THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 655 OF 2015 AND 468 OF 2014

(Arising from Criminal Case No. 009 of 2015)

1. MWANJE HARUNA

2. SENTAMU HENRY :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF COURT

The appellants were initially charged with Murder c/s 188 and 189 of the Penal Code Act in count 1 and Attempted Murder c/s 204 (b) of the Penal Code Act in count 2. On 4th March, 2013 before Kibuuka Musoke J. the indictment was amended to reduce the murder charge to manslaughter c/s 187 and 190 of the Penal Code Act in count 1. When the indictment was read, the record shows that only A1. Mwanje Haruna pleaded not guilty to the charge. Soon after, the trial Judge adjourned to the next session.

After the amendment, the appellants were charged with Manslaughter contrary to sections 187 and 190 of the Penal Code Act and attempted murder contrary to sections 204(b) of the Penal Code Act. The hearing was adjourned and resumed in the next session before another Judge Margaret C. Oguli-Oumo J. In that session, the Director of Public Prosecutions (DPP) further changed the indictment back to Murder after some of the accused persons had pleaded guilty. The accused persons entered fresh pleas.

The 1st appellant, Mwanje Haruna, was convicted of murder contrary to sections 188 and 189 of the Penal Code Act on his own plea of guilty, and sentenced to 15 years imprisonment.

The 2nd appellant, Sentamu Henry, was convicted of murder and sentenced to 30 years imprisonment.

Background

On 27th July 2011, Mutiibwa Kasimu (the complainant) together with Kigongo Sserume (the deceased) left to fish in the waters of Lake Victoria between Lulamba and Luke islands. At around 5:00pm when the complainant and the deceased were pulling out their fish nets, they saw two fish boats approach them and on each of the boats were two men inclusive of the 1st and 2nd appellants. The appellants together with two others surrounded the boats and asked to be given fresh fish. When the complainant and the deceased refused, the appellants started assaulting them with oars

and knocked their boat twice which made them fall into the water. The complainant and the deceased tried to swim to the shore but the appellants continued to assault them. The complainant managed to reach the shore and was rescued while the deceased drowned. On 30th July, 2011 the body of the deceased was found floating on the lake facing down. It had swellings and wounds. When it was examined, the cause of death was found to be due to beatings and drowning. The appellants were charged with murder

The 1st and 2nd appellants filed separate memoranda of appeal. We shall resolve the 2nd appellant's appeal first.

The hearing of this appeal was conducted through video link because of the Covid-19 pandemic. However, the lawyers for the appellants were in court and were in contact with their clients.

1st appellant's appeal

The 1st appellant filed this appeal against sentence only on a sole ground that;

> *The learned trial Judge erred in law and in fact when he sentenced the appellant to 18 years imprisonment which was illegal, harsh and manifestly excessive.*

At the hearing of the appeal, Mr. Tusingwire Andrew appeared for the appellant while Ms. Nabisenke Vicky Assistant DPP appeared for the respondent.

1st appellant's submissions

Counsel for the 1st appellant sought leave to appeal against sentence only under Section 132(1) (b) of the Trial on Indictments Act which was granted by court.

Counsel submitted that the learned trial Judge did not consider the mitigating factors of the case before sentencing the 1st appellant and thus passed a harsh and excessive sentence. He submitted that the appellant was a first offender of relatively young age and was remorseful. Counsel argued that these factors should have been considered in mitigation by the learned trial Judge.

He further submitted that the sentence passed by the learned trial Judge was illegal for failure to arithmetically take into account the period the appellant spent on remand. Learned Counsel relied on **Article 23(8)** of the **Constitution** and submitted that it is a mandatory requirement that any period a convict spent in lawful custody before completion of the trial has to be considered before imposing a term of imprisonment. Counsel prayed that this sentence be set aside for being illegal.

Respondent's submissions

In reply, the respondent's counsel conceded to the fact that the learned trial Judge did not consider both the aggravating and mitigating factors of the case before sentencing the appellants. Counsel prayed that the sentence be set aside and a lawful deterrent sentence be passed by this court. Counsel referred to the case of **Odoch Sam Vs Uganda Criminal Appeal No. 340 of 2010**

in which this court sentenced the appellant who pleaded guilty to manslaughter to 20 years imprisonment.

Consideration of the 1st appellant's appeal

It is trite law that an appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or if the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of Justice (See **Kyalimpa Edward v. Uganda SC Cr. App No. 10 of 1995, and Kyewalabye Bernard v. Uganda Criminal App. No. 143 of 2001).**

We have been guided by the above principle in resolving this appeal. We have also taken into consideration the submissions made by the parties and the authorities cited. The Constitution provides that the sentencing Court must take into account the period spent on remand.

Article 23(8) of the Constitution provides:

> *"23. Protection of personal liberty*
>
> *(8) 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."*

Similarly, in **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016,** the Supreme Court, while interpreting Article 23(8) held *inter alia*

that "*it does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in* ***Article 23(8) of the Constitution*** *is for the Court to take into account the period spent on remand.*"

The sentencing order of the learned trial Judge was as follows;

> *"The accused persons were indicted of two counts of murder c/s 188 and 189 of the Penal Code Act and Attempted murder c/s 204(1) of the Penal Code Act.*
>
> *The accused persons pleaded not guilty.*
>
> *The prosecution called five witnesses and the accused persons were found guilty and convicted.*
>
> *The accused persons are first offenders and have been on remand for 2 years and 10 months.*
>
> *The offenses with which the accused were convicted carries a maximum sentence of death and life imprisonment on conviction.*
>
> *The accused persons acted in total disregard of the life and safety of the fishermen who were honestly earning a living on the waters and such behavior makes the world unsafe for people to earn a living and court needs to put a deterrent sentence to protect them from such behavior.*
>
> *Consequently court sentences each of them to 15 years imprisonment on both counts and the sentences to run consecutively, total of 30 years each..."*

The Supreme Court decision in **Abelle Asuman Vs Uganda (supra)** held that although the process is not a mathematical exercise as stated above, a sentencing Judge should clearly indicate the mitigating and aggravating factors he/she has taken into account, particularly the remand period.

It is our considered view that the learned trial Judge put into consideration the period spent on remand, which is 2 years and 10 months.

We note that the learned trial Judge passed an omnibus sentence on all the accused persons. In addition, the learned trial Judge, while sentencing, did not consider both the aggravating and mitigating factors. The trial Judge concentrated on the aggravating factors in isolation of the mitigating factors. In the result, we have no option but to set aside the illegal sentence and re-sentence the appellants under Section 11 of the Judicature Act.

On the mitigating side, we note that the 1st appellant is a first offender, pleaded guilty thus saving court's time and has been on remand for 2 years and 10 months. On aggravating side, the appellant murdered the deceased in cold blood while he was struggling for his life in the water. This kind of act calls for a harsh sentence.

Therefore, we are satisfied that a sentence of 15 years imprisonment for the 1st and the 2nd appellants on each count from the date of conviction will meet the ends of justice in this case. The sentences shall run concurrently.

We so order.

2nd appellant's appeal

The 2nd appellant was dissatisfied with the decision of the trial court and filed this appeal against conviction and sentence on grounds that;

1. The learned trial Judge erred in law and fact when she found that the appellant was acting together with the other convicts/accused persons in committing the offence thereby reaching a wrong decision.
2. The learned trial Judge erred in law and fact when she sentenced the appellant to 15 years imprisonment on both counts to run consecutively to make a total of 30 years which was manifestly harsh and excessive.

Appellant's submissions on ground one

It was submitted for the appellant that the element of participation of the appellant was not proved by the prosecution. The learned trial Judge invoked the doctrine of common intention and found that because the appellants were acting together when they said it was orders of their boss, they had the common intention. Counsel argued that none of the prosecution eye witnesses confirm presence of the 2nd appellant in the assault. Counsel relied on the decision in **State Vs Goode 350 N. C 247 [1999]** in which it was held that a person is not guilty of a crime merely because he is present at the

scene even though he may silently approve of the crime or secretly intend to assist in its commission.

Counsel argued that in the instant case, there was no single evidence on record to show that the appellant performed acts that led to the murder of Kigongo or attempted murder of Kassim Mutibwa.

Respondent's submission

For the respondent, counsel submitted that there was sufficient evidence to place the 2nd appellant at the scene of the crime. Whereas it is the 1st appellant who hit the deceased, the other three people were like bodyguards on watch. The evidence of PW3 and PW4 was that the appellants attacked the fishermen and after the rescue, they all ran away. Counsel submitted that the evidence on record was sufficient to show that the appellants and their two counterparts were working in unison in attacking the deceased and the complainant.

Counsel argued that the learned trial Judge properly considered the principles of common intention and came to a conclusion that the four people, including the appellant, had the intention of attacking the victims.

Consideration of the 2nd appellant's appeal

A first appellate court has a duty to re-evaluate the evidence and come to an independent conclusion on the facts and the law, taking into account that it did not see or hear the witnesses **(See Pandya v. R [1957] EA 336; Okeno v. Republic [1972] EA 32; Charles Bitwire v. Uganda SC Cr. App No. 23 of 1985 and Kifamunte Henry v. Uganda SC Cr. App. No. 10 of 1997. See also R. 30 of the Court of Appeal Rules)**

In a murder charge, the burden lies on the prosecution to prove the following ingredients beyond reasonable doubt;

1. Death of a person.
2. The death was unlawfully caused.
3. The death was caused with malice aforethought.
4. The accused persons participated in or caused the death of the deceased.
5. Where there is more than one accused person, it ought to be proved that there was a common intention among them to execute an unlawful purpose.

In this case, the first four ingredients are not being contested on appeal. The appellant's case is that the prosecution did not prove the participation of the 2nd appellant in the murder. The respondent argues that all the four accused persons including the appellants had common intention to commit the offence against the complainant and the deceased.

Section 20 of **the Penal Code Act** provides that:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

The evidence of PW2 is that the appellants together with two others were in two boats and were demanding for tilapia and nets and said they had been sent by their boss. PW3 and PW4 also testified that the four assailants were together and after the deceased had drowned in the water, they drove off together.

The case of **Kisegerwa and Another v. Uganda Criminal Appeal No. 6 of 1978 (Court of Appeal)** elaborates on common intention thus:

In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence...an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

The 2nd appellant, together with the 3 others, attacked the deceased and the victim at around 5:00pm. The evidence of the prosecution shows that the attack lasted about 45 minutes and when the

complainant and the deceased fell into the water and the deceased drowned, the attackers, including the 2nd appellant, ran away with their boats. This action, in our view, was sufficient enough to prove common intention. It was held in **Kisegerwa and Another v. Uganda (supra)** that common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault. The 2nd appellant was with the 1st appellant and 2 others when the attack was made and at no point did the 2nd appellant try to stop the assault or save the deceased when he drowned. This, in our view, amounts to common intention to commit an offence.

We find no reason to fault the learned trial Judge's finding of guilt on the 2nd appellant. The learned trial Judge did not err when she found that the 2nd appellant was acting together with the other convicts in committing the offence. She properly evaluated the evidence and reached the correct decision.

Ground 1 of the appeal therefore fails.

2nd Appellant's Ground 2

It is trite law that an appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of Justice (See **Kyalimpa Edward v.**

Uganda SC Cr. App No. 10 of 1995, and Kyewalabye Bernard v. Uganda Criminal App. No. 143 of 2001).

We have been guided by the above principles in resolving this appeal. We have also taken into consideration the submissions made by the parties and the authorities cited.

The sentencing order of the learned trial Judge was as follows;

> *"The accused persons were indicted of two counts of murder c/s 188 and 189 of the Penal Code Act and Attempted murder c/s 204(1) of the Penal Code Act.*
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Consequently court sentences each of them to 15 years imprisonment on both counts and the sentences to run consecutively, total of 30 years each..."

It appears the appellant took issue with his sentences running consecutively. However, as was held by the Supreme Court in **Magala Ramathan v Uganda Criminal Appeal No. 1 of 2014**, judicial officers have the discretion to decide the manner in which the sentences given will be served- whether concurrently or consecutively. S. 2 (2) of the Trial on Indictments Act provides:

"When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as court may direct, unless the court directs that the punishments shall run concurrently".

We however underscore the need for an accused to know why a Judge arrived at a particular decision. It is a trite principle of law that in ordering a consecutive sentence, the total sentence must be proportionate to the offence and the circumstances surrounding each case.

The learned trial Judge, while sentencing, did not consider both the aggravating and mitigating factors. The trial Judge concentrated on the aggravating factors in isolation of the mitigating factors. This rendered the sentence illegal. In the result, we shall set it aside and

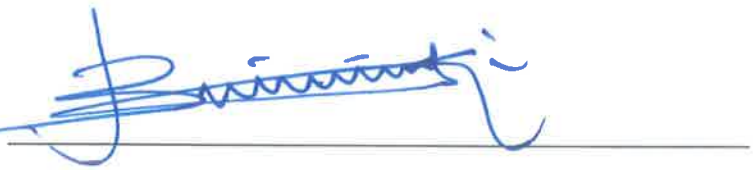
proceed to re-sentence the 2nd appellant under Section 11 of the Judicature Act.

On the mitigating side, we note that the 2nd appellant is a first offender, pleaded guilty thus saving court's time and has been on remand for 2 years and 10 months. On aggravating side, the appellant murdered the deceased in cold blood while he was struggling for his life in the water. This kind of act calls for a deterrent sentence.

Therefore, we are satisfied that a sentence of 15 years imprisonment for the 2nd appellant on each count, from the date of conviction, will meet the ends of justice in this case. Since there are no reasons assigned by the trial Judge why the sentences were to run consecutively, we shall order that the sentences shall run concurrently.

We so order.

Dated this 13th day of September 2021



Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

Hon. Justice Muzamiru Mutangula Kibeedi, JA