THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CONSOLIDATED CRIMINAL APPEALS NOS. 0078 AND 113 OF 2017

NDIMUKAGA EDSON::APPELLANT

VERSUS

UGANDA::RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kabale before Kazibwe, J. delivered on the 16th day of November, 2016 (conviction) and the 18th day of November, 2016 (sentence) in Criminal Session Case No. 0006 of 2015.)

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 High Court (Kazibwe, J.) sentenced the appellant to 28 years imprisonment, having convicted him of Murder contrary to **Sections 188** and **189** of the **Penal Code Act, Cap. 120**.

The facts of the case are as follows:

The victim, his parents, as well as the appellant lived in the same village of Kabera Cell, Bigaga Parish, Rutanda Sub County, Kabale District. On 6th August, 2014, in the wee hours of the night, the victim's father heard the victim crying, who at that time, should have been peacefully sleeping in his room. The father was sleeping in another room of the same house. It appeared something was physically hurting the victim and causing him pain.

Earlier in the same night, the victim's mother who was sleeping in the same room as the father, had heard strange noises coming from the direction of the room, where the victim and his other young siblings were sleeping.

The victim's father left his room and moved towards the victim's room. On his way to the said room, the victim's father came across the appellant.

Perhaps, because the victim's father viewed the appellant as an intruder, against whom he had to defend himself, the two began to wrestle. At that moment, the appellant's son, came and joined in the scuffle, helping to overpower the victim's father. The appellant and his son managed to flee from the scene.

Finally, when the victim's father got to the room, he found the victim there with injuries. He sounded an alarm which was responded to by some of his neighbours. On the next day, he also reported the matter to the area L.C. I Chairman, who caused the arrest of the appellant. The appellant was taken to the nearby Police Station.

Meanwhile, at the scene, the victim was seriously injured but he was still alive. Arrangements were made to take him to a nearby Health Centre. Later, he was taken to Kabale Referral Hospital, but he died on his way there.

No weapon was recovered from the scene of crime, but a postmortem report indicated that the deceased had died of intracranial haemorrhage, having sustained external injuries in the form of deep cut wounds on the head.

The appellant was charged with the murder of the deceased. He was accordingly committed and tried on an indictment. The particulars of the offence were that:

> **"Ndimukaga Edison on the 6th day of August, 2014 at Kabera Cell, Bigaga Parish, Butanda Sub-County in the Kabale District murdered Niwamanya Brian."**

The appellant pleaded not guilty to the charge and the matter proceeded for trial. Upon conclusion of the trial, the trial Court convicted the appellant as charged, and imposed the sentence referred to earlier.

The appellant does not contest his conviction by the trial Court. However, he is dissatisfied with the decision of the trial Court to sentence him as it did. This Court granted leave to the appellant to proceed against sentence only. He proceeds on the sole ground that:

> **"The learned trial Judge erred in law and fact when he sentenced the appellant to 28 years' imprisonment, a sentence which is manifestly**

harsh and excessive and did not take into account all mitigating factors given the circumstances of the case."

We must state that on 6th April, 2017, the appellant filed a Notice of Appeal, which was given the Appeal Number 113 of 2017. The appellant had earlier filed a notice of appeal, which was registered as Appeal Number 78 of 2017. Both the stated appeals are from the same decision of the High Court which is reviewed in this decision.

Representation.

At the hearing of the appeal, Mr. Emmanuel Tumwebaze represented the appellant on state brief. The appellant followed the proceedings remotely from prison, as he could not physically appear at the hearing due to the restrictions on his movement imposed by the Government measures to curb the spread of Covid-19. Mr. Peter Mugisha a State Attorney in the Office of the DPP represented the respondent.

Counsel for both parties, prayed to the Court to adopt submissions filed by the parties prior to the hearing in support of the respective parties' cases. Court granted that prayer.

Appellant's submissions.

In his written submissions on the sole ground of appeal, counsel for the appellant reiterated the legal principles applicable to appeals against sentence, as stated in **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 0017 of 1993** that:

"The appellate court will only alter a sentence imposed by the trial court if it is evident that 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."

Counsel contended that the instant appeal calls for the alteration of the sentence of the trial court for the following reasons:

First, given the appellant's relatively old age of 62 years at the time of conviction, it was harsh to sentence him to 28 years imprisonment. Counsel submitted that the learned trial Judge had alluded to the undesirability of sentencing the appellant to a long sentence, when he said in sentencing, that "a long prison term would not enable him spend the last years of his life with his children as his counsel pleaded." Counsel cited **Aharikundira**

Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015, where the court reduced a sentence of death imposed on the appellant aged 63 years at the time, basing its decision to reduce the sentence, on the advanced age of the appellant. Counsel then contended that the sentence of 28 years imprisonment imposed on the appellant, a 62-year-old man, must have been arrived at because the trial Court overlooked his advanced age as a mitigating factor. Counsel further contended that because the appellant would leave prison aged 90 years, that fact considered alone could imply that the sentence imposed on him was excessive.

Secondly, counsel also argued that other mitigating factors submitted for the appellant were not considered by the trial Court, such as: the appellant having shown remorse for his role in the killing of the deceased; and his being the chief care giver for a family including 7 orphans which needed his presence.

Counsel concluded by praying this Court to consider a sentence of 15 years imprisonment appropriate in the circumstances, and have it substituted for the sentence of 28 years imprisonment imposed on the appellant, upon conviction by the trial Court for murder contrary to **sections 188 and 189** of the **Penal Code Act, Cap. 120**.

Respondent's submissions.

The respondent opposed the appeal.

In reply to the submissions for the appellant, counsel for the respondent submitted that it was not true, as asserted for the appellant that the sentence imposed in this case was manifestly harsh or excessive. The sentence of 28 years imprisonment is neither harsh nor excessive considering that under sections 188 and 189 of the Penal Code Act, the maximum sentence for murder, for which the appellant was liable is the death sentence. Further, that the sentence imposed on the appellant was also neither harsh nor excessive considering that the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** set the starting point in sentencing for the offence of murder at 35 years imprisonment. Counsel for the respondent contended that the sentence of 28 years imprisonment which was imposed on the

appellant is lenient considering that it was less than the starting point of 35 years imprisonment under the said guidelines.

Counsel reminded the Court of the circumstances when it would be permissible for an appellate Court to interfere with the sentence imposed by the trial Court, as stated by the Supreme Court in **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001**, namely: a) where the sentence is manifestly excessive; b) where the sentence is so low as to amount to a miscarriage of justice; c) if the trial Court in passing the sentence ignored to consider an important matter, which ought to have been considered; d) where the sentence imposed is wrong in principle.

Counsel for the respondent submitted that none of the factors articulated in the case of **Kiwalabye (supra)** exist in the present case. On the contrary, the learned trial Judge considered every important matter, including, the aggravating and mitigating factors and the period which the appellant had spent on remand.

Counsel cited **Bakubye Muzamiru & Another vs. Uganda, Supreme Court Criminal Appeal No. 56 of 2015,** a case of murder where the Court stated that a sentence of 40 years imprisonment for murder is neither harsh nor excessive.

Counsel concluded by making a prayer to this Court to find that the sole ground of appeal fails, as the sentence of the trial Court was neither harsh nor excessive, and to dismiss the appeal and uphold the sentence of the trial Court.

Resolution of the Appeal.

We have read 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 are at pages 49 to 50 of the record. During those proceedings, Ms. Inzikuru State Attorney for the State submitted the aggravating factors. She told Court that the deceased who had been killed by the appellant was a young boy aged 8 years and 9 months, a first born of his parents, who had a long life ahead of him; and that the appellant, who was a neighbour of the deceased, should have acted in a manner which would protect the deceased instead of killing him. Ms. Inzikuru told Court that the killing of the deceased had gravely affected his parents, and that it was necessary to send out a firm message against perpetrators of unlawful killings. Ms. Inzikuru then told Court that the deceased had been killed because of a grudge the appellant had with the deceased's parents. She then prayed the Court to impose the maximum death sentence on the appellant.

Learned counsel Muhangi, presented the mitigating factors for the appellant. He told Court to pass a sentence that would help the appellant to reform. Mr. Muhangi then pointed out to court that the appellant was, at the time of sentencing of an advanced age of 62 years, and sentencing him to a lengthy sentence would be akin to life imprisonment. Mr. Muhangi asked court to impose a shorter sentence which will enable the appellant to spend time with his family of 7 children, for whom, he was the sole bread winner. Mr. Muhangi also asked the court to consider the fact that the appellant had been on remand for 2 years.

When the appellant was asked to say anything relevant to guide the court in sentencing, he told the trial Court that he was remorseful and he asked for forgiveness. He repeated what his counsel said that he was the chief care giver for 7 orphans who lived with him; that he had a sickly wife; and that he was of an advanced age.

Giving his reasons for the sentence he arrived at, the learned trial Judge had this to say at pages 49 to 50 of the Court record:

> **"It has been submitted by the prosecution that court should give the maximum penalty of death to deter others who visit their anger on innocent persons as in the instant case. As a neighbour, the convict should have exercised remorse on the deceased whose future was brutally terminated.**

For the convict, Counsel submitted the need for rehabilitation as opposed to mere retribution. The age of the convict was submitted in as a mitigating factor to support the plea for a lenient custodial sentence against the convict.

The convict is 62 years of age with seven children to look after. He appears remorseful for what he did. A long prison term would not enable him spend the last years of his life with his children as his counsel pleaded.

In aggravation, however, the manner in which he committed the murder of an innocent minor was brutal and is strongly condemned. I, however, consider his advanced age and will not impose the maximum penalty of death. I sentence him to 30 years in prison less the 2 years spent on remand. He will serve 28 years."

It is evident that the learned trial Judge gave clear reasons for arriving at the sentence he imposed on the appellant. He considered the very factor of the appellant's age which counsel for the appellant now says on appeal that the learned trial Judge did not consider. To us, counsel for the appellant is, by asking us to reconsider the age of the appellant and pass a lesser sentence than the one passed by the trial Court, merely asking us to say that we could have passed a different sentence if we had been the sentencing court. But it is now firmly established by several authorities that an appellate court will not interfere with the sentence of the trial Court merely on the ground that if the members of the appellate Court had been the trial Court, they would have passed a different sentence. **See: Ogalo s/o Owoura vs. R (1954) 21 EACA 270**. We are unpersuaded to ignore the said principle in this case.

As to whether the sentence of 28 years imprisonment imposed on the appellant was out of the range of sentences approved by this Court or the Supreme Court in murder cases, it certainly was not. In **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015** cited by counsel for the appellant, the Supreme Court approved a sentence of 30 years imprisonment in a case of murder. In **Bakubye Muzamiru & Another vs. Uganda, Supreme Court Criminal Appeal No. 56 of 2015,** the Supreme Court stated that a sentence of 40 years was neither harsh nor excessive for murder. Therefore, the sentence of 28 years is firmly within the range of sentencing for murder.

For the above reasons, we find that the sole ground of this appeal fails.

The appeal shall stand dismissed, and the sentence imposed on the appellant by the trial Court is hereby upheld.

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.