THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 352 OF 2015

(An appeal against conviction and sentence, by Zehurikize J., in Mbarara High Court

Criminal Session Case No. 0014 of 2012)

TUHUMWIRE MARY.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM:

1. **HON. MR. JUSTICE KENNETH KAKURU, J.A.**
2. **HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.**
3. **HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.**

JUDGMENT OF THE COURT

In Mbarara High Court Criminal Session Case No. 0014 of 2012, Zehurikize J. convicted the appellant herein on her own plea of guilty of the offence of murder and sentenced her to serve 25 (twenty-five) years in prison. She is dissatisfied with the conviction and sentence; against which this appeal lies. The grounds of appeal, as stated in the memorandum of appeal, are: -

1. ***That the learned trial judge erred in law and fact when he convicted the Appellant for the offence of murder basing on a plea of guilty recorded without following the legally established procedure of recording a plea of guilty.***
2. ***That the learned trial judge erred in law and fact when he relied on the Appellant's equivocal plea of guilty to convict and sentence her to 25 (twenty-five) years imprisonment for the offence of murder thereby occasioning a miscarriage of justice.***

The Appellant has proposed in the memorandum of appeal that this Court should allow the appeal, quash the conviction, and set aside the sentence; and thereby set her free.

The facts of the case are simple. The Appellant was wife to one Batinaki Samuel with

whom she lived together. While her husband was having supper which she had served him, the Appellant picked a panga and cut him on the neck and hands a number of times; leading to his bleeding to death. She then handed herself to Police where she confessed to having killed her husband. It was to this fact that she pleaded guilty of murder; for which she was convicted and sentenced as shown above. Gerald Nuwagira, Counsel for the Appellant at the hearing of this appeal, submitted that the trial judge irregularly recorded the Appellant's plea of guilt.

He submitted further that the Appellant was denied the right to an interpreter; which contravened the provisions of Article 28 of the Constitution. He contended that it was for this reason that, during the *allocutus*, the Appellant presented different facts from those she had pleaded guilty to, and for which she was convicted and sentenced as shown above. Counsel referred us to ***Adan vs Republic [1973] E.A. 445*** which succinctly laid down the procedure Courts should follow in recording plea of guilt. It is considered the *locus classicus* on taking a plea guilt.

On the ground of the appeal against sentence, Counsel argued that the Appellant was a first offender, had reported herself to police after the fateful event, and is remorseful. She has six children of the marriage, the youngest of whom was only two years at the time of her conviction. These children are now scattered under the care of various relatives. Counsel contended that in the circumstances, the sentence imposed on the Appellant is manifestly excessive; and so, he proposed that we impose a ten-year sentence instead.

Ms Jacquelyn Okui, Senior State Attorney, who represented the Respondent, opposed the appeal and supported the sentence; contending that the conduct of taking plea in the instant case was properly done, and therefore the conviction was proper. She submitted that it is evident, from the record, that the Appellant understood the language used in Court; and further that the omission to include the word 'interpreter' and to state the language used, had not occasioned miscarriage of justice. She pointed out further that the Appellant was represented at the trial by legalCounsel; and further that there is nothing on record showing that there was any objection to the language used.

Counsel contended further that the Appellant was unequivocal in her plea of guilt; and after she had confirmed that the facts of the case read to her were correct, the Court was justified in entering the plea of guilt, followed by conviction and sentence. In support of her submission that the manner the plea was taken did not occasion any miscarriage of justice to the Appellant, learned Counsel referred us to the case of ***Sebuliba Siraji*** **vs**

Uganda - C.A. Crim. Appeal No. 0319 of 2009. Counsel conceded that the sentence of 25 (twenty-five) years imprisonment imposed by the trial Court was rather high in the circumstance of this case. She proposed a sentence of 15 (fifteen) years in prison instead, as appropriate punishment.

RESOLUTION OF THE APPEAL

As a first appellate Court, it is incumbent on us to re appraise the evidence on record and reach our own conclusion; but with a caveat that, unlike the trial Court, we have not had the benefit of observing the witnesses testify. This duty has been spelt out in numerous cases, including such cases as ***Pandya vs R. [1957] E.A. 336, Bogere Moses vs Uganda - S.C. Crim. Appeal No. 1 of 1997,*** and, as well, ***Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions.*** In ***Kifamunte*** **vs** ***Uganda - S.C. Crim. Appeal No. 10 of 1997,*** the Supreme Court reiterated the position of the law in this regard as follows: -

> *"We agree that on first appeal from a conviction by a judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole, and its own decision thereon. The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it."*

1. **Whether the trial Court convicted the Appellant for the offence of murder basing on a plea of guilty recorded without following the legally established procedure of recording a plea of guilty.**

The law governing the taking of plea in the High Court, by any person indicted of an offence triable by the High Court, is in section 60 of the Trial on Indictments Act. It spells out the procedure Court should follow during the taking of plea. It provides, *inter alia,* that an officer of the Court must read over the indictment to the accused person. It provides further that, if need be, the officer of Court shall explain the indictment to the accused, or it may be interpreted by an interpreter of the Court; and the accused person shall be required to plead instantly to the indictment. It also provides for instances where the accused person may, as of right, decline to plead to the indictment against him or her.

Section 63 of the Act provides that upon the accused person pleading guilty, the Court shall record the plea of guilty; and may convict the accused person on it. It is noteworthy to point out that while the Act provides that an accused person may be convicted upon his own plea of guilty to the indictment, it is now a well-established and mandatory

requirement founded on Court decision - see ***Adan*** vs ***Republic*** (supra) - that after Court has entered the plea of guilty, the prosecution must state the facts of the case. It is only after the accused person has admitted that the facts as stated by the prosecution are correct, that Court may proceed to convict the accused person on his or her own plea of guilty.

The need for this elaborate process is in furtherance of the imperative need to protect and promote the right of an accused person to a fair trial; which is a safeguard enshrined in the Constitution; more specifically in Article 28(3) of the Constitution, which provides as follows: -

"Every person who is charged with a criminal offence shall: -

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person understands, of the nature of the offence;

(f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial... ."

There is a *corpus* of authorities laying down the circumstances under which the appellate Court may either quash conviction based on a plea of guilt, or uphold such conviction. In ***Tomasi Mufumu* vs *R. [1959] E.A. 625,*** cited by this Court in the ***Sebuliba Siraji vs Uganda*** case (supra), the Court of Appeal for Eastern Africa had stated that: -

> *"... it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder ... and understands that the penalty is death. Where the plea taken does not amount to an unequivocal plea of guilty to the offence to which the accused is convicted, the conviction must be quashed (see* ***R. v. Tambukiza s/o Unyonga [1958] E.A. 212).****"*

In the ***Sebuliba Siraji vs Uganda*** case (supra) this Court recast a passage from ***Adan vs R.*** case (supra) at, p. 446, and stated as follows: -

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter, the Court*

should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he admits, his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered.

The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the Court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."

In ***Juma Nkunyigi & Anor.*** *vs* ***U. - C.A. Crim. Appeal No. 217 of*** *2012,* the Appellants were challenging their conviction on their own plea of guilt, contending that the proper procedure had not been followed for recording the plea and entering conviction. This Court quashed the conviction on the ground that no statement of facts of the case had been presented to the accused before the conviction. The Court cited the ***Adan*** vs ***R.*** case (supra) where, on the imperative of presenting the statement of facts to the accused before conviction is entered, the East African Court of Appeal stated at p. 447 as follows: -

"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that the accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

In ***Idirisaa Mugisa*** vs ***Uganda - Fort Portal H.C. Crim. Appeal No. 16 of 2008,*** the Appellant had been charged, in the Fort Portal Chief Magistrate's Court, with the offence of reckless driving in contravention of sections 4(1) (a), and 5(b), of the Traffic and Road Safety Act, 1970. He admitted the charge; and the trial Magistrate entered a plea of guilty. The Prosecutor presented the facts of the case; which the Appellant agreed to, and confirmed was correct. The trial Magistrate then convicted him, and sentenced him to imprisonment. He appealed against both conviction and sentence, on grounds that the learned trial Magistrate had not followed the correct procedure of recording a plea of

guilt; and that he had convicted the Appellant on an equivocal plea of guilt. More importantly, it was submitted for the Appellant that the facts of the case presented to Court did not show that the Appellant had committed the offence for which the plea of guilty had been entered against him. Owiny - Dollo J. (as he then was) found that the charge had been explained to the Accused in enforcement of his right to a fair trial in a language he understood; and this was in keeping with the holding in ***Adan* v. *Republic*** (supra).

However, the learned judge found fault with the charge sheet as the statement of offence alleged '*reckless driving'*, while the particulars of the offence alleged *'dangerous driving*'; yet *'reckless driving'* and *'dangerous driving'* are two distinct offences under separate provisions of the same Act. It was evident that the interpreter must have had problems rendering the two phrases *'reckless driving'* and *'dangerous driving'* into the language understood by the Appellant, as well as in explaining the ingredients of the offence to the Appellant. This would have presented a challenge even to a person well versed in the English language, and did not require the services of an interpreter. Accordingly, although the Appellant had stated to Court that he had heard the facts of the case as narrated by the prosecutor, and had confirmed that they were correct, the learned judge allowed the appeal, quashed the conviction, and set aside the sentence, after stating as follows: -

> *"While the facts of the case was in conformity with the charge of 'reckless driving', as given in the statement of offence, it however pointed to an altogether different offence from the particulars of the offence; and, worse still, this had to be conveyed to the Accused in the Rutooro language ... From the above, the plea of guilt by the Accused, and his subsequent purported assent to the correctness of the facts of the case presented, which led to his conviction, was of no avail as the crucial test at the stage of plea - taking had failed due to the fatally defective charge."*

Although this is a High Court decision, and is therefore not binding on this Court, we however find that it correctly states the position of the law in regard to plea taking. In the ***Sebuliba Siraji vs Uganda*** case (supra), the Appellant was ambivalent in his plea; changing from plea of not guilty, to that of guilty. Finally, he pleaded guilty to murder after notifying Court that his lawyer had explained to him the consequences of pleading guilty to the indictment. He also confirmed that the statement of facts of the case, as presented by the State Counsel was correct; following which the trial judge then convicted him on his own plea of guilt.

The issue before the Court of Appeal for determination was whether the failure by the trial Court to state the language used for interpretation during the taking of plea by the Appellant was fatal to the conviction, or not. In finding that the omission to state the language used for interpretation was not fatal to the conviction, the Court stated as follows: -

> *"We consider it desirable that a trial Court should indicate the language in which the indictment has been read and explained, and the proceedings interpreted to the accused. It assists the appellate Court in discerning whether the appellant fully understood the nature and consequences of the proceedings against him. However, in the circumstances of this case, we do not consider the fact that the learned iudae did not record the language of interpretation to be fatgl to the conviction.*
>
> *The record clearly indicates that the indictment and facts were not only put, but fully explained to the appellant. His answers to all the stages of the proceedings indicate that he understood what was said to him, its consequences, and what the proceedings were all about. Moreover, there is no protest on record from his Counsel to indicate that the appellant did not understand or misunderstood anything. In the premises, we conclude that the conviction was valid under section 63 of the Trial on Indictments Act and uphold it for being unequivocal."* ***(Emphasis added)***

In the instant appeal before us, the record of the proceedings at the trial shows that during the plea-taking process, the Appellant had the full benefit of learned Counsel who represented her at the trial. It is also manifest from the record of the proceedings that a Court clerk was in attendance in Court when the indictment was read out and explained to Appellant. The record of the proceedings of the plea taking attests to this. It reads as follows: -

> *"Court: The indictment is read and explained to the accused.*
>
> *Accused: I have heard the charge it is true I killed him intentionally."*

It was after this that the learned trial judge entered the plea of guilty against the Appellant. When the trial judge had recorded the plea of guilty, State Counsel presented the facts of the case; which the learned trial judge recorded verbatim. The statement of facts disclosed the circumstances under which the Appellant killed her husband; and that she committed this homicide intentionally, after prior planning to do so. Upon the presentation of the facts by the State Counsel, the Appellant replied as follows: -

> *"Accused: I have heard the fact that is what transpired; the facts are true."*

Following the admission of the correctness of the facts by the Appellant, the learned trial judge then convicted her in the following words: -

"Court: Upon her plea, I find the accused guilty of Murder
C/S 188 & 189 of the Penal Code Act, convict her accordingly."

It is this process of plea taking, and the resultant conviction and sentencing of the Appellant, against which this appeal lies. We note from the record that the indictment was read over and explained to the Appellant; and from her response, it is quite apparent that she understood that she had been indicted with the offence of murder, and what the essential element of the offence of murder is. Explaining the offence of murder to her could not have caused any confusion in her mind. Otherwise, she would not have stated expressly that she had killed the victim '*intentionally*'; which brings out the element of malice aforethought in the killing, and is an essential element for establishing the offence of murder.

If the indictment had not been explained to her, and the elements constituting murder had not been made clear to her, the Appellant would surely not have included the intentional aspect of the killing in her plea. Had she admitted having killed the victim, but without adding the key word *'intentionally'*, it would not have amounted to a plea of guilty for the offence of murder with which she had been indicted. Court would then have been wrong to enter a plea of guilty for murder against her, as it would have had to establish whatever defence was available to her; and this might have instead disclosed the offence of manslaughter.

Furthermore, the statement and particulars of the offence in the indictment were in agreement with the statement of facts presented by State Counsel after the plea of guilt, which the Appellant accepted as being correct. In the circumstances then, we find that the Appellant was unequivocal in her plea of guilty of the murder with which she was indicted. We also find that whatever omission that there was, in the plea taking process, such as failure to state the language of interpretation used in the process, occasioned no miscarriage of justice to the Appellant.

Counsel for the Appellant pointed out to us that during the allocutus after conviction, the Appellant revealed facts and circumstances of the killing, which could possibly reduce the offence from murder, to the lesser homicide of manslaughter. True, at this stage the convict stated that after her husband had shown hostility to her and had refused to respond to her greetings and threatened her, asking her to leave his home, they struggled for a panga; and it was during that struggle that she cut him with the panga, leading to

his death. However, even if Court were to believe this version, it came after Court had already convicted the Appellant of murder on her own plea of guilty.

After convicting the Appellant, the trial judge became *functus officio* regarding conviction; and could therefore not reverse it. Court was only left with considering whatever aggravating or mitigating factors to be presented by either side, to enable the trial judge exercise his sentencing discretion from an informed position. Admittedly, if the facts revealed by the Appellant at the allocutus had come before the conviction, then her conviction for murder would have been wrong; and this Court would have quashed it. We find no fault with the trial Court in its conduct of the plea taking. Accordingly, the appeal against conviction fails.

2. Whether sentencing the Appellant to serve 25 (twenty-five) years in prison, after conviction for the offence of murder, occasioned miscarriage of justice.

As an appellate Court, we are constrained not to interfere with sentence imposed by the trial Court, merely because we would have imposed a different sentence had we been the trial Court. We can only interfere with sentence where it is either illegal, or founded upon a wrong principle of the law, or a result of the trial Court's failure to consider a material factor, or harsh and manifestly excessive in the circumstances of the case - (***see James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954)24 E.A.C.A. 270, Kizito Senkula*** vs Uganda - S.C. Crim. Appeal No. 24 of 2001, Bashir Ssali vs Uganda - S.C. Crim. Appeal No. 40 of 2003, ***and*** Ninsiima Gilbert vs Uganda - C.A. Crim. Appeal No. 180 of 2010).

The principles that should govern our exercise in that regard are well laid down. In the case of ***Kyalimpa Edward vs Uganda - S.C. Crim. Appeal No. 10 of 1995,*** the Supreme Court clarified on these principles as follows: -

> *"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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice:* ***Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270, R. vs Mohamedali Jamal (1948) 15 E.A. C.A. 126."***

In ***Livingstone Kakooza vs Uganda - S.C. Crim. Appeal No. 17 of 1993,*** the Supreme Court re-echoed the same principles; and added that an appellate Court will also alter a sentence imposed by a trial Court if it *'overlooked some material factor'*. It also

added that *'sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration:*

See ***Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270.'*** In the case of ***Kiwalabye Bernard vs Uganda - S.C. Crim. Appeal No. 143 of 2001,*** the Court further expanded the principles governing intervention with sentence imposed by a trial Court. It stated that: -

> *"The appellate Court is not to interfere with the sentence imposed by the trial Court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence 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 circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

Furthermore, in the exercise of its discretion during the sentencing of a convict, while being cognizant of the fact that no two cases are the same, Court must always have in mind the need to maintain consistency or uniformity of sentence;

see ***Kalibobo Jackson vs Uganda - C.A. Crim. Appeal No. 45 of 2001, Naturinda Tamson vs Uganda - C.A. Crim. Appeal No. 13 of 2011, Kyalimpa Edward vs Uganda*** (supra), and ***Livingstone Kakooza vs U.*** (supra). In ***Mbunya Godfrey vs Uganda - S.C. Crim Appeal No. 4 of 2011,*** the Supreme Court stated that: -

> *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

We therefore have to be guided by sentences imposed in cases that, in the commission of the offence, bear similarity with the instant one. In ***Attorney General vs Susan Kigula & Others - S.C. Const. Appeal No. 1 of 2005,*** the Appellant had murdered her husband, the Supreme Court noted that murders are committed under varying circumstances. It also noted that murderers are of different characters, as some are first offenders, or remorseful; which Court should take into account in the exercise of its discretion during sentencing. The Court reduced the death sentence imposed on the Appellant to 20 (twenty) years.

In ***Mbunya Godfrey vs Uganda*** case (supra), the Appellant was convicted for the murder of his own wife by cutting her neck. The Supreme Court imposed a sentence of 25 years in prison. Amongst the factors, which the Court considered in that case, was the need to afford the Appellant, a first offender, the opportunity for reform and reconciliation with the community where he had committed the crime.

In ***Akbar Hussein Godi vs Uganda - S.C. Crim. Appeal No. 3 of 2013,*** the Appellant had

murdered his wife with a gun. The Supreme Court imposed a sentence of 25 years in prison.

In ***Atuku Margaret Opii vs U. - C.A. Crim. Appeal No. 123 of 2008,*** this Court imposed a sentence of 20 (twenty) years in prison on the Appellant, a single mother of 8 (eight) children, who had murdered another woman's infant child by drowning and the body was never recovered. In ***Kereta Joseph vs Uganda - C.A. Crim. Appeal No. 243 of 2013,*** this Court reduced the sentence of 25 (twenty-five) years imprisonment, which the trial Court had imposed on the Appellant for murder, to 14 (fourteen) years in prison; on the grounds that the Appellant was of advanced age, and was remorseful.

In the instant case before us, as has been stated above, the Appellant murdered her own husband. During the *allocutus,* the State Counsel informed Court that the convict had no past record. However, State Counsel pointed out the gravity of the offence the Appellant was convicted of; and that it attracts the death penalty. In mitigation however, Court was informed that she was a first offender, who had pleaded guilty to the offence she had been indicted with without wasting Court's resources and time. She is recorded as having been remorseful and repentant. She herself told Court that she was legally married to the deceased; and together they have six children of the marriage.

In his sentencing ruling, the trial judge took note of the fact that she was a first offender who had pleaded guilty, and thereby saving Court's scarce resources. He also noted that she had *'fairly rehabilitated'.* Against these mitigating factors, the learned trial judge took note of the fact that the Appellant had murdered her husband in cold blood. He took into account the one year the Appellant had spent on remand before conviction, and then sentenced her to the 25 years imprisonment she has appealed to this Court against. Ordinarily we would not have interfered with this sentence since, on the authorities cited above, it falls within the range of sentences imposed for similar murders.

However, we find that the learned trial judge failed to take into consideration the fact that the Appellant has six very young children of her marriage with the deceased husband; a very important factor she brought out in mitigation during the *allocutus.* Had the trial judge considered these factors, they would have had a further mitigating influence on his discretion in sentencing the Appellant. Counsel for the Appellant asked us to reduce the sentence of 10 (ten) years in prison considering the peculiar circumstances of this case. Counsel for the Respondent has contended that 15 (fifteen) years would reflect both the gravity of the offence, and the special mitigating factor presented to this Court.

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 circumstance of this case, we reduce the sentence to 10 (ten) years; to enable the Appellant reform further, pick up the pieces with the children, and then reconcile with her family.

The sentence of 10 (ten) years will run from the 25th day of October 2013 when she was first sentenced.

Dated at Mbarara; this 6TH day of DECEMBER 2016

HON.MR.JUSTICE KENNETH KAKURU, JA

HON.MR.JUSTICE SIMON MUGENYI BYABAKAMA, JA

HON.MR. JUSTICE ALFONSE C.OWINY-DOLLO, JA