THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CONSOLIDATED CRIMINAL APPEALS NOS. 0565 AND 0587 OF 2015

1. NIWAGABA DIDAS
2. TURYAMUBONA FRANCIS::APPELLANTS

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kabale before Elubu, J. dated the 3rd day of July, 2014 in Criminal Session Case No. 0004 of 2013.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF THE COURT.

Background

The two consolidated appeals were brought against the decision of the High Court (Elubu, J.) wherein the 1st appellant was sentenced to 27 ½ years' imprisonment; and the 2nd appellant to 37 ½ years' imprisonment, the two having been convicted of the offence of Murder of the same person, Kabagye Moses.

The particulars of offence in the indictment on which the appellants were tried, stated that:

> **"Turyamubona Francis alias Bongole, Niwagaba Didas Sabiiti and others still at large on 30th day of December, 2011 at Omuratare Cell, Kamwezi Sub County in Kabale District murdered Kabagye Moses."**

The facts of the case as accepted by the learned trial Judge may be summarized as follows:

At about 3.30 pm on the 11th day of December, 2011, the deceased was seen at a local bar in Omuratare Cell, Kamwezi Sub-county, Kabale District,

enjoying drinks. The deceased was in the company of Sabiti, Bongele and others. Apparently Sabiti and Bongole were aliases for the 1st and 2nd appellants, respectively.

Later in the day, as it became dark, the deceased boarded a motorcycle with one Mutesigensi and Ronald. The two appellants also boarded a motorcycle and theirs closely followed the motorcycle on which the deceased moved.

The next morning, at about 8.00 a.m, the body of the deceased was discovered in a river where it had been thrown. It was retrieved from there and taken for post mortem examination. The report from the said examination indicates that the deceased had external injuries namely; "cut wounds over the head", "cut off left ear", "cut off lower lip and deep penetrating wound in the temporal region". The cause of death was intracranial hemorrhage.

At a place on the riverside, blood and clothes of the deceased were also discovered by some locals moving about. Although the 1st appellant was a relative of the deceased's and the 2nd appellant lived in the same village as the latter, the appellants neither went to the scene where the deceased's body was recovered nor to the deceased's burial place. According to the evidence of several witnesses, the appellants were seen with the deceased just before he died.

Following police investigations, the appellants were arrested in connection with the murder of the deceased. They were charged, tried, convicted and sentenced as indicated earlier.

The appellants do not wish to contest the decision of their respective convictions. They are however dissatisfied with the sentence imposed on them. With leave of this Court, the appellants have appealed against sentence only on the sole ground of appeal that:

> **"The learned trial judge erred in law and fact when he sentenced the appellants respectively to 37 ½ years and 27 ½ years imprisonment, a sentence which is manifestly harsh and excessive which did not take into account all the mitigating factors given the circumstances of the case."**

Representation.

At the hearing of the appeal, Mr. Emmanuel Tumwebaze represented the appellants, on state brief; on the other side, Mr. Peter Mugisha a State Attorney in the Office of the DPP represented the respondent. The appellants followed the proceedings remotely from prison, as they could not physically appear at the hearing due to the restrictions on their movement imposed by the government measures to curb the spread of Covid-19. Counsel for both parties, prayed to the Court to adopt submissions filed for the parties prior to the hearing, in support of the respective parties' cases. Court granted that prayer.

Appellants' case.

On the sole ground of appeal, counsel for the appellants, relying on **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 0017 of 1993**, submitted that an appellate Court can alter a sentence imposed by the trial Court if that sentence may be said to be manifestly excessive in the circumstances. Counsel contended that the instant appeal is a case that calls for the alteration of the sentences imposed by the trial Court for being manifestly excessive, for the reason that, given the mitigating factors submitted for the appellants in the trial Court, they ought to have been sentenced to shorter sentences.

In regard to the 1st appellant, before sentencing it was submitted as a mitigating factor that he was 20 ½ years at the time of sentencing, and was therefore a young person with a chance to reform and be useful to society; that he was a first offender; and had just finished Primary Seven level of education.

In regard to the 2nd appellant, it was submitted before sentencing that he was also of a relatively young age of 35 years at the time of commission of the offence and could be useful to society if given a chance to reform; the 2nd appellant was remorseful for killing the deceased; and therefore deserved a shorter sentence which he could serve and return to take care of his family of young dependents.

For the circumstances highlighted above, counsel contended that owing to the length of the sentence imposed by the trial Court, it was implied that it ignored the mitigating factors submitted for the appellants. For that reason, counsel asked this Court to alter the trial Court's sentence. Counsel proposed a sentence of 20 years imprisonment for each appellant.

Respondent's case.

In his written submissions, counsel for the respondent reiterated the role of an appellate Court in appeals against sentence only, which is that, "the appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being 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 circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle." Counsel cited: **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001**; counsel also cited **Kamya Johnson Wavamunno, Supreme Court Criminal Appeal No. 16 of 2000** where the Court referred to **R vs. De Haviland (1983) 5 Cr. App. R 109** and held that:

> **"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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive to amount to an injustice."**

Counsel for the respondent then contended that the respective sentences for the appellants were arrived at by the learned trial Judge after he had carried out a comprehensive consideration of the mitigating factors for both the appellants, namely; that both appellants were first offenders; that the 2nd appellant was a young man with a young family; and that the 1st appellant was a young boy who had just completed primary seven level education.

But the learned trial Judge had also considered the aggravating factors, namely; that the appellants killed the deceased in a brutal manner; that the

appellants had not expressed remorse for the killing; and that the murder of the deceased had devastated his family.

Counsel for the respondent, citing **Karisa Moses vs. Uganda, Supreme Court Criminal Appeal No. 0023 of 2016**, stressed the legal proposition 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, the court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly excessive so as to amount to an injustice.

Counsel for the respondent further pointed out that in the instant case the appellants had been indicted for murder contrary to sections **188 and 189** of the **Penal Code Act, Cap. 120**, an offence which attracts a maximum sentence of death. Further that the starting point for sentencing in murder cases, as stipulated in the **Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013** is 35 years imprisonment, and that the permissible sentencing range for murder is from 30 years imprisonment to the death sentence. Counsel contended that the respective sentences imposed on the appellants of 37 ½ years imprisonment and 27 ½ years imprisonment were neither harsh nor excessive and were imposed after the Court had properly directed itself on the law.

Counsel concluded by praying to this Court to dismiss the appeal and uphold the sentences imposed by the trial Court on the appellants.

Resolution of appeal.

We have reviewed the evidence on the Court record, carefully considered the submissions for both sides, the law applicable, and the authorities cited and those not cited but relevant to the determination of this appeal.

This appeal is against sentence only. Even in an appeal against sentence only, this Court has a duty to review all the materials as regards sentencing which were put before the trial Court, and come up with its own decision as to whether the sentence imposed on the appellant ought to be interfered with or not. **See: Kifamunte Henry vs. Uganda, Supreme Court**

Criminal Appeal No. 10 of 1997; **and Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** on the duty of this Court as a first appellate Court.

The sentencing proceedings in the lower Court are recorded at pages 45 to 48 of the record. Before giving his reasons for arriving at the sentences he imposed, the learned trial Judge heard the aggravating factors submitted for the state, and the mitigating factors submitted for the appellants.

As aggravating factors, counsel for the state asked the learned trial Judge to consider the brutal manner in which the appellants murdered the deceased by cutting off the deceased's lip and ear after they had savagely assaulted the deceased. Counsel for the state asked the learned trial Judge to consider that the manner in which the deceased was murdered was the worst a human being could be treated by another. Counsel for the state further submitted that the family of the deceased and the community where the deceased lived had been left traumatized by the incident. Counsel for the state also submitted that the appellants had not been remorseful and had continued denying their participation in the murder of the deceased. Counsel for the state further submitted to the trial Court that the offence of murder for which the appellants had been convicted is a serious offence which attracts the death sentence as its maximum sentence. Finally, counsel for the state asked the learned trial Judge to impose on each appellant a sentence of 90 years.

In mitigation of the sentence for the accused persons during the allocutus, counsel for the defendants told the learned trial Court that the 2nd appellant was a young man of 36 years; that the 2nd appellant was married and had a young family; that he had been on remand for 2 ½ years; and that he was a first offender. Counsel for the appellants asked for a lenient sentence to allow the 2nd appellant to go home and look after his family.

In regard to the 1st appellant, counsel for the appellants told the trial Court that he was a young man of only 20 years; that he had just finished Primary Seven; that he was a first offender; and that he had spent 2 ½ years on

remand. Counsel for the appellants also asked the Court to impose a lenient sentence on the 2nd appellant to enable him to complete his education.

When the appellants were given a chance to address the trial Court on the appropriate sentence, they both said that they did not commit the offence for which they had been convicted, and asked the Court to set them free.

The deceased's sister was also asked to address the trial Court on the appropriate sentence. She said that she was saddened by the murder of her brother and that she did not want the appellants to return to the village. She told Court that the deceased had his own child of 8 years who would now go without his parental love; and a wife who would miss him. The deceased's sister also told the trial Court that the deceased's mother too, would go without the deceased's care as he was taking care of her as well.

In sentencing the appellants, the learned trial Judge had this to say at page 47 of the record:

> **"The convicts are to be treated as first offenders as they have no.... (sic) of crime.**
>
> - **They have both spent 2 ½ years on remand which this Court shall take into consideration.**
> - **The first convict has a family and his family situation shall be taken into consideration.**
> - **The second convict is a relatively young man and this shall be considered by Court in passing sentence.**
> - **This Court however notes that this is a most serious offence carrying a maximum sentence of death.**
> - **I have noted that the convicts show no remorse and profess their innocence even now after being proved guilty.**
> - **The offence of murder is rampant in this region. In this session 24 out of 40 cases are murder cases.**
> - **The deceased in this case was killed in a most gruesome and brutal manner. The convicts acted like beasts in cutting off his lips and ear before crushing his head with a stone.**
> - **They went farther (sic) to strip him naked.**
> - **The convicts must be punished for their actions. Others of a like mind should be deterred from acting in this manner.**

- **The first convict had a grudge and chose to end the life of the deceased in revenge. The law cannot countenance this.**
- **In the result, Turyamubona Francis is sentenced to 40 ½ years which I shall reduce by the 2 ½ years spent on remand. He shall serve 37 ½ years.**
- **Nuwagaba Didas aka Sabit is sentenced to 30 years which is reduced by 2 ½ years he spent on remand. He shall serve 27 ½ years."**

Upon scrutiny of the Court record, we have found a potential challenge to the legality of the sentence imposed on the 1st appellant. According to the report produced after the medical examination of the 1st appellant shortly after he was arrested over the murder of the deceased, at page 52 of the record, the 1st appellant was stated to be approximately 18 years old. It was also common ground in the trial Court that at the time of the commission of the offence in question, the 1st appellant was in the Primary Seven Class. Therefore, in our view, there remained the probability that the 1st appellant was below the age of 18 years at the time of the commission of the offence, as there is doubt as to his real age at that time. We shall give the 1st appellant the benefit of doubt and take it that he was below the age of 18 years at the time of the commission of the offence.

As a minor, the 1st appellant could only be sentenced to three years' imprisonment or a lesser term for a capital offence, like the offence of murder of which he was convicted. This is pursuant to **Section 94 (1) (g) of the Children Act, Cap. 59** which provides as follows:

> **"(1) A family and children court shall have the power to make any of the following orders where the charges have been admitted or proved against**
>
> **a child—**
>
> **...**
>
> **(g) detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child."**

In **Ssendyose Joseph vs. Uganda, Court of Appeal Criminal Appeal No. 0150 of 2010**, it was held that three years imprisonment is the

maximum sentence a child can serve in respect of any offence, including a capital offence. In that case, this Court ordered for the release of the appellant who was a child at the time he committed the offence, a fact which the trial Court had failed to take into account, when sentencing him to a term of imprisonment of twelve years.

We wish to express further views on the 1st appellant. PW1 Siripisio Bindeeba, stated in evidence that the two appellants and the deceased were well known to him; the 1st appellant was his grandson; while the 2nd appellant and the deceased, were both his nephews. PW1 further testified that the 2nd appellant had a grudge against the deceased. According to the evidence of PW4 Mbelinda Kabi Charles, the grudge arose after the deceased made a report to the area LCIII and GISO that the 2nd appellant had a gun illegally. On the other hand, the 1st appellant was not known to have had a grudge with the deceased, evidence from which we infer that he must have been misled by the 2nd appellant, his uncle, into participating in the killing of the deceased.

Considering all the factors, specifically the fact that the 1st appellant was a minor at the time of the commission of the offence, and the fact that the maximum sentence which can be imposed on minor upon his/her conviction of any offence is three years imprisonment, yet as of the date of this judgment, the 1st appellant has been incarcerated for over 7 years, we order for his immediate release. The 1st appellant has already served a term of imprisonment longer than the one which should have been rightly imposed on him.

We shall now address the contentions that the sentence imposed on the 2nd appellant was harsh and excessive. In doing so, we must reiterate the principle that an appellate court may alter a sentence where it is evident that the trial Court has acted upon some wrong principle. **See: Ogallo s/o Owuor v Republic [1954] EACA 270.**

In **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 0027 of 2015,** the Court emphasized the need for the application of the principle of consistence in sentencing, when it stated that:

> **"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."**

Applying the above principle, we shall review the sentences imposed in previously decided murder cases.

In **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 0027 of 2015**, a sentence of 30 years imprisonment was considered appropriate for murder. In that case, the appellant had committed the murder of the deceased in a brutal manner. The deceased's body was discovered when the arms and legs had been cut off.

The Court in the **Aharikundira Yustina case (supra)** reviewed various previously decided cases before coming to the decision that 30 years imprisonment reflected the appropriate sentence after taking into consideration the previously decided cases of murder. The Court considered the case of **Susan Kigula vs. Uganda, High Court Criminal Session Case (in mitigation of sentence)** where the accused was sentenced to 20 years imprisonment, which the Court considered appropriate for murder. The accused had killed her husband by cutting his throat with a sharp panga.

In the same case, the Court considered the case of **Akbar Hussein Godi vs. Uganda, Supreme Court Criminal Appeal No. 3 of 2013**, a sentence of 25 years imprisonment was considered appropriate in a case of murder. The facts in that case were that the appellant had shot his wife dead.

In **Muwonge Fulgensio vs. Uganda, Court of Appeal Criminal Appeal No. 0586 of 2014**, this Court substituted a sentence of 25 years imprisonment for a sentence of life imprisonment imposed by the learned trial Judge. In arriving at its decision, the Court reviewed the sentences considered appropriate in several previously decided cases of murder. Thereafter, the Court considered the aggravating factors which were grave in that case as the appellant had killed the deceased by struggling her. After committing the murder, the appellant had tried to conceal the deceased's body by dumping it in a swamp.

However, the Court considered the mitigating factors including his youthful age of 20 years at the time he committed the offence; and the fact that the appellant had not wasted Court's time on appeal by pursuing an appeal against conviction, a fact which the Court said was a sign of remorsefulness on the appellant's part.

After taking into account the principles articulated in the above cases, as well as the facts of this case, we hold that the sentence of 37 ½ years imprisonment imposed on the 2nd appellant was harsh and excessive. It is higher than the range of sentences imposed in previous cases of murder in the Supreme Court and this Court reviewed earlier. Therefore, we shall set aside the sentence imposed on the 2nd appellant.

Pursuant to **Section 11** of the **Judicature Act, Cap. 13**, we shall proceed to exercise the powers of the High Court to determine the appropriate sentences in the circumstances.

With respect to the aggravating factors in the present case, we shall reiterate that the murder was conducted in a brutal manner, which must have caused the deceased a lot of pain, considering that the appellants cut off some of the deceased's body parts such as the lips and the ears. The Court must therefore impose sentences to mark its disapproval of the appellants' conduct.

We have considered the fact that the 2nd appellant was still at the relatively young age of 34 years when he committed the offence. The 2nd appellant had a family at the time, for which he was the chief bread winner. Like the 1st appellant, the 2nd appellant has not wasted this Court's time by arguing against his conviction. This shows is a sign of remorsefulness on the 2nd appellant's part as well.

After taking into consideration all the relevant material factors in this case, we would impose a sentence of 30 years imprisonment on the 2nd appellant. After deducting the period of 2 ½ years, spent by the 2nd appellant on remand, he shall serve a sentence of 27 years and 6 months imprisonment from the date of his conviction in the trial Court.

In view of the above findings, the sole ground of this appeal succeeds.

Therefore, the appeal is allowed.

The summary of this decision is as follows: the 1st appellant shall be set free forthwith unless he is held on other lawfully charges, as he has already spent more than three years in prison, yet he could only be rightly sentenced to three years imprisonment upon his conviction of Murder by the trial Court.

The 2nd appellant shall serve a term of 27 years and 6 months for the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act, Cap. 120**, of which he was convicted by the trial Court. The sentence shall run from the date of the conviction of the 2nd appellant by the trial Court, on 3rd July, 2014.

We so order.

Dated at Mbarara this ..... 13th ..... day of ..... October ..... 2020.

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Elizabeth Musoke

Justice of Appeal.

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Stephen Musota

Justice of Appeal.

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Remmy Kasule

Ag. Justice of Appeal.