THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MASAKA

Criminal Appeal No. 0767 of 2014

(Arising from High Court at Kampala (Elizabeth Alividza, J) Criminal Session No. 0142 of 2014, Itself arising from High Court at Masaka (Mwangusya, J. as he then was) Criminal Session Case No. 0093 of 2001)

Ssegingo Mesaki alias Dibata :::::::::::::::::::::::::::::: Appellant

versus

Uganda ::Respondent

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT

This appeal is against sentence only, based, at first on two grounds that:

"1. The learned trial Judge erred in law and fact when she sentenced the appellant to 40 years of imprisonment, which sentence is harsh, and severer, considering the mitigation factors that were raised by the appellant and it occasioned miscarriage of justice.

2. The trial Judge erred in law and fact when she passed sentence of 40 years on two counts to run concurrently, yet the appellant had been charged on one count only."

In the course of submissions, it transpired that the second ground of appeal arose out of a mere typing error in the record of Court proceedings. The error was corrected and ground 2 of the appeal withdrawn by consent of the parties to the appeal.

Learned Counsel Alexander Lule appeared for the appellant and Peter Mugisha, State Attorney, was for the respondent.

The background is that on 5th March, 2003, the **High Court (E.B. Mwangusya, J. as he then was) at Masaka in Criminal Session case No. 0093 of 2001** convicted, after full trial, the appellant of murder contrary to **Sections 183** and **184** of the **Penal Code Act**, and sentenced him to the then mandatory death sentence.

The trial Court found, as proved beyond reasonable doubt, that on 18th August, 2000 at 8.00 p.m. at Kabalungi village, Butiti Parish, Rakai District, the appellant went to the home where Emmanuel Lukyamuzi (husband) and Nassali Gorreti (wife) and their children stayed. One of the children was by the names of Kayabula Jimmy aged 10 years, now deceased.

The appellant on reaching the said home, entered the house poured a liquid on Jimmy Kayabula, one of the children, lit a match stick, threw it upon the said child, causing a fire that burnt the said child to death. The appellant carried out this act because he suspected that his wife was having an affair with Emmanuel Lukyamuzi, the father of the deceased child.

The appellant was arrested, charged and tried for murder contrary to Section 183 and 184 of the Penal Code Act in High Court at Masaka Criminal Session Case No. 0093 of 2001. He was convicted and sentenced to the then Mandatory Sentence of death for murder.

Pursuant to the **Supreme Court decision of Attorney General vs Susan Kigula & 417 Others: Constitutional Appeal No. 03 of 2006,** that held the mandatory death sentence to be unconstitutional, the appellant re-appeared before the High Court (Elizabeth Alividza, J.) at Kampala on 23rd July, 2014, under Criminal Session case No. 0142 of 2014 for re-sentencing. The Court re-sentenced the appellant to 40 years imprisonment. Dissatisfied, the appellant lodged this appeal.

This Court, with no opposition from the respondent, granted leave to the appellant to appeal only against sentence pursuant to **Rule 43** of the Rules of this Court and **Section 132 (1)(b)** of the Trial on Indictments Act.

Counsel for appellant submitted that the sentence of 40 years imprisonment for murder passed against the appellant was too harsh and excessive and was also out of consistency and uniformity with past Court decisions having some similarity of

facts like those in this appeal. Counsel referred to the case of the **Court of Appeal No. 762 of 2014: Twikirize Alice vs Uganda** where the High Court sentence of 37 years imprisonment for murder was reduced by this Court to 25 years imprisonment. In the case the appellant had killed a neighbour's 12 year old daughter by drowning her.

Then in **Court of Appeal Criminal Appeal No. 123 of 2008: Atuku Margaret Opii vs Uganda**, the death sentence for murder had been reduced to 20 years imprisonment. Counsel prayed that the sentence of the appellant be reduced to 20 years imprisonment, out of which be deducted the period the appellant had spent on remand before his conviction.

Counsel for the respondent opposed the appeal and submitted that this Court upholds the sentence of 40 years imprisonment passed against the appellant, which sentence was not harsh and excessive, given the fact that the maximum sentence for murder is still death. Respondent's Counsel argued that since the sentencing Judge had carefully considered the aggravating and mitigating factors, before arriving at the sentence of 40 years imprisonment, there was no basis for this Court to interfere with the said sentence. Counsel referred this Court to the Supreme Court decision of **Criminal Appeal No. 56 of 2015: Bakubya Muzamiru & Another vs Uganda** where the Supreme Court upheld a sentence of 40 years for murder and 30 years for Aggravated Robbery as being neither wrong nor excessive.

In resolving this appeal, it is appreciated that this is an appeal of first instance and as such under **Rule 30(1)** of the Rules of this

Court, this Court may re-evaluate the whole evidence and draw its own inferences of fact and decide whether or not the trial Court arrived at the correct decision as regards the issue of sentencing. See also: **Kifamunte Henry vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997.**

This Court, as the appellate Court of first instance, will not ordinarily interfere with the discretion exercised by the trial sentencing Judge, unless it is evident that the Judge acted upon some wrong principle; or overlooked some material factor; or that the sentence was harsh and manifestly excessive; or too low in view of the circumstances of the case so as to amount to a miscarriage of justice. An appellate Court does not alter a sentence on the mere ground that if the members of the appellate Court had been trying the appellant, they might themselves have passed a somewhat different sentence. See: **Supreme Court Criminal Appeal No. 24 of 2001: Kizito Senkala vs Uganda**. See also: **Ogalo s/o Owoura vs R (1954) 24 EACA 270 and James vs R [1950] 18 EACA 147.**

The learned sentencing Judge in arriving at the sentence of 40 years imprisonment, considered the submissions for the appellant and those for the state, pre-sentencing reports from Luzira Prison and social inquiry reports from the probation office, all about the appellant. The learned Judge was also guided by the Sentencing Guidelines.

The Judge considered the aggravating factors of the injury caused to a 10 year old deceased upon whom the appellant deliberately poured petrol; and then set it ablaze killing the innocent deceased,

instead of the appellant taking up the disgruntlement he had, with the father of the deceased whom he suspected to be having an affair with his wife. The appellant committed the offence in front of the 12 year old sister of the deceased.

As to mitigating factors the learned Judge considered the fact that the appellant was a first offender, had been remorseful and, had shown signs of reform, he had had family responsibilities, and was aged 56 years.

This Court notes however, that while the learned trial Judge took into account the 11 years that the appellant had been in custody from the date of his conviction and sentence of 5th March, 2003 to the date of re-sentencing of 30th July, 2014, the learned Judge did not specifically in her passing sentence, consider the remand period of 2 years and 7 months, from 16th August, 2000 the date of the offence and arrest of the appellant to 5th March, 2003, the date of conviction and sentence. This was in contravention of **Article 23(8)** of the Constitution. It follows therefore that the sentence of 40 years imprisonment that the trial Judge imposed upon the appellant was illegal. The same is hereby vacated.

On re-appraising the evidence at trial, this Court finds that the act of the appellant pouring petrol on a defenceless and innocent 10 year old and then setting the fire ablaze causing so much pain to the victim all over his body, was very deliberate and most callous. If the appellant suspected that the father of the deceased was having an affair with his wife, then the appellant ought to have directed his anger to the father of the deceased, and not the innocent and helpless 10 year old victim of this crime.

This Court has carefully considered the evidence of the appellant being remorseful, having had no previous conviction and the evidence of his reform from the prison reports. This Court however holds that the appellant must be sentenced on the basis of what was obtaining as at the time of his conviction and sentence and not what happened after his conviction and is being stated in the prison reports. It is also appreciated by this Court that the appellant has now been in custody for a total period of almost 19 years and 3 months made up of 2 years and 7 months remand period from 16th August, 2000 to 5th March, 2003, and 16 years and 8 months from the date of conviction of 5th March, 2003 to-date.

This Court is alive to the fact that no two crimes are identical. However consistency and uniformity in sentencing should as much as possible, be maintained. See: **Supreme Court Criminal Appeal No. 04 of 2011: Mbunya Godfrey vs Uganda.**

In **Bakubye Muzamiru & Another vs Uganda: Supreme Court Criminal Appeal No. 56 of 2015,** the Supreme Court left undisturbed a sentence of 40 years for murder and 30 years for aggravated robbery. The violent murder was committed in the course of the robbery of a number of motor-vehicles, and personal effects from the murdered victim.

A sentence of life imprisonment for murder was reduced to 35 years imprisonment in **Abaasa and Another vs Uganda**: **Supreme Court Criminal Appeal No. 54 of 2016.** The murder was also committed in the course of a robbery and a 15 year imprisonment

sentence was imposed for aggravated robbery, the sentences to run concurrently.

In **Uwihaymaana Molly vs Uganda: Court of Appeal Criminal Appeal No. 103 of 2009**, the appellant, a wife, was convicted of murdering her husband by hacking. The death sentence was reduced to 30 years imprisonment.

The **Court of Appeal in Atuku Margaret Opii vs Uganda, Criminal Appeal No. 123 of 2008** reduced the sentence of death to 20 years imprisonment where the appellant killed a neighbour's 12 year old daughter by drowning.

In **Kalyamaggwa vs Uganda, Court of Appeal Criminal Appeal No. 189 of 2012,** the circumstances of the murder were so gruesome that the trial Court sentenced the appellant to death and the Court of Appeal did not interfered with the said sentence.

This Court, having considered the submissions of Counsel, both the mitigating and aggravating factors, the Sentencing Guidelines and past Court decisions, comes to the conclusion that the pre-meditation and the callousness with which the appellant carried out this murder against a 10 year innocent and defenceless victim, puts this case in a class of its own,` different from the other cases considered in this Judgment. Doing the best in the circumstances, this Court, having taken into consideration the remand period of 2 years and 7 months, sentences the appellant to 38 years imprisonment. The sentence is to commence to run form the 5th March, 2003, the date of conviction of the appellant in High Court at Masaka Criminal Session case No. 0093 of 2001.

It is so ordered.

Dated at Masaka this.....12th day of ....Feb..... 2019.

.....

Elizabeth Musoke
Justice of Appeal

.....

Ezekiel Muhanguzi
Justice of Appeal

.....

Remmy Kasule
Ag. Justice of Appeal