

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO.152 OF 2013.

(Arising from the judgment dated 23rd October, 2013 of the High Court at Rukungiri in Criminal Session Case No. 0155 of 2013 (Murangira, J.)

[CORAM: ELIZABETH MUSOKE, STEPHEN MUSOTA, JJA & REMMY KASULE, Ag. JA]

BETWEEN

TUKAHABWE EDSON:..... APPELLANT

VERSUS

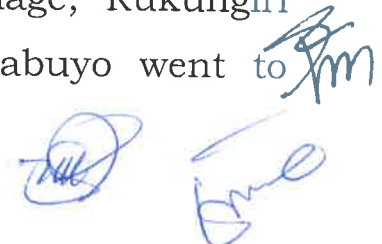
UGANDA:..... RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the judgment of His Lordship Joseph Murangira delivered on 23th October, 2013, in High Court, Rukungiri Criminal Session Case No.0155 of 2013. The appellant pleaded guilty to the offence of murder contrary to Section 188 and 189 of the Penal Code Act. He was convicted and sentenced to 50 years imprisonment.

The appeal is against sentence only.

The facts of the case, as accepted by the trial Judge, were that on 12th April, 2013 at about 6:30pm at Butare Village, Rukungiri District, the deceased Edward Arinitwe Kabuyabuyo went to



Omukirere Trading Centre to buy airtime. He entered the bar of one Byaruhanga from where he bought airtime and thereafter sat down to drink with others whom he found in the bar.

At 7:00pm, the appellant entered the same bar and sat in the corner suspiciously. After a few minutes, the appellant stood up, went to where the deceased was and stabbed him in the neck using a knife. Thereafter the appellant ran away.

The deceased bled profusely. His relatives were called. They came and took him to Kisiizi hospital when he was in a critical condition. He died on 14th April 2013 at this hospital due to over bleeding from the stabbed wound.

The appellant was later arrested in Kanungu district. He was charged with the murder of the deceased. On the 22nd October 2013, the appellant pleaded guilty to the offence of murder and was convicted on his own plea of guilt. On the 23rd October 2013 he was sentenced by the trial Court to 50 years imprisonment.

Dissatisfied with the sentence, the appellant lodged this appeal against sentence only.

This appeal is premised on two ground as per the Memorandum of Appeal, namely;

“1. The learned trial judge erred in both law and fact when he failed to take into account the period spent on remand before imposing the sentence of 50 years imprisonment.

2. The learned trial judge erred in both law and fact by imposing a sentence of 50 years imprisonment on the



appellant which sentence was harsh and excessive in the circumstances of the case”

At the hearing of this appeal, the appellant was represented by learned counsel Bruno Muhanguzi on state brief, while learned State Attorney Vicky Nabisenke was for the respondent.

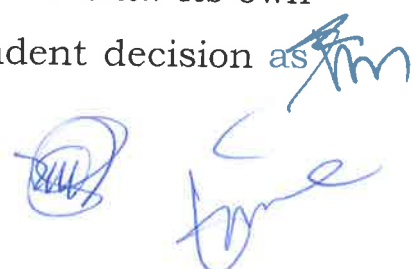
The appellant remained confined to the premises of the Uganda Government Prison at Mbarara during the hearing of the appeal. This was in compliance with the then obtaining Government Health Rules aimed at preventing the spread of the deadly Covid 19 Virus that was pandemic all over the world, Uganda inclusive. The appellant was however enabled to follow and participate in the Court proceedings and to be in touch with his legal counsel through the video conferencing and communications technology of the Court. He was for all purposes present in Court.

Counsel for the appellant applied to Court for leave for the appellant to appeal against sentence only. The Respondent's Counsel did not oppose this application. This Court granted the appellant the leave to appeal against sentence only pursuant to **Section 132 (1) (b) of the Trial on Indictments Act, and Rule 43 (3) (a)** of the Rules of this Court.

Both counsel for the respective parties, with the permission of Court, filed and relied upon written submissions.

Submissions for the Appellant

Counsel for the appellant invited this court under **Rule 30 of the Rules of this Court** to reappraise the evidence and draw its own inferences of fact and come up with an independent decision as



regards the sentence of 50 year imposed upon the appellant. He relied on the case of **Ogalo S/O Owoura v R (1954) 21 EACA 270** where the Court of Appeal for Eastern African held as follows: -

“The appellate Court is not to interfere with 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 being 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 circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principleThe Court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial court”.

These principles were applied by the Supreme Court of Uganda in **Kyalimpa Edward Vs Uganda; Criminal Appeal No. 10 of 1995 (SCU)**.

On the first ground of appeal, Counsel for the appellant submitted that the learned trial judge did not consider the period spent on remand when sentencing the appellant. This omission rendered the sentence of 50 years imprisonment imposed on the appellant to be illegal for non-compliance with **Article 23 (8) of the Constitution**. Counsel relied upon the case of **Rwabugande Moses Vs Uganda; Supreme Court Criminal Appeal No. 25 of 2014**, where the Supreme Court held that the period spent on remand in lawful custody prior to the trial and conviction of a

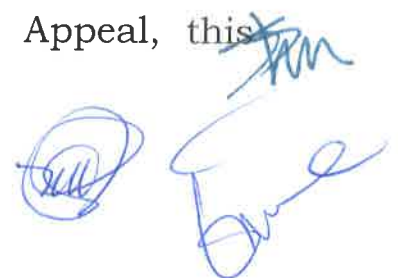
convict, must be taken into account by the sentencing Court when imposing a sentence upon a convict.

Counsel thus prayed this honorable court to set aside the sentence of 50 years imprisonment imposed by the trial Court upon the appellant by reason of its being illegal in law.

On the second ground of appeal, learned counsel for the appellant submitted that the trial Judge did not give sufficient consideration to the mitigating circumstances pertaining to the appellant. That he was relatively young at the age 19 years old. He was thus capable of reforming into a responsible citizen who would contribute positively to society. He was also a first offender. Learned counsel thus invited this court in the exercise of its judicial discretion to take into account both mitigating and aggravating factors and determine the appropriate sentence for the appellant.

Counsel for the appellant referred Court to the case of **Godi Akbar Vs Uganda; Supreme Court Criminal Appeal No. 03 of 2013**, where the appellant a member of parliament of Uganda, had murdered his wife and was sentenced to 25 years imprisonment which sentence was upheld by both this Court and the Supreme Court.

Counsel also invited this Court to consider the case of **Oyita Sam Vs Uganda; Court of Appeal Criminal Appeal No. 307 of 2010**, where the appellant pleaded guilty to having murdered his own brother over land wrangles, was convicted on his own plea of guilt and sentenced to death by the trial judge. On Appeal, this



honorable court set aside the death sentence and substituted the same with a sentence of imprisonment for 25 years.

Learned counsel further relied on the decision of the **Court of Appeal Criminal Appeal No. 095 of 2014: Emeju Juventine Vs Uganda**, where this Court set aside the sentence of 23 years imprisonment passed upon an appellant who pleaded guilty and was convicted of murdering his wife by use of an axe. This Court substituted the same with a sentence of 18 years imprisonment.

Counsel also referred court to the case of **Nkurunziza Julius Vs Uganda, Court of Appeal Criminal Appeal No. 12 of 2009**, where the appellant had been convicted of murder on his own plea of guilty and sentenced to 17 years imprisonment, the sentencing Court noting that a plea of guilt is a mitigating factor.

Counsel for the appellant contended that the cited cases were comparable to the one of the appellant and in all of them the sentences imposed were lower than 30 years imprisonment. Counsel thus invited this court to consider the above cited decisions, and find that the sentence of 50 years imprisonment imposed upon the appellant to be too excessive and reduce it to an appropriate sentence.

Submissions for the Respondent;

On the first ground of appeal, Learned Counsel for the respondent conceded the fact that the learned trial Judge failed to consider the period spent in lawful custody by the appellant thereby rendering the sentence imposed by the trial court to be illegal. Counsel also cited to this court the case of **Rwabugande Moses Vs Uganda,**



(Supra), where it was held that a sentence that did not comply with the mandatory constitutional provision of Article 23 (8) was illegal.

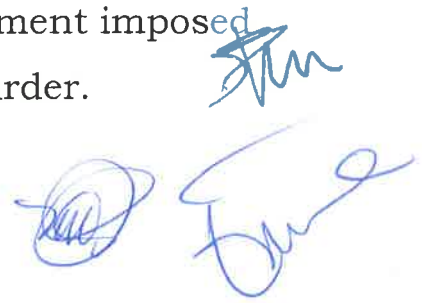
Learned Counsel conceded to the prayer of counsel for the appellant for this court to set aside the illegal sentence of 50 years imprisonment imposed upon the appellant and for this Court to proceed to determine an appropriate sentence for the appellant.

On the second ground of appeal, respondent's counsel submitted that the offence of murder of which the appellant was convicted, carries a maximum sentence of death.

Counsel referred this Court to the **Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013**, that provide for the starting point for the offence of murder to be 35 years imprisonment up to a maximum sentence of death. Learned Counsel then invited this court to weigh all the relevant factors, both mitigating and aggravating, and exercise judicial discretion to impose an appropriate sentence upon the appellant.

As to applicable Court precedents, Counsel referred this Court to the case of **Kaddu Kavulu Lawrence Vs Uganda; Supreme Court Criminal Appeal No.72 of 2018**, where the court of Appeal substituted the death penalty with life imprisonment, upon an appellant convicted of murder, which was subsequently upheld by the Supreme Court.

Counsel also cited the case of **Obote William Vs Uganda; Supreme Court Criminal Appeal No.12 of 2014**, where the Supreme Court upheld the sentence of life imprisonment imposed by the trial court upon an appellant convicted of murder.



Learned counsel then prayed this court to invoke its inherent powers and on giving due consideration to all relevant factors, impose upon the appellant a sentence of life imprisonment as being the most appropriate in the circumstances of the case.

RESOLUTION BY COURT.

We have carefully considered the submissions as well as the authorities submitted to Court by both counsel. We have also carefully considered the record of proceedings of the the trial Court.

Being the first appellate court, our duty is to review and re-evaluate the evidence adduced before the trial court, by subjecting the same to fresh scrutiny, draw inferences therefrom and reach our own conclusions as to the appropriate sentence to be passed upon the appellant. See: **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10, Kifamunte Henry Vs Uganda; SCCA No. 10 of 1997 and Areet Sam Vs Uganda Supreme Court Criminal Appeal No. 20 of 2005.**

On ground one, the Court record of the trial court supports the submission of Counsel for the appellant, to which submission counsel for the respondent also conceded, that the learned trial judge did not take into account the period the appellant spent on remand when sentencing the appellant. Accordingly, on the authority of **Rwabugande Moses Vs Uganda (Supra)** we hold that the sentence of 50 years' imprisonment imposed upon the appellant by the learned trial judge is illegal in law. We accordingly set the same aside. Ground 1 of the appeal is thus allowed.

On ground two, we have considered the principle of uniformity and consistency in sentencing as set out in the case of **Mbunya Godfrey v Uganda; Supreme Court Criminal Appeal No. 4 OF 2011 (SCU)**, where the Supreme Court held that though no two crimes are identical in all aspects, Courts of law ought to try, as much as possible, to maintain consistency and uniformity in sentencing so that criminal cases of similar facts and circumstances attract similar sentences.

In the case of **Oyita Sam Vs Uganda; Court of Appeal Criminal Appeal No. 307 of 2010**, the appellant pleaded guilty to having murdered his own brother over land wrangles and was convicted on his own plea of guilt. He was sentenced to death by the trial judge. On Appeal this Court substituted the death sentence with one of imprisonment for 25 years.

In **Kyaterekera George William v Uganda; Court of Appeal Criminal Appeal No. 113 of 2010**, this court confirmed the sentence of 30 years imprisonment imposed by the trial court upon an appellant who had fatally stabbed his victim on the chest. Similarly, in **Kisitu Majaidin alias Mpata v Uganda; Court of Appeal Criminal Appeal No.28 of 2007**, the Court of Appeal upheld a sentenced of 30 years imprisonment by the trial court passed against an appellant who had been convicted of murdering his mother.

In **Bwefugye Patrick and Namumpa Patrick v Uganda; Court of Appeal Criminal Appeal No. 268 OF 2010**, this court set aside a sentence of life imprisonment for murder and substituted the same with one of 30 years imprisonment.

In **Kijungu Emmanuel v Uganda; Court of Appeal Criminal Appeal No.625 of 2014**, this court confirmed a sentence of 30 years imprisonment upon an appellant convicted of murder.

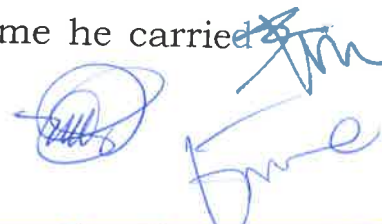
Having subjected the sentencing carried out by the learned trial Judge to fresh scrutiny and having considered the past court precedents of cases with more or less similar facts as set out above, we have come to the conclusion that the trial Judge indeed did not follow the principle of uniformity and consistency in passing the sentence of 50 years imprisonment upon the appellant. The said sentence, apart from being illegal as already held by this Court in respect of ground one of the appeal, was also harsh and excessive.

The sentence of 50 years imprisonment of the appellant having been already set aside, this Court now proceeds to determine the appropriate sentence for the appellant.

The mitigating factors for the appellant according to the Court record are that he was still young having just entered into adulthood, and thus he was capable of reforming into a better citizen to be useful to society.

He was a first offender. He also pleaded guilty to the offence of murder and thus saved the time and other resources of Court that would have been incurred if a full criminal trial had been held. He was also remorseful and repentant according to the submissions of his Counsel at the trial.

The aggravating factors were that he committed the murder in a very fierce and merciless manner thus causing too much physical pain to the deceased. The appellant must also have spent time planning the execution of the crime. Hence the crime he carried



out was pre-meditated. The killing of the deceased was senseless as no motive was disclosed to Court by the appellant as to why the appellant murdered the deceased. The appellant acted without any provocation at all from the deceased. The crime of murder was rampant in the area and as such there is need to impose a sentence that will deter other members of the public from committing similar crimes of the same nature.

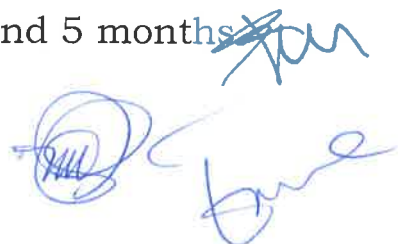
We have carefully considered the above mitigating and aggravating factors, the relevant provisions of the **Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013**, as well as sentences passed by Courts in past decisions having similarity to the case of the appellant. We have come to the conclusion that the appropriate sentence for the appellant is 30 years imprisonment.

We accordingly sentence the appellant to 30 years imprisonment.

The appellant, according to police form 24, exhibit P2, was arrested and taken into custody on 15th April, 2013. He was thus in lawful custody from that date up to the date of his conviction on 22nd October, 2013. This is a period of about 7 (seven) months.

The period of 7 (seven) months is deducted from the sentence of 30 years imprisonment thus leaving a period of 29 years and 5 months that the appellant shall serve as the imprisonment term as from the date of conviction of 22nd October, 2013.

In Conclusion this appeal is allowed. The sentence of 50 years imprisonment passed against the appellant is set aside as being illegal. It is substituted with a sentence of 29 years and 5 months



imprisonment to be served by the appellant as from the date stated above.

It is so ordered.

Dated at Mbarara this.....13th..... day of ..October.....2020.

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HON. LADY JUSTICE ELIZABETH MUSOKE, JA.

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HON. MR, JUSTICE STEPHEN MUSOTA, JA.

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HON. MR. JUSTICE REMMY KASULE, Ag. JA.