THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 737 OF 2014

ONYABO BOSCO:::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Justice Rugadya Atwoki holden at Kampala High Court Criminal Session Case No. 0065 of 2002 delivered on 18/07/2014)

(CORAM: KENNETH KAKURU, JA, F.M.S EGONDA-NTENDE, JA & HELLEN OBURA, JA)

JUDGMENT OF THE COURT

This is an appeal against sentence of the High Court sitting at Kampala imposed on 18th July, 2014 by Hon. Mr. Justice Rugadya Atwoki. The appellant was indicted, tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and on two counts of aggravated robbery contrary to section 286 (2) of the Penal Code Act. He was sentenced to 45 years imprisonment in respect of the offence of murder and the sentence in respect of the offence of aggravated robbery was suspended.

Background to the Appeal

The facts giving rise to this appeal are that on 10th July, 2001, the appellant and his accomplices went to the house of the deceased, Otto Peter at about 12:30am in the night and broke the door open. They had a panga, an axe, a spear, a club and pestle for pounding. They entered the house, tied up the deceased and made him lie down. They demanded for Shs. 200,000/= which he did not have. They cut the deceased on the neck, head, side of the head and shoulder and began to burn him with molten plastic. They

dragged him outside and pulled down some grass from the roof thatch and lit a fire. The fire aided the deceased's wife to recognize the assailants as a one Okao David whom she knew as he was their neighbor and a one Tofa. She also managed to identify the appellant when he was arrested three days later and taken to police.

The appellant was indicted on one count of murder and three counts of aggravated robbery. He was tried and convicted on all counts and sentenced to death, for the offence of murder, which was mandatory at the time. However, the trial Judge suspended sentences on the other three counts.

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 after mitigation. Having heard the submissions of both counsel in the mitigation proceedings, the re-sentencing Judge sentenced the appellant to 45 years imprisonment. He, however did not impose any sentences on the two counts of aggravated robbery which had been suspended by the trial Judge.

Being dissatisfied with the decision of the sentencing Judge, the appellant appealed to this Court against sentence alone on two grounds, namely; *that the learned trial Judge erred in law when he imposed an illegal sentence and in the alternative, that the learned trial Judge erred in law when he passed a harsh and excessive sentence for count one.*

Representations

At the hearing of this appeal, Mr. Olwoch Daniel Evans appearing jointly with Shamim Amolo represented the appellant on state brief while Mr. Martin Rukundo, Principal State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellant

On the first ground, counsel submitted that from the wording of the sentence it is clear that the period the appellant had spent on remand was not taken into account during sentencing yet it is a mandatory requirement under Article 23 (8) of the Constitution and as it was held in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014 (unreported)*** it renders the sentence imposed in non-compliance with the article illegal. Counsel contended that the Judge referred to the sentencing guidelines as a starting point and by so doing, it took away his discretion to impose an appropriate sentence in the circumstances of the case.

On the second ground which is set out in the alternative, counsel submitted that the learned sentencing Judge gave less weight to the factors that mitigated the sentence which were already on Court record at the time of mitigation and included the pre-sentencing report on page 137-148. He argued that the sentence is manifestly harsh. He cited the case of ***Rwabugande Moses vs Uganda (supra)*** where the sentence of 35 years for murder was reduced to 22 years. The appellant was ordered to serve 21 years after court deducted the one year he had spent in lawful custody prior to his conviction. Counsel submitted that the circumstances of the appellant's case are similar to that of ***Rwabugande Moses vs Uganda (supra)*** and therefore the appellant needs to be given time to reform and go back to his family and raise his children.

He prayed that this Court considers the above factors and authority and reduces the appellant's sentence to 18 years.

The Respondent's Reply

Counsel opposed the appeal. However, he conceded that the sentencing Judge erred when he failed to take into account the period the appellant had spent in lawful custody prior to his conviction as required by Article 23(8) of the Constitution. He implored this Court to invoke

section 11 of the Judicature Act and impose an appropriate sentence in the circumstances. He submitted that the offence of murder was heinous and the appellant was very cruel because in addition to taking the life of the deceased, an innocent man, he also robbed his properties and prayed for a sentence of 45 years imprisonment.

Resolution by the Court

The appellate Court will only interfere with the sentence of the trial court, if there is an illegality, that is, if the trial court acted contrary to the law or upon a wrong principle, or overlooked a material factor. The appellate Court will also interfere if the said sentence is harsh and/or manifestly excessive. ***See: Kiwalabye Bernard vs Uganda, Criminal Appeal No.143 of 2001 (unreported).***

We find that the sentencing Judge, with all due respect, while passing sentence did not take into account the period the appellant had spent in lawful custody prior to his conviction. While passing sentence, he stated thus;

> *"The sentence must fit not only the crime, but also the criminal with all factors considered, I have considered all the above factors. The starting point under the sentencing guidelines for the offence of murder is 35 years. I found that the aggravating factors tended to push the period upward. I was mindful of the mitigating factors, including the youthful age of the accused and the period he spent in prison.*
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> *The taking of a life in this case in the circumstances as shown deserve a deterrent sentence. I am satisfied that a period of imprisonment of 45 years for Onyabo Bosco shall be appropriate in the circumstances and I so order. The sentence shall run from the date of conviction."*

Article 23 (8) of the Constitution makes it mandatory for court to take into account the period spent in lawful custody prior to conviction. In ***Rwabugande Moses vs Uganda (supra)*** the

Supreme Court held that the taking into account of the period spent on remand by a court is necessarily arithmetical. It emphasized that a sentence couched in general terms that the court has taken into account the time the accused has spent on remand is ambiguous. The Court further stated that the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; the fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together.

It is apparent from the wording of the sentence that the sentencing Judge did not take into consideration the period of 5 years 7 months and 24 days the appellant had spent in lawful custody prior to his conviction. He appears to have placed it on the same scale as the mitigating factors which is a violation of the already established principles of law. As such, in view of ***Rwabugande Moses vs Uganda (supra),*** we find that the sentence of 45 years imposed on the appellant is illegal for failure to comply with a mandatory constitutional provision and we accordingly set it aside.

We also note that the trial Judge had suspended the sentences in respect of the two counts of aggravated robbery because he had imposed a mandatory death sentence in respect of the offence of murder. In re-sentencing, the Judge ought to have passed sentences in respect of those two counts. He did not.

Section 11 of the Judicature Act gives this Court the power, authority and jurisdiction as that of the trial court to impose a sentence of its own it considers appropriate. In arriving at an appropriate sentence, we shall consider both the mitigating and aggravating factors as well as the sentencing range in cases of a similar nature.

We have considered the following mitigation factors in favour of the appellant; that he was a first offender without any previous conviction, he had spent 5 years 7 months and 24 days in

detention prior to his conviction, he has 3 wives and 4 children, he suffers from recurrent peptic ulcers and tuberculosis, he was a youth aged 24 years at the time he committed the offence.

On the other hand, we have also considered the aggravating factors, namely that; the appellant killed a defenseless man who was first severely tortured in the presence of his wife. The appellant cut the deceased's head, neck and shoulder with a panga from which injuries he eventually died. He was also burnt with molten plastic and his wife was also cut with a panga on her back. The appellant and the other assailants used deadly weapons which included, a panga, an axe, spears, bows and pistols to terrorise their victims. The murder was committed in the course of robbery.

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, CACA No. 46 of 2012***, the appellant was convicted of murder and sentenced to 32 years imprisonment. On appeal, this Court sitting at Mbarara set aside the sentence of 32 years imprisonment and substituted it with 20 years imprisonment.

In ***Atiku Lino vs Uganda, CACA No. 041 of 2009***, the appellant was convicted of murder and sentenced to life imprisonment. This Court citing the case of ***Tumwesigye Anthony vs Uganda (supra)*** observed that the appellant ought to be given an opportunity to reform. The sentence of life imprisonment was substituted with 20 years imprisonment. In ***Wodada Moses vs Uganda, CACA No. 0758 of 2014,*** the appellant was convicted of murder and sentenced to death by the trial Court. Following the decision in ***Attorney General vs Susan Kigula and 417 others (supra)*** a plea in mitigation of sentence was made and the appellant's sentence was reduced to 39 years imprisonment. The appellant appealed against the sentence to this Court and it was reduced to 25 years imprisonment.

Taking into consideration the above mitigating and aggravating factors and guided by the range of sentences in similar offences in the above authorities and others we have not cited, we are of the considered view that the ends of justice would be met by sentencing the appellant to 20 years imprisonment for the offence of murder and 18 years imprisonment on each count of aggravated robbery.

However, we are enjoined by Article 23 (8) of the Constitution to deduct the period of 5 years 7 months and 24 days the appellant had spent in lawful custody prior to his conviction from each of the sentences and we accordingly deduct the same leaving a period of 14 years 4 months and 6 days on the count of murder and 12 years 4 months and 6 days on each of the counts of robbery. The sentence in respect of the offence of murder shall run consecutively with the sentence on the two counts of aggravated robbery which shall run concurrently. He shall serve a total of 26 years, 8 months and 12 days from the date of his conviction which is 21/03/2007.

In the result, this ground alone disposes of the appeal and there is no need to consider the alternative ground of severity of sentence since it has already been set aside.

We so order.

Dated at **Gulu** this..7th.....day of..November.....2017

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Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL

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Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

10 **JUSTICE OF APPEAL**