

UGANDA / JUDGMENT

Ogwang v Uganda (Criminal Appeal 99 of 2014) [2024] UGCA 114 (16 May 2024)

[2024] UGCA 114

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Muzamiru, JA, Monica K. Mugenyi, JA

CASE / FILE NUMBER

Criminal Appeal 99 of 2014

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

[Coram: Geoffrey Kiryabwire, Muzamiru M. Kibeedi, Monica Mugenyi, JJA]

CRIMINAL APPEAL No. 099 OF 2014

(Arising from High Court Criminal Session Case No 0052 of 2014 at Mukono)

BETWEEN

OGWANG BOSCO aka KOMAKECH DANIEL =====APPELLANT

AND

\$UGANDA \xrightarrow{\hspace*{1.5cm}} \textbf{UGANDA} \xrightarrow{\hspace*{1.5cm}} \textbf{RESPONDENT}\$

(An Appeal from the Judgment of the High Court of Uganda Lameck Mukasa J Delivered on 31st March 2014)

JUDGMENT OF THE COURT

The Appellant Ogwang Bosco (aka Komakech Daniel), was indicted with the offences of: -

- Murder contrary to Sections 188 and 189 of the Penal Code Act. \$i\$.
- Aggravated Robbery Contrary to Sections 285 and 286 of the Penal ii. Code Act.

- Conspiracy to commit a felony contrary to Sections 390 of the Penal iii. Code Act.

The Brief Facts

The facts as can be discerned from the Summary of the Case filed at the trial Court are that the Appellant and four others (all security guards) trailed one Tamale Ahamed (the deceased) in his car to the home of his mother Hajjati Zawedde at Ntinda zone, in Seeta Mukono. There at the gate of the deceased's mother's house, the Appellant and his accomplices assaulted deceased and later shot him and also took his property included his phone (ZTE GS S10 dual band S/No. which 353609040458 I T 8). The Appellant was then tracked using the phone data by the police and arrested. The Appellant then made both a Charge and Caution Statement and Extra-Judicial Statement in which he confessed to having

planned and participated in the Robbery and Murder of the deceased with his fellow accused persons.

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Decision of the Trial Court

At the trial, the Appellant admitted all the facts of the offence and pleaded guilty for which he was convicted on his own plea and was sentenced to terms of imprisonment being 39 years for Murder; 29 years for Aggravated Robbery and 1 year for Conspiracy of commit a felony.

Representations

At the hearing, the Appellant was represented by Mr. Dan Mudhumbusi (on State Brief) and the Respondent by Ms. Gladys Nyanzi.

Leave to Appeal on Sentence only

At the hearing the Appellant sought leave under Section 132 (1) (b) of the Trial on Indictment Act to appeal the sentences only. The Respondent did not object and Court granted leave to the Appellant to appeal sentence only.

Both parties also sought the leave of Court to adopt their written submissions as their legal arguments in this Appeal, which leave was granted.

Powers of an Appellate Court

We are alive to the duty of this court as a first appellate court as decided in the case of Kifamunte Henry V Uganda SCCA No 10 of 1997 to reappraise all the evidence at trial and come up with our own inferences of law and fact.

The basis for setting aside a sentence imposed by a trial court were generally set out in **Ogalo s/o Owoura v R** (1954) 21 EACA 270. In that appeal, the appellant appealed against a sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. The East African Court of Appeal held that: -

"... The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in **James v R**, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. An appropriate sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser offences in terms of aggravation attracting less severe penalties. Courts have also added another principle of consistency in terms of equality before the law so that offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding actor..."

In Kiwalabye versus Uganda Criminal Appeal No. 143 of 2001 (SC) this Court held: -

"The appellant court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle"

Furthermore, this Court in **Alex Biryomunsi V Uganda CACA No 464 of 206** (following **Katureebe Boaz V Uganda SCCA No 066 of 2011**) it was held: -

"Consistency in sentencing is neither a mitigating nor an aggravating factor, the sentence imposed lies in the discretion of the court which in exercise thereof may consider sentences imposed in other cases of a similar nature..."

Arguments of the Appellant

Counsel for the Appellant argued that the sentences imposed were manifestly harsh and excessive. In this regard, Counsel submitted that the Appellant had voluntarily pleaded guilty to the charges but this was not taken into account.

Secondly, the Appellant during mitigation had prayed for forgiveness on the grounds that he had been influenced to commit the crime by a bad group he was involved in, for which he was sorry.

Counsel further argued that the sentences imposed on the Appellant were not consistent with sentences in other similar offences imposed in previous cases.

In this regard we were referred to the case of *Kamya Abdullah and 4 others V Uganda SCCA No 24 of 2015* where the Supreme Court reduced a sentence of murder from 32 to 18 years after a full trial.

Counsel also referred us to more cases. In the case of *Lwere Bosco V Uganda CACA No 531 of 2016* this Court reduced a sentence of murder from 25 to 18 years.

In yet another case, *Tumwesigye V Uganda CACA No 46 of 2019* a Sentence of 25 years was reduced to 20 years after a full trial.

Counsel noted that notwithstanding these mitigating factors, the trial Judge still went ahead to sentence the Appellant as he did.

Arguments of the Respondent

Counsel for the Respondent opposed this Appeal. Counsel argued that the Appellant together with a gang trailed the deceased, shot and killed him in a very gruesome manner. As a result, the State at trial had prayed for harsher sentences like 45 years for murder; 35 years for aggravated robbery and 2 years for conspiracy to commit a felony but the trial Court instead rendered more lenient sentences.

As to consistency of sentences, Counsel submitted that sentences imposed were within range of other similar crimes.

Counsel in this regard referred us to *Kaddu Kavulu Lawrence V Uganda SCCA No 72 of 2018* where the Appellant in that case committed murder using a panga inflicting fatal wounds on his former lover leading to her death. The Appellant in that case was charged with murder and sentenced to suffer death. On appeal to this Court the sentence was reduced to life imprisonment. On further appeal to the Supreme Court the sentence of life imprisonment was upheld.

In *Nabongho Ibrahim V Uganda CACA No 181 of 2014* the Appellant in that case attacked the deceased and robbed his motorcycle. The Appellant was arrested and confessed to the committing the offences of murder and aggravated robbery. The Appellant was sentenced at trial to concurrent sentences of life imprisonment on each count. On appeal to this Court, the sentence was reduced to 34 years.

Counsel therefore prayed that the sentences imposed in this Appeal be upheld.

Decision of the Court

This appeal is against sentence only. We have carefully considered the submissions of both Counsel, the record and authorities availed to us; for which we are grateful.

At sentencing, the trial Court Judge held as follows: -

"... The offence of murder and the offence of aggravated robbery each on conviction carries sentence ranging from 30 years of imprisonment to death with a starting point of 35 years of imprisonment.

Conspiracy to commit a felony carries a maximum sentence of 7 years' imprisonment. Considering all the above I find 40 years appropriate for murder, 30 years appropriate for aggravated robbery and 2 years appropriate for conspiracy to commit a felony. I take into account the almost one year spent on remand and sentence the convict as follows;-

- Murder 39 years of imprisonment.
- Aggravated robbery 29 years of imprisonment and
- Conspiracy to commit a felony 1 year of imprisonment

Since the three offences were committed in the same transaction and against one victim the above sentences will run concurrently effective from the date of conviction — i.e. \$17/03/2014...\$ "

The Judge before passing sentence took into account the aggravating and mitigating factors and earlier held: -

"... I have considered all the aggravating factors and mitigating factors put forward. The convict is a young man and has led a positive life by going back to school while in prison. He is capable of reform. He owned up to the commission of the offences right from his charge and caution statement. However, life is a fundamental right which everyone has a constitutional and biblical obligation to protect..."

From the Sentencing Order, it can be seen that the trial Judge also addressed himself to Article 28 (2) of the Constitution and took into account the time spent on remand.

We have considered the submissions of both parties to the Appeal and the authorities submitted to us for which we are grateful.

It is clear to us that from the language used by the sentencing Judge that in sentencing the Appellant, that he was heavily guided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (Sentencing guidelines).

Guideline No.6(c) of the Sentencing Guidelines emphasizes the need for consistency and provides that: -

"Every court when sentencing an offender shall 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 "

In *Ninsiima v. Uganda* Crim. Appeal No. 180 of 2010, Court of Appeal held that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

In this Appeal the Appellant has argued that the sentences for murder and aggravated robbery imposed on him were manifestly harsh and excessive. It is further argued that the said sentences were not consistent with others rendered by the Courts.

Turning to the charge of murder, in *Turyahika Joseph V Uganda* CACA 0327 of 2014 this Court held: -

"... In similar circumstances, this Court and the Supreme Court have confirmed or imposed sentences ranging from 20 to 30 years. In exceptional circumstances, the sentences have been lower or higher... In *Hon. Godi Akbar vs Uganda: Supreme Court Criminal Appeal No 3 of 2013*, the Supreme Court confirmed a 25-year imprisonment for murder. In *Kisitu Majaidin alias Mpata vs Uganda: Court of appeal Criminal Appeal No. 28 of 2007*, this Court upheld a sentence of 30 years' imprisonment for murder. The appellant had killed his mother. In *Suzan Kigula vs Uganda Supreme: Court Criminal Appeal No 1 of 2014*, the Supreme Court reduced the sentence from death to 20 years' imprisonment. In *Atuku Margret Opii vs Uganda: Court of Appeal Criminal Appeal No. 123/2008*, this Court reduced the sentence from death to 20 years' imprisonment. The appellant was a single mother of 8 children. She killed a neighbour's 12-year-old daughter by drowning her in a well..."

In the case of aggravated robbery, reference is made to the case of *s Abetle Asuman v Uganda* Criminal Appeal No 66 of 2016 where the Appellant had been convicted of the offence of aggravated robbery and was sentenced to Life imprisonment by the High Court. This court reduced the sentence of Life imprisonment to a sentence of 18 years' imprisonment.

On further appeal to the Supreme Court on the ground that the sentence of 18 years' imprisonment was a harsh and excessive sentence, the Supreme Court upheld the 18 years' imprisonment imposed by the Court of Appeal.

In *Naturinda Tamson v Uganda; Supreme Court Criminal Appeal No 025 of 2015* the Appellant had been convicted by the High Court of the offences of rape, defilement and aggravated robbery and was sentenced to 18 years' imprisonment on each of the counts which sentences were to run concurrently. The Court of Appeal reduced the sentence to 16 years' imprisonment and the second appeal to the Supreme Court against sentence was dismissed.

In *Bogere Asimwe Moses and Senyonga Sunday v Uganda; Supreme Court Criminal Appeal No 39 of 2016* the Supreme Court upheld a sentence of 20 years' imprisonment imposed for aggravated robbery. The Appellant's were 22 and 23 years old respectively and court noted that there was no violence, no death occurred and some property was recovered.

In *Tukamuhebwa David Junior and Mulodo Yubu v Uganda Supreme Court; Criminal Appeal No 59 of 2016* on appeal, a sentence of 18 years imprisonment for aggravated robbery was set aside and the Supreme Court held that a sentence of 20 years imprisonment was appropriate in respect of the aggravated robbery.

In *Muchunguzi Benon and Muchunguzi Thomas J v Uganda Criminal Appeal No 008 of 2008* the Appellant's were convicted of aggravated robbery and sentenced to 15 years' imprisonment by the High Court. On appeal to the Court of Appeal, the sentence was upheld. The robbery involved violence in that the victim of the offence had been hacked with a cutlass and sustained several injuries on her body.

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We find on the strength of the above authorities that the sentences imposed of 39 years of imprisonment for murder and 29 years of imprisonment for aggravated robbery to be manifestly harsh and excessive. This is especially so given that the trial Judge had a starting point for sentencing of 35 years which is not consistent with the ranges used in the above cases. We also note that the Appellant pleaded guilty and saved Court time and resources for a full trial.

We now proceed under Section 11 of the Judicature Act to impose a fresh sentence on the Appellant as hereinafter. The Appellant is sentenced to 26 years' imprisonment for murder and 21 years' imprisonment for aggravated robbery with effect from the date of sentence based on the aggravating and mitigating factors set out in the record of appeal and the decided cases we have cited hereinabove. We have in imposing these sentences, taken into account as the trial Judge did before the 1 year on remand spent by the Appellant, and therefore sentence the Appellant to 25 years for murder and 20 years for aggravated robbery respectively. We see no reason to disturb the sentence of one year imposed for conspiracy to commit a felony.

Final Decision

The Appeal is hereby partially allowed and we accordingly set aside the sentence of 39 years' imprisonment imposed for murder and substitute it with a sentence of 25 years' imprisonment.

We further set aside the sentence of 29 years' imprisonment imposed for aggravated robbery and substitute it with a sentence of 20 years' imprisonment.

The sentence of 1 year for Conspiracy of commit a felony remains undisturbed.

These sentences shall run concurrently from the original date of sentence.

We must inform the Appellant that he has a right to appeal against this sentence to the Supreme Court.

We so Order

| Dated at Jinja this \$\sqrt{6}\$ | | Day of | mon | 2024 |

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE JA HON. MR. JUSTICE MUZAMIRU M. KIBEEDI JA

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*HON. LADY JUSTICE MONICA MUGENYI JA

*This judgment was signed before this judge ceased to hold that office.

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