**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CRIMINAL APPEAL NO. 559 OF 2014**

**1. BEROCAN ROBERT**

**2. NAKALYANGO GRACE.....APPELLANTS**

**VERSUS**

**UGANDA.....RESPONDENT**

*(Appeal against sentence passed by the High Court at Nakawa before Hon. Justice Wilson Masalu Musene dated 10th day of June, 2014 in Criminal Session Case No. 452 of 2010)*

**Coram: Hon. Lady Justice Elizabeth Musoke, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Justice Ezekiel Muhanguzi, JA**

## JUDGMENT OF THE COURT

### Introduction

The appellants were on 10th of June 2014 convicted of the offence of murder contrary to *Sections 188* and *189* of the Penal Code Act and sentenced to 30 and 20 years imprisonment for the 1st and 2nd appellants respectively by Musalu-Musene, J in High Court Criminal Case No. 452 of 2010 at Nakawa.

## Brief background

The facts of the case as accepted by the trial Judge are that, on the night of 10th June 2009, the deceased, Sekibule Henry was hacked to death by three strange men at his home. Upon the attack the deceased stormed out of the house while making an alarm but nobody came to his rescue. As the deceased struggled to escape, he was pursued by unidentified men who kept cutting him with a panga till he collapsed near the gate of Dr. Besigye where the 1st appellant used to guard. The 2nd appellant was by then living with the deceased as husband and wife, and a friend of the 1st appellant who worked as a watchman at Dr. Besigye's farm which neighbors the home of the deceased.

Both appellants were suspected and upon arraignment and trial in the High Court, they were convicted for the offence of murder and sentenced accordingly. Being dissatisfied with the decision of the High Court and having been granted leave to appeal against sentence alone under section 132(1) (b) of the Trial on Indictments Act Cap 23, the appellants have appealed to this Court on the following ground;-

> ***"The learned trial judge erred in law and fact when he imposed a sentence of 30 years imprisonment on appellant No.1 and a sentence of 20 years on appellant No.2 after hearing their mitigations, which sentences are deemed to be manifestly harsh and excessive in the circumstances of this case and taking into account the ages of the appellants and other mitigating factors before sentencing."***

## Representation.

At the hearing of the appeal, Mr. Mark Bwengye, learned counsel represented the appellants while Mr. David Ndamurani Ateenyi, learned

Senior Assistant Director of Public Prosecutions appeared for the respondent. Both appellants were in court.

**Submissions by the appellants**

Counsel for the appellants submitted that, the appellants were first offenders and have families to look after. He pointed out that the 1st appellant is married to 3 wives and has 6 children who depend on him. He submitted further that the 2nd appellant is a single mother to her children she had with the deceased and these children need her parental care and guidance. He faulted the learned trial judge for not taking into consideration the above factors which resulted into a harsh and excessive sentence of 30 and 20 years imprisonment to the first and second appellants respectively.

Counsel asked court to reduce the sentences to 18 years imprisonment for the 1st appellant and to 10 years for the 2nd appellant.

**Submissions by the respondent**

Counsel for the respondent opposed the appeal and supported the sentences of the trial court. He submitted that, the sentences imposed by the trial court cannot be said to be harsh and excessive given the manner in which the offence was committed and bearing in mind the maximum penalty for the offence of murder.

Counsel relied on ***Sebuliba Siraj v Uganda,*** *Court of Appeal Criminal Appeal No. 319 of 2009* and ***Kiwalabye Benard v Uganda***, *Supreme Court Criminal Appeal No. 143 of 2001,* to illustrate to court the circumstances under which this court can interfere with the sentences imposed by the trial court. Counsel asked court to uphold the sentences imposed by the trial court because they are appropriate in the circumstances of this case.

## Consideration by court

We have listened carefully to the submissions of both counsel and we are alive to the duty of this court as a first appellate court to re-appraise the evidence on record and come to our own conclusions on issues of law and fact. See: Rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 and ***Kifamunte Henry v Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997.*

This court can only interfere with the sentence of the trial court if that sentence is illegal and being based on wrong principle or the court has overlooked a material factor, or the sentence is manifestly excessive or so low as to amount to a miscarriage of justice---See: ***James v Republic,*** *(1950) 18 EACA 147,* ***Ogalo S/o Owoura V Republic****, (1954) 24 EACA 270* and ***Kizito Senkula v Uganda****, Supreme Court Criminal Appeal No. 24 of 2001.*

The learned trial Judge in sentencing the appellants in the instant case at pages 101 and 102 of the record of proceedings, had this to say;

> ***"The prosecution has instead of the death penalty, and using the sentencing guidelines prayed for each convict to be sentenced to 80 years. The submissions of counsel for the state are understood; particularly in the context of loss of life in a barbaric, cruel, inhuman and crude manner, far much below civilization.***
>
> ***Mr. Okwalinga has prayed for a lighter sentence, preferably 10 years each, given that both convicts are still within the youthful bracket. He also added that the fact of young children of both convicts but as I have already ruled in the case of Uganda v Bongomin Kennedy, I would rather direct the government through ministry of gender, labor and social welfare to take care of such children other than giving lighter sentences.***

***In the premises, and considering the circumstances of the offence, I do hereby decline 80 years as that would mean the convicts would continue serving their sentences in hell(after death) and not on earth. My powers are confined to this mother earth planned.***

***The court will take into account the period of remand of 5 years. So instead of 35 years, A2, Berocan Robert is hereby sentenced to serve 30 years. As for A1, Nakalyango Grace, instead of 25 years I reduce it by 5 years and sentence her to serve 20 years imprisonment."***

Our understanding of the above passage is that the learned trial judge was mindful of the mitigating and aggravating factors. We note that the maximum sentence for the offence of murder is death.

The offence of murder is serious. The appellants murdered the deceased on account of jealousy and rivalry by co-wives as observed by the learned trial judge. We are satisfied that the circumstances of this case called for a sentence in relation to the gravity of the offence. In this case the learned trial judge considered such sentence to be 30 years and 20 years imprisonment.

We also take the view that there is need to have consistency in sentencing in cases with similar circumstances. See: ***Livinstone Kakooza v Uganda,*** *Supreme Court Criminal Appeal No. 17 of 1993.*

In ***Susan Kigula & Anor v Uganda***, *Supreme Court Criminal Appeal No. 1 of 2004*, the appellant was convicted by the High Court for the offence of murder and sentenced to death. By that time, the death penalty was a mandatory sentence upon conviction for murder. When the mandatory death sentence was subsequently declared unconstitutional by this Court, in ***Susan Kigula & 416 Ors v AG,*** *Court of Appeal Constitutional Petition No. 6 of 2003* and following the directive by the Supreme Court in ***AG v Susan Kigula & 417 Ors***, *Supreme Court Constitutional Appeal*

*No. 03 of 2006*, the death sentence was reduced to 20 years imprisonment after her case was returned to the High Court for mitigation of sentence.

In ***Mbunya Godfrey v Uganda***, *Supreme Court Criminal Appeal No. 04 of 2011,* the appellant had been sentenced to death for the murder of his wife. The Supreme Court observed 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."***

In that case the sentence of death was set aside and substituted with a sentence of 25 years imprisonment.

In ***Ayikanying Charles v Uganda***, *Court of Appeal Criminal Appeal No.* 08 of 2012, this court confirmed a sentence of 25 years imprisonment. The appellant had been convicted of murder whereby he stabbed the deceased over a land dispute.

In ***Kyaterekera George v Uganda***, *Court of Appeal Criminal Appeal No. 0113 of 2010*, this court confirmed a sentence of 30 years imprisonment imposed by the trial judge. In that case the appellant was convicted of murder by stabbing the deceased on the chest with a knife.

In ***Akbar Hussein Godi v Uganda***, *Supreme Court Criminal Appeal No. 03 of 2013,* the appellant murdered his wife with a gun and the Supreme Court confirmed a sentence of 25 years imprisonment.

In ***Rwabugande Moses v Uganda***, *Supreme Court Criminal Appeal No. 25 of 2014,* **a sentence of 35 years imprisonment was reduced to 21 years imprisonment for the offence of murder where the appellant murdered** the deceased by hitting the deceased on the head twice with a herdsman stick.

In this case, the appellants were first offenders and were approximately aged 38 years and 32 years at the time of conviction. By the time the appellants serve their sentences of 30 and 20 years imprisonment, they will be about 68 and 62 years old. They will be of advanced age and they will not be able to contribute much to the society and the nation at large.

Given the circumstances in this case, and in line with the authorities cited above, we reduce the sentences of 30 years imprisonment and 20 years imprisonment for the 1st and 2nd appellants to a sentence of 20 years and 18 years imprisonment respectively. The sentences are to run from 10th June, 2014, the day the appellants were convicted by the High Court.

Dated at Kampala this 2nd day of July 2019.

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**Elizabeth Musoke**

**Justice of Appeal**

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**Hellen Obura**

**Justice of Appeal**

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**Ezekiel Muhanguzi**

**Justice of Appeal**