THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 100 OF 2014

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

Kenyi James.....Appellant

V

Uganda.....Respondent

(Appeal arising from the judgment of His Lordship Hon. Justice Lameck Mukasa, at High Court of Uganda at Mukono, Criminal Session Case No. 13 of 2012, delivered on 17th March 2014)

JUDGMENT OF COURT

The appellant 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 34 years imprisonment. The appellant, with leave of Court granted under section 132 (b) of the Trial on Indictments Act, appealed against the sentence on the sole ground that:-

1. The trial judge erred in law and fact when he sentenced the appellant to 34 years imprisonment which is excessive and harsh in the circumstances of the case.

Background

On 17th August 2012, the appellant visited his brother Bongi Manansi, who was living with his wife Gwo Musimira (the deceased). The appellant kept indoors and refused to eat any food prepared by the deceased. On 22nd August 2012 at about 8.00 pm, after having supper with the deceased and Yebu Cecilia who had visited, Bongi Manansi went to the kraal to check on his cattle. The appellant followed Bongi Manansi to the kraal and attempted to cut him with a hoe, but Bongi took off and hid in a nearby bush. The appellant returned home and began chasing Yebu Cecilia and the deceased. He caught up with the deceased and cut her to death with the hoe.

Representation

Mr. Esarait Robert appeared for the appellant while Asiku Nelly (Senior State Attorney) represented the respondent. The appellant was in court at the time of hearing this appeal.

Submissions for the Appellant

Mr.Esarait referred this Court to pages 11 and 12 of the record of appeal, where it is indicated that the appellant is a first time offender; that he saved court's time and resources; and that he was repentant. He apologized to court, the country, the deceased's family, as well as his own relatives. Counsel submitted that despite the above, the trial judge sentenced the appellant to imprisonment for 34 years, after considering the period the appellant spent on remand.

Counsel submitted that the sentence of 34 years imprisonment for a person who pleaded guilty, is remorseful and a first offender, was harsh and excessive. He prayed that the said sentence be reduced to what is fair and just in the

circumstances. Counsel relied on **Ainobushobozi Venanciao V Uganda Criminal Appeal No. 242 of 2014;** and **Livingstone Kakooza V Uganda, Supreme Court Criminal Appeal No. 17 of 1993 [unreported]** to support his arguments.

Counsel submitted that sentencing is a matter of the discretion of the sentencing Judicial Officer; and that each case shall be determined on its facts to enable the judicial officer exercise his or her sentencing discretion. He argued that in the instant case, the mitigating factors, though noted by the trial judge, were never considered, as seen from the very harsh and excessive sentence of 34 years imprisonment given to the appellant who was convicted on his own plea of guilty. He contended that the sentence was out of range with sentences imposed in the circumstances of this nature, though it is true the appellant committed a very serious offence the maximum penalty for which is death.

Counsel invoked this Court's powers under section 11 of the Judicature Act and prayed that this Court allows the appeal, and substitutes the sentence of 34 years imprisonment with the most appropriate sentence of 20 years imprisonment.

Submissions for the Respondent

Ms. Asiku opposed the appeal. She submitted that the sentence passed against the appellant was not excessive or harsh. She referred this Court to page 13 of the record of proceedings and submitted that before passing the sentence, the trial Judge took into account both the mitigating and aggravating factors.

Regarding mitigating factors, Counsel submitted that factors that the appellant pleaded guilty, that he was a first time offender, that he was remorseful, that he

repented, and that he had a child who was in nursery, including the period he had spent on remand, were all considered.

Regarding aggravating factors, Counsel submitted that the offense of murder carries a maximum penalty of death; that in the instant case, the deceased sustained injuries on vulnerable parts of her body which eventually led to her death. She argued that this factor was aggravating, especially considering the fact that the appellant and the deceased were related, in that the appellant was a brother in-law to the deceased, which breached the trust between the two.

Counsel contended that the punishment of 34 years imprisonment was appropriate, considering the fact that the maximum penalty for murder is death. She submitted that the sentencing guidelines avail a range of between 30 and 35 years in such circumstances. She cited **Muhereza Bosco V Uganda Criminal Appeal Number 066 of 2011,** to support her proposition. She prayed to this Court to uphold and confirm the sentence given by the trial Judge.

Resolution of the appeal

We have considered the facts of this case, the submissions of the respective Counsel, and the authorities cited.

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 2015. However, this Court has to bear in mind that, unlike the trial court, it did not see or hear the witnesses testify. 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. 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.

It is now settled law that an appellate court will only alter the sentence imposed by the trial court if it is evident that the trial court acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of that case.

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 sentence or where the sentence is wrong in principle."*

The same principle was expounded in **Ainobushobozi Venanciao V Uganda Criminal Appeal No. 242 of 2014** and **Livingstone Kakooza V Uganda Supreme Court Criminal Appeal No. 17 of 1993** [unreported].

Thus, based on the foregoing principle, we as an appellate Court must consider whether we should interfere with the sentence passed by the learned trial Judge.

The appellant in this case was convicted of murder, which offence carries a maximum penalty of death, on his own plea of guilty. The record shows on pages 12, 13 and 14 that the learned trial Judge while sentencing the appellant, referred to the sentencing guidelines which set a sentencing range for 30 years to death with a starting point of 35 years. The trial Judge also considered the aggravating factors as well as the mitigating factors as highlighted in the submissions of both counsel, including the fact that the appellant had pleaded guilty and not wasted court's time and resources; that he was a first offender; and that he was repentant. The trial Judge also took into account the period of one year and two months the appellant had spent on remand before sentencing the appellant to imprisonment for 34 years. The aggravating factors he considered are that the appellant was related to the deceased as brother in law, and that he attacked the vulnerable part of his body like the head and neck. The evidence on record shows that the skull of the deceased was fractured open and the neck was exposed.

Thus, we do not agree with the appellant's counsel's submissions that the trial judge never considered the mitigating factors when sentencing the appellant. We also note that the case of **Ainobushobozi Venanciao V Uganda**, (supra) cited by the appellant does not exactly offer similar circumstances as this case. The appellant in that case was convicted of manslaughter, unlike in the instant case where the facts of the case point to unprovoked murder.

We note however that, compared to other court decisions concerning murder of relatives, sentences have ranged between 30 years and 20 years imprisonment. In **Kyaterekera George William V Uganda, Court of Appeal Criminal Appeal No. 113/2010**, this Court confirmed a sentence of 30 years in jail imposed by the trial

court, where the killing was by stabbing the deceased in the chest. In **Atuku Margret Opii V Uganda, Court of Appeal No. 123/2008**, this Court reduced a death sentence to 20 years imprisonment where a mother of 8 children had drowned her daughter.

From the foregoing authorities, we are of the considered view that though this was a brutal, unprovoked murder, and though the trial Judge took into account the mitigating factors, the aggravating factors, as well as the period the appellant spent on remand, the appellant deserved more lenience since he pleaded guilty and saved court's time, in addition to being remorseful and apologizing to court, the country, and the deceased's family and relatives.

We accordingly set aside the sentence of 34 years imprisonment imposed against the appellant because it is harsh and excessive, in the circumstances of the case. To that extent, this appeal succeeds.

Having set aside the sentence of 34 years imprisonment, we exercise our powers under section 11 of the Judicature Act, and, taking into account all the factors in the instant case as outlined above, including the period the appellant spent on remand, we substitute the sentence of 34 years imprisonment with a sentence of 25 years imprisonment, to run from the date of conviction, which is 17/03/2014.

We so order.

Dated at Jinja.....30th.....this .....day of .....April.....2019

Hon. Mr. Justice Cheborion Barishaki

Justice of Appeal

Hon. Mr. Justice Stephen Musota

Justice of Appeal

Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal

30.9.19 -

Appellant present
No State Attorney
Clerk: Clean.

Court: The DPP was duly served with the judgment notice of this matter.
The judgment is read in the absence of the DPP representative.

DR
30.9.19