THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBALE

CRIMINAL APPEAL NO. 302 OF 2015

1. **ONYANGO DESTINO**
2. **OKUMU EDWARD::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala delivered on 15th day of September 2015 in Mitigation Session Case No.0117 of 2015 by Hon. Justice Joseph Murangira)

CORAM: HON. MR. JUSTICE FMS.EGONDA NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE KIBEEDI MUZAMIRU, JA

JUDGMENT OF COURT

This is an appeal from the ruling of the High Court in criminal Mitigation Session Case No.0117 of 2015 wherein, the appellants' death sentences were reduced to 33 years imprisonment.

The appellants were convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. According to the charge, Onyango Destino with Okumu Edward and others at large on 2nd January, 2007 at Mukuju Central, Mukuju sub-county in Tororo District murdered Otabongo Abusolom. They were each sentenced to death by the High Court on 27th October, 2008. The case was remitted to the High Court for the appellants to be heard on mitigation of sentence following the decision in Attorney General v. Suzan Kigula & 417 others, SC Constitutional Appeal No.3 of 2006.

When the matter came up for mitigation of sentence, they were re-sentenced to 33 years imprisonment from the date of conviction after deducting the 2 years they had spent on remand.

Dissatisfied with the re-sentence, the appellants with leave of this Court appealed to this Court against sentence only .The sole ground of appeal reads;

1. ***That the learned resentencing Judge erred in law and fact when he imposed a manifestly harsh and excessive sentences against the Appellants.***

At the hearing of the appeal, Mr. Henry Kunya appeared for the appellants while the respondent was represented by Ms. Nyanzi Macrina Gladys, Assistant DPP. Both parties filed written submissions.

Counsel for the appellants submitted that the re-sentencing Judge alluded to various aggravating factors, but did not consider the mitigating factors save for the period the appellants had spent on remand. That it was erroneous for the judge to disregard critical and compelling mitigating factors put forward for the appellants which included the fact that they were first offenders, had capacity

to reform, had diverse family responsibilities and were of youthful ages of 20 and 28 years respectively. He cited **Suzan Kigula and 417 others cited in Mbunya Godfrey v Uganda Supreme Court Criminal Appeal No.04 of 2011.**

Counsel Kunya submitted that the sentences of 33 years imprisonment were beyond the sentencing range for similar offences and emphasised the need to embrace uniformity while sentencing.

He further submitted that it was erroneous on the part of the resentencing judge to compute the period of imprisonment in total disregard to the appellants' right to remission provided under S.84 of the Prisons Act.

Ms. Nyanzi Gladys opposed the appeal and submitted that the sentences of 33 years imprisonment passed against the appellants were not manifestly harsh and excessive since the maximum sentence for murder is death. She contended that the commission of the offense was planned, the deceased was attacked, beaten and left to die by the road side and the appellants actively participated. That the resentencing Judge took into consideration all the mitigating and aggravating factors for each of the appellants before arriving at an appropriate sentence.

She further submitted that the sentence of 33 years imprisonment was not out of the sentencing range for similar offences and cited **Kaddu Kavulu Lawrence versus Uganda SC Cr App No. 72 of 2018** that to say that an appropriate

sentence is a matter for the discretion of the sentencing court and each case presents its own facts upon which a court will exercise the discretion.

Regarding the issue of remission provided in S.84 of the Prisons Act, counsel for the respondent submitted that the resentencing Judge did what was required of him under article 23(8) of the Constitution to consider the 2 years period spend on remand. That S.84 of the prisons act pertains to Uganda prisons administration of sentences and has no bearing on the sentences handed down by court. She cited **Wamutabane Jamiru vs Uganda Criminal Appeal NO: 74 OF 2007) [2018] UGSC 8 (12 April 2018).**

This being a first appeal, we exercise our duty under ***Rule 30 (1) (a)* of the Rules** of this Court to reappraise the evidence adduced at trial, draw inferences of fact and come to our own conclusion. This mandate of the Court was reiterated in ***Kifamunte Henry v Uganda SCCA NO. 10 of 1997***.

The circumstances when an appellate court can interfere with the sentence imposed by a trial judge are well settled. In ***Kyalimpa Edward v Uganda, SCCA No 10 of 1995*** the supreme court made reference to the case of ***R v De Havilland (1983) 5 Cr. App (R)s 109*** and held that;

> *"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 a practice as an appellate court; this court will not normally interfere with the discretion of the sentencing judge unless the sentence is*

illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

Counsel for the appellants submitted that the appellants where first offenders, had capacity to reform, had diverse family responsibilities and were of youthful age being 20 and 28 years respectively at the time of commission of the offence. The respondent did not respond to this submission.

In passing the sentence, the resentencing Judge noted that;

"Considering all the above mitigating factors, I would have sentenced each convict to a period of 35 years. However, considering the period of 2 years each convict had spent on remand, I sentence each convict to 33 years imprisonment from the date of conviction up to date, the convicts have been in prison for a period of 7 years, which means each convict has already served years in prison. Going by that calculation each convict is remaining with a period of 26 years imprisonment to serve."

In **Ramathan Magala vs (Criminal Appeal No.01 Of 2014) [2017] UGSC 34 (20 September 2017)**; Supreme Court held that a judicial officer must record what the accused submitted in mitigation and this should be evident on record. The judicial officer must state that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones.

It is evident from the record that the resentencing Judge started by stating that he was to consider both aggravating and mitigating factors. At page 16 of the record he clearly mentioned, alluded to and accorded due weight to both aggravating and mitigating factors. He weighed both pleas and accorded some lenience to the appellants by sentencing them to 35 years imprisonment less the 2 years they had spent on remand. We find that the trial Judge took into consideration the appellants' mitigating factors and we have no reason to fault him.

Section 84 of the Prisons Act 2006 deals with remission of part of sentence of certain prisoners. It provides that;

(1) ***A convicted prisoner sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences.***

(2) For the purpose of giving effect to subsection (1), each prisoner on admission shall be credited with the full amount of remission to which he or she would be entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission

This Court has been categorical on the application of the Prisons Act when it held in **Wamutabane Jamiru vs Uganda Supra** that the prison Act and Rules made there under are meant to assist the Prison authorities in administering prisons and in particular sentences imposed by the courts. The prisons Act does not prescribe sentences to be imposed for defined offences. The sentences are

contained in the Penal Code and other Penal statutes and sentencing powers of courts are contained in the Magistrates Courts Act and the Trial on Indictment Act, and other Acts prescribing jurisdiction of Courts.

In our view, the resentencing Judge was not required to have regard to the appellants' rights to remission under the Prisons Act 2006 because this right is a preserve of the Uganda Prisons Administration in administering sentences to convicts and not within the court's jurisdiction.

Counsel for the appellants argued that the sentence of 33 years for each appellant was way beyond the sentencing range for similar offences. The respondent contended otherwise adding that the resentencing Judge properly exercised her discretion.

Guideline 19 (2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that;

> *"In a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, consider the aggravating and mitigating factors to determine the sentence in accordance with the sentencing range."*

In Part 1 of the Third Schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty.

Courts have emphasized the need for consistency while sentencing persons convicted of similar offences. In ***Mbunya Godfrey V Uganda, SCCA No.04 of 2011*** the Supreme Court pointed out that although no two crimes are identical, Courts should try as much as possible to have consistency in sentencing. In this case the appellant had murdered his wife. He was convicted and sentenced to death. The Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

In ***Atuku Margret Opii V Uganda, Court of Appeal Criminal Appeal No. 123 of 2008,*** the appellant had killed a neighbor's 12 year old daughter by drowning. This Court reduced the sentence from death to 20 years imprisonment.

In ***Ayikanying Charles vs Uganda Court of Appeal Crim. Appeal No. 8 of 2012,*** the Appellant had stabbed the victim to death over a land dispute. This Court confirmed the sentence of 25 (twenty-five) years in prison. We find the sentences of 33 years imprisonment imposed on the appellants manifestly harsh and excessive and set them aside.

Section 11 of the Judicature Act, Cap 13 grants this Court the same powers as the Court of original jurisdiction including power to impose a fresh sentence.

Considering the mitigating and aggravating circumstances presented by counsel for the appellants and the respondent respectively, we sentence each of the appellants to 27 years imprisonment. We take into account the period of 2 years they had spent on remand. They shall now serve a term of 25 years imprisonment each commencing from 27th October, 2008 when they were convicted.

In light of the above findings, this appeal succeeds.

We so order

Dated at Mbale this 15th day of September 2020.

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HON. MR.JUSTICE FMS EGONDA NTENDE

JUSTICE OF APPEAL

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HON. MR.JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE MUZAMIRU KIBEEDI

JUSTICE OF APPEAL