THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBARARA

[CORAM: ELIZABETH MUSOKE, STEPHEN MUSOTA, JJA & REMMY KASULE, Ag. JA]

CRIMINAL APPEAL NO.188 OF 2013.

[Appeal from the re-sentencing decision of the High Court of Uganda at Kampala (Hon. Justice Paul. K. Mugamba) (as he then was) delivered on 09th December, 2013 in High Court, Kampala Criminal Session Case No. 0238 of 2013]

BETWEEN

1. KIZZA ROBERT:: APPELLANTS

2. GUMISIRIZA ENOCK

VERSUS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the judgment of the High court at Mbarara whereby both appellants were convicted of Murder of their father a one Bakanyomera John contrary to Section 188 and 189 of the Penal Code Act and were sentenced to death. This was on 23rd May 2007.

However following the Supreme Court decision in **Attorney General Vs Susan Kigula and 417 Others; Supreme Court Constitutional Appeal No. 03 of 2006 [2009] UGSC6,** whereby the Supreme Court upheld the decision of the Uganda Constitutional Court that the mandatory death sentence is unconstitutional and an order was made to re- sentence all those, who at the material time had been sentenced to a mandatory death sentence, the case of the appellants was referred back to the High Court (Mugamba, J.) as he then was, for re-sentencing.

The learned Judge then re-sentenced each one of the appellants to imprisonment for the rest of each one's life. This was through **High Court of Uganda at Kampala Criminal session case No. 0238 of 2013.** The re-sentencing was done on 9th December, 2013.

Dissatisfied with the sentence, both appellants appealed to this Court, raising 3 grounds of appeal namely: -

1. The Learned trial Judge erred in fact and law by sentencing the Appellants to imprisonment for the rest of their lives for the offence of Murder which was based on a wrong principle and occasioned a miscarriage of justice.

2. The Learned trial Judge erred in fact and law by sentencing the Appellants to imprisonment for the rest of their lives for the offence of Murder upon overlooking several material factors and occasioned a total failure of justice.

3. The Learned trial Judge erred in fact and law by sentencing the Appellants to imprisonment for the rest of the Appellants lives which was manifestly harsh and excessive.

At the commencement of the hearing of the appeal, Counsel for the Appellant applied for Court's leave to appeal against sentence only under **Rule 43 (3) of the Court of Appeal Rules** and **Section 132 (1) (b) of the Trial On Indictments Act.** The respondent did not

oppose the application. Leave was accordingly granted by Court for the appellants to appeal against sentence only.

Background:

The facts as accepted by the trial High Court are that on 14th, December, 2003, the appellants, while at Kyembogo 1 Cell, Mbarara District attacked their father Bakanyomera John at his home with a panga, and cut him on the head and throat leading to his instant death. The deceased's body was medically examined and the cause of death was found to have been due to severe hemorrhage as a result of cutting of his blood vessels which led to loss of a lot of blood.

The appellants were subsequently arrested, charged and tried for the murder of their father. On 23rd May 2007, the High Court (Mugamba, J, as he then was) found both of them guilty, convicted each one of them of the murder of the deceased and sentenced each one to the then mandatory death sentence of murder. Later, as already earlier stated, the sentence of death was set aside and substituted with a sentence of each appellant to imprisonment for the rest of each one's life.

Legal Representation.

At the hearing of the appeal, the appellants were represented by learned Counsel Sam Dhabangi on state brief; while the Learned Assistant Director of Public Prosecutions, Nabisenke Vicky represented the respondent.

With leave of Court, both counsel proceeded by way of written submissions.

On the date of the hearing of this appeal, it was not possible to have both appellants present in Court. This was in compliance with the Government of Uganda Health rules issued to prevent the spread of Covid 19 Virus. Each one of the appellants thus remained at Uganda Government Prison Premises at Mbarara during the hearing of the appeal. Each appellant was however attending to, following and participated in the appeal Court proceedings and was at all material time in contact with his lawyer, through video conferencing and communication technology applied by the Court.

Grounds 1 and 2

Learned counsel for the appellants submitted in respect of both ground 1 and 2 of the Appeal that the sentencing Judge erred when he did not take the principle of consistency and uniformity of sentence into account when sentencing the appellants. Counsel argued that on the basis of the Supreme Court decision of **Mbunya Godfrey Vs Uganda; Criminal Appeal No. 04 of 2011**, the learned sentencing Judge was under obligation to maintain uniformity and consistency in sentencing, by passing a sentence in respect of each appellant that was in range with sentences passed by Uganda's Courts of competent jurisdiction made in previous Court decisions in cases that had similarity of facts and circumstances like the case of the appellants.

Counsel contended that had this principle been followed, the learned sentencing Judge would not have sentenced each one of the appellants to imprisonment for the rest of each appellant's life, a sentence that was harsh and excessive and not in conformity with past Court decisions.

Counsel based his above stated submission on the fact that in the recent cases of **Akbar Hussein Godi Vs Uganda; Supreme Court Criminal Appeal No. 03 of 2013**, the Supreme Court confirmed as appropriate a sentence of 25 years imprisonment upon an appellant, who was a member of parliament at the time he was charged, tried and convicted of the murder of his wife.

Counsel also referred this Court to the sentence of 20 years imprisonment passed by the High Court and later confirmed by the Court of Appeal and the Supreme Court on **Susan Kigula**, the lead respondent in **Attorney General vs Susan Kigula and 417 others; Supreme Court Constitutional Appeal No. 03 of 2006 (2009) UG SC 6**, who too had been tried, and convicted of the murder of the husband and had been sentenced to death when the death sentence was still mandatory. After the compulsory death penalty had been held to be unconstitutional by both the Constitutional Court and by the Supreme Court on appeal and Susan Kigula had to be re-sentenced by the trial High Court, she was sentenced to imprisonment for 20 years imprisonment for murder.

Counsel thus submitted that the appellant should be subjected to a sentence ranging from 20 to 25 years imprisonment for the sake of maintaining consistency and uniformity in sentencing, given the sentences passed upon the appellants in the above stated two cases.

Appellant's counsel also referred Court to **paragraph 5 (2) of the Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013** and contended that the sentencing trial Judge in passing a sentence of imprisonment for the rest of the appellant's life did not balance the mitigating and the aggravating factors in respect of each of the appellants who were biological brothers. The mitigating factors were that both appellants regretted and apologized for what had happened, they wrote a letter of regret to the deceased's family of which they were a part, and the family had pardoned the appellants. Further steps towards reconciliation had been taken by all the parties concerned. The trial Court had been so informed. Each appellant had a family of a wife and school going children to support. The appellants had been in prison for 10 years as at the date of re-sentencing.

While in prison, both appellants had improved on their education levels, acquired vocational skills in art and crafts and had undertaken religious studies. The conduct of each appellant was regarded as commendable by the Prison authorities.

As to the aggravating factors, both appellants had killed the deceased, their biological father, by cutting his neck. A month earlier before the murder, the appellants had attacked their deceased father. Thus the appellants showed no respect and love at all for their biological father, the deceased. The deceased's family with a wife and other children were left without any support. The deceased's wife was a step mother of the appellants. The killing of an elderly father was a grave breach of filial trust.

Learned counsel submitted that had the learned trial Judge balanced the mitigating and aggravating factors, he would not have sentenced each one of the appellants to such a harsh and excessive sentence of imprisonment for the rest of each appellant's natural life.

Counsel for the appellants argued that a sentence of imprisonment for the rest of one's life was not different from a sentence of death since both sentences have death as the ultimate destination. The

death sentence is only different from the sentence of imprisonment for the rest of one's life because it is brutal and sudden, while the other is slow, drawn and most painful.

Learned counsel thus prayed this Court to exercise justice and mercy towards each appellant by setting aside the sentence of imprisonment for the rest of each appellant's life by reason of the fact that such a sentence is too harsh and excessive.

Ground 3

As to ground 3 of the appeal, learned counsel for both appellants reiterated that sentencing each appellant for the rest of his life, will result in the negation of the sentencing principle of rehabilitating and re-integrating the offender into society set out in **Paragraph 5 (2)** of **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,** since such a sentence because of its harsh and excessive nature cannot promote and assist in rehabilitating and re-integrating the appellants as offenders into society. The same sentence of imprisonment for the rest of each appellant's life, because of its harsh and excessive nature, does not provide reparation, psychological or otherwise by the appellants for

the harm done to the deceased's family or community. Because of its severity and excessiveness, such a sentence is likely to promote vengeance and revenge instead of reparation and reconciliation.

There will be no promotion of a sense of responsibility by the appellants as offenders acknowledging the harm they did to the deceased's family and the community since both of them are doomed to spend the rest of their lives in confinement in prison given the nature of the sentence.

Appellant's learned counsel thus prayed this Court to set aside the sentence of imprisonment of each one of the appellant to the rest of each one's life and substitute the same with a sentence of 18 years imprisonment for each one of the appellants, which sentence will promote reparation, reconciliation and re-integration of both appellants, as offenders, into society. Learned appellants counsel thus prayed this Court to allow this ground 3 as well as the whole appeal.

Submissions for the Respondent:

Grounds 1, 2 and 3

Counsel for the respondent opposed the appeal. Learned counsel consolidated the 3 grounds of appeal and dealt with them together.

According to respondent's counsel, the essence of the grounds of appeal by the appellants is that the sentence of imprisonment for the rest of one's life passed upon each appellant by the learned sentencing Judge was based on wrong principles, overlooked a number of material factors, and was manifestly harsh and excessive.

Counsel contended that there was no merit in the grounds of appeal as the learned trial Judge correctly considered both the mitigating and aggravating factors in respect of each appellant before he arrived at the sentence he imposed upon each one of the appellants

The learned trial Judge took into account the aggravating factors when he stated that;

"the fact that the two convicts killed their father by cutting his neck with a panga showed the extent of their intention...a month prior to the assault, the convicts had attacked the deceased, who

had reported the incident to the Chairperson of LC1...as a result of the killing of the deceased his family was left helpless since he was the bread winner.... the deceased was elderly and his needless killing by the two convicts, who were his sons, was in breach of filial trust and was premeditated."

Counsel further submitted that the learned re-sentencing Judge also took into account the mitigating factors in favour of the appellants when he stated that;

"I have noted what has been said in mitigation. It is impressive and in the circumstances of this case I find a custodial sentence rather than a death penalty apt. I have however to take into account the dastardly killing of the deceased by his two sons. I sentence the two convicts to imprisonment for the rest of their lives".

Learned counsel for the respondent cited to this Court a decision of this Court in **Bandebaho Benon Vs Uganda; Court of Appeal Criminal Appeal No. 319 of 2014**, a case that dealt with how post-conviction and re-sentencing factors should be handled by a re-sentencing Court when that Court stated that;

"it is an error, in our humble view, for the High Court in sentencing mitigation proceedings of post ***Kigula Vs Attorney General cases****, to take into account any mitigating or aggravating factors that occurred between conviction and re-sentence. The only factors that ought to be taken into account are only those that would have been available to the judge at the time of conviction."*

In respect of this case therefore, counsel for the respondent contended that it was wrong of counsel for the appellants to submit that the re-sentencing Judge and this Court of Appeal should take into consideration acts that each appellant had carried out during the period after conviction and sentence on 23rd May 2007 while each one was serving sentence and the re-sentencing of the appellant to imprisonment for the rest of each appellant's life on 09 December, 2013. The factors that occurred between the period of conviction and re-sentencing as relate to each appellant, ought not to be the factors for the appellants to rely upon to have a reduction in the sentence. Yet Appellant's counsel was relying on those factors namely, the appellants doing Bible studies, participating in arts and crafts and seeking family reconciliation, all done by the appellants while in

prison serving sentence after their conviction and sentence on 23rd May 2007 as the basis for reduction in sentence by each appellant.

Counsel for the respondent further submitted that the re-sentencing Judge properly applied for guidance purposes **paragraph 5(2)** of **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice)Directions, 2013,** when re-sentencing each appellant. Therefore the sentence arrived at by the learned trial Judge was an appropriate one.

Learned counsel for the respondent reiterated the position of the law that an appellate Court will only alter the trial Court's sentence if the said trial Court acted on a wrong principle, overlooked some material factor, or the sentence was manifestly excessive or too low to amount to a miscarriage of Justice. Counsel relying on the Supreme Court decision of **Livingstone Kakooza Vs Uganda; Supreme Court Criminal Appeal No. 17 of 1993,** submitted that the re-sentencing Judge did not act on any wrong principle, never overlooked any material factor and he judiciously exercised his discretion in deciding that the sentence of imprisonment for the rest of each one of the appellant's life was the appropriate sentence.

As to uniformity and consistency in re-sentencing, respondent's counsel submitted that the sentencing Judge observed this principle when re-sentencing each appellant.

Learned counsel referred this Court to the case of **Bukenya Stephen Vs Uganda; Court of Appeal Criminal Appeal No. 0051 of 2007**, where the appellant stabbed to death his brother with a knife and spear and was sentenced to life imprisonment by the trial Court, which decision was upheld by the Court of Appeal.

Respondent's counsel also further contended that the act of murder done by the appellants was brutal and savage, done in a pre-meditated manner, after the appellants had previously threatened to kill the deceased who happened to be their biological father. The appellants used a panga to hack him on the head and throat cutting through all the major blood vessels connecting to the brain which led to a deep cut wound on his neck. The deceased also had scalds indicating burns on his chest and abdomen. The appellants then left him in a big pool of blood and went away. This was too much callousness on the part of each of the appellants.

Counsel therefore prayed this Court to uphold the sentence of imprisonment for the rest of each appellant's life imposed by the trial Judge and have all the three grounds of this appeal dismissed.

Decision:

We have considered the submissions of both counsel and also considered the court record as well as the re-sentencing judgment of the learned trial Judge who tried the case and later carried out the re-sentencing of the appellants. We have also carefully analyzed the Court authorities relevant to the case by way of precedents as well as the appropriate statutory laws.

The duty of the Court of Appeal, as a first appellate Court, is provided by **Rule 30(1) of the Court of Appeal Rules as being the Supreme Court** in the case of **Kifamunte Henry Vs Uganda Supreme Court Criminal Appeal No. 10 of 1997:** elaborated this duty as being to rehear the case on appeal by reconsidering all the materials which were placed before the trial Court and for this appellate Court to make up its own decision as to whether or not the trial Court was correct or wrong in the conclusions that it reached and the orders it made in resolving the issues in the case. The appellate Court may

come out with its own independent decision, different from that of the trial Court, if circumstances so demand.

As to the sentence passed by the trial Court, the settled position of the law, is that the appellate court will only interfere with the sentence imposed by a trial court only where the sentence passed is either illegal or founded upon a wrong principle of law. The appellate court will equally interfere with a sentence so arrived at when the trial court failed to consider a material factor in the case; or imposed a sentence which is too harsh and manifestly excessive or was too low in the circumstances as to amount to a miscarriage of Justice. See; **Bashir Ssali v Uganda: Supreme Court Criminal Appeal No. 40 of 2003.**

Further, in passing sentence this Court will, as much as circumstances so permit, follow the principle of uniformity and consistency of sentencing so that the sentences passed in the case should have some resemblance and similarity with those passed in previous cases of similar facts and circumstances, even though in real life no two crimes are identical in all circumstances. See;

Mbunya Vs Uganda; Supreme Court Criminal Appeal No. 4 of 2011.

In the instant case, the appellants killed their own biological father, a one Bakanyomera John, with a panga, by cutting him on the head and throat, leading to his instant death which was in breach of filial trust. The murder was premeditated.

However, on the mitigating side the appellants are first offenders, were remorseful, and are young men having family responsibilities including support for their spouses and children as to health and education. Each one of them is capable of reforming into a better person and being useful to society.

The law as pronounced upon by this Court in **Bandebaho Benon Vs Uganda; Court of Appeal Criminal Appeal No. 319 of 2014** is that a re-sentencing Court should consider those factors that were available to the sentencing Judge at the time of conviction of the accused/appellant. The re-sentencing Court has to disregard those factors, whether mitigating or aggravating, that occurred between conviction and re-sentencing. We therefore disagree with counsel for the appellants who urged this Court to take into account such factors

that have happened after the period since the conviction and sentencing of each one of the appellants on 23rd May 2007.

The re-sentencing Judge considered as aggravating the fact of both appellants, sons to the deceased, killing their elderly father by cutting his neck with a panga, thus showing the extent of their premeditated intention and breach of filial trust. It was also aggravating that the killing happened when only a month before, the same appellants had attacked and assaulted their now deceased father and the incident had been reported to the LC1 chairman. Further aggravating was the fact that the deceased's family was left helpless with the bread winner having been killed. It is also a fact that the wife of the deceased, now the widow was not the biological mother of both appellants.

As mitigating, the learned sentencing Judge noted that both appellants regretted killing their father, had apologized to the deceased's family and sought reconciliation.

It was also taken note of that the first appellant was a family person with a wife and three children whose ages ranged from 12 to 16 years at the time and were thus school going. These were losing support of the first appellant.

In respect of the second appellant, he too had a wife and 7 children whose ages ranged between 11 and 25 years, who too were school going, and were losing support of their father.

Finally, the 1st appellant was aged 30 years and the 2nd appellant was aged 38 years at the time of their conviction, so that it can be concluded that both of them were still in their youthful age. They still had years to live as useful members of society before getting into old age.

The learned re-sentencing Judge did not, in the considered view of this Court, properly address himself on the issue of the period spent on remand by each one of the appellants before conviction. The learned re-sentencing Judge stated in his sentence Ruling that: -

"It was stated also that the convicts have been in prison for almost 10 years but that during that period they had improved....."

We find that the 10 years was not the period that each of the appellants had spent in lawful custody before conviction. Each appellant was arrested on 14th December, 2003 and each appellant's

trial ended on 23rd May 2007 when each one was convicted of the offence of murder after a full criminal trial. It follows therefore that the period spent on remand by each appellant was about 3 years and 6 months.

This was the period that the learned re-sentencing Judge had to take into account when re-sentencing each appellant in compliance with **Article 23 (8) of the Constitution**. With respect to the learned trial Judge, there was no compliance with this constitutional requirement. This made the sentence passed by the learned re-sentencing Judge upon each appellant to be illegal in law.

We note that before passing sentence, the re-sentencing Judge took into account both the mitigating and aggravating factors.

We had the benefit of considering and being guided by the decision of the **Supreme Court** in **Bakubye Muzamiru & Jjumba Tamale Musa v Uganda; Criminal Appeal No. 56 of 2015**, where it upheld a trial court sentence of 40 years imprisonment for an appellant who had been tried and convicted of murder.

In **Supreme Court Criminal Appeal No. 54 of 2016; Abaasa John son & Muhwezi Siriri v Uganda**, the appellants had been convicted of the offences of murder and aggravated robbery. The appellants had murdered a private in the Uganda army in the course of carrying out a robbery, The Supreme Court upheld the sentence, after giving allowance for the 5 years the appellants had spent on remand before conviction, to 35 years imprisonment for each appellant for the offence of murder.

Having considered the law and all the appropriate factors and Court precedents as set out above, we find that the sentence imposed by the re-sentencing Court of imprisonment of each appellant for the rest of the life of each one of the appellants was not only illegal in law but the same was also harsh and excessive. We accordingly set the same aside.

Having taken into consideration all the mitigating and the aggravating factors of each appellant as already set out earlier in this Judgment and being guided by **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,** and having considered the past Court precedents as to sentences in

Court cases where convictions of the offences of murder have been secured, we sentence each appellant to 45 years imprisonment.

Each appellant as already stated spent 3 years and 6 months on remand. This period is deducted from the sentence of 45 years imprisonment for each appellant. Accordingly each appellant is to serve a sentence of imprisonment of 41 years and 6 months as from 23 May 2007. We accordingly allow the appeal as to sentence on the terms. We have set out in this Judgment.

We so order.

Dated at Mbarara this ..20th.. day of ..Nov..2020.

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ELIZABETH MUSOKE. JA.

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STEPHEN MUSOTA. JA.

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REMMY KASULE. Ag, JA.