THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL No. 0586 OF 2014

(Arising from High Court of Uganda at Kampala (Criminal Division) Session Case No. 200/2013 (Re-sentencing) also arising from High Court of Uganda at Masaka Criminal Session Case No. 0226 of 2002)

MUWONGE FULGENSIO :::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala before Her Lordship Tuhaise, J. (as she then was) delivered on 25th November, 2013 in Criminal Session Case 200 of 2013 (resentencing Court) and the decision of the High Court of Uganda at Masaka before His Lordship Mwangusya, J. (as he then was) delivered on 28th January, 2005 in Criminal Session Case 0226 of 2002 (trial Court))

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

This is a first appeal against the decisions of the High Court of Uganda. The appellant was originally tried before Mwangusya, J. (as he then was) at the High Court of Uganda at Masaka on an indictment of one count of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 and one count of rape contrary to sections 123 and 124 of the same Act. He was accordingly convicted on the count of murder and sentenced to suffer the then mandatory death punishment. However, following the decision in **Attorney General vs. Susan Kigula & 417 others, Supreme Court Constitutional Appeal No. 003 of 2006** which declared the mandatory death punishment unconstitutional and the directions made therein that convicts who had been sentenced to serve the mandatory death penalty be

heard in mitigation and re-sentenced. The appellant was accordingly re-sentenced to serve a sentence of life imprisonment by the High Court (Tuhaise, J) on 25th November 2013.

Brief Background

The relevant back ground facts as accepted by the learned trial Judge were that:

The appellant was a herdsman who used to graze Ntambala George's cows and occasionally thereof Ntambala's father in law. On 6th January, 2002, he did not graze those cows, and so they were found straying in other people's gardens. The appellant was nowhere to be seen. A search for both the appellant and the deceased was carried out and on 7th January, 2002 the accused was found in the house of one Kamuwanga. He was in a critical condition. He was vomiting and the vomit smelled of a cattle drug known as decatrix. He was taken to Ssesamirembe Clinic from where he was treated for suspected poisoning. He was subsequently transferred to Kalisizo Hospital where he was admitted for treatment. Apparently, he took the said drug in an attempt to commit suicide.

While at the said Hospital, Vincent Kakuba (PW4) asked the appellant why he wanted to kill himself; to which he replied that it was because he had killed a girl whom he had raped as she threatened to report him to the authorities. Thereafter, PW4 arrested him and took him to Kalisizo Police Station where he was detained. A charge and caution statement was recorded from him in which he is alleged to have confessed to the relevant offences. He was accordingly charged for murder and rape of the deceased.

The body of the deceased had been found in a swamp. It was in a decomposing state. According to Dr. Wagumbulizi (PW1) who performed a post mortem examination of the body, the same was found lying in the swamp with maggots emanating from it. PW1 further testified that he could not ascertain the cause of the deceased's death because her body was found in a decomposing state making it difficult to examine the said body to examine the precise cause of her death. PW1 however further testified that

he had established that the deceased was defiled and suffocated before she died. He did not elaborate how he established so.

In his defence, the appellant denied participating in the offences in question or having taken any cattle drug or having been treated for poisoning at all. He stated that he did not know what happened to him until he was arrested and found himself at Kalisizo Police Station where he spent one night before he was taken to Court. He denied having made a confession to any police officer. At the closure of the trial, the learned trial Judge believed the prosecution case and convicted the accused of murder and sentenced him to the then mandatory death sentence. The appellant was however acquitted of the Count of rape.

As stated earlier, the appellant was subsequently heard on mitigation and re-sentenced to life imprisonment by the re-sentencing Court. He was dissatisfied with the said sentence and appealed to this Court against sentence only on the sole ground:

> **"THAT the learned re-sentencing Judge erred in law and facts (sic) in imposing the sentence of life imprisonment on the appellant which is manifestly excessive and harsh in all circumstances (sic)."**

Representation

At the hearing of the appeal, Mr. Joseph Wasswa, learned Counsel represented the appellant, while, Mr. Nkwasibwe Ivan, learned Senior State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. Counsel for both parties made oral submissions.

Appellant's case

The present appeal was against sentence only, and accordingly counsel for the appellant brought an application for leave to appeal against sentence only under **Section 132 (1) (b)** of the **Trial on Indictments Act, Cap. 23** and **Rule 43 (3) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**. Counsel for the respondent had no objection to the application. We granted him the requisite leave in the circumstances.

Counsel proceeded to make submissions in support of the appeal. He began by faulting the learned re-sentencing Judge for imposing a sentence of life imprisonment on the appellant, which in his view, was generally harsh and excessive in the circumstances. Counsel conceded that the learned re-sentencing Judge had considered the relevant mitigating factors in favour of the appellant and she could not be faulted in that regard. The only complaint counsel had, however, was that the learned re-sentencing Judge erroneously insisted on following the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** which led her to an erroneous decision that the sentencing range in cases of murder was immutably fixed in the range of 35 years to the Death sentence.

It was further contended for the appellant, that the Court of Appeal has, in several decided cases expressed the view that there must be consistency in sentencing and that to achieve the fore going the said Court has established a range in which the sentences for murder must fall. He cited the authorities of **Imakuru Isaac vs Uganda, Court of Appeal Criminal Appeal No. 215 of 2009; Byamukama Herbert vs. Uganda, Court of Appeal Criminal Appeal No. 162 of 2013** to support his contention that this Court has set a sentencing range of 15 years to 30 years in cases of murder regardless of the level of pre-meditation with which the same was committed. He then prayed this Court to set the relevant sentence of life imprisonment aside and substitute the same with a custodial sentence within the ranges set by this Court for the offence of murder.

Respondent's case.

Counsel for the respondent disagreed with the submissions for the appellant and supported the decision of the learned re-sentencing Judge to impose the sentence that she gave. He submitted that, based on the mitigating and aggravating factors on record, it could not be reasonably stated that the sentence in issue was either manifestly harsh or excessive. He elaborated that, notwithstanding the mitigating factors, the following aggravating factors warranted the imposition of the sentence in issue. First, the appellant, had in committing the offence in question, strangled the victim who was a mere child which pointed to the level of pre-meditation and the

determination by the appellant to cause death to the victim. Secondly, the appellant dumped the deceased's body in a swamp to conceal his barbaric acts. In counsel's view, the above manner and circumstances justified the imposition of the sentence in question.

Counsel for the respondent then cited the following authorities to support the view that in certain circumstances, life imprisonment would be the only suitable sentence; **Twebaze Yasin VS Uganda, Court of Appeal Criminal Appeal No. 120 of 2013; Obote William vs Uganda, Supreme Court Criminal Appeal No. 12 of 2014; Sebuliba Siraje vs. Uganda, Court of Appeal Criminal Appeal No. 319 of 2009; Sande Gordon vs Uganda, Criminal Appeal No. 103 of 2006.** He maintained that consistency will be achieved by this Court imposing life imprisonment for murder in grave and rare cases like the present one. He concluded by praying this Court to dismiss this appeal and uphold the relevant sentence.

Rejoinder

In rejoinder, counsel for appellant sought to distinguish the cases relied on by counsel for the respondent submitting that all the cases cited concerned murder which was pre-meditated unlike the present case. He thus urged this Court to find that the cases relied on by counsel were distinguishable and not to rely on them.

Resolution of Court

We have carefully considered the submissions of counsel for both side, the court record; as well as the law and authorities cited and those not cited. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry v. Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

Even in appeals against sentence only, this Court must reappraise the material before it and make up its mind on whether the sentence in question can be sustained. The discretion to pass an appropriate sentence lies with the trial Court with the appellate Courts playing only an assessment role to

ensure that the sentence imposed complies with certain well-set legal requirements. This role has been re-iterated in **Aharikundira Yusitina vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015** in the following words:

> **"Before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, Practice Directions together with general principles of sentencing as guided by case law.**
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> **...**
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> **It is also important to bear in mind that a death sentence being the heaviest sentence in the land should be carefully examined at different levels including at the appellate level to ensure its propriety. The above obligation is more compelling to this Court, since it is a Court of last resort. The Supreme Court should not merely rubber-stamp sentences passed by the trial courts and the Court of Appeal.**
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> **...**
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> **In Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995, the Supreme Court referred to R vs. De Haviland (1983) 5 Cr. App. R(s) 109 and held as follows:**
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> **"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 trial 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 and R vs. Mohammed Jamal (1948) 15 E.A.C.A. 126"**

While the above extract refers to the death sentence, we form the opinion that it holds true with any other sentence. From the **Aharikundira Yusitina case (supra),** the following principles would emerge, namely; while the trial Court retains the discretion to pass an appropriate sentence, on any appeal against the sentence passed by the trial Court, the appellate Court should not merely rubberstamp the said sentence but should examine it to ensure

its propriety. The propriety of a sentence is to be measured on three determining criteria. First, whether it is legal. Second, whether it is so excessive as to amount to an injustice and third, whether the sentence imposed was consistent with the sentences imposed in earlier decided cases involving similar facts which is the consistency principle.

In the **Aharikundira Yusitina case (supra),** the Supreme Court had this to say on consistency of sentences:

> **"...It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime."**

In the same case, the Supreme Court discussed the sentences imposed in murder cases and said that:

> **"...Cases in point include inter alia Suzan Kigula in Suzan Kigula Versus Ug HCT- 00 CR-SC-0115 (in mitigation) where the accused cut her husband's throat with a sharp panga to death before their children and was sentenced upon mitigation to 20 years imprisonment, Uganda v Uwera Nsenga, Criminal Appeal No. 312 of 2013 where the accused ran her husband over with a car and eventually killed him at the gate in their home and was sentenced to 20 years imprisonment and in Uganda Versus Lydia Draru alias Atim HCT- 00-CR-SC-0404 of 2010 where the accused hit the husband with a metal /rod , Akbar Hussein Godi in Godi Versus Uganda Supreme Court Criminal Appeal No. 3 of 2013 who shot the wife dead and was sentenced to 25 years imprisonment to mention but a few.**
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> **Further in a recent case of Mbunya Godfrey Versus Uganda, Supreme Court Criminal Appeal No. 04 of 2011, the appellant murdered his wife in cold blood and court while dealing with sentence observed that;**
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> **'With greatest respect to the two courts below, we are of the view that the death sentence should be passed in very grave and rare circumstances because of its finality. When a death sentence is executed, the appellant has no chance to reform and /or to reconcile with the community. 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... "**

The Supreme Court then sentenced the appellant in the **Aharikundira Yusitina case** to 30 years which was a considerable reduction on the sentence of death which had been imposed by the trial Court and confirmed by the Court of Appeal. We observe that in the Mbunya case (supra), the Supreme Court suggested that the objectives of sentencing should be predicated by the need to give the appellant a chance to reform and reconcile with the community as well as to punish him/ her sufficiently enough for him to realize his mistake.

Furthermore, it would appear that the sentence imposed by the learned re-sentencing Judge in the present case was in contravention of the principle recently enunciated by the Supreme Court in the **Aharikundira Yusitina case** which we analyzed earlier. It also appears from the foregoing case that the Supreme Court has so far capped the sentence in murder cases at 30 years imprisonment.

However, in another authority, the Supreme Court appeared not to endorse the consistency principle. Thus in **Kaddu Kavulu Lawrence vs Uganda, Supreme Court Criminal Appeal No. 72 of 2018** which was delivered on 22nd August, 2019, the Supreme Court appeared to cast doubt on the application of the consistency principle when it ignored arguments raised for the appellant about the weight to be placed on precedents in sentencing. The said decision would imply that if the lower court had taken into account the relevant aggravating and mitigating factors prior to passing the relevant sentence, its decision would not be altered merely on grounds that the sentences imposed therein appeared harsher than those imposed in the relevant precedents. It was observed that:

> **"Counsel for the appellants presented to court related cases where the appellants were sentenced to lesser prison terms and in his view the Court of Appeal ought to have taken those into consideration and given the appellant a somewhat similar sentence. It is our view that an appropriate sentence is the matter for the discretion of a sentencing court. Each case presents its own facts upon which a Court exercises its discretion. The offence of murder attracts a maximum sentence of death and the appellant was given a sentence of life imprisonment which is a**

legal sentence. We find no reason to disturb the sentence and uphold the same."

The **Aharikundira** and **Kaddu Kavulu** cases seem to be at variance. However, the Kaddu case which was decided later in 2019 did not declare that the **Aharikundira case** (supra) (decided in 2018) or the consistency principle enunciated therein represented bad law. Until the Supreme Court does so, we believe that we may continue to rely on it.

Indeed in keeping with the consistency principle in sentencing, the Court of Appeal has consistently imposed sentences in the range of 15 years to 30 years for cases of murder. **In Atukwasa Jonan & 6 others vs Uganda, Court of Appeal Criminal Appeal No. 168 of 2018**, the Court observed that:

> **"We also note that there is need for parity in sentencing. Therefore we have to take into consideration the sentences the Supreme Court and this court have imposed on offenders in similar circumstances. Objective 3 (e) of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions, 2013 provides that guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to determine appropriate sentences lies with the Court by weighing all relevant facts and then exercising its discretion judiciously."**

In **Atukwasa Jonan (supra)**, the Court went on to consider sentences handed out in murder cases. It considered **Anguyo Robert vs Uganda, [2016] UGCA 39**, the appellant was convicted of murder and sentenced to 20 years imprisonment. On appeal to the Court of Appeal, the sentence was set aside and substituted with 18 years' imprisonment.

The Court also considered **Kin Erin v Uganda [2017] UGCA 61**, the appellant was convicted of murder and sentenced to imprisonment for life. On appeal to the Court of Appeal, the sentence was substituted with a sentence of 18 years of imprisonment.

Further, we note that in **Mbunya Godfrey vs Uganda, SCCA No. 4 of 2011**, the Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment. The appellant had been convicted of the murder of his wife.

In **Aharikundira (supra)**, the Supreme Court imposed a sentence of 30 years imprisonment for the Offence of Murder after setting aside a sentence of death which had been imposed by the trial Court and confirmed by the Court of Appeal.

We shall keep the principles articulated in the above cited cases in mind, as well as the sentences imposed in similar decided cases, in determining this appeal. In so doing, we have considered the manner in which the appellant caused the death of the victim by strangling her and the manner in which the appellant attempted to conceal the murder by dumping the victim's lifeless body in the swamp. Doubtless, the fore going seriously aggravated the offence in question.

However, we have further considered the following mitigating factors for the appellant: he was a first offender; he was of the youthful age of 20 years at the time of the commission of the offence in question; he displayed a guilt effect after the commission of the offence, when he attempted to commit suicide by taking a poisonous substance on realizing that he had committed a very grave offence; the appellant was said to have pursued studies in prison which are evidence of his rehabilitation, reformation and transformation. Additionally, the appellant has not wasted this Court's time by trying to argue against his conviction. This is a sign of further remorsefulness on his part. Having considered all the relevant factors, we have come to the conclusion that the sentence of life imprisonment in the circumstances was on the higher end and was therefore harsh and excessive.

Accordingly, we have come to the conclusion that a sentence of 25 years imprisonment is the most appropriate in the circumstances of this case. From that sentence we deduct the period of 3 years which the appellant spent on remand while attending trial meaning that the appellant shall serve a term of imprisonment of 22 years from the date on which he was convicted.

We so order.

Dated at Masaka this ....19th.... day of ....Nov.... 2019.

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Elizabeth Musoke

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal