THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 576 OF 2014

CORAM: ***Egonda-Ntende, Bamugemereire, Madrama JJA***

KAKURUCU EMMANUEL .....APPELLANT

VERSUS

UGANDA. .....RESPONDENT

(Appeal from the Decision of Joseph Murangira J at the High Court of Uganda at Rukungiri dated 6th November 2013)

JUDGMENT OF THE COURT

The appellant, **Emmanuel Kakurucu** was indicted for the offence of murder contrary to **sections 188 and 189 of the Penal Code Act**. It was alleged that on the 18th day of August 2011, at Rugyendwa village, in Rukungiri District, the Appellant with malice aforethought caused the death of Katemba Musimenta Silverio.

The Brief Facts

The facts on the record are that on the 18th day of August 2011, the appellant went to his mother's home and picked a goat which he sold at the trading centre. When his mother learnt of the sale, she followed him and with the help of locals caused his arrest. They retrieved from him the money from sale and gave it back to the buyer who in turn returned the goat. The appellant became angry and attempted to commit suicide but was rescued by the deceased. The appellant convinced the deceased to follow him to his

home in order to reward him for saving the appellant's life. The deceased accepted and the two sat on a *boda boda*, a motorcycle for hire, which took them to the accused's home. The *boda boda* rider waited outside while the two men entered the appellant's house. It was not long before the deceased rushed out of the house bleeding profusely while a machete-wielding appellant chased after him. Shortly afterwards the deceased fell died instantly. On seeing the dead man, the appellant took to his heels. He later handed himself over to the police and confessed to the murder of the deceased whereupon he was charged with the offence of murder. He made an extra judicial statement in which he admitted murdering the deceased. The Appellant was convicted of the offence of murder and sentenced to 60 years' imprisonment on 6th November 2013.

Dissatisfied, the Appellant appealed against sentence only.

Grounds of Appeal

i. **That the learned Trial Judge erred in law and fact when he convicted the Appellant to 60 years imprisonment, a punishment which was manifestly harsh and excessive in the circumstances upon the Appellant.**

ii. **That the learned Trial Judge erred in law and fact when he sentenced the Appellant to 60 years' imprisonment and failed to take into account the time the Appellant had spent on remand and hence the sentence being illegal.**

Representation

At the hearing of the appeal the Appellant was represented by Mr. Andrew Byamukama on state brief while the Respondent was represented by Ms Amina Akasa a State Attorney in the Office of the Director of Public Prosecutions. The Appellant appeared via an audio-visual link from Mbarara Government Prison. Both counsel filed written submissions prior to the hearing date and court has adopted the same.

The Appellant's Case

Submitting on Ground No. 1, counsel for the appellant protested the sentence of 60 years imposed on the Appellant as manifestly excessive and harsh thus occasioning a miscarriage of justice. He referred to the case of **Turyahika Joseph v Uganda CACA No. 327 of 2014**, where this court held that;

> 'Sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence…'

It was argued that there is need to maintain uniformity and consistency in sentencing thus he prayed that the sentence of 60 years imposed on the Appellant be reduced to a lesser sentence.

Regarding Ground No. 2, counsel submitted that the Trial Judge while sentencing the appellant failed to take into account the period the appellant

spent on remand, which is illegal as per article 23 (8) of the Constitution and the decision of **Moses Rwabugande v Ugsanda SCCA No. 25 of 2014.**Counsel prayed that this court holds that the sentence imposed on the appellant without deducting arithmetically the time spent on remand was illegal and should be set it aside accordingly.

The Respondent's Case

In reply to Ground No. 1, counsel for the respondent submitted that the sentence of 60 years imposed on the Appellant was appropriate given the manner in which he murdered the deceased. Counsel contended that this court should maintain the sentence of 60 years. Counsel added that the Trial Judge carefully evaluated the factors in mitigation and aggravation before arriving at a befitting sentence of 60 years' imprisonment. Counsel invited this court to follow similar decisions in which more severe sentences than 60 years' imprisonment have been upheld this honourable court and the Supreme Court. He cited **Sebuliba Siraji v Uganda CACA No. 319 of 2009,** and submitted that the appellant in that case was convicted of murder in almost similar circumstances as the present case and he was sentenced to life imprisonment, which was upheld by this court. He also cited **Henry Kagwa v Uganda SCCA No. 17 of 2005** where the Supreme Court confirmed a sentence of life imprisonment where the appellant was convicted of murder. It was counsel's argument that given the gruesome manner in which the

appellant ended the life of the deceased, a sentence of 60 years is appropriate and this court should maintain it.

In reply to Ground No. 2, it was also counsel's submission that the Trial Judge considered the time the Appellant spent on remand before handing him a sentence of 60 years' imprisonment. She added that the Trial Judge passed sentence on 6th November 2015 where the prevailing law was **Kizito Senkula v Uganda SCCA No. 17 of 2010** before the decision in **Rwabugande Moses v Uganda SCCA No. 25 of 2014 which** was passed in 2016 and therefore Rwabugande could not have been followed by the Trial Judge.

Duty of the Court

It well within the rights of an appellant to appeal against sentence only. S. 132 (1) (b) and (e) of the Trial on Indictments Act provides that;

> *Subject to this section,*
> *(b) An accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law*
> *and the Court of Appeal may—(e) in the case of an appeal against the sentence alone, confirm or vary the sentence;*

The Court of Appeal can also lawfully alter, increase or decrease a sentence under **S. 34(2) of the Criminal Procedure Code Act cap 116**. However, it is well settled that the court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently, see **Kamya Johnson Wavamuno**

SCCA No. 16 of 2000. Similarly, in **Livingstone Kakooza v Uganda SCCA No. 17 of 1993**, it was observed that courts can and will only interfere with a sentence of the trial court if the sentence is illegal or is based on a wrong principle or the court has overlooked a material factor or where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice. Similarly, in Also in **Kizito Senkula v Uganda SCCA No 24 of 2001**,

'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 have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case.' In considering this appeal, we bear in mind the above principles.

Regarding Ground No. 1, the appellant faults the trial judge for sentencing him to a punishment of 60 years' imprisonment, which he considered manifestly harsh and excessive.

Paragraph 19 (2) of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) 2013,** enjoins a sentencing court in the offence of murder to consider the aggravating and mitigating factors in paragraph 20 and 21 of the guidelines and to determine the appropriate sentence in accordance with the sentencing range. Our role as an appellate court is to determine whether the sentence reflects an understanding of the

guidelines. **Kyalimpa Edward v Uganda SCCA No.10 of 1995, expounds the position of the law on sentencing.** 'It is trite law that an Appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of justice.'

Also in **Aharikundira v Uganda SCCA No. 27 of 2015**, it was held that 'it is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.'

The appellate courts consider the issue of consistency in sentencing to be critical. In **Anywar Patrick & Anor v Uganda, CACA No. 166 of 2009**, this court set aside the sentence for life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months' imprisonment. Similarly, in **Mbunya Godfrey v Uganda SCCA No. 4 of 2011**, the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years' imprisonment. In **Tumwesigye Anthony v Uganda, CACA No. 46 of 2012**, the appellant was convicted of murder and sentenced to 32 years imprisonment. On appeal, this court set aside the sentence of 32 years and substituted it with 20 years' imprisonment. **In Turyahika Joseph v Uganda**

CACA No. 327 of 2014, this court found that...sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence.

In **Tumwesigye Rauben v Uganda CACA No. 181 of 2013**, the appellant was sentenced to 40 years and on appeal, the sentence was reduced to 20 years' imprisonment. While in **Atiku Lino v Uganda CACA No. 41 of 2009,** the Appellant murdered the deceased by cutting her several times causing her death. He was convicted and sentenced to life imprisonment and on appeal, the sentence was reduced to 20 years imprisonment having considered mitigating factors and the age of the appellant, which was 31 at the time he committed the offence.

Further in **Tusingwire Samuel v Uganda CACA No. 110 of 2007,** the appellant murdered the deceased, an old woman in a brutal manner by inserting a stick in her vagina and pushing it to the abdomen leaving her intestines protruding. This court set aside the sentence of life imprisonment for being harsh and manifestly excessive and reduced it to 30 years' imprisonment. In the present case during sentencing, the prosecution submitted that the Appellant killed the deceased in a brutal manner. In mitigation, counsel for the Appellant stated that the Appellant is a first offender, he has been on remand for 2 years, and he is aged 31 years.

We are alive to the fact that courts are enjoined to maintain consistency in sentencing can be gleaned from the above authorities. We have considered the manner in which this offence was committed and fact of a suicidal

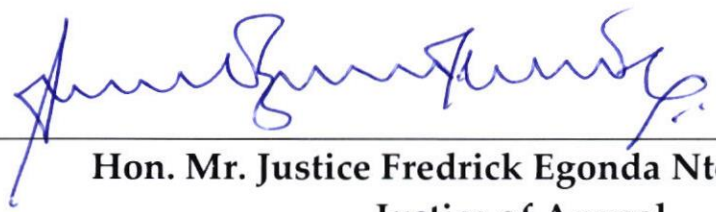
attempt by the appellant. These revelations could point to the fact that the appellant appeared to have undiagnosed mental health issues. In the circumstances, we find that the sentence of 60 years was harsh and excessive. Indeed, this is a case that merits the revisiting of the sentencing passed in order to bring it in line with cases of a similar nature.

Ground No. 1 of the appeal is successful.

Regarding Ground No. 2, the appellant faults the Trial Judge for not deducting the period he had spent on remand. In arguing ground No. 2 counsel for the respondent observed that the Trial Judge passed sentence on the 6th of November 2013 where the prevailing law was **Kizito Senkula v Uganda SCCA No. 17 of 2010** before the decision in **Rwabuganda Moses v Uganda SCCA No. 25 of 2014** which incidentally was only passed in 2016 meaning that it could not have been followed by the Trial Judge. While we agree that the law could not be applied retrospectively in the circumstances we note, however that courts must adhere to the principle in **Article 23 (8) of the Constitution,** which requires they to take into account the period the convict spent on remand. We note that in all circumstances the courts have a duty to take into consideration the time spent on remand. The Trial Judge in this case did not clearly take into consideration the time spent on remand. As a result, we set aside the sentence of 60 years imposed by the trial court. We shall now proceed under s. 11 of the Judicature Act to pass a fresh sentence. Having considered the circumstances of this case, the youthfulness of the offender and that he is a first offender, we consider a sentence of 25

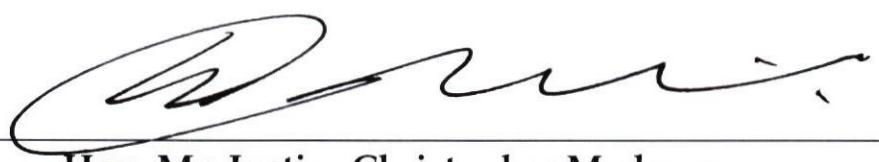
years to be appropriate. Having set aside the sentence of 60 years imposed by the trial court and we hereby replace it with a sentence of 25 years' imprisonment. We take into consideration 2 years the appellant spent on remand. We therefore set off the two years from the 25years. In the result, the appellant will serve a sentence of 23 years' imprisonment which will run w.e.f 6th November 2013 being the date of sentence.

Dated, Signed and delivered at Mbarara this 23rd Day of March 2022.



Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal



Hon. Mr. Justice Christopher Madrama
Justice of Appeal