

UGANDA / JUDGMENT

Ekonga v Uganda (Criminal Appeal 332 of 2017) [2023] UGCA 179 (3 July 2023)

[2023] UGCA 179

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Mulyagonja, JA,
Bamugemereire, JA

CASE / FILE NUMBER

Criminal Appeal 332 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

Coram: Egonda-Ntende, Bamugemereir & Mulyagonja, JJA

CRIMINAL APPEAL NO. 332 OF 2017

EKONGA PATRICK \$\mathsf{S}\$

VERSUS

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

(Appeal from the decision of Nabisinde, J. delivered on 28th July 2017
in Lira High Court Criminal Session Case No. 256 of 2016)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. On 28th July 2017, he was convicted on his own plea of guilty and sentenced to 28 years' imprisonment.

15 Background

The facts that were admitted by the appellant were that Beatrice Atala, the victim, was the appellant's stepmother. Prior to her death, she had a disagreement with the appellant over allegations that he stole her chicken. With the intervention of clan elders, the dispute was resolved, and the appellant compensated the victim. However, a week later when the appellant lost his bicycle, he alleged that the deceased stole it.

On 12th February 2017, the deceased left home for Teabolo Market but did not come back home. It was later found that the appellant and his brother, one Ojok, inflicted injuries upon her which resulted in her death and

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dumped her body in a bush. The appellant and his brother confessed to the murder of the deceased and led village mates to the place where they dumped the body. In anger village mates descended upon them and lynched them, which resulted in Ojok's death and injuries to the appellant

- 5 that resulted in his admission to hospital. On discharge, he was charged with the murder of Beatrice Atala. He pleaded guilty and was sentenced to 28 years' imprisonment. He now appeals against that sentence in the following ground:
- That the learned trial judge erred in law and fact when she sentenced the appellant to 28 years' imprisonment, which was manifestly harsh and excessive (and) in total disregard of the mitigating factors.

Representation

At the hearing of the appeal on 29th March 2023, Mr. Layoo Paul Julius represented the Appellant on State Brief. Ms. Caroline Marion Acio, Chief State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. 15

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30(1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See Bogere Moses 20

& Another v Uganda; Supreme Court Criminal Appeal No.1 of 1997)

We are guided by the principles above and in resolving this appeal, we carefully reviewed the record set before us and considered the submissions 25

of both counsel, the authorities cited and those not cited that were relevant to the appeal.

Submissions of Counsel

5 Mr. Layoo, for the Appellant submitted that the sentence that was imposed by the trial judge was harsh and excessive and in total disregard of the mitigating factors. That the appellant was a first-time offender, who pleaded guilty right from the Police Station and before court and so did not waste court's time. Further, that the Appellant was remorseful and just 24 years old with a family of three. Counsel further submitted that blood compensation was paid in order to promote peace between the two families. That therefore, the appellant deserved a more lenient sentence. He urged court to reduce the sentence as it was done in *Magala Ramathan v Uganda*, SCCA No. I of 2014 and *Mawazimallanga v Uganda*; SCCA No.43 of 2018. He also referred court to *Kiwalabye Bernard v Uganda* 10

Criminal Appeal No, 143 of 2001 and Muhwezi Bayon v Uganda Criminal Appeal No. 198 of 2013. 15

In reply, Ms. Acio for the respondent referred to *Livingstone Kakooza v Uganda*; SCCA No. 17 of 1993 which was cited with approval in *Naturinda Tamson v Uganda*; SCCA No. 25 of 2015, for the submission that the appellate court could only interfere with the sentence passed by the trial court where the sentence was illegal, manifestly harsh or excessive or where the trial court overlooked some material factor in arriving at the sentence.

She contended that none of the criteria above was established in this case in order to warrant interference with the sentence. She asserted that the trial judge considered all the mitigating factors in favour of the appellant and that she had even referred to more factors that are provided for in the

Constitution (Sentencing Guidelines for the Courts of Judicature Practice Directions, Legal Notice No. 8 of 2013. She emphasised that the trial judge considered all the aggravating and mitigating factors before coming to a conclusion that the aggravating factors outweighed the mitigating factors. Further, that the trial judge considered the submissions of counsel, including the blood compensation that was adverted to by the appellant.

She prayed that this court dismisses the appeal and confirms the sentence imposed by the trial court because it was within the sentencing range for murder provided for by the Sentencing Guidelines for the Courts of Judicature.

Resolution of the Appeal

15 The principle that the appellate court will not interfere with a sentence imposed by a trial court unless the sentence is illegal or the court is convinced that the trial judge did not consider an important matter or circumstances which ought to have been considered when passing sentence is settled. The court may also interfere with the sentence if it is shown that it is manifestly excessive or so low as to amount to an injustice.

[See Livingstone Kakooza v Uganda SCCA No. 17 of 1993]

- We note that counsel for the appellant raised two issues for this court to consider: i) that the sentence of 28 years' imprisonment was manifestly harsh and excessive in the circumstance of the case because the appellant pleaded guilty from the onset; and ii) that the trial judge did not consider the mitigating factors, including the blood compensation that was paid by 20
- the appellant to the family of the deceased. We shall therefore address the two in order to resolve the appeal. 25

While sentencing the appellant on 28th July 2017, the trial judge stated that she had considered the submissions of both counsel, the convict's own words as well as his demeanour during the sentencing proceedings and the circumstances under which the deceased met her death. The judge

- made reference to the **Constitution (Sentencing Guidelines for Courts 5 of Judicature) Practice Directions Legal Notice No.8 of 2013** on the purpose of sentencing and the different factors which would aggravate or mitigate a sentence on a charge of murder. Further to that she took into account the general factors to be considered in sentencing as laid out in the Second Schedule to the Sentencing Guidelines. She then concluded 10
- that the aggravating factors outweighed the mitigating factors and held thus:

"I have also noted that in such a case, the maximum sentence would *have been the death penalty; however, I find that this will not serve the* ends of justice in this case and this will be too harsh in this particular 15 case. I have also thought about his family and the consequences her *death will have on them. I therefore find that the convict being a young* adult needs a custodial sentence to enable him rethink about his life and *learn better ways of resolving disputes. While the starting range in terms* of years would be at least (35) years imprisonment, that being the case, 20 *I have also taken into account the age of the deceased and the convict.* Taking into account all the circumstances of the case as noted above, and the fact that this convict has been on pre-trial remand for just one year and half month, (sic) but readily admitted his guilt. I find that a sentence of (35) thirty-five years' imprisonment would have been 25 appropriate. I have however deducted the (5) five years because of his plea of guilt and youthfulness and also another two years already served on remand. The final sentence for the convict in this case is 28 *(twenty-eight years' imprisonment."*

From the ruling above, it is clear that the trial judge not only took the 30 aggravating factors into account but she also considered the mitigating factors such as the youthful age of the appellant, his responsibilities to his young family, and most importantly and separately, his plea of guilty. The submission that she did not consider the mitigating factors was therefore misplaced.

- 5 However, with regard to the guilty plea, we note that while the trial judge stated that the starting point was given as 35 years in the Sentencing Guidelines, she reduced the would be sentence by a proportion of one seventh, only. We take cog:risance of the fact that the

Sentencing Guidelines, in paragraph 21 provide that the sentencing court shall when considering whether to impose a sentence of death, among others, take into account the plea of guilty [paragraph 21(e)] and whether the convict pleaded guilty [paragraph 21(k)]. Further that though the Guidelines provide in Schedule 2 (under paragraph 14) a list of the factors that the sentencing court must take into account, including clause (pl "the stage of the trial and the circumstances within which a plea of guilty was made," 10

- the level of reduction that the sentencing judge may apply is not indicated anywhere in the Guidelines. It is left entirely within the discretion of the sentencing judge. 15

This is not the case in other jurisdictions. For example, in the United Kingdom of England and Wales, the Sentencing Council issued a Definitive Guideline on sentencing where an offender pleads guilty, under section 73 of the Sentencing Code. The Guideline points out that although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, acceptance of guilt: a) normally reduces the impact of the crime upon victims; b) saves victims and witnesses from having to

testify; and c) is in the public interest in that it saves public time and money on investigations and trials. A guilty plea produces greater benefits 25

¹Reduction in Sentence for a Guilty Plea, 2017, retrieved on 21 June 2023 from <https://www.sentencingcouncil.org.uk>

the earlier the plea is indicated. In order to make the most of the benefits above and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this Guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.

The Guideline specifies that the maximum reduction on a plea of guilty shall be one third. Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made subject to specified exceptions. The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court. Further, that after the first stage of the proceedings the maximum level of reduction is one-quarter, subject to specified exceptions. The reduction should be decreased from one-quarter to a maximum of one-tenth on the first day of trial having regard to the time when the guilty plea is first indicated to the court, relative to the progress of the case and the trial date subject to specified exceptions. The reduction should normally be decreased further,

The framers of the Sentencing Guidelines for the Courts of Judicature in Uganda should in the future indicate the specific levels of reduction on pleas of guilty. This would reduce the burden cast on the trial or sentencing judge to determine the level of reduction on a guilty plea. It would no doubt result in sentences that can be determined before an offender pleads guilty to an offence, especially if the starting levels are also agreed upon across the courts and included in the Guidelines' 20 25

even to zero, if the guilty plea is entered during the course of the trial.

Finally, counsel for the appellant submitted that the court ought to have considered the 'blood compensation' that was paid to the deceased's family

as a mitigating factor to warrant a more lenient sentence. Counsel explained that this blood compensation was in a bid to promote peace between the two families. We also observed that blood compensation was advanced as a mitigating factor during the sentencing proceedings, as it is

shown on page 12 of the Record of Appeal, where it was stated that: $\$S$

> "... and in order to bring peace (and) tranquillity, the clan of the slain mum, (sic) the family of the accused had to pay blood compensation to the family of the deceased as a sign that they wanted peace to prevail *being close family..."*

- Paragraph 6 (f) of the Sentencing Guidelines provides that every court sentencing an offender shall take into account, among others, any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case. Paragraph 4 of the Guidelines defined "restorative justice" as the means for "repairing the harm caused to
- the victim by the commission of the offence to the victim, transforming the offender, reconciling the offender with the victim and the community."

Much as the principle of reparations is included in the Sentencing Guidelines, blood compensation has its basis in the customary law of the appellant, and perhaps the victim who was his aunt. It is trite law that where a party wishes to prove a right under custom before a court of law, he or she is under an obligation to adduce evidence to prove such custom. Section 46 of the Evidence Act thus provides for it in the following terms:

46. Opinion as to existence of right or custom, when relevant.

When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation. —The expression "general custom or right" includes customs or rights common to any considerable class of persons.

It is clear that the appellant did not adduce any evidence to prove that he paid blood compensation to the family of his victim, as is the custom among the clans/people in the Lango sub-region of Uganda. It was only brought to the attention of court during his statement in mitigation of sentence. The trial judge therefore made no error when she did not consider this aspect of his plea for leniency.

In conclusion therefore, we find that the trial judge erred when she did not seriously consider the impact of the guilty plea on the sentence that she imposed on the appellant. In addition, contrary to paragraph 6 (c) of the Sentencing Guidelines, which requires a sentencing court to take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances, the trial judge did not take this into account, either. The resultant sentence therefore was contrary to this principle and for that reason, we set it aside. We shall now consider sentences that have been imposed by the courts on offenders who pled guilty to the offence of murder in order to come to the appropriate sentence to impose upon the appellant in this case. We do so pursuant to the powers vested in this court under section 11 of the Judicature Act. 10 15

In *Ntambi Robert v Uganda*, Court of Appeal Criminal Appeal No 334 of 2(J-19), the appellant was convicted of the offences of murder and aggravated robbery on his own plea of guilty. The trial court sentenced him to 20 years and 18 years' imprisonment for murder and aggravated robbery, respectively, to run concurrently. On appeal to this court, it was observed that considering the mitigating, aggravating factors and the precedents set by this court and the Supreme Court, the sentences were neither manifestly harsh nor excessive. Further that according to the 20

sentencing range laid down in the Third Schedule of the Sentencing Guidelines, sentences for both offences range from 35 years' imprisonment to the death sentence, after considering the mitigating and aggravating factors. The court thus found no reason to interfere with the sentences imposed by the trial court and they were upheld.

In *Anguyo Robert v Uganda* 120161 UGCA 39, the appellant was convicted of murder on his own plea of guilty and sentenced to 20 years of imprisonment. On appeal, upon finding that the remand period was not taken into consideration, this court imposed a sentence of 18 years' imprisonment. In *Sande v Uganda* a20141 UCICA 11, the appellant was sentenced to 18 years' imprisonment on her own plea of guilty to the offence of murder. This court confirmed the sentence.

In *Tamuzadde Hamidu v Uganda*, Criminal Appeal No. 456 of 2014, the appellant was convicted of murder on his own plea of guilty. He was sentenced to imprisonment for a term of 20 years. On appeal, he claimed the sentence was harsh and excessive in the circumstances of the case because the trial judge sentenced him to 20 years instead of the period of ¹⁵years that had been agreed to in the plea bargain "g."-"r). This court found that the lower court exercised a wrong principle in sentencing and restored the sentence of 15 years' imprisonment. Having deducted the period of 2 years that the appellant spent on remand; the court sentenced him to 13 years' imprisonment. 15 20

In *Okech Simon v Uganda*, Criminal Appeal No. 007 OF 2018, the appellant complained about a sentence of 15 years' imprisonment that had been agreed upon in a plea bargain agreement as being harsh and

excessive because the trial judge did not consider the mitigating factors.

This court found that the grievance did not have merit and confirmed the sentence of 15 years' imprisonment.

According to the authorities that we have reviewed above, the sentence on a plea of guilty for the offence of the appellant pled guilty before and at the

5 commencement of the trial. We are therefore of the view that a sentence of 15 years' imprisonment would serve the cause of justice in this case. From that we are obligated to deduct the period of two (2) years that he spent on remand before he was convicted. Accordingly, we sentence him to a period of 13 years' imprisonment which shall commence on 28th July 2017, the

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10 date of his conviction.

\) Dated at Gulu this of 2023.

¹⁵ Fredrick Egonda Ntende WSTICE OT'APPEAL

²⁰ Catherine Bamugemereire WSTICE OF APPEAL

Irene MulyagonJa JUSTICE OF APPEAL 25

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