

UGANDA / JUDGMENT

Okello v Uganda (Criminal Appeal 101 of 2016) [2024] UGCA 235 (30 August 2024)

[2024] UGCA 235

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Mulyagonja, JA, Eva K. Luswata, JA/
JCC

CASE / FILE NUMBER

Criminal Appeal 101 of 2016

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

Coram: KiryabuLire, Mulgagonja & Lustuata, JJA

CRIMINAL APPEAL NO.101 OF 2016

BETWEEN

OKELLO JOHN OGENGA : : : : : ! : : : : :
APPELLANT

AND

UGANDA : : : : : RESPONDENT

(An appeal from the decision of Mutonyi, J delivered at Kitgum on 2nd MaA, 2016 in High Court Criminal Session Case No' 123 of 2015)

Introduction

The Appellant was indicted for the offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act, Cap. 120. Upon his own plea of guilty, he was sentenced to 25 years' imprisonment'

¹⁵ Background

The facts as ascertained from the court record were that the Appellant and the deceased, ochola Patrick, were step brothers. They lived in the same homestead in Putuku East Ward, Matidi Sub-County in Kitgum District. on 15rh June 2013, the Appellant who was in the company of four others and the accused attended a burial, and on their way back home they stopped to have a drink and all of them got drunk'

As a result, the deceased refused to g do so, the Appellant begun to Punch unconscious and was abandoned in o home and in an effort to ge and kick him. The deceased the bush close to his home. t him to became He u'as

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found the next morning and taken to Kitgum Hospital. He later died in hospital and the cause of death was said to be possible violent trauma leading to a fracture of the cervical bone.

The Appellant together with his four colleagues were arrested and initially charged with murder but it was later reduced to manslaughter. All 5 S accused pleaded not guilty. The prosecution then presented 7 witnesses who all testified that the Appellant assaulted the deceased on their way home on that fateful night. None of the witnesses' evidence implicated the other four accused persons so the trial judge held that they had no case to answer. 10

When the matter came up for the Appellant's defence on 2nd May 2016, he changed his plea to guilty and he was sentenced to 25 years' imprisonment. Dissatisfied with the sentence, he appealed on one ground as follows:

1. That the learned trial judge erred in law and fact when she passed an 15 illegal, excessive and harsh sentence of 25 years without due consideration to the mitigating factors and the family relation between the deceased and the Appellant.

Representation

- When the appeal came up for hearing on 21st November 2023, the 20 Appellant was represented by Mr. Onencan Ronald. Mr. Sam Oola, Senior Assistant Director of Public Prosecutions from the Office of the Director of Public Prosecutions represented the respondent. The prayer by the Appellant's counsel to appeal against sentence only was granted. Counsel
- for both parties applied to have their written submissions adopted as their 25 final arguments in the appeal and the prayers were granted.

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Preliminary Matters

In his written submissions, Mr. Onenkan for the Appellant indicated that he intended to make two oral applications at the hearing pursuant to Rules 67 and 30(1)(a) of the Rules of this court. The first was to seek leave to file a Supplementary Memorandum of Appeal because the Appellant erroneously filed his own with two grounds of appeal against both conviction and sentence. The other was for leave to bring additional evidence.

10 However, at the hearing Mr Onenkan informed court that he met with the Appellant and explained that he could only appeal against sentence following his plea of guilty. A Supplementary Memorandum of Appeal was therefore filed and it was counsel's prayer that it be adopted, substituting the one that had been filed by the Appellant'

In his submissions in reply, Mr Oola indicated that he had no objection to the Appellant filing a Supplementary Memorandum of Appeal' Though we

did not consider the issue at the hearing, Mr Onenkan's application to appeal against sentence only was allowed and the appeal was heard on the basis of the Supplementary Memorandum of Appeal'

Submissions of Counsel

²⁰ with regard to the appeal against sentence, Mr. Onenkan submitted that the appeal was twofold:

- i) that the sentence that was handed down was illegal; and
- that it was harsh and excessive in the circumstances of the case. ii)

Regarding illegality of sentence, counsel referred to Article 23 (8) of the Constitution and the authorities of Oumo Ben alias Ofwono v' ^U

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SCCA No. 20 of 2016 and PC Amukun John Michael & DC Oruba Michael v. Uganda, CACA No. 67 of 2011, on the requirement to take into account the remand period in the determination of an appropriate sentence. He pointed out that the Appellant stated that he spent 2 years and 8 months in lawful custody before he was sentenced but the trial judge did not consider it while handing down the sentence. She instead stated that the Appellant "is sentenced to '25 years' imprisonment period spent on remand inclusive." Counsel contended that this is not what is required by the law and therefore the sentence is illegal and should be set aside'

counsel further submitted that pursuant to section a9 Ql of the Prisons Act life imprisonment shall be deemed to be 20 years' imprisonment. He referred to Tigo Stephen v. Uganda, SCCA No. 08 of 2009' where it u'as held that life imprisonment refers to the natural life of a convict but the actual period of life imprisonment may be reduced on account of remission 10

earned. counsel contended that it was illegal to sentence the Appellant to 25 years' imprisonment since the maximum sentence for manslaughter is life imprisonment, which according to the Prisons Act is actually 20 years' imprisonment. He referred to Livingstone Kakooza v. uganda, sccA No. 17 of 1993 where a sentence of life imprisonment was substituted with ¹⁰years, imprisonment. He prayed that the sentence in the instant case be declared illegal. 15 20

In reply, Mr oola conceded that the trial judge did not specifically take into account the period that the Appellant spent on remand before he was sentence. However, he went on to submit that the sentence imposed upon

him was neither harsh nor excessive in the circumstances of this case. Further, that the trial judge took into account the mitigating and 25 aggravating factors while sentencing the Appellant'

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It was also counsel's submission that according to the Constitution (Sentencing Guidelines for courts of Judicature) (Practice) Directions 20 ^I3, the maximum sentence for the offence of manslaughter is life imprisonment and the starting point is 15 years' imprisonment. He further

- 5 referred to Mutebi Ronald v. Uganda (supral and Kyalimpa Edwerd v Uganda, SCCA No 10 of 1995, where it was held that an appropriate sentence is a matter for the discretion of the sentencing judge and the circumstances upon which an appellate court may interfere with the sentence imposed by the trial court are specified'
- 10 He prayed that this court invokes its powers under Section Judicature Act and deducts the period which the Appellant remard from his final sentence of 25 years' imprisonment' 11 of the spent on

Analysis and Determination

15 20 It is a well settled principle that this court is not to interfere with the sentence imposed by the trial court exercising its discretion unless the sentence is illegal or this court is convinced that the trial court did not consider an important matter or circumstance which ought to be considered when passing sentence. Further, that the court may interfere with the sentence if it is shown that it was manifestly excessive or so low as to amount to an injustice. (See Livingstone Kakooza v' Uganda' SCCA

No. 17 of 1993.f

The Appellant's grievances are two:

lawful custody before he was sentenced; and 6 i) that the trial judge handed down an illegal sentence because she did not consider the fact that he spent 2 years and 8 months in

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ii) that the sentence was harsh and excessive because it exceeded the life sentence as it is computed by the Prisons authorities, pursuant to Section 86 (3) of the Prisons Act. This provides that for purposes of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years' imprisonment.

While imposing the sentence upon the Appellant on 3'd May 20 16, at pages 27-28 of the Record, the trial Judge found as follows:

"The conuict has pleaded guilty tuhich is a sign of remorse much as he allowed the mother of the deceased to come to court and go through the rigors of trial by testifuing and reminding her of uhat happened to her son more than tuo years' age. (sic) That utas being cruel to the old uoman. Court heard her narrate hou she found her son bg the road side, naked. The conuict should haue saued her that ordeal.

Neuertheless, court still considers his plea of guiltg as a mitigating factor.

The effect of cime is counterproductiue. It affects the Jamilg of the offender and the family of the uictims of the cime. 15

> This therefore calls for detetrent sentences to reduce the cime rate. Manslaughter is uery rampant in this region tuhich aggrauates the sentence.

Manslaughter is an offence uhich offers a uide range of circamstances. It mag be as a result of a joke gone bad to a case short of murder. This case was just short of murder because the accused had been drinking but he was not as intoxicated as the deceased. Theg stopped him from assaulting the deceased but he took aduantage of a uery drunk man and brutallg assaulted him until he caused gieuous harm u.thich led to his death. 20

For that reason, he deserues retibution for his conduct. Consequently, he is sentenced to 25 years' impisonment perlod spent on remand Inclusiue. Right of appeal against sentence explained." 25

{Emphasis added}

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The excerpt above shows that the trial judge did not specifically refer to the period of 2 years and 8 months that the Appellant spent in lawful custody before he was sentenced. The Supreme Court in Rwabugande Moses v. Uganda, Criminal Appeal No. 24 of 2014i l2OL7l ucsc 8, 30

summarised its understanding of Article 23 (8) of the Constitution prior to its decision in that case as follows:

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"The principle enunciated by the Supreme Court in *Kizito Senkula vs. Uganda SCCA NO. 24 of 2001*; *Kabuye Senvewo vs. Uganda SCCA No. 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."

In *Kizito Senkula (supra)* the court considered a situation where the sentence was challenged for failure to take the remand period into account. The court observed that:

"In the instant case, it is clear that the learned trial judge took into account the period of two years the Appellant had spent in remand. But it is not clear whether he considered that the sentence to be imposed should be 17 years, reduced by 2 years to make 15 years; or whether the sentence was 15 years to be reduced by 2 years to 13 years. Both the learned Principal State Attorney and the counsel for the Appellant were of the view that the latter was what the learned trial judge must have meant. The Court of Appeal did not advert to it.

As we understand the provisions of Article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. Taking into account does not mean an arithmetical exercise. ..."

However, the court deducted the period spent on remand from the proposed sentence of 15 years and sentenced the Appellant to 13 years' imprisonment from the date of conviction.

In *Kabwiso Isa v. Uganda, Criminal Appeal No 7 of 2002*, the Supreme Court again considered the import of Article 23 (8) of the Constitution and gave guidance on how it was to be applied as follows:

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"We understand that prison authorities experience difficulties in determining remission periods in cases where convicts are sentenced in terms similar to the words used by the trial judge in this case. We would therefore give the following guidelines to trial courts. When sentencing a person to imprisonment a trial judge or magistrate should say: -

'Taking into account the period of ... years (months or weeks whichever is applicable) which the accused has already spent in remand, I now sentence the accused to a term of ... years (months or weeks, as the case may be)'

In such an event the sentence imposed shall be definite and be treated as excluding the period spent in custody on remand.

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We direct that this judgment be circulated to all courts, prosecutors and prison authorities for guidance."

In view of the fact that the sentence in this case was handed down on ²nd May 2016 before the Supreme Court rendered its decision in *Rwabugande 15 Moses* (supra), the trial judge had to use the format above but she did not. The sentence that she imposed was therefore not definite; it did not demonstrate that she took the period spent on remand into account as it is required by the Constitution. We therefore have no alternative but to set the sentence of 25 years' imprisonment that she imposed aside for that reason.

Counsel for the Respondent prayed that we adjust the sentence of 25 years by deducting the period that the Appellant spent on remand in order to come to an appropriate sentence for him. However, the Appellant also complained that the sentence was harsh and excessive in the circumstances of the case. We must therefore consider that as well before we come to an appropriate sentence for the Appellant.

It is clear that the Appellant pleaded guilty and the trial Judge considered that this was the only mitigating factor in his favour. However, before he

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was sentenced, the Appellant's Advocate made a statement in mitigation, at page 26 of the record, as follows:

The convict is a first offender. He is having (sic) 9 children and three wives.

The convict and the deceased are relatives. They are clan brothers. He has already spent 28/12 months in prison. (sic) He is 40 years old. They were drinking together and he was trying to take him home. He had no intention of killing him. We pray that while punishing him, consider the mitigating factors and promote reconciliation in the family. I so pray.

Paragraph 21 of the Sentencing Guidelines lays down the factors mitigating a sentence of death. On the basis of that provision, including 10 that the Appellant pleaded guilty, counsel for the Appellant in the lower court referred to several of them in her address to the court, that is: that the Appellant was a first time offender; he lacked premeditation (intent to kill); was remorseful; had enormous family responsibilities and there was some element of intoxication. In addition, counsel referred to an important

15 constitutional imperative in the administration of justice which is provided for by Article 126 (2) (d) of the Constitution; the courts are obligated to promote reconciliation between parties in both civil and criminal cases.

In *Aharikundira Yustina v. Uganda*, Supreme Court Criminal Appeal No. 27 of 2015 [2018] UGSC 49, the court had this to say about 20 mitigating factors in sentencing:

> "The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.

The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that the Court of Appeal does not have to handle mitigation and that (the) mitigation process is done only in the trial court as was done in the instant case.

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In the instant case, since the trial judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the Court of Appeal to weigh the raised factors (sic).

From the foregoing, we find that the Court of Appeal erred in law when it $\overline{\$5}$ failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as (a) second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See *Kyalimpa Versus Uganda* (supra), *Kiwalabye Benard Vs Ug 10* (supra).

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In the instant case therefore, the trial judge erred when she did not take into account all of the mitigating factors that were advanced in favour of the Appellant. We are thus fortified by this error in setting the sentence aside as we already did.

The Appellant further complained that the sentence that was imposed was also harsh and excessive in the circumstances of the case. The Supreme Court in *Yustina Aharikundira* (supra) explained what is meant by the expression "manifestly excessive" when it stated thus:

"There is a high threshold to be met for an appellate court to intervene with 20 the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation." 25

It now behooves this court to consider sentences that have been handed down by the courts for the offence of manslaughter before we proceed to re-sentence the Appellant, pursuant to section 11 of the Judicature Act.

In *Ahimbisibwe Solomon v Uganda*, Court of Appeal Criminal Appeal No 132 of 2010; [2016] UGCA 8, the Appellant accused his stepmother 30

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of practicing witchcraft. They had a fight in which the Appellant picked up a panga and cut off her head and right arm. He handed himself over to the police and was charged with murder. At the trial he pleaded guilty to the lesser offence of manslaughter and was sentenced to 16 years' imprisonment. On appeal to this court, on 7th December 2016, the sentence was substituted with imprisonment for 13 years on account of the facts that the Appellant was a young man, only 21 years old, who surrendered and confessed to committing the crime.

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In Okwaimungu Dominic v. Uganda, Court of Appeal Criminal Appeal No. 36 of 2014, [2016] UGCA 37, the Appellant was convicted of murder 10 by the High Court as a result of assaulting the deceased with a panga which led to his death. On appeal the conviction was substituted with manslaughter because he acted in self-defence. The Appellant who was 43 years old and had spent 2 years and 2 months in lawful custody, was then on 7th June, 2016 sentenced to 15 years' imprisonment. 15

In Mawanda Patrick v. Uganda, Court of Appeal Criminal Appeal No. 210 of 2010; [2015] UGCA 101, the Appellant was an old man who was 60 years old. While at a drinking place, he assaulted the deceased, a young man, by hitting him with a stick on the head. The deceased died in hospital. The Appellant was tried, convicted of murder and sentenced to 35 years' imprisonment. On appeal this court substituted the conviction of murder with manslaughter. Due to his advanced age, on the 28th May 2015 this court sentenced him to 7 years' imprisonment.

In Ainobushobozi Venancio v. Uganda, Court of Appeal Criminal Appeal No 242 of 2014, [2024] UGCA 50, in a brawl where the deceased 25 insulted the Appellant's brother, he pushed him causing him to fall upon a fixed stamp. He was injured and died in hospital. The Appellant was Lem.

convicted of murder and sentenced to imprisonment for life. On appeal to this court, the conviction was substituted with manslaughter. Since the Appellant was only 21 years old when he committed the offence, and had spent 3 years in lawful custody before sentence, on 18th December 2014 he was sentenced to 12 years' imprisonment.

Having considered the sentences above, we are of the view that for the Appellant who pleaded guilty to the offence, a sentence of 15 years' imprisonment would be appropriate given the other mitigating factors advanced on his behalf. From that we are duty bound to deduct the period of 2 years and 8 months that he spent in custody before he was sentenced

10 and hereby sentence him to a term of imprisonment of 12 years and 4 months. The sentence shall run from the 3rd May 2016, the date on which he was first sentenced.

Dated this 30th Day of A_{UC} 2024.

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Geoffrey Kiryabwire JUSTICE OF APPEAL

20 Irene Mulyagonja JUSTICE OF APPEAL 25 Eva K. Luswata JUSTICE OF APPEAL 30

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