THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO.186 OF 2013

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA and Stephen Musota, JA)

SETTUBA WILLIAM:::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Justice Moses Mukiibi holden at High Court at Kololo in Criminal Session Case No. 254 of 2013 delivered on 11/12/2013)

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted of the offence of murder contrary to section 188 and 189 of the Penal Code Act and was sentenced to death.

On the 11th day of January 2002, at about midnight at Kasaka village, in Mpigi district, the deceased Musuza David was attacked in his house by the appellant who was armed with a panga. The appellant cut the deceased several times on the head, neck and the left shoulder. As the appellant was still cutting the deceased, the deceased made an alarm which was answered by his neighbor PW1 Mbalire Fred who witnessed the incident and in turn made an alarm which was answered by PW2 Mulindwa Charles and PW3 Nakibinge Mathew. The appellant fled the crime scene and the deceased was rushed to Gomba hospital where he died shortly after. The appellant was later arrested and handed over to Kanoni Police station where he was charged with murder. He was tried, convicted and sentenced to death by the trial court.

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. Having heard the submissions of both counsel, the learned re-sentencing Judge sentenced the appellant to 33 years imprisonment.

Being dissatisfied with the decision of the re-sentencing Judge, the appellant appealed to this Court against sentence only on one ground.

> *"That the learned mitigating judge erred in fact to sentence the appellant to 33 years imprisonment exclusive of the remand period which was a harsh sentence according to the circumstances."*

Representation

At the hearing of this appeal, Ms. Kentaro Specioza represented the appellant on state brief while Mr. David Baxter Bakibinga Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

The appellant's case

Counsel sought leave to appeal against sentence only which was granted and she submitted that the sentence passed by the trial Judge was harsh. She invited this Court to reconsider the decision of the judge taking into account the mitigation factors which were put forward by the appellant together with his counsel. Counsel submitted the mitigating factors are that the appellant was very remorseful and he has learnt a lesson on how to behave and how to treat other people he lives with in the community. Further that, the appellant had attained a higher level of education while in prison which he would like to use to benefit his community. She prayed that court reconsiders the mitigating factors as they appear on record and reduce the sentence to 15 years from which the period spent on remand should be deducted.

The respondent's case

Counsel submitted that this Court can only interfere with the sentence imposed by the trial court if the principles stated in ***Abaasa Johnson and another vs Uganda, SCCA No.54 of***

2016 case were not followed. He submitted that while deducting the period the appellant spent on remand from the sentence, the re-sentencing Judge deducted the post-conviction custody period which was not lawful. He also pointed out that the judge did not specify when the sentence would start running. Counsel prayed that this Court sentences the appellant afresh since the sentence imposed was illegal.

Court Resolution

The principles upon which an appellate Court should interfere with a sentence were considered by the Supreme Court in the case of ***Kiwalabye Bernard vs Uganda, SCCA No.143 of 2001*** where the court held that the appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion unless the exercise of this discretion is such that it results into a sentence which is manifestly excessive or so low to amount to a miscarriage of justice or when court based the sentence on a wrong principle.

Before passing sentence, the re-sentencing Judge took into account both the mitigating and aggravating factors and stated as follows:

> *"I therefore sentence the convict, to 45 years imprisonment. I now deduct eleven (11) years representing the total period the convict has been in prison since his first remand on16.1.2002. This leaves a balance of a term of imprisonment of 33 years and 1(one) month to be served by the convict subject to remission"*

We note that the re-sentencing Judge combined and subtracted both the pre and post-conviction period the appellant had spent in prison from the sentence of 45 years he had imposed on the appellant.

Article 23(8) of the Constitution makes it mandatory for a court while imposing a sentence to take into account the period a convict spent in lawful custody in respect of the offence before the completion of his or her trial. The Article clearly specifies that the period to be taken into

account is the pre-conviction period. In this case the learned sentencing Judge took into account the post-conviction period which was irregular. In addition, the learned judge did not specify when the sentence would start running.

In the circumstances, we find that the sentence of 33 years imprisonment that was imposed by the re-sentencing Judge without complying with Article 23 (8) of the Constitution was illegal.

We now invoke the provisions of section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of the trial court to impose a sentence of its own which it considers appropriate. In so doing, we shall consider the range of sentences in similar offences to determine an appropriate sentence of our own.

In ***Mbunya Godfrey vs Uganda, SCCA No. 4 of 2011,*** the Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment. The appellant had been convicted of murder of his wife.

In ***Tumwesigye Anthony vs Uganda, CACA No. 46/2012,*** the appellant killed the deceased by crushing his head and burying his body in a sandpit. He was convicted of murder and sentenced to 32 years imprisonment. He appealed to this Court which set aside the sentence and substituted it with 20 years imprisonment.

In ***Atiku Lino vs Uganda, CACA No. 0041/2009,*** the appellant was convicted of murder and sentenced to life imprisonment. He attacked the deceased in his house and cut him to death. On appeal, this Court observed that the appellant ought to be given an opportunity to reform and it reduced the sentence to 20 years imprisonment.

We note that the sentencing range in the above similar cases is between 20-25 years. In the premises, we find a sentence of 25 years imprisonment appropriate in the circumstances of this case. However, since the appellant had spent a period of 2 years and 3 months in lawful custody prior to his conviction, we deduct that period from the 25 years and sentence the

appellant to 22 years and 9 months imprisonment from the date of his conviction, that is, 16/04/2004.

In conclusion, we allow the appeal against sentence in the above stated terms.

We so order.

It should be noted that Egonda-Ntende, JA has not signed this judgment as he did not agree with the majority decision.

Dated at **Masaka** this...30th...day of.....July.....2018

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Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

.....

Hon. Justice Stephen Musota

JUSTICE OF APPEAL