5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA

SITTING AT KAMPALA

CRIMINAL APEAL NO. 0362 OF 2019

10 *(Arising from High Court of Uganda at Kampala Criminal Session Case No. 0162 of 2017)*

1. Mayengo Hassan
2. Nsimbe Muhammad *alias* Medi } :::::::::::::::::::: **Appellants**

15 **Versus**

Uganda :::**Respondent**

Coram: **Hon. Mr. Justice Richard Buteera, DCJ**
Hon. Lady Justice Catherine Bamugemereire, JA
20 **Hon. Mr. Justice Remmy Kasule, Ag JA**

Judgment of the Court

The Appellants appealed against their convictions for Murder c/s 188 and 189 of the Penal Code Act and sentences of imprisonment 25 of 26 years and 4 months for the 1st Appellant and 6 years and 4 months for the 2nd Appellant. The convictions and sentences were delivered and passed by the learned trial Judge Stephen Mubiru of the High Court sitting at Kampala respectively on 12th and 13th July, 2018.

30 By way of background, on the 3rd November, 2014, at about midnight, three brothers, Nakibinge Dickson, (deceased), Kanakulya Gerald and Seguya Brian (Pw6) took a taxi at Seguku and disembarked therefrom at Bata-Bata stage along Kampala

Entebbe Road. The taxi conductor demanded of each one of them UGX. 1,000= as the taxi fare. Each one paid UGX. 500= and refused to pay the balance. They hired the 1st Appellant, a boda-boda rider, to take them to Ndejje-Kanyanya, off the main Kampala-Entebbe Road, at a fare of UGX. 3,000= of which they paid up-front UGX 2,000=.

The driver and conductor of the taxi also boarded a boda boda and chased the three brothers in pursuit of recovering from them the full amount of the taxi fare. A long the way, the boda-boda motor-cycle, upon which the taxi driver and conductor were being carried, over-took the one taking the three brothers and being driven by the 1st Appellant. The three brothers instructed the 1st Appellant to stop the motor-cycle, which he did. They jumped off the motor-cycle and ran into hiding in different directions.

The taxi driver and conductor also jumped off their motor cycle, pursued the three brothers while loudly raising an alarm that they were chasing thieves. Other people, including the 1st appellant who had been riding the boda boda motor-cycle from which the three brothers jumped off and ran away, joined the taxi driver and conductor in chasing the three.

Two of the brothers disappeared. The deceased however was caught near a well and was assaulted to death by the chasing mob. It was passed midnight. The 1st and 2nd Appellants were identified, amongst others, as those who assaulted the deceased to death. Both Appellants were arrested, charged and tried of murder before the High Court at Kampala (Mubiru, J.). They were convicted and

60 sentenced as already stated. Dissatisfied they both lodged this appeal.

The appeal is on three grounds:

"1. ***The learned trial Judge erred in law and fact in failing to properly evaluate the evidence adduced as a whole thereby***
65 ***arriving at a wrong decision.***

2. That the learned trial Judge erred in law and fact in failing to admit that the Appellant was of minority age at the time of commission of the offence and thus convicted and sentenced him on a wrong inference of law.

70 ***3. That the learned trial Judge erred in law and fact when he imposed a sentence of 30 years imprisonment which is deemed to be manifestly harsh and excessive taking into account the circumstances of this case, the Appellant's age and occasioned a miscarriage of justice" (sic).***

75 At the hearing of the appeal, learned Counsel Tusiimere Anitah was for the Appellants on State brief; while Rachel Namazzi, Chief State Attorney, was for the Respondent.

Due to Covid Pandemic the Appellants attended Court through Zoom. They remained in prison but were in touch with their
80 lawyers and the whole Court through out the whole hearing.

On 9th November, 2020, learned Counsel for the Appellants communicated to Court in writing pursuant to **Rule 70 of the Judicature (Court of Appeal) Rules SI 13-10** that the 2nd Appellant, Nsimbe Muhammad alias Medi was withdrawing his
85 Appeal. He was ready to serve the remaining term of his sentence.

The same prayer was repeated on 17th November, 2020 when the appeal was called for hearing in open Court. Learned Chief State Attorney, Rachel Namazzi for the Respondent, did not oppose the withdraw of appeal of the 2nd Appellant.

90 This Court accordingly proceeded to dismiss the appeal of the 2nd Appellant by reason of its being withdrawn by the 2nd Appellant under **Rule 70(1) of the Judicature (Court of Appeal) Rules.**

Learned Counsel for the 1st Appellant then sought leave of Court to withdraw ground 1 of the appeal so that he proceeds with only 95 grounds 2 and 3 of the appeal. There was no objection from Counsel for the Respondent. Court granted the prayed for leave. Ground 1 of the appeal was taken as withdrawn. The appeal proceeded on grounds 2 and 3 only.

Both Appellant and Respondent's Counsel filed in Court written 100 submissions in respect of which each Counsel carried out highlights before the Court.

Submissions:

Ground 2:

Appellant's Counsel contended that on the evidence that was 105 adduced, the learned trial Judge ought to have found that the Appellant was of a minority age at the time the offence was committed. The Appellant had testified that he was at that material time 17 years old. The Appellant's biological mother, Pw3, had also stated on oath that she gave birth to the Appellant in 110 1997. She produced a birth certificate Exhibit D.Ex2 showing that the Appellant was born on 9th January, 1997. This evidence had

not been contradicted by the prosecution evidence, Appellant's Counsel so contended. The learned trial Judge therefore ought to have found that the Appellant was a minor at the time the offence
115 was committed and thus applied the relevant provisions of the **Children Act, Cap. 59** in sentencing the Appellant. Learned Counsel for the Appellant thus prayed that ground 2 of the appeal be allowed.

For the Respondent, it was submitted by the learned Chief State
120 Attorney Rachel Namazzi, that at the trial, the prosecution had proved beyond reasonable doubt that the age of the Appellant was 19 years at the time the offence was committed. The medical report on the Appellant, Exhibit PEX2 by Pw2, Dr Kimwero had so found. Both the Appellant and his Counsel had confirmed to Court
125 and even signed the Court record agreeing to and confirming the truth of the contents of that medical report, Exhibit PEX2, amongst other exhibits, on 28th June, 2018, in the course of the conduct of a Preliminary Hearing under **Section 66 of the Trial on Indictments Act.** Under **Section 66(3) of the Trial on**
130 **Indictments Act** the fact that the Appellant was 19 years old by the 14th November, 2014, accordingly was deemed as duly proved beyond reasonable doubt.

As to the evidence of Dw3, the biological mother of the Appellant, the learned trial Judge had had the opportunity to observe the
135 demeanour of this witness and had come to the conclusion that she was not a truthful witness. Her evidence as to the age of the Appellant had been purposely prepared specifically to defend and benefit the Appellant her son. It was false evidence. The learned

trial Judge was entitled to arrive at this conclusion. Learned
140 Respondent's Counsel prayed this Court to disallow ground 2 of the appeal.

Ground 3:

Appellant's Counsel found the sentence of imprisonment of the Appellant to 26 years and 4 months to be manifestly harsh and
145 excessive and as such the same ought to be vacated.

Learned Counsel reasoned in mitigation for the Appellant, that the Appellant was still in the early years of his life. He had been very remorseful, had apologized to the deceased's relatives for the loss of the deceased. He was a first offender and had prayed for mercy
150 and leniency from the Court. He looked forward to turning himself into a better citizen working to support himself.

The learned trial Judge, according to Appellant's Counsel, did not sufficiently consider the above mitigating factors that were in favour of the Appellant. Instead, the learned trial Judge over
155 emphasized the aggravating factors as outweighing the mitigating factors. The aggravating factors were that the Appellant had beaten the deceased with an electric cable, mercilessly dragged him around the scene of crime, even when it was clear that the deceased was weak and helpless.

160 Learned Appellant's Counsel submitted that the learned trial Judge ought to have passed a more lenient sentence than the harsh one of 26 years and 4 months imprisonment. Counsel prayed that this sentence be vacated and ground 3 of the appeal be allowed.

165 The Respondent's Counsel in her submission in respect of ground 3 maintained that the sentence that the learned trial Judge imposed was not illegal, harsh or excessive. The maximum sentence for murder is death, but the learned trial Judge restrained himself from passing that maximum sentence over the 170 Appellant. The learned Judge had carefully considered the mitigating and the aggravating factors and had also taken into consideration the period the Appellant had spent on remand. There was accordingly no merit in ground 3 of the appeal. The same ought to be disallowed, learned Counsel so submitted.

175 **Resolution of Grounds 2 and 3**:

As a first appellate Court, the duty of this Court is to carefully and exhaustively re-evaluate the evidence as a whole and resolve whether or not the learned trial Judge arrived at the correct conclusions and made the right decisions basing on that evidence 180 and the applicable law.

This Court carries out the above duty bearing in mind that, unlike the learned trial Judge, we of this Court did not ourselves have the opportunity to observe the demeanour of the witnesses while they were testifying. Therefore on issues of demeanour of witnesses, 185 this Court has to rely on the observations of the learned trial Judge, unless there is evidence or factors that happened at trial, rendering it necessary for this Court not to do so. See: **Rule 30(1)(a) of the Judicature (Court of Appeal) Rules.** See also: **Kifamunte vs Uganda: Supreme Court Criminal Appeal No. 10** 190 **of 1997**.

We shall apply the above stated principles while resolving grounds 2 and 3 of this appeal.

Ground 2:

The essence of this ground is that the learned trial Judge erred in
195 law and fact for not holding that the Appellant was of a minor age at the time the offence was committed.

This Court has re-appraised the evidence as to the age of the Appellant, Mayengo Hassan, as of 3rd November, 2014 when the offence was committed. On 28th June, 2018 at the Preliminary
200 Hearing under **Section 66 of the Trial on Indictments Act,** the evidence of Pw2, Dr. Kimwero, a Pathologist, Mayfair Clinic, was admitted as Exhibit PEX2 with the consent of the Appellant himself and that of his Counsel and after the learned trial Judge had made sure that the Appellant had known and appreciated the contents
205 of that evidence. The Appellant and his Counsel as well as Counsel for the Respondent and finally the learned trial Judge signed the Court record as proof that whatever had been put on record had been explained, understood and accepted as the truth. Hence the fact that by the 12th November, 2014, nine (9) days after the
210 murder of the deceased, the Appellant was aged 19 years, was accepted and admitted by the Appellant under the guidance of his legal Counsel and also under the overall conduct of the trial Judge.

It was only later in his defence that the Appellant stated he was 17 years old in 2014 when the offence was committed. He was
215 supported in this assertion by Dw3, Nantongo Harriet, his biological mother.

The learned trial Judge dealt with the issue of the age of the Appellant when determining the sentence. As regards the evidence of Dw3, the learned trial Judge, observed and held:

220 *"I observed Dw3 Nantongo Harriet as she testified regarding the date of birth of her son, A1 and it appeared to me that she could only recall the date with great effort, such as is characteristic of one who has crammed it for a purpose. The date did not readily come to her recollection and she kept on*
225 *referring to it repeatedly as 1979, and later correcting it repeatedly to 1997".*

As to the Birth Certificate, Exhibit DEX2 tendered in evidence by Dw3, the learned trial Judge found the said piece of paper much older than the writing on it. The standard print in black ink and
230 the pink colour of the paper document had faded and stained while the handwritten insertions of particulars on it were fresh in blue ball point ink. So was the purple ink of the stamp impression. The learned trial Judge concluded and held that the document Exhibit DEX2 and the evidence of Dw3 had been specifically prepared for
235 the case against the Appellant. Accordingly, the learned Judge rejected the evidence of Dw3 and Exhibit PEX2 by reason of being misleading and unreliable.

This rendered the evidence of the Appellant as to his age also unacceptable since it was his mother, Dw3, who had told him that
240 he was born in 1997. The learned trial Judge believed the evidence of Pw2, Dr. Kimwero contained in Exhibit PEX2 that by 12th November, 2014, he found the Appellant to be of the obvious i.e. apparent age of 19 years old. The learned trial Judge himself on

physically observing the Appellant and having considered the evidence of both the prosecution and the defence held that:

> *"I therefore find that the accused, A1 Mayengo Hassan, was an adult at the time he committed the offence and he will be sentenced as such".*

We have subjected all the evidence adduced at the trial as relates to the age of the Appellant. We too have had an examination of this Birth Certificate, as well as all the other evidence as regards the age of the appellant, and we agree and uphold the observations and conclusion of the learned trial Judge.

In our considered view, we find that the learned trial Judge properly addressed himself to the law, particularly **Section 107 (1) and (2) of the Children Act** as well as to all the evidence that was before him on the issue of the age of the Appellant. We accordingly uphold his holding that the prosecution proved beyond reasonable doubt that the Appellant was an adult by the date of 3rd November, 2014 when the offence was committed. Ground 2 of the appeal is accordingly disallowed.

Ground 3:

In this ground it is contended for the Appellant that the sentence passed upon the Appellant by the learned trial Judge was manifestly harsh and excessive, resulting in a miscarriage of justice and the same ought to be set aside by reason thereof.

The position of the law is that an appellate Court is not to interfere with the sentence imposed by a trial Court where that Court has exercised its discretion on sentence, unless the exercise of that

270 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 the 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 itself
275 wrong in principle. See: **Court of Appeal Criminal Appeal No. 187 of 2013: Kemba John Emmanuel & Another vs Uganda**.

The learned trial Judge sentenced the Appellant to a term of imprisonment of twenty six (26) years and four (4) months to be served starting from 13th July, 2018.

280 In determining and passing that sentence upon the Appellant, the learned trial Judge took into account the degree of culpability of the Appellant in the killing of the deceased, the nature of the weapon the Appellant used in executing the crime and the current sentencing practices of the Courts.

285 The learned trial Judge found the Appellant to be in the higher category of blameworthiness for the crime committed because, despite not having used a weapon adapted for cutting or stabbing in assaulting the deceased, the Appellant continuously beat the deceased with an electric cable and mercilessly dragged the
290 deceased in the area of the scene of the crime even when it was clear that the deceased was weak and helpless. This was wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and disregard for the sanctity of life on the part of the Appellant.

295 The learned trial Judge carefully considered the mitigation factors in favour of the Appellant. The fact that the Appellant was of

youthful age, a first offender, who was just starting life as a boda boda rider and at the same time a car washer. He had apologised to the relatives of the deceased and prayed for a lenient sentence.

300 The learned trial Judge having appreciated both the aggravating and the mitigation factors, then proceeded, pursuant to **Article 23(8) of the Constitution,** to consider the period the Appellant had spent in lawful custody so as to deduct the same from the sentence he was to impose upon the appellant pursuant to 305 **Regulation 5(2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. The learned trial Judge determined this period to be from 24th November, 2017 to 13th July, 208 which was three (3) years and eight (8) months.

As to case authorities the learned trial Judge sought guidance from 310 **Bukenya v Uganda: Court of Appeal Criminal Appeal No. 51 of 2007** where a 36 year old man had been convicted of murder on 22nd December, 2014. He had used a knife and a spear to stab to death the deceased, who was his brother. He was sentenced to life imprisonment.

315 Then in **Sunday v Uganda: Court of Appeal Criminal Appeal No. 103 of 2006,** a sentence of life imprisonment was upheld by the Court of Appeal in a case where a 35 year old convict, part of a mob armed with pangas, spears and sticks, killed a defenceless elderly woman.

320 The learned trial Judge was lastly guided by the case of **Byaruhanga v Uganda, Court of Appeal Criminal Appeal No. 144 of 2007** in which in a Judgment dated 18th December, 2014, the Court of Appeal imposed a sentence of 20 years imprisonment

as a reformatory sentence upon a 29 year old young man who had

325 drowned his seven (7) months old baby in deep water until the baby died. This happened as a result of the break-up of the relationship of man and wife between the convict and his wife, the mother of the deceased baby.

Having considered all the above factors and case authorities the

330 learned trial Judge sentenced the Appellant to twenty six (26) years and four (4) months.

We have re-appraised all the evidence, circumstances and case authorities as to the sentencing of the Appellant. We find that the learned trial Judge properly approached and addressed the issue

335 of the sentence of the Appellant. We find the sentence of imprisonment of the Appellant to twenty six (26) and four (4) months to be appropriate, given all the circumstances of this case. We uphold the decision of the learned trial Judge. Ground 3 of the the appeal therefore also fails.

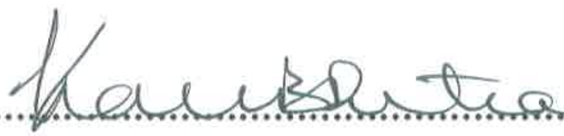
340 Ground 1 of the appeal having been abandoned and grounds 2 and 3 having failed, this appeal also fails and stands dismissed.

The Appellant is to continue serving the sentence of imprisonment for twenty six (26) years and four (4) months starting from the date of conviction in the Judgment of the trial Court, that is 12th July,

345 2018. The learned trial Judge, in apparent error, stated the 13th day of July, 2018, the date of sentence as the starting date for the serving of sentence by the appellant. The correct date is the date of conviction, that is 12th July, 2018.

It is so ordered.

350 Dated and signed at Kampala this 22nd day of July 2021.



Richard Buteera

355 **Deputy Chief Justice**

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Catherine Bamugemereire

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal