THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO 122 OF 2010

ODONGO ROBERT}..... APPELLANT

VERSUS

UGANDA}..... RESPONDENT

(Appeal from the judgment and sentence of the High Court sitting at Lira by Hon. Justice Byabakama Mugenyi in Lira Criminal Case No. 165 of 2008 delivered on the 5th July, 2010)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Izama Madrama, JA

JUDGMENT OF THE COURT

Background to the appeal

The appellant and the deceased were living together as husband and wife. On 12th November 2007 at Te-kulu village, Apale Sub – County, Lira District, the deceased left home at around 12 noon to go demand money from debtors who owed her. The deceased delayed where she had gone and upon returning home late, the appellant severely assaulted her by beating her with a big stick all over her body and even in the genitalia. The violent assault caused her death. The post mortem report established that she was 12 weeks pregnant at the time of her death.

The appellant was tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act by Byabakama J, as he then

was, on the 5th of July, 2010 and sentenced to 45 years imprisonment. His appeal to this court is against sentence only.

Representation

At the hearing of the appeal, learned Counsel Mr. Ondoma Samuel on state brief represented the appellant while the learned Principal State Attorney, Mr. Onencan Moses represented the respondent.

Submissions of the appellant

Counsel for the appellant sought for and was granted leave under section 132 (1) (b) of the Trial on Indictments Act Cap 23 to present the appellants appeal against sentence only. The appellant's counsel submitted that the 45 years imprisonment sentence imposed by the learned trial Judge is harsh and excessive in the circumstances. This is because the cause of the murder was a domestic quarrel leading to violence between the appellant and his wife. Counsel submitted that the violence was generated by disagreement over a sum of Uganda shillings 5000/-. For an appropriate sentence, he relied on the case of **Suzan Kigula and another v Uganda; S.C.C.A No. 0001 of 2004** which was also a murder case and a form of domestic violence where death was caused by a spouse against another spouse and where the Court reduced the sentence to 20 years imprisonment following mitigation proceedings. In the sentencing decision, the learned trial Judge stated that the only lenience the Court would accord the appellant is not to impose the maximum penalty prescribed by law which is the death penalty. The appellant's counsel prayed for a lighter sentence and submitted that the 45 year sentence should be reduced to 14 years imprisonment.

Submissions of the respondent

Counsel for the respondent opposed the appeal and submitted that the learned trial Judge followed the right principles in sentencing before arriving at the sentence of 45 years imprisonment. Counsel contended that

there were aggravating circumstances like the fact that the deceased and the appellant were a married couple and the assault had gone on for a period of time yet the deceased was pregnant. He cited **Obote William v Uganda S.C.C.A No. 12 of 2014** in which the Supreme Court upheld a life sentence for the offence of murder. Counsel argued that since the learned trial Judge took into account all the mitigating and aggravating factors and found that the aggravating factors overweighed the mitigating factors, he arrived at appropriate sentence and consequently this court ought to uphold the sentence as passed by the trial court.

Consideration of the appeal

We have carefully considered the submissions of both counsel as set out above; the facts and circumstances revealed by the trial court record as well as the law and cited authorities.

The duty of this Court as a first appellate court under **Rule 30 (1)** of **the Judicature (Court of Appeal Rules) Directions** on any appeal from a decision of the High Court issued in the exercise of its original jurisdiction, is to reappraise the evidence and draw its own inferences of fact. In the reappraisal of evidence, the court warns itself that it has neither seen nor heard the witnesses and should make due allowance for that inadequacy. The duty of the Court of Appeal was considered by the then East African Court of Appeal in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**, when they held that the conduct of an appeal from the High Court in the exercise of its original jurisdiction to the Court of Appeal may be by way of a retrial of issues of fact. In this regard, the Court of Appeal is not bound to follow the findings of fact of the trial Judge but will review the evidence and may reach its own conclusion:

> "this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has

neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

These principles are echoed by the Supreme Court of Uganda in **Kifamunte Henry v Uganda; S.C.C.A No.10 of 1997.** The only issue for consideration in this appeal is whether the sentence of 45 years imprisonment is harsh and excessive in the circumstances of this appeal.

An appellate court will not interfere with a sentence imposed by the High Court in the exercise of its original jurisdiction on the mere ground that the members of the court might have passed a 'somewhat different sentence' if they had tried the appellant. The court will only interfere where it is established that the trial judge acted upon a wrong principle or principles. Secondly, the court will interfere where trial judge overlooked some material factor or factors. Thirdly, the court will interfere with the sentence imposed where it finds that it is manifestly excessive in view of the circumstances of the case or so low as to amount to a miscarriage of justice. These principles were laid out by the East African Court of Appeal in **Ogalo s/o Owoura v R; Criminal Appeal No. 175 of 1954.** In that case, the appellant appealed against a sentence of 10 years imprisonment with hard labour imposed by the trial court for the offence of manslaughter and this is what the Court held:

"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:"

The Supreme Court of Uganda elaborately restated these principles in **Kyalimpa Edward v Uganda; Criminal Appeal No. 10 of 1995** when they held that:

"...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 the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: Ogalo s/o Owoura v R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) E.A.C.A. 126"

Before passing sentence, the learned trial Judge made the following observation:

"I have listened to both counsel as well as the convict on sentence. The court has said over and again human life is sacred and we all ought to respect another's life. The manner by which the convict murdered the deceased is to say the least, mind-boggling. This was his wife with whom they bore children. This case goes beyond domestic violence or wife battering. It is pure, unfettered and untamed barbarism and savagery at its worst. Not even animals and chicken that are slaughtered every day in this country for human consumption are killed in such fashion. By battering the deceased in

the private parts, the convict showed no scant regard for a woman who mothered his children. Moreover he savaged the deceased for a mere shillings 5000/=! According to Adongo Sarah (PW1) the convict has another wife with other children. It is probable he regarded the deceased a disposable item since there was another woman to give him comfort. This court has to send out the loudest warning that this kind of conduct is despicable and deplorable. Society must be protected from the likes of the accused and others of his ilk must be warned. The circumstances of this case called for the stiffest penalty possible.

The convict is said to be a first offender. He is aged 44 years. He has been on remand since November 2007, a period of 2 years and 8 months. He clearly deserves punishment that will enable him reflect fully on his heinous conduct. The only leniency court will accord him is not to impose the maximum penalty prescribed under the law. But the kind of untamed savagery he exhibited cannot be cured by a short custodial sentence.

In the circumstances of this case I consider a sentence of 45 years imprisonment appropriate taking account the period spent on remand.…"

The sentence of the High Court was strongly influenced by the manner and the brutality of the act and particularly the fact that the appellant assaulted his wife in the genitals. The post-mortem report gives these shocking details of how the deceased had a healthy well nourished body with both hands broken. She had multiple bruises on her legs, knees, chest, abdomen; soft tissue injuries on both thighs and lower abdomen. The left eye was completely damaged. There was severe haemorrhage of the vulva and vagina. The appellant had been seen battering his wife in her private parts.

We note that a sentence of 45 years imprisonment is a lawful sentence. The appellant was 38 years old at the time of committing the offence in November 2007. At the time of the sentence of the trial court in 2010 he must have been about 41 and trial court put into consideration period he spent on remand before imposing the sentence. In effect, a 45 years custodial sentence meant that he would be imprisoned for life depending on his life span. He would be above 80 years by the time the sentence was served and therefore would be unable to start life afresh to earn a living or contribute to the society.

We agree with the trial judge that the murder of the appellant's wife by the appellant in such a gruesome manner was more shocking to the conscience and unacceptable, though all forms of murders should not be tolerated. The evidence demonstrates that the appellant was initially happy with his wife and this was clearly an offence of passion when she delayed coming home wherever she went and for the reasons of collecting money from debtors. We agree that to assault a woman in her private parts is not only base and despicable but reflects a mentality that degrades a woman to an object of sex. We agree with the trial judge in that respect. The motivation for the assault is not material. The manner of execution of the assault aggravated the offence and degree of culpability of the appellant.

Nonetheless a heinous offence should attract retribution as well as reform and rehabilitation of the convict. A long term of imprisonment in the circumstances of this case only applies the retribution of the society for the heinous and shocking offence of murder. Rehabilitation of offenders however requires changing them and making them better citizens. If they spent the rest of the lives in prison then the society is not applying rehabilitation but only punishment.

A period of 45 years imprisonment even if reduced by remission plus the appellants 41 years at the time of sentence would mean that he would

come out after the advanced age of over 75 years. It is apparent that such a sentence of 45 years in the circumstances of this case applies only retributive justice and does not include rehabilitative justice. The sentence could not have considered the age and reintegration into society of the appellant. In such circumstances the age of the appellant ought to mitigate the sentence and is a very material factor in dealing with the need for rehabilitation.

In the case of **Francis Bwalatum v Uganda; Court of Appeal Criminal Appeal No. 48 of 2011**, the appellant had been charged and convicted of the offence of murder on two counts and sentenced by the High Court to 50 years imprisonment on each count and the sentences were to run concurrently. The appellant appealed to the Court of Appeal and one of the grounds of appeal was that the learned trial Judge erred in law and fact when she sentenced the appellant to 50 years imprisonment; which sentence was harsh and excessive in the circumstances. The Court of Appeal noted that prior to his trial the convict had spent one year and seven months on pre conviction lawful custody. The appellant was 57 years old at the time and had been charged with the offence when he was 54 years of age. The Court of Appeal held that appellant had been convicted of two very serious counts of murder involving the loss of two lives. The maximum punishment for the offence of murder is the death penalty. Because the appellant was a first offender, he had been spared the death penalty. Taking into account the above factors, this Court reduced the sentence of 50 years imprisonment on each count to 20 years imprisonment on each count of murder to run concurrently.

Secondly, the fact that the convict is a first offender and his or her age are important factors to consider. In the case of **Bikanga Daniel v Uganda; Criminal Appeal No 38 of 2000,** the appellant was 21 years old at the time of commission of the offence and was also a first offender but these factors

were not taken into account. The Court of Appeal followed its earlier holding in **Kabatera Steven v Uganda; Court of Appeal Criminal Appeal No 123 of 2001** and held that the age of an accused person is always a material factor that ought to be taken into account before a sentence is imposed. They held that:

> "We agree with the submission of the counsel for the appellant that the learned trial Judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not reform him. "

Programmes to rehabilitate the offender, makes the age of the offender at the time of being released from prison, a material factor to consider in terms of the term of years of imprisonment to impose.

Finally, we cite one case which involves the murder of a spouse by her spouse. In the case of **Tuhumwire Mary v Uganda; Criminal Appeal No. 352 of 2015**, the appellant had been convicted and sentenced by the High Court to 25 years imprisonment for the murder of her husband with whom she had 6 children. The appellant appealed to the Court of Appeal and this court reduced the sentence and stated that:

> "There is need to weigh the aggravating factors against the special mitigating factor of the fate of the children of this marriage, who are of tender years; and are unfortunate victims of a deed, which they had no hand in. In the special circumstances of this case, we reduce the sentence to ten (10) years; to enable the appellant reform further, pick up the pieces with the children, and then reconcile with her family."

The need for reformation is an important element in our justice system though in appropriate cases, retributive justice can be meted out to fully

punish the appellant and for the punishment to act as a deterrent to other offenders. In this case the failure of the trial Judge to bring to bear on the sentence the rehabilitation of the offender made the sentence harsh and excessive in the circumstances of this case.

In the premises, the learned trial Judge omitted to consider a material factor of age while imposing a sentence of 45 years imprisonment. Taking into account the age of the appellant at the time of sentence, resulted into the court imposing a harsh and excessive sentence. Nonetheless, in light of the aggravation of the offence by the manner of assault inflicted on the deceased, the appellant still deserves a stiff sentence. We allow the appeal and substitute the sentence of the trial court with a sentence of 24 years imprisonment which we consider to be appropriate in the circumstances of this case to run from the date of conviction on 5th of July, 2010.

Dated at Arua the 28th day of November, 2018

Hon. Justice Kenneth Kakuru

JUSTICE OF APPEAL

Hon. Justice Ezekiel Muhanguzi

JUSTICE OF APPEAL

Hon. Justice Christopher Izama Madrama

JUSTICE OF APPEAL