THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT GULU

Criminal Appeal No. 334 of 2016

Coram: Kakuru, Tuhaise, & Kasule, JJA

Alyao Moses ..... **Appellant**

Versus

Uganda ..... **Respondent**

(Appeal arising from the judgment of Dr. Winifred Nabisinde, J, at the High Court of Uganda at Lira in Criminal Case No. 74 of 2016 delivered on 14th September 2016)

Judgment of the Court

The appellant, Alyao Moses, was convicted of murder contrary to sections 188 and 189 of the Penal Code Act, on his own plea of guilty. He was sentenced to 30 years imprisonment.

The appellant's application to have his Notice of Appeal which had been filed in this Court out of time validated was granted. His application for leave to appeal against sentence alone, pursuant to Section 132 (1) (b) of the Trial on Indictments Act, was also granted.

The appellant's ground of appeal, as amended by learned Counsel Shamim Amolo at the commencement of the hearing of this appeal, with leave of this Court, was that:-

> "The learned trial judge erred in law and fact when she imposed a manifestly harsh and excessive sentence."

Background

The brief background of this case is that on 19th September 2016 at around 10.00 pm, Okwir George, the Local Council (LC) 1

Chairperson in Amach, Lira District, heard Alobo Sarah, the deceased, screaming that the appellant had stabbed her. He rushed to the deceased's rescue and found her in a critical condition bleeding through the neck. As he tried to give her first aid, the appellant, who was passing by the deceased's house, made remarks that, *"she had been disturbing her and she thought it was easy."* On hearing this, Okwir asked his wife to make an alarm to gather people so that they arrest the appellant. Okwir's wife made an alarm, but the appellant escaped in the dark, before he could be arrested.

The deceased died on the way to hospital. The matter was reported police. The appellant went into hiding in an abandoned house where he was found by one Alex Alyao to whom the appellant showed the knife he had used to stab the deceased. The appellant asked Alyao Alex to hand him over to the police to avoid being lynched by a mob. Thereafter he was arrested, indicted, and convicted of the offence of murder on his own plea of guilty, and was sentenced to 30 years imprisonment.

Representation

Ms. Amolo Shamim, learned Counsel, appeared for the appellant, on state brief. Ms. Racheal Namazzi, learned Senior State Attorney, appeared for the respondent.

The appellant was present in Court for the hearing.

Submissions for the Appellant

Ms. Amolo submitted that, the sentence of 30 years imprisonment imposed by the learned trial Judge against the appellant was manifestly harsh and excessive. She submitted that the appellant deserved a more lenient sentence since he handed himself over to police, pleaded guilty, and was a first offender. Counsel maintained that the appellant has 8 children with no caretaker, and that he is

diabetic. She prayed to this Court to impose a sentence that will allow the appellant's children to have a father, maintaining that 10 years imprisonment would be an appropriate sentence in the circumstances. She cited the case of **Tuhumwire Mary V Uganda, Court of Appeal Criminal Appeal No. 352 of 2015** to support her submissions.

Submissions for the Respondent

Ms. Racheal Namazzi opposed the appeal. She submitted that the appellant planned the murder in that it was pre-meditated and not accidental; and that it was merciless. She submitted that the maximum penalty for murder is death; and that the learned trial Judge had taken into account both the aggravating and the mitigating factors before she sentenced the appellant.

Resolution of the appeal

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. It will however be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. See: **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No.10/1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

This appeal is against sentence only. The law is now well settled on when an appellate court can properly interfere with a sentence passed by a trial Judge. Sentencing is a discretion of the sentencing Judicial Officer. Each case is determined on its facts to enable a Judicial Officer exercise his or her sentencing discretion. In **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No. 143 of 2001**, the Supreme Court stated as follows:-

"The appellate court is not to interfere with the sentence imposed by a 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 circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."

Thus, based on the foregoing principle, we as the appellate court must consider whether we should interfere with the sentence imposed against the appellant by the learned trial Judge.

The appellant was convicted of murder, which offence carries a maximum penalty of death. The record of appeal shows the mitigating factors raised by the appellant. They were that, the appellant pleaded guilty, he was remorseful, he handed himself over to the police, he was of advanced age of 55 years, and he had 8 children depending on him.

The learned trial Judge, while sentencing, stated the reasons as to how she arrived at the sentence. She stated that:-

"The facts reveal that there was clear premeditation on the part of the convict, looking at the weapon used and the part of the body aimed at, the head and neck which are vulnerable parts of the body. I have noted that the facts reveal that there was no clear outstanding dispute between the accused person and his family and the deceased. I rule out a fight since the deceased was not armed herself; the deceased died after a very painful death and died of massive injuries on her head and neck.

The State Attorney in her submissions stated that there was a previous known record against the convict in which he was convicted of killing his brother and served 4 years; the defence

denied this. In the absence of the state presenting the actual reference of the case alluded to, this court will therefore treat him as a first offender. In my view, having taken cognisance of the circumstances under which this offence was committed and cautioned myself of the evil recklessly taking away the life of another human being and the impact it would have on both families and the community generally; it is my finding that this was a vindictive and senseless killing that should have been avoided. The victim was a middle aged woman who still had her life ahead of her.

I have also noted that in such a case, the maximum sentence would have been the death penalty; however, I find that this will not serve the ends of justice in this case and this will be too harsh in this particular case. That being the case, I have also taken into account the 1 year the convict has spent on remand and the age of the victim and the convicts. While the convict is not in the prime of his life any more with family responsibilities, he ought to have thought better before inflicting such fatal stabbing on the deceased especially as it was found by the court that the deceased was just a harmless and defenceless woman. As an adult male of his age, he ought to have thought about the consequences of his actions before he stabbed the deceased, and also thought about his family and the consequences his actions would have on them. To me, the aggravating circumstances in this case far outweigh the mitigating circumstances in this case.

While the starting range in terms of years would be at least (35) years imprisonment, taking into account all the circumstances of the case as noted above, I find that the convict deserves a sentence of (30) thirty years imprisonment as appropriate in the circumstances."

We have addressed our minds to the adduced evidence and submissions from both sides. We agree, based on the record, that the appellant was a first offender with no precious record. He was aged 55 years when he committed the offence. The record of appeal shows that the circumstances under which the appellant killed the deceased were clearly unlawful, unprovoked, pre-meditated and merciless. The learned trial Judge took all this into account when she was sentencing the appellant.

In **Tuhumwire Mary V Uganda, Court of Appeal Criminal Appeal No. 352 of 2015**, the appellant was convicted of murder on her own plea of guilty and sentenced to 25 years imprisonment. The trial court took into account all the aggravating and mitigating circumstances of the case. However on appeal, this Court found that the learned trial Judge failed to take into consideration the fact that the appellant had 6 children of her marriage with the deceased husband; that if the learned trial Judge had considered these factors, they would have further mitigated the sentence against the appellant. This Court reduced the sentence of 25 years imprisonment to 10 years imprisonment to enable the appellant reform further, pick up the pieces with the children and reconcile with her family.

The Constitution (Sentencing Guidelines For Courts Of Judicature) (Practice) Directions, 2013 set the sentencing range for murder to be 35 years to death, with the starting point of 30.

The record of appeal shows that the appellant was an elderly man. He was remorseful about committing the offence, in that he not only pleaded guilty, but handed himself over to the police. While we note that the appellant planned the murder under unprovoked circumstances, which conduct we do not condone, we are of the

considered opinion that, given his remorse and age, he should be given a sentence which will enable him reform and be re-integrated in society. In that regard, the sentence of 30 years imprisonment imposed against the appellant, who pleaded guilty, was manifestly harsh and excessive in the circumstances of the case.

We accordingly set aside the sentence of 30 years' imprisonment imposed against the appellant by the learned trial Judge, on grounds that it is manifestly harsh and excessive in the circumstances of the case. We, in exercise of our powers under section 11 of the Judicature Act, and, taking into account all the factors in the instant appeal as stated above, including the circumstance of the case, the sentencing ranges regarding cases of similar circumstances, and the period the appellant spent on remand, substitute the sentence of 30 years imprisonment with a sentence of 22 years imprisonment.

However considering that the appellant spent 1 year on remand prior to his conviction, this period of 1 year shall be deducted from the 22 years imprisonment pursuant to Article 23 (8) of the Constitution of Uganda.

Accordingly, the appellant is to serve a sentence of 21 years imprisonment starting from the date of conviction which is 14th September 2016.

It is so ordered.

Dated at Gulu this ....20th.... day of ....Dec....2019.

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Kenneth Kakuru

Justice of Appeal

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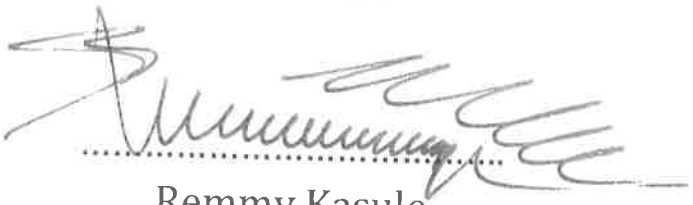
Percy Night Tuhaise

Justice of Appeal



Remmy Kasule

Ag. Justice of Appeal