

UGANDA / JUDGMENT

Bunoti v Uganda (Criminal Appeal 105 of 2023) [2024] UGCA 308 (25 October 2024)

[2024] UGCA 308

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Gashirabake, JA, Kihika, JA / JCC

CASE / FILE NUMBER

Criminal Appeal 105 of 2023

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT MBALE
(Coram: Egonda-Ntende, Gashirabake and Kihika, JJA)

CRIMINAL APPEAL No.105 OF 2023 (Arising from High Court Criminal Session Case No. 0058 of \$2019\$ at Mbale)

BETWEEN

BUNOTI ISAAC ::::::::::::::::::::::::::::::

AND

UGANDA ::::::::::::::::::::::::::::::

An Appeal Arising from the decision of the High Court at Mbale before Okalany, J., delivered on \$9/01/2020\$)

JUDGMENT OF COURT

The Appellant was indicted and convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 22 years, 8 months, and 12 days in prison.

The appellant, being dissatisfied with the decision of the trial court, filed this appeal against sentence only on one ground namely;

The learned trial judge erred in law and fact in passing an illegal, manifestly harsh, and excessive sentence.

Background

The facts of the case as discerned from the record are as follows; The deceased Kennedy Bwire worked as a bio-statistician at Busia District Administration Block. The said premises were ordinarily guarded by the police, and the appellant and his colleague PC Matsiko, both police officers, were the ones on duty on that fateful day, the 18th day of September 2017.

On that day at about 6:45pm, a one Munialo Eriabu met the deceased being carried on a bicycle boda boda and he was carrying his laptop. The deceased stopped, greeted him and told him he was going to finish some work in his office after which they parted ways. Shortly after the deceased entered the compound of the Busia District Administration Block, gun shots were heard. The police were informed and when they went to the scene the deceased was found lying in the pool of blood with a bullet wound on the head with a fractured skull. The appellant who was still at the scene admitted to having shot the deceased in the head and he was immediately disarmed and arrested.

The Scene of Crime officer visited the scene took photographs, recovered the cartridges, drew a sketch plan and thereafter the body was taken to Busia Health Centre for post-mortem. According to the post-mortem report, the cause of death was a gunshot to the head. The charge and caution statement was recorded from the appellant wherein he admitted to have shot the deceased on the forehead. The appellant was as well examined and was found to be approximately 33 years with normal mental faculty.

At the trial, the appellant pleaded guilty and was sentenced to serve 22 years, 8 months, and 12 days in prison.

Representations

At the hearing of the appeal, Ms. Faith Luchivuya appeared for the appellant while Ms. Fatima Nakafeero, a Chief State Attorney from the office of the Director of Public Prosecutions (DPP) appeared for the respondent. Both parties filed written submissions which were adopted with leave of court.

Consideration of the appeal

This being a first appeal, it must be recalled that the duty of the first appellate court is to re-appraise all the evidence adduced at the trial and arrive at its own conclusions and draw inferences on questions of law and fact, bearing in mind that it did not see the witnesses testify. (See *Klfamunte Henry v Uganda SCCA No. 10 of 1997*, *The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No.15 of 2015* (unreported) and *Pandya Vs R* [1993] EA 336.)

We shall bear the above principles in mind while resolving this appeal.

GROUND T

The learned trial judge erred in law and fact in passing an illegal, manifestly harsh, and excessive sentence.

Appellant's submissions

It was submitted for the appellant that the learned trial judge overlooked a mitigating factor while sentencing the appellant. Specifically, that the

appellant is the sole bread winner fending for his direct and extended family and for that reason, the learned trial judge sentenced the appellant to a harsh sentence. Counsel for the appellant relied on the authority of *Aharikundira Yusitlana v Uganda SCCA No.27 of 2015* where the Supreme Court held that the trial court ought to take mitigating factors into consideration. Counsel for the appellant further criticized the learned trial judge for deviating from the principle of consistency in sentencing resulting into an excessive sentence. Counsel for the appellant further averred that the sentence imposed was illegal for failing to arithmetically deduct the 2 years, 3 months, and 18 days that the appellant had spent on remand, thus rendering the sentence legally questionable.

Respondents submissions.

In reply, Counsel for the respondent averred that the learned trial judge properly evaluated the evidence and that the sentence of 22 years, 8 months and 12 days was neither harsh nor excessive. Nevertheless, the respondent's Counsel acknowledged an oversight by the learned trial judge in failing to deduct the time the appellant spent on remand, which rendered the sentence illegal. Regarding the matter of sentencing consistency, it was contended that the sentence of 22 years and 8 months fell within the acceptable sentencing parameters and did not exceed reasonable bounds.

Consideration of ground I

This is an appeal on sentence only. The principles upon which an appellate court should interfere with a sentence were considered by the Supreme Court in *Kyalimpa Edward v Uganda CACA No. 10 of 1995*, where the supreme court referred to *R v Haviland (1983) 5 Cr. App. R(s) 109* and held as follows;

"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.*"

In the present case, counsel for the appellant contended that the learned trial judge failed to take into consideration the mitigating factor, which was that the appellant was a sole bread winner providing for his immediate and extended family.

The learned trial judge while sentencing held as follows;

"I have considered the submissions of the prosecution and the defence, as well as the statement made by the convict in mitigation. I have also considered the relevant laws above mentioned. The following factors are specifically considered: (1) The fact that the *convict committed murder' which carries a maximum punishment of* death. (2) The fact that the convict intentionally targeted the deceased's head with a deadly weapon - a gun weapon on his head' *grossly shattering his skull and scattering brain matter' The head is* such a vulnerable part of the body whoever targets it (and especially if it is done by someone like the convict whose job is to use a rifle and is trained to handle such weapon), intends that his target dies instantly; (3) The fact that the convict attempted to cover up the murder

by placing a panga and fire extinguisher next to the body' to make it appear as if the deceased was a criminal who had met his death while stealing the said extinguisher' 'thus the aggravating factors specified in paragraph 20 (a)' (b)' (d)' (e)' (m) and (p) of the Constitution (Sentencing Guidelines for courts of Judicature) (practice Directions 2013), are relevant, namely; the fact that the deceased sustained fatal gunshot injuries on the head, resulting into his immediate death' there was an element of premeditation as seen from the fact that the convict tried to cover up the murder when he put a panga and fire extinguisher next to the body to give the impression that he had killed an armed thief and the impact of the crime on the family and community where the deceased hailed from' which goes without saying' (4) The mitigating factors spelt out in paragraph 21 (e), (f), (i) and (l) of the Sentencing Guidelines are relevant, namely; the fact that the convict pleaded guilty, is a first offender and is remorseful and wrote an apology to the family, and was youthful - being 33 years of age when he committed the offence' (5) The fact that the convicts have spent 2 years' 3 months and 18 days on remand before conviction, since 21/9/2017 It is mandatory under Article 23 (8) of the constitution of the Republic of Uganda 1995 for the court to take into account the period spent on remand while sentencing a convict. Paragraph 15(2) of the Constitution (Sentencing Guidelines for courts of Judicature) (practice) Directory 2013 requires that court deducts the period spent on remand from the sentence considered appropriate in the circumstances of each case".

From the above excerpt, it is evident that the learned trial judge considered both the aggravating and mitigating factors before sentencing the

appellant. The trial Judge quite clearly stated that she had taken into consideration the submissions of the prosecution and the defence, as well as the statement made by the convict in mitigation. Counsel for the appellant took issue with the fact that the trial judge did not specifically mention that the appellant was a sole bread winner providing for his immediate and extended family.

In *Ramathan Magala v Uganda*, SCCA No.1 of 2014 the Supreme Court held that:

"However, after identifying the mitigating and aggravating factors, a judge may come to the conclusion that in the circumstances of the particular case, the aggravating factors outweigh what would have been mitigating factors. This principle was well laid out in the persuasive authority of *SS\$ vs Vilakazi* 2009 1 SACR 552 (SCA), where the Supreme Court of South Africa held

that: In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has 2 children or \$3\$... are largely immaterial to what that period should be. Nevertheless, the fact that the judicial officer was alive to what the accused submitted in mitigation must be evident on record. It must therefore be stated by the judicial officer that the sentence was arrived at with both the mitigating and aggravating factors in mind."

We are of the view that it is evident on the record that the trial judge was alive to what the appellant had submitted on record. That

notwithstanding, it is worth noting that the omission of one mitigating factor, that the appellant was a sole breadwinner does not significantly impact the sentencing outcome particularly given the severity of the offense at hand, which is murder. It is essential to remember that the deceased also contributed as a provider for their family, and the appellant's act of taking their life resulted in depriving the deceased's family of sustenance as well. We are therefore unable to agree with Counsel for the appellant that the learned trial Judge did not take into account the mitigating factor.

It is trite law that the imposition of sentence lies within the discretion of the trial court, and, that an appellate court will only interfere with such a sentence if there has been a material misdirection resulting into ^a miscarriage of justice.

This court is also guided by *Kamya Johnson Wavamuno v Uganda SSCA No.24 of 2015* where court held that;

"It is well settled that the court of appeal will not interfere with the exercise of discretion, or failure to take into account a material consideration or on any error in principle that has been made. It is not sufficient that the members of the court would have exercised their discretion differently."

In our view, the mitigating factor that the appellant was a sole breadwinner is not material enough to set aside a sentence. The aggravating factors in this case tremendously outweigh the mitigating factors, we find no reason to fault the learned trial judge's evaluation of the same.

Counsel for the appellant further contended that the imposed sentence of 22 years, 8 months, and 12 days deviated from established sentencing

norms. We note that the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, provide for the starting point in sentencing for Murder to be 35 years, and the maximum as death.

In the case of *Kisitu Majaidin alias Mpata v Uganda*, CACA No. 028 of 2007 this court upheld a sentence of 30 years imprisonment for Murder. The appellant was convicted of killing his mother. In *Kazarwa Henry & Others v Uganda*, SCCA No. 110 of 2007, this court found the sentence of life imprisonment imposed against the appellant for the offence of Murder to be harsh and manifestly excessive and reduced it to 30 years imprisonment. In *Mutebi Muhammed*

and *Nzinsa Isaac v Uganda*, CACA No.32 of 2014 and 109 of 2012 this court upheld a sentence of 25 years and 30 years respectively for the offence of Murder. We therefore, find that the learned trial judge's sentence of 22 years, 8 months and 12 days was not inconsistent with the sentencing trends.

Lastly, it was appellant's Counsel's contention that the Learned Trial Judge did not arithmetically deduct the period that the appellant spent on remand rendering the sentence illegal. This point was conceded to by Counsel for the respondent.

While sentencing the appellant, the Learned Trial Judge held as follows;

. although death is the maximum punishment prescribed for murder and the sentencing guidelines in the 3^d schedule, part I prescribes a starting point of 35 years. Murder is the highest form of abuse of a person's rights since it takes away his/her life. The convicted a police officer on duty suddenly and unceremoniously ended the life and career of a very promising young man depriving him of a whole

lifetime, and his parents and siblings of a dear one. His reasons for so doing remain unknown. After killing the deceased, he tried to cover it up insensibly. His conduct deserves serious punishment. The convicted qualifies however, for the above mitigating factors for some indulgence. He shall be sentenced to long term imprisonment for his crime. I sentence the convicted to imprisonment for 22 years, 8 months and 12 days from the date of conviction."

From the above, it is evident that the learned trial judge did not first determine what would be the appropriate sentence from which to arithmetically deduct the time spent on remand from the sentence. The learned trial Judge, in her earlier sentencing notes did observe that article 23(8) of the Constitution was applicable. Nevertheless in sentencing she did not demonstrate that she had complied with it. In *Rwabugande Moses v Uganda* [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand by deducting the same from an appropriate sentence violates article 23 (8) of the Constitution. In the circumstances, we find that the sentence passed was illegal for violating Article 23 (8) of the Constitution. This court hereby sets it aside on grounds of illegality.

Given the above, we invoke the powers of this court under the provisions of section 11 of the Judicature Act to re-sentence the appellant. We take note of the fact that the appellant pleaded guilty thus saving courts time. Secondly, we also note that the appellant is a first-time offender as well as the fact that he was the sole bread winner for his family and extended family. The appellant has written to the family of the deceased apologizing for what he has done.

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On the other hand, however, the appellant inexplicably snuffed out the deceased's life in a brutal manner by shooting him in the head. The deceased was an exceptional young man who had a promising future. The reasons for this brutal murder remain unknown and have had a deep impact on the immediate family of the deceased.

Consequently, we sentence the appellant to a term of 20 years, and deduct therefrom the period of 2 years, 3 months, and 18 days that the appellant spent on remand. In the result the appellant shall serve a sentence of 17 years and seven months beginning from the date of conviction.

We so order.

.t")E' ^tb"-,.1 Signed and dated at Kampala this day of ²⁰²⁴

FRIDRICK EGONDA NTENDE Justice of Appeal

CHRISTOPHER GASHIRABAI(E Justice of Appeal

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