

UGANDA / JUDGMENT

# Opiyo v Uganda (Criminal Appeal 573 of 2015) [2025] UGCA 58 (27 February 2025)

## [2025] UGCA 58

## COURT

Court of Appeal of Uganda

## BEFORE

Egonda-Ntende, JA, Tibulya, JA/JCC, Kazibwe, JA

## CASE / FILE NUMBER

Criminal Appeal 573 of 2015

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**THE REPUBLIC OF UGANDA****IN THE COURT OF APPEAL OF UGANDA HOLDEN AT GULU**

[\*Coram: Egonda-Ntende, Tibulya, Kazibwe Kawumi, JJA\*]

**CRIMINAL APPEAL NO. 0573 OF 2015**

(Arising from High Court Criminal Session Case No. 090 of 2014 at Gulu)

**BETWEEN**

OPIYO SIMON aka OJWEE=  $\begin{array}{c} \hline \hspace{0.5cm} \textbf{APPELLANT} \\ \hline \end{array}$

**AND**

UGANDA=

**RESPONDENT**

[An appeal from a Judgment of the High Court of Uganda (John Eudes Keitirima, J.), delivered on the 25th August, 2014]

**JUDGMENT OF THE COURT****Introduction**

- [1] This is an appeal against sentence only with leave of this court.

- \$[2]\$ The appellant was convicted by the High Court upon his own plea of guilty, on 25th August, 2014 for the murder of Anywar Justine, contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence are that on the 17th August 2013 at Palami ward in Koro District the appellant murdered Anwar Justice. He was sentenced to 20 (twenty) years' imprisonment.
- \$[3]\$ The brief facts of this appeal as accepted by the trial Court are that on the 17th August 2013, at around 10:00 pm, the deceased and Okello David were heading home after watching a football match. When they got to Koro Abili Primary School, the appellant and Ojok Martin bypassed them. After moving for about 10 meters ahead of the deceased, the appellant turned back, approached the deceased and asked him why he was talking about him. The deceased denied that allegation.
- \$[4]\$ The appellant removed his shoes and hit the deceased on his nose. The deceased fell and Ojok Martin tried to restrain the appellant. The deceased who was bleeding from the nose was supported to his feet by Okello David. Both of them started walking home. The appellant, who had since moved some 30 meters away, ran back and hit the deceased

on his head with his shoe. The appellant also punched the deceased in his face and head several times.

- The deceased fell and the appellant stepped on him. The appellant was \$[5]\$ restrained by Okello David and Ojok Martin and escorted to a road junction leading to his home. The following day, the deceased was found dead near his home and the case was reported to Koro police post. The appellant went into hiding but was traced by the member of the public together with the police. He was arrested, taken to Gulu Police Station and charged with murder.
- The appellant was tried and convicted of the murder of the deceased. \$[6]\$ He was sentenced to 20 years' imprisonment. Aggrieved with that sentence, the appellant lodged the instant appeal before this Court, with the sole ground of appeal being that;

'The learned trial Judge erred in law and, fact when he sentenced the appellant to 20 (Twenty) years imprisonment which sentence is manifestly harsh and excessive in the circumstance of the case.'

## Representation and Submissions of Counsel

- At the hearing, the appellant was represented by Mr. Ogen-Rwot \$[7]\$ Simon Peter while Mr. Nabende David, Senior State Attorney held brief for Mr. Kulu Idambi John Boniface, Assistant D. P. P on behalf of the respondent. Learned Counsel for the appellant submitted that the sentence was harsh and excessive because the appellant readily pleaded guilty and was remorseful. He was a first time offender who was only 22 years old. He contended that the mitigating factors in the record were not considered and given adequate weight. Counsel contended that had trial judge considered those factors, he could have handed down a more

lenient sentence.

- Counsel for the appellant relied, inter alia, on *Ekonga v Uganda* [2023] UGCA 179, a murder case where the convict had pleaded guilty, Court set aside 28 years sentence and substituted it with a 15 years' imprisonment. In *Mwesige v Uganda* [2018] UGCA 10, the Court found that a sentence of 35 years was harsh and excessive. In its place it handed down a sentence of 15 years. In *Kusemererwa and Another v Uganda* [2014] UGCA 38, Court substituted a sentence of 20 years' imprisonment that had been imposed upon each of the appellants with 13 years' imprisonment on ground that it was manifestly excessive.
- Counsel for the respondent submitted that there was no miscarriage of justice occasioned to the appellant and that the sentence of 20 years'

imprisonment for murder was a very lenient sentence. He stated that this Court be pleased not to interfere with the sentence of the trial Court.

He relied on *Florence Abbo v Uganda*, [2023] UGCA 17, where this court did not interfere with a prison sentence of 40 years.

## Analysis

The role of a first appellate court with regard to first appeals against sentences was adumbrated in *Livingstone Kakooza v Uganda*, [1994] UGSC 17, as follows;

'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See *Ogalo S/O Owoura v R* (1954) 21 E. A. C. A. 270.'

- We shall follow the said guidelines.
- The sentencing order of the trial Judge is set out as follows;

'I have heard both the aggravating and mitigating factors. Much as the convict pleaded guilty and hence did not waste Court's time, his actions were heinous to say the least. Human life is so precious and should not be taken away the way the convict took away the life of the deceased. This calls for a deterrence. I have considered the period the convict has spent on remand. I will now sentence him to 20 (twenty) years in Prison.'

- We note that the learned trial judge, much as he states that he had taken into account the period spent on remand, he did not first determine the length of this period. Neither counsel appearing in the matter alluded to this period during their submissions before sentencing. It is rather odd that one can consider a period one has not ascertained.

- [15] We sought the views of counsel on whether this approach was compliant with article 23 (8) of the Constitution which compels a sentencing court to take into account, in passing sentence, the period a person has spent in pretrial custody.
- [16] In his response Mr Kulu Idambi for the respondent submitted that this was sufficient to comply with article 23 (8) of the Constitution, in so far as the learned trial judge stated that he had taken the period spent on remand. We do not agree that this is sufficient. In *Kabwiso Issa v*

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Uganda [2003] UGSC 36, the Supreme Court required the sentencing courts to ascertain the period spent on remand and then to specifically take it into account. This was rule before *Rwabugande v Uganda* [2017] UGSC 8 and the learned trial judge did not comply with it.

- We therefore find that this sentence was unlawful for failure to comply [17] with article 23 (8) of the Constitution. We set it aside. It is unnecessary to consider the ground of appeal raised.
- Pursuant to section 11 of the Judicature Act we shall sentence the [18] appellant anew. There is need for parity in sentencing. We are obliged to maintain consistence or uniformity in sentencing while being mindful that offences are not necessarily committed under the same circumstances.
- The authorities cited by counsel for the appellant and those highlighted [19] herein-below render necessary guidance in as far as sentences for the offences of murder in similar circumstances are concerned.
- In *Kule Kalamaya v Uganda* [2019] UGCA 153, this Court found a [20] sentence of life imprisonment against a 27 year-old appellant in a case of murder as being harsh and excessive, it substituted it with a sentence of 17 years imprisonment.
- In *Tumuhirwe Mary v Uganda*, [2016] UGCA 69, Court substituted a [21] 25 years' imprisonment against an appellant who had pleaded guilty to murder with a 10 years' imprisonment.
- In *Ekonga v Uganda* [2023] UGCA 179, the convict had pleaded guilty [22] to murder, Court set aside the 28 years imprisonment sentence and substituted it with a 15 years' imprisonment.
- In *Kasaija Daudi v Uganda* [2014] UGCA 47, the appellant was [23] convicted of murder and sentenced to life imprisonment, Court reduced the sentence to 18 years of imprisonment.

- We consider all the mitigating and aggravating factors evident on the \$[24]\$ record in the court below. The appellant pleaded guilty and saved the court's time and resources. He was remorseful. He is a youthful offender likely to reform and become a useful member of society. We note though that the appellant committed a capital offence whose maximum punishment is the death penalty. We form the view that a term of imprisonment of 18 years would serve the ends of justice.

## Decision

The appeal succeeds. The remand period of 1 year is deducted from \$[25]\$ the 18 years to yield a sentence of 17 years' imprisonment. The 17 years' imprisonment will run from 25th August, 2014, the date of conviction.

Signed, dated and delivered at Gutu this 7-fuy ot fe-b <sup>2025</sup>

Fredrick Egonda-Ntende Justice ofAppeal

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