THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama JJA*]

CRIMINAL APPEAL NO. 177 OF 2013

(*Arising from High Court Criminal Session Case No.0039 of 2013 at Rukungiri*)

BETWEEN

Kiiza Alex===Appellant

AND

Uganda===Respondent

(*An appeal from the Judgement of the High Court of Uganda [Murangira, J] delivered on 5th December 2013*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant and others at large on the 6th day of May 2010 at Kigango village Nyarushaje sub county in Rukungiri District murdered Medius Nyesiga. The appellant was sentenced to 60 years' imprisonment.

[2] Dissatisfied with the decision of the trial court the appellant appealed to this court against both conviction and sentence. He set forth the following grounds:

'1. The Learned Trial Judge erred both in law and fact to convict the Appellant of the offence of murder when the ingredient of participation had not been proved against the Appellant.

2.The Learned Trial Judge erred both in law and fact to convict the Appellant of the offence of murder while ignoring the Appellant's defence of Alibi.

3.That the Learned Trial Judge erred both in law and fact by convicting the Appellant basing on a charge and caution statement which was not the Appellant's statement and which was recorded without following the laid down legal procedure.

4.The Learned Trial Judge erred in fact to sentence the Appellant to 60 years imprisonment which was a harsh sentence.'

[3] The respondent opposed the appeal.

[4] The appellant was represented at the hearing of this appeal by Ms. Specioza Kentaro while the respondent was represented by Mr. Ddungu Martin, Chief State Attorney in the Office of the Director of Public Prosecutions. At the hearing of this appeal both counsel relied on their written submissions.

Submissions of counsel

[5] Counsel for the appellant submitted on grounds 1 and 2 concurrently. The gist of counsel's submission is that the appellant had not been identified at the scene of the crime. PW4, who was present at the scene of the crime testified that she did not see any of the deceased's attackers while the evidence of PW5 was merely hearsay. Counsel contended that that evidence of PW4 and PW3 corroborated the appellant's defence of alibi. She argued that the fact that the appellant surrendered himself to police points to his innocence.

[6] Counsel for the respondent on the other hand submitted that the appellant had been properly identified at the scene of crime by virtue of PW2's evidence who recorded the charge and caution statement, the evidence of PW3 and that of PW5. He contended that the statements made to PW5, PW4

and PW6 by the appellant admitting to having participated in the murder of the deceased were sufficient to implicate the appellant in the murder of the deceased. He relied on Androa Asenua & Anor v Uganda [1998] UGSC 2.

[7] Furthermore, counsel for the respondent contended that the evidence of previous conduct is admissible evidence against an accused. He stated that PW4, PW5 and PW6 testified that the appellant had on previous occasions attempted to murder PW4. He relied on Godi v Uganda [2015] UGSC 17 for this submission. Counsel contended that the appellant's previous attack on PW4 and his subsequent conduct of disappearing from the village after the murder of the deceased is sufficient circumstantial evidence against him. Counsel referred to Kasaija Emmanuel v Uganda [2004] UGSC 22 and Remegious Kiwanuka v Uganda Supreme Court Criminal Appeal No. 41 of 1995 (unreported). He concluded that the direct and circumstantial evidence against the appellant is overwhelming against his defence of alibi.

[8] Regarding ground 3, counsel for the appellant submitted that the appellant did not make the charge and caution statement because the words contained in the statement are in English, a language the appellant does not understand. He contended that the proper procedure was not followed while recording the appellant's statement. The statement should have been recorded in a language he understands and then translated to English. Counsel for the respondent on the other hand contended that PW2 was speaking *Lukiga*, the appellant's mother language while recording the statement therefore there was no possibility of miscommunication. He argued that the learned trial judge conducted a trial within a trial and satisfied that the proper procedure was followed in recording the confession and that the confession was made voluntarily. He relied on Sekitoleko & 2 Ors v Uganda [2017] UGSC 40.

[9] Regarding the ground 4 of the appeal, it was counsel for the appellant's submission that the learned trial judge did not take into consideration the appellant's mitigating factors and arrived at a harsh sentence. At the hearing, counsel for the respondent conceded that indeed the sentence imposed against the appellant was excessive in the circumstances of the case.

Analysis

Grounds 1, 2 and 3

[10] We shall consider grounds 1,2 and 3 since they are interrelated. We are alive to our duty as a first appellate court as provided by Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and as was stated in Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[11] The case for the prosecution was that prior to the murder of the deceased, Myesiga Medius, the appellant had attacked his grandmother (PW4) and when the deceased, came to her rescue, the appellant threatened to kill both of them. On the fateful night while the deceased and PW4 were sleeping, they were attacked by a group of people. When the deceased cried out for help that she was being killed, a one Brian who was sleeping in the same house made an alarm and the assailants ran away. When the assailants left, PW4 found the deceased lying on a mattress in a pool of blood with deep cut on her neck. She died shortly after. PW4 told people who came to their rescue that she suspected the appellant because he had always threated to kill them. The matter was reported to police that night who tried to trace the appellant, but the appellant disappeared from the village for months before his arrest.

[12] On the other hand, the appellant denied having participated in the commission of the offence and raised the defence of alibi. He stated that he was not in the village during the fateful night. that he was in Kasese at the place that he used to work.

[13] The learned trial judge found that there was both direct and circumstantial evidence that placed the appellant at the scene of the crime. He relied on the appellant's repudiated charge and caution statement, the appellant's plain statement and the evidence of PW5 and PW6 to the effect that the appellant admitted to them to having committed the offence to support his findings. He found that the conduct of the appellant before and after the murder of the deceased corroborated the other evidence that the appellant committed the offence.

[14] From the evidence on record, it is clear that there is no direct evidence implicating the appellant in the murder of the deceased save the appellant's retracted charge and caution statement. PW4, Jovia Mapimo who was present at the scene of the crime during the murder of the deceased in her testimony stated:

> 'When we were asleep, she saw light entering the house. They had big torches and had enough light. Then I had Nyesiga Medius crying that "I am the one they have killed" that cry awoke me up from the sleep. Then Brian made noise saying that who are those people breaking the house. After the alarm the people ran away. We all went out, the deceased remained in the house and died instantly. We did not see any of the attackers. They took off. Then people came and gathered and others went to the sub-county to call police...'

[15] Upon cross examination, PW4 confirmed that she was asleep when the attackers came to the house. She woke up when she heard the deceased's cry and when the assailants were running away. She only saw the light from the torches of the attackers while they were running away. PW5, Nyashaija Charles chairman LC1 and PW6, Twemire Amos gave hearsay evidence that PW4 had told them that the appellant was one of the attackers. These witnesses arrived at the scene of the crime after the murder of the deceased.

[16] It was PW4, PW5 and PW6's testimony that the appellant confessed to them while in police custody at Nyarushanje Police Post that he was involved in the murder of the deceased. Such admission, if true, is of no evidential value because it contravened section 23 (1) of the Evidence Act. See Kedi Martin v Uganda [2002] UGSC 27.

[17] Section 23 (1) states:

> '(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—
> (a) a police officer of or above the rank of assistant inspector; or

> (b) a magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.'

[18] Similarly, the plain statement of the appellant that the learned trial judge relied on to convict the appellant is of no evidential value.

[19] Concerning the charge and caution statement, counsel for the appellant contended that the proper procedure was not adopted while recording the statement. He argued that the statement ought to have been recorded in vernacular and not in English. In his retracted statement, the appellant gave an account of his involvement in the murder of the deceased. He stated that he was the one who took the other assailants to the home of the deceased. They were two men who had been hired by his aunt Prudence to kill PW4. He identified one of the men as Kiconco. He stated that he remained outside while the two proceeded inside and murdered the deceased. They ran away when a one Brian raised an alarm. When they reached the place where they had left their motorcycle, he was informed by Kiconco that they had killed another person instead of their intended target. He thereafter gave a detailed account of what transpired before he went into hiding following the murder of the deceased.

[20] The defence objected to the admission of the statement in evidence on the ground that the appellant did not make the statement. He was made to sign a document that he did not understand. Counsel for the appellant also contended during the trial within a trial that the statement had been recorded in a language that the appellant does not understand and was recorded in violation of the appellant's constitutional right guaranteed under Article 23(4) of the Constitution.

[21] The learned trial judge found that the confession was true and voluntary and that it implicated the appellant in the murder of the deceased. PW1, IP Mugarura Vicent, the police officer who recorded the charge and caution statement stated in his testimony during the trial with in a trial that while taking the appellant's statement, they used the *Lukiga* language, but he translated the statement to English while recording. He stated that after

recording the statement, he read it back to the appellant in *Lukiga* and that the appellant confirmed that what he had written was true. He thereafter signed the statement and the appellant signed too.

[22] On the other hand, the appellant denied having made a statement while at Rukungiri police station. He claimed that he was only made to sign a document. He also stated that the police at Rukungiri were very friendly to him.

[23] Other than not recording the statement in *Lukiga,* the language that the appellant understands, PW1 appears to have followed the right procedure before and after recording the statement. He read back the statement to the appellant in *Lukiga* before the appellant signed it. It is presumed that the appellant signed it because he understood what was read to him. It has been held in a number of cases by the Supreme Court that such procedure is not fatal as long as the charge and caution statement is read back to the suspect through a translator in the language he or she understands and he or she signs the English version. See Ssegonja Paul v Uganda [2002] UGSC 10, Mweru Ali and Ors v Uganda [2003] UGSC 29, and Lutwama David v Uganda [2004] UGSC 31. In this case a translator was not necessary because the recording police officer was well versed with the local language of the appellant.

[24] We agree with the findings of the trial court that the appellant's confession statement was correctly admitted in evidence as having been voluntarily made and that the procedure followed in recording it did not cause a miscarriage of justice to the appellant.

[25] We note that there was delay in recording the statement after the appellant had been arrested. The appellant was arrested on 12th November2010 and detained at Nyarushanje Police post for 2 days. He was then transferred to Rukungiri Police station on 14th November 2010 and charge and caution statement was recorded on the 16th of November 2010. This was after the expiration of the lawful time that a suspect should spend in custody thus violating the appellant's right to liberty guaranteed under Article 23(4) of the Constitution of Uganda which states:

'A person arrested or detained-

(a) for the purpose of bringing him or her before a court in execution of an order of a court; or
(b) upon reasonable suspicion of his or her having committed or
being about to commit a criminal offence under the laws of
Uganda,
shall, if not earlier released, be brought to court as soon as possible but
in any case not later than forty-eight hours from the time of his or her
arrest.'

[26] In Corporal Wasswa and Dan Ninsiima v Uganda [2001] KALR 10, the Supreme Court disapproved of unexplained delay by the police to record a charge and caution statement from the appellant who had admitted the offence and was already in custody. In that case the delay was for two days as the appellant was arrested on 7th December 1993 and the statement was recorded on 9th December 1993.

> '... The second unsatisfactory feature is inter-linked with the first. It is the delay in recording the confession after the arrest. If, as testified by James Kanyankore, Cpl. Wasswa on first being interrogated on 7.12.93, admitted he had participated in the robbery, his confession ought to have been recorded then. The unexplained delay until 9.12.93, during which delay the suspect had to visit the scene of the crime with the investigating officers is bound to raise eyebrows, if not legitimate questions, whether the prosecution version is without blemish. We do appreciate, however, that those features per se would not be sufficient ground for rejecting the confession. Nonetheless they call for a negative comment.'

[27] We, however, note that although the delay to record the statement from the appellant is improper, it does not appear to us in this case that such delay was deliberately designed to cause the appellant to make an involuntary statement. Had that been the case it would be fatal to the admission of the charge and caution statement.

[28] The law with regard to retracted and repudiated confession was re-stated in the case of Tuwamoi V Uganda [1967] 1 EA 84 at page 91 as follows;

> 'We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true'

[29] In essence, a court can convict on a retracted or repudiated or both retracted confession alone if it is satisfied after considering all material factors and surrounding circumstances of the case that the confession is true.

[30] PW4 and PW5 testified that the appellant had previously attempted to kill PW4. PW4 reported the incident to PW5, the LC1 chairman who arrested the appellant, but the appellant escaped while he was being taken to police. PW5 stated that the incident took place in March 2010. The conduct of the appellant disappearing from the village for over 6 months following the murder of the deceased cannot be explained on any other reasonable hypothesis other than that he was fleeing because he was guilty of committing the offence. See Kasaija Emmanuel v Uganda [2004] UGSC 22.

[31] Regarding the defence of alibi, the law is that an accused person who sets up an alibi assumes no burden to prove the truth of his alibi. The burden to displace an alibi lies with the prosecution. The prosecution has to disprove the alibi by adducing credible evidence placing the accused at the scene of the crime at that particular time when the accused claims he was elsewhere. See Bogere and Anor v Uganda [2018] UGSC 9.

[32] In light of the above, we find that there is sufficient evidence placing the appellant at the scene of the crime thereby disapproving the appellant's defence of alibi.

Ground 4

[33] As an appellate court, we can only interfere with sentence where it is either illegal, or founded upon a wrong principle of law, or a result of the trial Court's failure to consider a material factor, or harsh and manifestly excessive in the circumstances of the case. See Kakooza v Uganda [1994] UGSC 1, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported).

[34] In Aharikundira v Uganda [2018] UGSC 49, the Supreme Court stated:

> 'There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.'

[35] While sentencing the appellant, the learned trial judge stated:

> '**Before passing the sentence against the convict the following factors have been considered:**
> *1)All the mitigating factors for sentence advanced by counsel for the convict considering the circumstances and the gravity of the offence.*
> *2) Cases of murder are on the increase in Nyarushanje Sub-county. There is direct need to pass deterrent sentences so as to curb the offence down in the area.*
> *3)The convict appears not remorseful.*
> *4)The convict participated in the killing of his cousin which caused loss to their entire family.*
> *5)The period he has been on remand is considered.*

> Wherefore considering all the above factors the convict would have been sentenced to death, However, I do sentence the convict to 60 (sixty) years imprisonment in prison.'

[36] The appellant's mitigating factors were that he was a first-time offender. He was a young offender, 21 years old only and was remorseful. Counsel for the appellant urged the trial court to take into consideration the role the appellant played in the offence, the fact that the principal offenders are still at large and that the appellant handed himself over to police and admitted to having committed the offence in the charge and caution statement. The aggravating factors were that the offence of murder is grave and the victim was a young girl whose life was cut short. The murders were rampant especially in Nyarushanje where the offence was committed.

[37] Courts should always have in mind the need for parity in sentencing while exercising their discretion in sentencing. See Kakooza v Uganda (supra), Naturinda Tamson v Uganda (Criminal Appeal 13 of 2011) [2015] UGCA 3. Guideline No. 6(c) of the Sentencing Guidelines provides that

> "Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

[38] In Attorney General v Susan Kigula & 417 Ors [2009] UGSC 6, the Supreme Court noted that murders are committed under varying circumstances. It also noted that offenders are of different characters, as some are first offenders, or remorseful which court should take into account in the exercise of its discretion during sentencing. The court reduced the death sentence imposed on the appellant to 20 years' imprisonment. In Godi v Uganda [2015] UGSC 17, the appellant was convicted of the murder of his wife and sentenced to 25 years' imprisonment.

[39] In Kia Erin v Uganda [2017] UGCA 70, the appellant was convicted of the offence of murder and sentenced to imprisonment for life. On appeal,

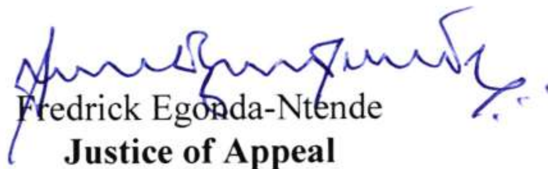
the sentence was substituted with a sentence of 18 years of imprisonment. In Tumwesigye Anthony v Uganda [2014] UGCA 61, the appellant was convicted of murder and sentenced to 32 years of imprisonment, this court reduced the sentence to 20 years on appeal.

[40] The learned trial judge stated that he had taken into account the period spent on remand without, ascertaining and specifying the length of this period. It would follow, if he took the same into account, that he considered the appropriate sentence in this case to be a term of imprisonment for 63 years and 10 months. We are satisfied this sentence was harsh, manifestly excessive and out of range with sentences for murder as determined by the Supreme Court and this court. We shall therefore interfere with the sentence.

Decision

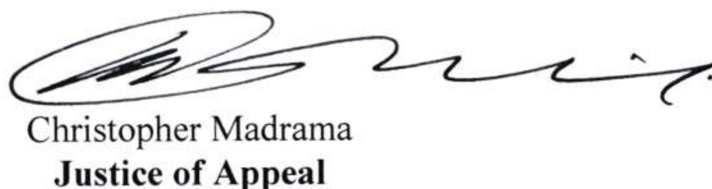
[41] We set aside the sentence imposed by the court below. Taking into account all mitigating and aggravating circumstances in this case we are satisfied that an appropriate sentence for the offence of murder, which the appellant stands convicted of, would be 25 years' imprisonment. From this period, we deduct the period the appellant spent in pre-trial custody which is 3 years and 2 months. **We order the appellant to serve a term of imprisonment of 21 years and 10 months from the 5th day of December 2013, the date of his conviction**.

Signed, dated and delivered at Mbarara this 3rd day of March 2022



Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal



Christopher Madrama
Justice of Appeal