THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.25 OF 2014

CORAM: HON. JUSTICE BART KATUREEBE, CJ

HON. JUSTICE JOTHAM TUMWESIGYE, JSC

HON. JUSTICE STELLA ARACH-AMOKO, JSC

HON. JUSTICE ELDAD MWANGUSYA, JSC

HON.JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JSC

BETWEEN

RWABUGANDE MOSES :: APPELLANT

AND

UGANDA :: RESPONDENT

[*Appeal from the decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.297 of 2011 decided by Augustine Nshimye, Faith E.K Mwondha and Kenneth Kakuru, JJA*]

JUDGMENT OF THE COURT.

This is a second appeal, brought against the decision of the Court of Appeal, which upheld the judgment of the High Court (Justice Monica Mugenyi), sitting at Luweero on the 15th of December 2011.

The Appellant was indicted, tried and convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120. He was sentenced to 35 years imprisonment. On appeal to the Court of Appeal, the conviction and sentence were upheld.

Background

The brief background to this appeal is that on 24th December 2010, a scuffle ensued between the deceased on the one hand and the appellant together with his herdsman on the other, over an impounded herd of cattle. The deceased was hit with a herdsman stick twice on the head. He sustained bodily injuries which led to his death. The High Court and Court of Appeal found the appellant guilty of murder.

The Appellant now appeals to this Court against both the conviction and sentence on the following grounds:

1. *The learned Justices of Appeal erred in law when they held that the appellant participated in killing of the deceased without ample evidence in proof of that ingredient.*

2. *The learned Justices of Appeal erred in law when they rejected the appellant's defence that he is not the one who caused the death of the deceased but rather a one Kafesi, thereby causing a miscarriage of justice.*

3. *The learned Justices of Appeal erred in law when they held that the appellant was liable under the principle of common intention yet there was no such intention.*

4. *The learned Justices of Appeal erred in law when they upheld the appellant's conviction basing on evidence full of contradictions, gaps and discrepancies.*

In the alternative without prejudice to the above grounds,

5. *The learned Justices of Appeal erred in law when they convicted the appellant for murder without proof of malice aforethought.*

6. *The learned Justices of Appeal erred in law when they confirmed the sentence of imprisonment of 35 years which had been given by the trial judge, which sentence was illegal.*

The appellant prayed that the appeal be allowed either wholly or in part and in the event that the appeal was partly allowed, the conviction of murder be substituted with that of manslaughter. In addition, he prayed that the sentence of 35 years imprisonment be quashed and replaced with one according to the law.

Representation

At the hearing of the appeal, the Appellant was represented by Counsel Andrew Sebugwawo, on State Brief, while the Respondent was represented by the Principal State Attorney, Kulu Idambi John Boniface.

Counsel for the petitioner argued grounds 1 to 4 together while grounds 5 and 6 were argued separately.

We will deal with the grounds of appeal in the order they were argued.

Appellant's Arguments

Ground 1-4

The essence of the argument of counsel for the appellant was that the appellant's conviction had been based on inconsistencies and discrepancies in the evidence of the prosecution witnesses regarding who actually hit the deceased.

He argued that two of the prosecution witnesses that is PW1 and PW2 had different accounts of how the deceased was killed. PW1 (wife to the deceased) testified that the deceased was beaten by the accused (appellant) at the back of his neck and on his head in his house at 10 p.m. PW1 further testified that the fight continued outside the house and she was able to identify the appellant as the person who beat the deceased to death using bright moonlight and a lamp which was inside the house. On the other hand, PW2 (a child of the deceased aged 16 years) testified that the scuffle that resulted into the deceased's death occurred outside the house near the kraal. He stated that when he reached home, he saw three men- i.e. the deceased, accused (appellant) and Kafabi get out of the house. PW1 got a torch and together with the three men headed toward

the kraal. On cross-examination, PW2 stated that there was no fight going on at the kraal at the time the deceased was hit by the accused. There was no re-examination on this issue.

Counsel thus argued that the cited inconsistencies should be resolved in favour of the appellant.

With regard to whether the appellant had participated in the killing of the deceased, counsel for the appellant referred to the testimony of DW2-Mwesigye Charles. DW2 testified that he was the deceased's neighbour and when he asked the deceased what had happened, he said that the appellant's herdsman had hit him with a stick. That he rung the police and told them that the herdsman had killed someone. DW1 (appellant) testified that he reported his herdsman to police because he had beaten the deceased however, the police arrested him instead.

Counsel for the appellant thus argued that since it was in doubt as to whether the appellant had participated in killing the deceased, the doubt ought to be resolved in favour of the appellant.

Ground 5

On the question of malice aforethought, counsel argued that there was no evidence to prove malice aforethought. All that was evident is that there was a fight which led to the death of the deceased.

Ground 6

Counsel for the appellant argued that in arriving at the sentence of 35 years imprisonment, neither the trial court nor the Court of Appeal considered the period the appellant had spent on remand.

Respondent's Arguments

Grounds 1-4

Counsel for the respondent opposed the appeal on the ground that it lacked merit. He contended that there were no inconsistencies and discrepancies in the identification of the appellant as the person who hit the deceased. That, the appellant was correctly identified by the light from the moon and the lamp inside the house.

The respondent's counsel further argued that there was no discrepancy as to the scene of crime where the assault happened. He explained that the scuffle took place outside the house, near the kraal but had started from inside the house.

Ground 5

On this ground, counsel argued that there was existence of malice aforethought by the appellant. He referred to the judgment of the trial court that dealt in detail with the ingredient of malice aforethought in proof of the offence of murder.

The Trial Court relied on Section 191 of the Penal Code Act which is to the effect that malice aforethought may be proved by direct evidence or may be inferred from circumstantial evidence indicating knowledge by an accused person that his or her conduct would cause death.

The Trial Court supported its finding of the existence of malice aforethought from the weapon used to assault the victim, the vulnerability of the part of the body injured i.e the head, neck and chest and the conduct of the appellant before and during the assault.

Ground 6

Counsel conceded that the record was silent on whether the remand period was considered by the trial judge. In response to the question of Court as to what consequence this had on the judgment, Counsel submitted that the higher court can deduct the remand period from the sentence.

There were no submissions in rejoinder.

Analysis and Resolution of the Court

In resolving the issues raised in this appeal, this court is mindful of its duty as a second appellate court to decide whether the first appellate court failed in its duty to re-evaluate the evidence presented before the trial court to reach its own conclusion. **[See**: **D.R PANDYA vs. R (1957) E.A 336, BANCO ARABE ESPANOL vs. BANK OF UGANDA (1998) LLR 84 (SCU), KIFAMUNTE HENRY vs. UGANDA (1997) LLR 72 (SCU)]**

It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. **[Baguma Fred vs. Uganda SCCA N0.7 of 2004]**

Thus, this Court will only interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as a first appellate court, the Court of Appeal failed to re-evaluate the evidence as a whole.

The first point to resolve was the essence of grounds 1-4 regarding the alleged inconsistencies as to who hit the deceased and thus led to his death and whether the appellant participated in the assault.

Counsel for the appellant argued that had the trial Judge considered the inconsistencies in the evidence adduced by the prosecution to prove that it was the appellant who hit the deceased, the court would have found that the appellant never committed the offence.

In dealing with this issue, the learned trial Judge stated that:

> *… the contention surrounding who was responsible for the fatal attack on the deceased notwithstanding, the foregoing evidence coupled with the post mortem report establish that the deceased's death was a direct result of injuries sustained from a physical assault to his person. The evidence of PW2 on record states that when his father(deceased) indicated that he was going to call the LC Chairman before the accused(appellant) and his team were allowed to take their cows, the accused hit him with a stick on the neck and head and he fell down.*

The learned Justices of Appeal emphasizing the findings of the trial judge stated:

> *The prosecution therefore proved beyond reasonable doubt that the appellant was the owner of the cows and was part of a group of people that came to the decease's home on the night of 24th December, 2010 to rescue them and unlawfully assaulted the deceased with sticks.*

… It is irrelevant whether or not it was the appellant who actually inflicted the fatal blows. The appellant would still be liable under the principle of common intention. The principle of common intention is set out in Section 20 of the Penal Code Act. (Cap 120) which states as follows:

> *"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."*

In this particular case the appellant, Kafeki and others had formed a common intention to assault the deceased and rescue their detained cattle. The appellant did not try to stop Kafeki from assaulting the deceased if indeed it was Kafeki who assaulted him. Instead in his own testimony he states that he proceeded to take away his cows. The evidence of PW1 and PW2 clearly indicates that the appellant and his group decided to unlawfully assault the deceased in order to take away the cows by force before he could report the matter to the local authorities.

In agreement with the learned Justices of Appeal, we find that there was no inconsistence regarding the participation of the appellant.

In regard to the inconsistence in identification of the appellant, the Court of Appeal was guided by the well stated principles for proper identification of an accused in **Abdallah Nabulere vs. Uganda Criminal Appeal No.9 of 1978**. The learned Justices of Appeal found that the appellant was identified by two witnesses whose testimonies corroborated each other. It was not a question of a single identifying witness or that of uncorroborated evidence of a child of tender age. The Court of Appeal thus found that although there were inconsistencies, as to whether the deceased was beaten in the house or outside at the kraal, these were minor and immaterial.

The appellant did admit that he was in the company of four other men when they went to demand for the impounded cattle from the deceased's family. The appellant and the deceased were

neighbours for four years which ruled out the possibility of mistaken identification. We are therefore unable to fault the findings made by the Court of Appeal.

Therefore, grounds 1 to 4 fail for lack of merit.

Ground 5

In determining the existence of malice aforethought in the offence of murder, Section 191 of the Penal Code Act provides as follows:

> **Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-**
>
> **a. an intention to cause the death of any person, whether such person is the person actually killed or not; or**
> **b. knowledge that the act or omission causing death will probably cause death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused**. (Emphasis mine)

This Court has in several previous cases stated the law on evidence for proof of malice aforethought. In **Nanyonjo Harriet and Another vs. Uganda Criminal Appeal No.24 of 2002 (SC)**, the Court held:-

> **In case of homicide, the intention and/or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used, and the part of the body assailed and injured.**

In the instant case, the weapon used was a herdsman stick. The trial Judge in considering the principles and the law on homicide stated that:

"*The courts are cognizant of the difficulty of proving an accused person's mental disposition and thus agreeable to an inference of such disposition from the circumstances surrounding the homicide. [R v Tubere (1945) 12 EACA 63, Uganda v Kiyingi & Others Criminal Session Case No. 30 of 2006].*

Circumstances from which an inference of malicious intent can be deduced are:

(a) The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity. In the present case, the accused assaulted the deceased by hitting him on the head and neck with a stick… On the part of the body targeted by the accused, the accused did hit the deceased on the head with the said stick and the head is deemed to be a vulnerable part of the body, which if targeted by an accused, imputes malicious intent on his part… The post mortem report referred to rod marks on the left side of the face and left side of the chest and brain injury due to open head injury as a result of blunt force trauma on the head. This raised the inference of a chest blow, in addition to the 2 head blows. Such use of a fairly large stick would, in my view, connote a malicious intent."

The learned Justices of Appeal in re-evaluating the evidence adduced in proof of malice aforethought, agreed with the reasoning and the findings of the learned trial Judge. The Justices of Appeal held as follows:

"We also find that the injuries inflicted were as a result of excessive force which caused a fatal brain injury. The deceased was assaulted several times with excessive force. The appellant and the other people had come to the deceased's home armed with sticks, with the apparent intention of forcefully and unlawfully taking away the cattle. The deceased was unarmed and unprepared for the attack. None of these people cared to find out what had

happened to the deceased after the assault. All the above lead to the conclusion that the deceased was killed with malice aforethought."

We note that there was a concurrent finding by the trial Judge and the learned Justices of Appeal on the existence of malice aforethought. This being a second appeal, this Court can only interfere with the concurrent finding if it is satisfied that the two courts were grossly wrong and or applied wrong principles of the law. This principle has been stated in various cases by this Court. [See for example: **Akbar Hussein Godi vs. Uganda; Supreme Court Criminal Appeal No.3 of 2003, Bogere Moses vs. Uganda; Supreme Court Criminal Appeal No.1 of 1997**].

We find no fault in the principles on malice aforethought upheld by the Justices of Appeal as well as those applied by the trial Judge.

This ground therefore fails.

Ground 6

In his Memorandum of Appeal to the Court of Appeal, the appellant stated that the learned trial Judge erred in the exercise of her discretion when she sentenced the appellant to 35 years in prison which sentence was harsh and excessive in the circumstance.

In sentencing the appellant, the trial judge had stated as follows:

"I carefully listened to the antecedents cited by state counsel. I agree with Defence Counsel that they are suggestive of indiscipline and irresponsibility by the convict with regard to the management of his cattle, they are not indicative of past conviction. I therefore deem the convict to be a 1st offender… Nonetheless, as a punitive measure to the convict and deterrent measure to like-minded persons that an attack to the human person shall not be condoned by courts, I hereby sentence the convict to 35 years imprisonment from date hereof."

Basing on the above framed ground, the court of Appeal held as follows:

"The sentence imposed by the learned trial judge is not illegal. It is neither manifestly harsh nor excessive considering the fact that the maximum penalty for the offence of murder is death. We find no reason of interfering with the discretion of the trial judge and we accordingly uphold the sentence."

In his Memorandum of Appeal to this Court, the appellant stated that the learned Justices of Appeal erred in law when they confirmed the sentence of imprisonment of 35 years which had been given by the trial Judge, which sentence was illegal. In his oral submissions, counsel argued that the illegality of the sentence was due to failure by the trial Court and the Court of Appeal to consider the remand period in arriving at the sentence to which the appellant was committed.

We note that the issue of the trial Judge not considering the remand period was not challenged in the Court of Appeal. What was challenged was the harshness of the sentence.

A question which then follows is whether this court can address an issue which the first appellate court had no opportunity to rule on but was nevertheless brought to the attention of this Court.

The general rule is that an appellate court will not consider an argument raised for the first time on appeal. **Rule 70 (1) (a)** of the **Supreme Court Rules** provides:

(1) At the hearing of an appeal—

(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 63 of these Rules;

However, there are exceptions to this general rule. For example, as explained in the well known legal maxim, *"Ex turpi causâ non oritur action",* a court of law cannot sanction what is illegal. (**See: Kisugu Quarries vs. The Administrator General SCCA No.10 of 1998**).

The instant case warrants a departure from the general rule since it deals with a constitutional imperative, the issue at hand being in the nature of a fundamental right of a convict as guaranteed by the Constitution. **Article 2** of the **Constitution** states that the Constitution is the

Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

In light of the above, we will thus proceed to address the issue of failure by the lower court to consider the remand period even though it was not raised on first appeal.

In **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995,** the principles upon which an appellate court should interfere with a sentence were considered. The Supreme Court referred to **R vs. Haviland (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 the practice that 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: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126.** (Emphasis ours)

We are also guided by another decision of this court, **Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000** in which it was stated:

> **It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently.** (Emphasis Ours)

In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001** it was held:

> **The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence.**

The record of both the trial court and the first appellate court reveals that in arriving at the sentence of 35 years, neither court took the period spent on remand by the appellant into consideration. And yet **Article 23 (8) of the Constitution** provides:

> **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.** (Emphasis mine)

A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

We therefore find that in re-evaluating the sentence, the learned Justices of Appeal erred in failing to take into account the period the appellant had spent on remand and instead upheld an illegal sentence.

Ground 6 therefore succeeds.

Having found that the sentence meted out by the High Court and confirmed by the Court of Appeal is illegal, this Court invokes **Section 7 of the Judicature Act** to arrive at an appropriate sentence in this matter. **Section 7** provides:

> **For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated**.

The said provision places this Court in the same position as the court which had original jurisdiction to hear the matter and sentence the accused (now appellant).

But in arriving at an appropriate sentence, we find it pertinent to re-visit this Court's previous decisions on the meaning of the phrase in Article 23 (8) of the Constitution that in imposing a

term of imprisonment on a convicted person, "any period he or she spends in lawful custody shall be taken into account in imposing the term of imprisonment".

The principle enunciated by the Supreme Court in **Kizito Senkula vs. Uganda SCCA N0. 24 of 2001; Kabuye Senvewo vs. Uganda SCCA N0. 2 of 2002; Katende Ahamad vs. Uganda SCCA NO.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010** is to the effect that, the words *"to take into account"* does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court.

The principle of *stare decisis et non quieta movera*, which is applicable in our judicial system, obliges the Supreme Court to abide or adhere to its previous decisions. However, **Article 132 (4) of the Constitution** creates an exception and states that the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so.

We have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. **Article 23 (8) of the Constitution (supra)** makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; 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. Furthermore,

unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision.

We note that our reasoning above is in line with provisions of **Guideline 15** of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** which provides as follows:

> **(1) The court shall take into account any period spent on remand in determining an appropriate sentence.**
>
> **(2) The court shall deduct the period spent on remand from the sentence considered appropriate <u>after all factors have been taken into account.</u>**
> (Emphasis added)

To arrive at the appropriate sentence, we have considered both the aggravating and mitigating factors on record as well as the period spent on remand. In light of the fact that human life had been lost, the prosecution prayed for a maximum penalty as a deterrent. We agree that the offence committed was grave and that the sentence to be given must reflect the enormity of the accused's unlawful conduct. On the other hand, it was pleaded in mitigation that the appellant was a first time offender and was aged 24 years. Considering that the appellant committed the offence at a relatively young age we are convinced that it is necessary to give him a prison sentence which will enable him to reform and be re-integrated back into society.

We come to the conclusion that in the circumstances of the case, a sentence of 22 years is appropriate. However, in line with Article 23 (8) of the Constitution, the appellant will serve a sentence of 21 years which will run from the time of conviction.

ORDERS OF COURT

For the reasons given above, we make the following orders:

1. The conviction of murder is upheld.

2. The sentence of 35 years imprisonment is set aside and substituted with a sentence of 21 years imprisonment.

Dated at Kampala this ***3rd*** Day of ***March*** 2016.

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HON. JUSTICE BART KATUREEBE

CHIEF JUSTICE.

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HON. JUSTICE JOTHAM TUMWESIGYE

JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE STELLA ARACH-AMOKO

JUSTICE OF THE SUPREME COURT.

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HON. JUSTICE ELDAD MWANGUSYA

JUSTICE OF THE SUPREME COURT.

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HON.JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT.