THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 76 OF 2017

(Coram: Egonda-Ntende, Bamugemereire & Madrama, JJA)

NIWAMANYA GIDEON} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda Holden at Kabale in Criminal Session Case No 76 of 2017 before Kazibwe Kawumi, J delivered on 10th October 2016)

JUDGMENT OF COURT

The appellant was charged, tried and convicted of murder contrary to sections 188 and 189 of the Penal Code Act, cap 120 laws of Uganda.

The facts are that the appellant and the deceased were police officers. On 17th May 2013 at Nteko Village, Nyabwishenya sub County in Kisoro district the appellant shot and murdered police officer No 58346 PC Musasizi Gilbert. The deceased was a police officer attached to Nteko police post in the Kisoro district. The appellant had been involved in a fight at a bar in Kikomo trading centre with one Kategana Apollo. The deceased attempted to settle the matter between the appellant and Kategana Apollo. The appellant was disarmed. He went to his home and picked a gun and looked for Kategana but did not find him. He found the deceased and shot him whereupon he ran away. Following the gunshots, a search was mounted by security personnel whereupon the appellant was arrested and confessed to the murder. The appellant was convicted on his own plea of guilty and was sentenced to 31 years and 6 months' imprisonment.

The appellant was dissatisfied with the sentence only and appealed to this court with leave against sentence only on one ground of appeal that:

5 **The learned trial Judge erred in law and fact when he sentenced the appellant to 31 years and 6 months' imprisonment which sentence is harsh and manifestly excessive in the circumstances.**

At the hearing of the appeal, the appellant was represented by learned Counsel Mr Turyahabwe Vincent on state brief while the respondent was
10 represented by learned Counsel Mr. Nkwasibwe Ivan, Chief State Attorney. Both Counsel addressed the court in written submissions which were filed on court record and judgment was reserved on notice.

Submissions of the appellant's Counsel

The appellant's Counsel submitted that sentencing is a matter of the
15 exercise of judicial discretion and the Court of Appeal ought not to interfere with the exercise of that discretion unless the sentence imposed is illegal or excessive or so low or excessively so high as to occasion a miscarriage of justice (see **Kiwalabye v Uganda; Supreme Court Criminal Appeal No 143 of 2001**). Further, the appellant's Counsel
20 submitted that though the offence of murder carries a maximum sentence of death, a sentence of 31 years and 6 months imposed on the appellant is harsh and excessive in the circumstances.

He contended that the appeal is based on the principle of consistency in sentences in light of previously decided cases with similar facts and
25 circumstances and relied on **Aharikunda Yustina vs Uganda; Supreme Court Criminal Appeal No 27 of 2015.** Counsel further relied on **Butali Moses & 7 others v Uganda; Court of Appeal Criminal Appeal No 225 of 2014** where the Court of Appeal sentenced each of the appellants to 13 years and 9 months' imprisonment for murder. Further in **Rwabugande v**
30 **Uganda; Supreme Court Criminal Appeal No 25 of 2014,** the Court of Appeal upheld a sentence of 35 years' imprisonment imposed by the trial Judge. On further appeal to the Supreme Court, the sentence was reduced to 21 years' imprisonment.

The appellant's Counsel submitted that in the circumstances of the
35 appellant's appeal, the sentence of 31 years and 6 months is higher than the range of sentences imposed in cases of a similar nature. It was therefore harsh and excessive and he prayed that the sentence is set aside and an appropriate sentence imposed. He prayed that the court considers sentences previously imposed in similar matters.

Submissions of the respondent in the reply.

In reply, the respondent's Counsel submitted that the appellant was charged with murder which carries a maximum penalty of death. In imposing the sentence, the learned trial Judge considered the mitigating and aggravating factors. These were the facts that the appellant was a young man of 24 years with a family, he was a first offender who pleaded guilty and had saved the court's time. He also considered the possibility of reform upon release and the 3 ½ years that the appellant had spent on remand. Secondly the learned trial Judge with this mitigating factors against the aggravating factors. The aggravating factors were the gravity of the offence of murder, the fact that the appellant was an officer mandated to keep the law but instead used his firearm unlawfully. Secondly, the deceased was also a young man whose future was recklessly terminated by the appellant and the fact that the appellant had earlier on been disarmed in a scuffle but still ran back to the police barracks whereupon he picked another gun which he used to murder the deceased.

The respondent's Counsel submitted that this court and the Supreme Court have decided that an appellate court should not interfere with a sentence imposed by a trial court unless the trial court acted on wrong principle, or overlooked some material fact, or the sentence was manifestly harsh and excessive (see **Livingstone Kakooza vs Uganda; SCCA No 17 of 1993**). Counsel submitted that there was no illegality in the sentence and the sentence was neither harsh nor excessive considering the circumstances. In the premises, he contended that the learned trial Judge did not act on any wrong principle in imposing the sentence.

With regard to the decision of **Ahurikunda Yustina versus Uganda; Supreme Court Criminal Appeal No 27 of 2005**, it is true that there is a need to provide a mechanism that would promote uniformity, consistency and transparency in sentencing which is actually contained in the objectives of the Sentencing Guidelines. Further this court pronounced itself as to what the sentencing ranges were in murder cases in **Muhwezi Bayon versus Uganda; Court of Appeal Criminal Appeal No 198 of 2013** when it held that the terms of imprisonment for murder of a single person ranged between 20 to 35 years of imprisonment and in exceptional circumstances, the sentence may be higher or lower. Further in **Biryomumisho Alex vs Uganda; Court of Appeal Criminal Appeal No**

464 of 2016, this court held that interfering with sentences is not a matter of emotions but rather of law. Unless the trial Judge flouted the principles of sentencing, it does not matter whether the members of the court would have given a different sentence if they had been the one trying the appellant.

In the premises, the respondent's Counsel submitted that the appellant advanced no legal or justifiable grounds upon which the court may interfere with a sentence of 31 years and 6 months imposed by the trial Judge. He prayed that the appeal is dismissed for lacking merit.

Consideration of appeal

We have carefully considered the appellant's appeal on the issue of sentence only which was argued with the leave of this court to appeal against sentence only under the provisions of section 132 (1) (b) of the Trial on Indictments Act, cap 23 laws of Uganda.

It has consistently been held that an appellate court may only interfere with a sentence imposed by the trial court if the trial court acted on a wrong principle or misdirected itself or overlooked a material factor. The court may also interfere with a sentence that is manifestly excessive or too low as to amount to an injustice. In **Ogalo s/o Owoura v R (1954) 21 EACA** the Appellant appealed against a sentence of 10 years' imprisonment with hard labour for the offence of manslaughter and the East African Court of Appeal on the principles applicable to appeals against sentence held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

The facts of this appeal are not in controversy and the appellant pleaded guilty as charged. In imposing the sentence, the learned trial Judge stated as follows:

On 17 May, 2013, the convict who was a Police Officer killed another Police Officer No 58346 PC Musasizi Gilbert using a gun assigned to him to perform his duties of keeping law and order.

He pleaded guilty to the charge of murder. The convict is a young man of 24 years with a family. He pleaded guilty to the offence and hence saved Court's time. There are no known previous convictions prior to this case. It was submitted by his Counsel that the court exercises leniency when determining the sentence.

The prosecution invited court to give him a deterrent sentence given that the offence is grave, he is an officer mandated to keep law and order which he did not do, and that the deceased was also a young man whose future the accused terminated with reckless abandon.

I have considered the circumstances in which the offence was committed. The convict was disarmed in an earlier scuffle but still ran back to the police barracks and picked another gun used to kill the deceased. Misuse of weapons by those entrusted to handle them in the keeping of law and order is inexcusable in all circumstances.

I have considered the convict's age and the possibility that he can reform on release, the time he has spent on remand and the guilty plea that saved Court's time. I will not consider the death sentence that may be applicable to the circumstances in which the offence was committed.

I sentence the convict to 35 years in prison. I will subtract the 3 ½ years he has spent on remand. He will serve 31 ½ years.

The question for consideration is whether the learned trial Judge acted on a wrong principle or misdirected himself or overlooked a material factor that may aggravate or mitigate the sentence. We have carefully considered the sentencing notes of the trial Judge as reproduced above.

We agree with the respondent's Counsel that the learned trial Judge apparently took into account all the relevant factors before imposing the sentence. In this appeal, the matter for resolution is whether the sentence imposed by the trial Judge is consistent with sentences imposed in similar matters and therefore the consideration is whether in light of those sentences, the sentence imposed on the appellant is manifestly excessive.

Secondly, it is not sufficient to state that the court has taken into account the fact that the appellant pleaded guilty, is a first time convict with no

previous record, and is a young man with a family. The sentence imposed must demonstrate that that these facts mitigated the sentence by reduction of sentence when compared to cases where the accused did not plead guilty of was not young or a first offender. Suffice it to note that a severe penalty after a plea of guilty may dissuade future accused persons from pleading guilty.

We have in the circumstances compared the sentence imposed on the appellant to those imposed for murder after a full trial in other cases and the likely impact of the mitigating factors on sentences in other murder cases. We further agree with the trial Judge's comments on the aggravating factors.

In **Kajungu Emmanuel v Uganda; Court of Appeal Criminal Appeal No 625 of 2014** this court held *inter alia* that there is need to maintain uniformity of sentences in light of the principle of equality before and under the law enshrined in article 21 of the Constitution. Where age of the appellant is concerned, in **Kabatera Steven v Uganda; C.A.C.A No. 123 of 2001** (unreported)), this court held that the age of an accused person is a material factor that may act as a mitigating factor (especially where the convict is young):

> We agree with the submission of the Counsel for the appellant that the learned trial Judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not reform him.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant had been tried and convicted of two counts of murder by the High Court and sentenced to life imprisonment. His appeal was against sentence on the ground that it was manifestly excessive, harsh and unfair in the circumstances. The appeal was allowed and the sentence set aside and substituted with a sentence of 18 years' imprisonment on each count to be served concurrently.

In **Rwahire Ruteera v Uganda, Court of Appeal Criminal Appeal No 72 of 2011**, the appellant who was 42 at the time of commission of the offence was sentenced to 40 years' imprisonment after conviction of two counts of murder. He had been found guilty of the murder of his wife and

stepdaughter. He was sentenced to 20 years' imprisonment on each count which sentence was to be served consecutively. This court found the sentence imposed to be appropriate but reduced it by the 5 years the appellant had spent on pre-trial remand whereupon he was sentenced to 15 years' imprisonment on each count to be served consecutively from the date of conviction.

In **Tumwesigye Anthony v Uganda; Court of Appeal Criminal Appeal No 46 of 2012 [2014] UGCA 61 (18th December 2014)** the Appellant had been convicted of the offence of murder and sentenced to 32 years' imprisonment. The Court of Appeal held that the sentence was harsh and manifestly excessive in light of the fact that the appellant was a first offender and 19 years old at the time of commission of the offence and reduced the sentence to 20 years' imprisonment.

In **Kasaija v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant had been convicted of two counts of murder and sentenced to life imprisonment by the High Court. His appeal against sentence was allowed on the ground that it was harsh and manifestly excessive. The appellant was a first offender and was 29 years old at the time of commission of the offence. He had spent two and a half years in pre-trial detention before his conviction. This court imposed a sentence of 18 years' imprisonment on each count to be served concurrently in the circumstances.

In **Atiku Lino v Uganda; Criminal Appeal No 0041 of 2009 [2016] UGCA 20 (6th June 2016)**, the Appellant murdered the deceased with a cutlass by cutting her several times causing her death. He was convicted and sentenced to life imprisonment and on appeal from the High Court, the sentence was reduced from life imprisonment to 20 years' imprisonment and the sentence was mitigated among other factors by the age of the appellant who committed the offence when he was 31 years old.

The facts of this appeal are slightly different in that the appellant pleaded guilty. He was examined and found to be 24 years old at the time of commission of the offence. Secondly he was a first offender and was remorseful and did not waste the time of court. He was a family man with 3 children below the age of 10 years. Further facts which were not

disputed was the fact that the appellant had been drinking and he was apparently under the influence of alcohol at the time of commission of the offence. This was not considered as a possible factor to diminish the offence because the appellant pleaded guilty to the offence as charged. While the offence was a grave offence, and we agree with the aggravating factors considered by the judge, it is clear from the above precedents that a sentence of 35 years was manifestly excessive.

We accordingly allow the appeal on sentence and set aside the sentence of imprisonment of 31 years and six months imposed by the trial Judge. Exercising the powers of this court under section 11 of the Judicature Act, we would consider a sentence of 25 years' imprisonment appropriate in the circumstances. From that sentence, we would deduct the 3 years and 6 months the appellant had spent on pre-trial remand and sentence him to 21 years and 6 months which sentence shall commence from the date of his conviction and sentence on 10th October 2016.

Dated at Mbarara the 3rd day of March 2022

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal