further argued that the sentence passed on the appellant falls within the sentencing ranges of murder as stipulated in the Sentencing Guidelines and is consistent with

other sentences for murder as meted out in **Mbunya Godfrey Vs Uganda SCCA No.04 of 2011** and **Hon. Godi Akbar Vs Uganda SCCA No.03 of 2013.**

Counsel further submitted that the appellant is barred under section 5(3) of the Judicature Act to appeal against severity of sentence and therefore the issue of harsh and excessive sentence should not arise in this Court. Counsel relied on **Abelle Asuman Vs Uganda (supra), Okello Geoffrey Vs Uganda Criminal Appeal No. 34 of 204, Bonyo Abdul Vs Uganda SCCA No. 07 of 2011** to buttress this argument.

It was counsel's prayer that this Court upholds the trial court sentence as confirmed by the Court of Appeal and dismiss this appeal.

Consideration of the Appeal

This is a second appeal against sentence arising from the decision of the Court of Appeal. Under section 5(3) of the Judicature Act, an appeal against sentence lies to this Court on a matter of law not including severity of sentence. The section provides:

In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law, not including the severity of the sentence.

On an appeal against sentence, this Court's duty is simply to inquire into the legality or otherwise of the sentence passed by the trial Court and confirmed by the Court of Appeal.

In sentencing the appellant, the High Court held as follows:

Accused is allegedly a first offender. He has been on remand for about two years. I take this into consideration when sentencing him. He has prayed for leniency and he is said to be still a young man who could reform. However, he has committed a serious offence. He took away the life of an old defenceless woman, who was also his own flesh and blood. This was wanton and meaningless killing. The accused in my view should get a befitting sentence to match the crime. Putting everything into account, I sentence him to 25(twenty five) years imprisonment.

While upholding the trial Court sentence, the Court of Appeal held as follows:

While sentencing the appellant, the learned trial Judge observed that the accused was a first offender that had been on remand for about 2 years. Court noted that he was still a young man who could reform but had committed a serious offence by taking away the life of an old defenceless woman, who was also related to him by blood. Court found that this was a wanton and meaningless killing befitting sentence of 25 years imprisonment to match the crime.

We agree with the appellant's submission that the learned Judge took into consideration the period that the appellant spent on remand amongst other mitigating factors before imposing the sentence.

The Supreme Court in Mbunya Godfrey Vs Uganda SCCCA No. 4 of 2011, did emphasise the need to maintain consistency while sentencing persons convicted of similar offences.

In Atuku Margaret Opii Vs Uganda Court of Appeal Criminal Appeal No.123 of 2008, this Court reduced a death sentence to 20 years imprisonment where the appellant was a single mother of 8 children and had been convicted of killing a 12 year old girl by drowning. In Hon. Akbar Godi Vs Uganda, Supreme Court Criminal Appeal No.3 of 2013, Court confirmed a 25 year imprisonment where the appellant had killed his wife.

In the circumstances of this case, we find that 25 years imprisonment for murder is neither harsh nor manifestly excessive and find no reason to interfere with the sentence...

In this Court, the appellant argued that taking into account the period spent on remand is necessarily arithmetical and the Court of Appeal should have subtracted the period spent on remand from the sentence passed by the trial court. Counsel relied on the case of **Rwabugande Vs Uganda (supra)** for this position.

However, the High Court convicted and sentenced the appellant on the 22nd day of November 2011. This was six years before this Court's decision in Rwabugande which was delivered on 3rd March 2017. In the case of **Abelle Asuman Vs Uganda Criminal Appeal No. 66 of 2016,** this Court observed as follows:

We find also that this appeal is premised on a misapplication of the decision of this Court in the case of Rwabugande (supra) which was decided on 3rd March 2017.

In its Judgment this Court made it clear that it was departing from its earlier decisions in Kizito Senkula Vs Uganda SCCA No.24/2001; Kabuye Senvawo Vs Uganda SCCA No.2 of 2002; Katende Ahamed Vs Uganda SCCA No. 06 of 2004 and Bukenya Joseph Vs Uganda SCCA No. 17 of 2010 which held that "taking into consideration of the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula.

This Court and the Courts below before the decision in Rwabugande (supra) were following the law as it was in the previous decisions above quoted since that was the law then.... A precedent has to be in existence for it to be followed.

We observe that the Court of Appeal Judgment was delivered on the 22nd day of August 2017 when the Rwabugande decision was in force. While the learned Justices of Appeal made no reference to the Rwabugande decision in their judgment, we nonetheless find no sound reason to interfere with the sentence as confirmed. Even if the Court of Appeal were to address their minds to the Rwabugande decision, there is certainly no way they could have faulted the sentencing Judge for not following it since at the time of sentence, the law that was subsisting was properly followed while sentencing and precedents do not have retrospective application.

In the case of **Sebunya Robert & Kakuma Tonny Vs Uganda Criminal Appeal No. 58 of 2016**, where the appellant faulted the trial Court/ learned Justices of Appeal for not taking into account the period spent on remand in the terms set out in the Rwabugande decision, this Court held as follows:

Rwabugande does not have any retrospective effect on sentences which were passed before it by Courts taking into account the periods (a convict) spends in lawful custody. Accordingly, we find no justifiable reason to fault the high court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences were in conformity with the law that applied at the time the sentences were passed.

In the premise, we reject the appellant's argument that the **Rwabugande** decision was applicable to the appellant's case.

The appellant also argued that the trial court and the Court of Appeal did not consider the other available mitigating factors which could have significantly reduced on the sentence. With respect, we find this argument misconceived. It is clear from the above excerpt of the trial court decision that the sentencing Judge took into account all the mitigating and aggravating factors before arriving at the sentence of twenty five years imprisonment.

In the case of **Ogalo s/o Owoura Vs R (1954)21 EACA 270,** it was held as follows:

An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this Court will not normally interfere with the discretion of the trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive or so low as to amount to a miscarriage of justice.

In the premises, we find that the sentence of twenty five years was a proper exercise of discretion by the trial Judge, and the Court of Appeal cannot be faulted for upholding the same.

In the result, we would dismiss the appeal and uphold the sentence as confirmed by the Court of Appeal.

....

OPIO AWERI
JUSTICE OF THE SUPREME COURT

....

MWONDHA
JUSTICE OF THE SUPREME COURT

....

BUTEERA
JUSTICE OF THE SUPREME COURT

....

NSHIMYE
AG. JUSTICE OF THE SUPREME COURT

....

TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT

Dated at Kampala this 5th day of September 2019.

Judgment read and delivered in the presence of the appellant his Counsel Nekesa Diana and Senior State Attorney Nakafero Fatina for the State.

D/R
5/9/2019
10:32am.