THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 74 OF 2014

(ARISING FROM CRIMINAL SSESSION CASE NO 127 OF 2014)

(Formerly C.O.A. 073 of 2004)

MBARUSHIMANA RICHARD..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA

JUDGMENT OF THE COURT

The Appellant was charged with the offence of Murder contrary to Section 188 and 189 of the Penal Code Act Cap 120 Laws of Uganda, before Hon. Justice J.B. Katutsi, tried, convicted and sentenced to death by the High Court of Uganda Holden at Kabale. After the decision of the Constitutional Court outlawing the mandatory death penalty under the Penal Statutes was affirmed by the Supreme Court in **Attorney General v Susan Kigula Constitutional Appeal No.3 of 2006**, the appellant's sentence was remitted to the trial court for hearing on the question of appropriate sentence at the discretion of the High Court. The presiding judge at the resentencing, Hon. Justice Lameck N. Mukasa heard the parties and resentenced the appellant to 37 years imprisonment, hence this appeal against sentence only.

At the hearing, the appellant was represented by Mr. Kabagambe Peter (counsel for the appellant) while the appellant was represented by Senior State Attorney Ms. Aleluya Glory (counsel for the respondent).

Counsel for the appellant applied for and was granted leave under Section 132 (1) (b) of the **Trial on Indictments Act** to appeal against sentence only. This appeal is premised on the sole ground that **the learned trial Judge erred in law when he imposed a harsh and manifestly excessive sentence of 37 years imprisonment when there were mitigating factors that called for a lesser sentence**.

Learned counsel for the appellant submitted that the appellant was indicted for, tried and convicted of the offence of Murder and sentenced to death on 24th September, 2004. However, pursuant to the decision of the Supreme Court affirming the outlawing of the mandatory death penalty by the Constitutional Court in **Attorney General v Susan Kigula Constitutional Appeal No.3 of 2006**, the appellant's sentence was remitted to the High Court for mitigation hearing. The appellant was resentenced to 37 years imprisonment on 21st July, 2014, and asserts that the sentence imposed is harsh and excessive in the circumstances.

The appellant's Counsel submitted that the appellant was a first offender and is very remorseful for the actions that led to the death of his mother and can now be useful to the society if a lenient sentence is imposed. He submitted that the appellant was 23 years when the offence was committed and had already spent 13 years imprisonment at the time of resentencing. At re-sentencing the learned trial judge considered the fact that the appellant had reformed and was a disciplined person in accordance with the letter from the O.C Upper Prison dated 26th June, 2014. He cited **Adama Gino v Uganda Criminal Appeal No. 50 of 2006**, a case of aggravated Robbery where this Court held that reform and being a good citizen is a mitigating factor in passing sentence. Furthermore, in the case of **Turyahika Joseph v Uganda C.A.C.A No. 237 of 2014** where this court held that the sentencing range for murder cases is from 20 to 30 years imprisonment. He argued that since the appellant committed the offence when he was a young man of 23 years and having reformed during the period he has been in lawful custody, his sentence ought to be reduced to 20 years from the date of conviction.

Learned Counsel for the appellant opposed the appeal on ground that the trial court considered all the mitigating and aggravating factors and as such the sentence of 37 years imprisonment is justified.

Counsel drew the attention of the court to the Social Inquiry Report conducted in Nyaruheri Village Kisoro District where the offence was committed. It shows reveals that the community was not yet ready to receive the appellant back. She further argued that

the trial court was lenient not to sentence the appellant to life imprisonment. She also argued that the trial court handed the appellant a 37 years term of imprisonment to allow the community time to heal from the trauma. She argued that the sentence of imprisonment was for the appellant's own safety considering that during the social inquiry, one of the neighbours said that the return of the appellant would cause insecurity in the neighbourhood.

The Respondents counsel relied on the case of **Ssemanda Christopher v Uganda C.A.C.A No.77 of 2010** where the trial court considered all the mitigating and aggravating factors, the fact that the manner in which the victim was murdered and the need to keep people from taking the law in their hands. She submitted that the fact that the appellant was the son of the victim and that the appellant hit his mother on the head repeatedly with a hoe while saying she was useless and deserved to die are aggravating factors which the trial court properly considered before sentencing the appellant. He submitted that in the case of Ssemanda, the court confirmed the sentence of 35 years imprisonment. He prayed that the sentence be confirmed and the appeal dismissed.

We have carefully considered the submissions of the counsel for each of the parties, the facts and circumstances revealed by the record as well as the law and cited authorities.

The duty of Court of Appeal 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 in the exercise of its original jurisdiction, is to reappraise the evidence and draw inferences of fact. In the reappraisal of evidence, the court warns itself that it has neither seen nor heard the witnesses so as to draw inferences of fact from that. According to the East African Court of Appeal decision in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**, and the judgment of court read by Sir Clement De Lestang V-P, the conduct of an appeal from the High Court in the exercise of original jurisdiction to the Court of Appeal may be by way of a retrial on matters 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:

> "Briefly put they are that 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 reinstated by the Supreme Court of Uganda in the case of **Kifamunte Henry v Uganda S.C.C.A No.10 of 1997.** The question in this appeal is whether the sentence of 37 years imprisonment from the date of conviction is harsh and excessive.

It is now trite law that the Court of Appeal will not interfere with a sentence imposed by a trial High Court in the exercise of its original jurisdiction on the mere ground that the members of the court might have passed a different sentence if they had tried the appellant. The court will only interfere firstly, where there is clear evidence that the trial judge acted upon wrong principle or secondly, where the trial judge overlooked some material factor. Thirdly, the Court of Appeal will interfere with the sentence where the sentence is manifestly excessive in view of the circumstances of the case. These principles were summarized by the East African Court of Appeal inthe case of **Ogalo s/o Owoura v Reginam Criminal Appeal No. 175 of 1954.** In that case, the appellant appealed against a sentence of 10 years imprisonment with hard labour 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 restated the same principle in **Kyalimpa Edward v Uganda in Criminal Appeal No. 10 of 1995** where court 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:

"In consideration of all the aggravating and mitigating factors put forward and all the circumstances considered above, I find a sentence of 40 years imprisonment appropriate. I deduct therefore the nearly 3 years spent on remand and sentence the convict to 37 years of imprisonment from the date of conviction that is 29/09/2004."

The learned trial judge among other things had noted that the deceased was the appellant's mother.

"The deceased was an elderly lady when the convicted repeatedly assaulted her with kicks and killing her with a hoe until her death, while shouting that she was a useless woman who deserves to die and that he did not care as he was used to prison life. The medical evidence showed that the victim had been hit on the head.

At page 2 of the sentencing judgement, he considered the aggravating circumstances as well as the fact that the convict has made a positive life in prison by improving his education from being a Primary 4 drop out to being at a senior three level, he had acquired skills in handicraft and engaged in several religious seminars and training sessions and obtained a number of certifications.

We note that a sentence of 37 years imprisonment is a lawful sentence. The trial court put into consideration the 3 years the appellant spent on remand. We note that the appellant was 23 years of age when he killed his own mother. No crime of murder is acceptable and they all shock the conscience. Perhaps the killing of a mother is more shocking to the conscience and unacceptable though all murders are unacceptable hence the penalties. It is a question of the degree of culpability. The above notwithstanding, the trial court considered a material factor of reform of the appellant

and the various trainings he had undertaken. This had to go together with the age of the appellant at 23 years which ought to have been considered in light of the object of prisons reform policy which is the possibility of reform and reintegration into society as useful citizens. A period of 37 years imprisonment plus the appellants 23 years would mean he would come out at the advanced age of 60 years or so. We doubt whether such a sentence considered the age and reintegration into society of a 23 years old convict. In such circumstances the age of the appellant ought to mitigate the sentence and is a very material factor to consider before sentencing (See **Kabatera Steven v Uganda C.A.C.A No.123/2001(unreported)).**

In the case of **Owinji v Uganda Criminal Appeal No.106 of 2013,** the appeal was against sentence of 45 years imprisonment for the offence of Aggravated defilement. This court took into consideration the possibility that the appellant could reform in future and reduced his sentence to 17 years. In reducing the sentence this Court observed that:

> "On subjecting the sentencing proceedings to fresh scrutiny, we feel that the youthful age of the appellant, thus the possibility that he can reform in future, his being an orphan with a family of seven children whom he supports should have been considered as mitigating factor in favour of the appellant."

In **Tuhumwire Mary v Uganda Criminal Appeal No.352 of 2015**, the appellant was convicted and sentenced to 25 years imprisonment for the murder of her husband with whom she had 6 children. When the matter came on appeal, this court, before sentencing the appellant had this to say:

> "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."

Having considered all the above, we accordingly find that the sentence of 37 years imprisonment harsh and excessive and substitute it with a sentence of 25 years imprisonment to meet the ends of justice and enable the appellant come out of prison when he is able to start afresh the broken up threads of his life.

Dated at Mbarara the 2nd day of October 2018

HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA