THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 396 OF 2017
{CORAM: Egonda-Ntende, Bamugemereire, Madrama JJA}

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1. **TINDYEBWA EMMANUEL**
2. **BYABAZAIRE SIMON**
3. **TWINOMUGISHA JACKLINE :::::::::::::: APPELLANTS**

VERSUS`

10 **UGANDA:: RESPONDENT**

(Appeal from the Decision of Moses Kazibwe Kaumi J at the High Court of Uganda at Kabale dated 28th August 2017)

JUDGMENT OF THE COURT

15 The appellants were indicted for the offence of **Murder** contrary to **Sections 188 and 189 of the Penal Code Act**. It was alleged that on the 2nd day of June 2013, at Katerambare village in Rukungiri district, unlawfully and intentionally caused the death of Kyoha Stephen. The Appellants were sentenced to 26 years' imprisonment on 28th August 2017. The sad 20 facts of this case as can be gleaned from the records of the trial court are that Stephen Kyoha was the father to A1 and A2 and husband to A3, respectively. It is alleged that the appellants were displeased with some of decisions their frail and ageing father was making including a decision to sell off part of his land for his upkeep. Three sons and his two wives 25 openly conflicted with the old man. This family was known to deny the elderly man food as they continually, unashamedly and openly harassed him. Patrick Mbabazi, a son who escaped and is at large, was said to have destroyed the gardens which Kyoha had planted. This matter was reported to the police and Mbabazi was arrested, granted bond but

absconded. On the eve of his murder, the deceased managed to secure a warrant of arrest against Patrick Mbabazi. The local counsel defence secretary arrested Mbabazi but the accused persons resisted the arrest, wrestled down the LC official and set loose Mbabazi. The hostility and resentment against the deceased by his own family was palpable and a matter of concern to the community. It is alleged that on the fateful day, while all the other family members were away, Stephen Khoha, like a lonely buffalo, was attacked and killed by his own children and wives. Florence Kyomugisha, one of the two wives, was acquitted at the trial. Patrick Mbabazi was never apprehended. The three appellants were convicted of murder and sentenced to 26 years' imprisonment. Dissatisfied, the Appellants appealed against both conviction and sentence.

The Appellants' four grounds of appeal are:

1. **That the learned Trial Judge erred in law when he failed to sum up the law and evidence to the assessors which occasioned a miscarriage of justice.**
2. **That the learned Trial Judge erred in law and fact when he convicted the Appellants on the basis of weak and unsatisfactory circumstantial evidence.**
3. **That the learned Trial Judge erred in law and fact when he failed to properly evaluate evidence thereby coming to a wrong decision which caused a miscarriage of justice to the Appellant.**
4. **That the learned Trial Judge erred in law and fact when he sentenced the Appellants to a manifestly harsh and excessive sentence.**

Representation

At the hearing of the appeal the Appellants were represented by Mr. Vicent Turyahabwe on state brief while the Respondent was represented by Ms. Nabisenke Vicky Assistant DPP in the Office of the Director of Public Prosecutions. The Appellants appeared via an audio-visual link from Mbarara Government Prison. Both counsel filed and relied on written submissions.

The Appellants' Case

While submitting on Ground No. 1, counsel for the Appellants contended that the trial Judge did not sum up to the assessors as required by law. Counsel took issue with the record which only contained a phrase that ***"assessors briefed..."*** . He submitted that the phrase does not amount to summing up the law and evidence to the assessors. Counsel relied on **S. 82 (1) of the Trial on Indictments Act,** which imposes a mandatory obligation on trial courts to sum up to the assessors before recording their opinion. He prayed that the conviction and sentence should be set aside on the basis of that irregularity.

Counsel for the Appellants argued Grounds No. 2 and No. 3 together. He submitted that there was no direct evidence against the appellants as there was no single eyewitness that saw any of the appellants commit the offence but the Trial Judge relied only on circumstantial evidence to convict the appellants. Counsel added that the only circumstantial evidence on record relied on by the trial Judge to convict the appellant was on the alleged threats the appellant made to the deceased and the

conduct of the 2nd appellant. Counsel referred to **Simon Musoke v R (1958) 1 EA 715** where it was held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

It was counsel's argument that threats alone do not constitute circumstantial evidence. There must be other co-existing facts and pieces of evidence that are incompatible with the innocence of the accused. He added that prosecution did not prove any reason why the appellants would wish to kill their father.

Counsel also contended that the prosecution evidence was full of contradictions and inconsistences about the threats and who issued them hence it was wrong for the Trial Judge to conclude that it were the appellants who threatened to kill their father.

Regarding Ground No. 4, counsel submitted that the sentence of 26 years imprisonment was harsh and excessive in the circumstances of the case. Counsel contended that there is need to maintain consistency with earlier decided decisions of similar facts. He referred to cases of **Butali Moses & 7 Others v Uganda CACA No. 225 of 2014** where the Court sentenced each of the appellants to 13 years and 9 months imprisonment for murder. He also referred to **Rwabugande v Uganda SCCA No. 25 of 2014** where the Supreme Court reduced the sentence of 35 years for murder to 21 years imprisonment.

Counsel prayed that the sentence of 26 years be set aside and a fresh sentence for the appellants be imposed.

The Respondent's Case

In reply to Ground No. 1, Counsel for the Respondent submitted whereas s. 82 (1) of the T.I.A which provides for the process of summing is couched in mandatory terms, it was also the position of this court and the Supreme Court in **Mawanda Patrick v Uganda CACA No. 210 of 2010** that failure to sum up did not occasion a miscarriage of justice and could not render the trial a nullity. Counsel added that the above notwithstanding, the circumstances of the present case show that summing up was conducted and the Trial Judge only referred to it as a briefing to assessors. He argued that the lack of summing up notes could not be the basis for rendering the full trial a nullity.

Regarding Ground No. 2, Counsel contended that circumstantial evidence has been ruled to be best evidence where there are no other co-existing circumstances, which would weaken or destroy the inference of the accused's guilt. He referred to **Simoni Musoke v R (1958) 1 EA 715.** It was counsel's submission that the circumstantial evidence that was relied upon were the prior threats to kill the deceased by the appellants and their conduct of disappearing from the area did not depict them as innocent. Counsel also submitted that the evidence of PW3, PW4 and PW7 was that the appellants had threatened to kill the deceased on the eve of his murder. Their grudge sprang from a long standing dispute over land. Counsel argued that this was evidence of motive. It was counsel's

submission that the Trial Judge properly evaluated the evidence on record and correctly arrived at the finding that there was sufficient evidence implicating the two appellants in the murder.

In reply to Ground No. 3, counsel submitted that this ground offends the provisions of rule 66 (2) of the rules of this Court, which requires the Memorandum of Appeal to specify which particular points of law or fact are being appealed from. Counsel cited **Opolot Justine & Anor v Uganda CACA No. 155 of 2009** where this court struck out a Ground of Appeal for offending rule 86 (1) now rule 66 (2) of the rules of this court. He prayed that this ground be struck out for offending the above provision.

In respect of Ground No. 4, counsel contended that the appellants were convicted of Murder, which carries a maximum sentence of death and the Trial Judge considered both mitigating and aggravating factors and decided on the sentence of 26 years, which was neither harsh nor illegal in the circumstances. Counsel added that this court has pronounced itself on the sentencing ranges in murder cases in **Muhwezi Bayon v Uganda CACA No. 198 of 2013** where in determining sentence ranges the term of imprisonment for murder of a single person ranges between 20 to 35 years of imprisonment. In exceptional circumstances the sentence may be higher or lower. Counsel submitted that the sentence of 26 years was within the range of sentences passed by this honourable court thus Ground No. 4 lacks merit and should be dismissed.

Consideration of Court

This being a first appeal, this court is required to re-evaluate the evidence and make its own inferences on all issues of law and fact. In this regard **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.1 13-10** stipulates as follows;

(1) "On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) Reappraise the evidence and draw inferences of fact.

(See; **Bogere Moses v Uganda SCCA No. 1 of 1997 & Henry Kifamunte v Uganda SCCA No. 10 of 1997).**

With the above duty in mind, we shall proceed to resolve the grounds of appeal in the present case.

On Ground No. 1, the appellants fault the trial Judge for failing to sum up the law and evidence to the assessors. It was observed that the record lacks the summing up notes.

The law on summing up is provided under **Section 82 (1) of the Trial Indictment Act,** which provides as follows;

"When the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The Judge shall take a note of his or her summing up to the assessors."

This section has been a subject of consideration in many decisions. In **Byamugisha v Uganda (1987) HCB 4** the Supreme Court while discussing the duty of the trial Court in summing up held that;

"When summing up to the assessors the Trial Judge should not be too sketchy. He should have, when doing so, explained to the assessors the ingredients of the offence…the duty of prosecution to prove their case against the accused persons beyond reasonable doubt, and that the benefit of any doubt had to be given to the accused persons…."

This court in **Yunus Wanaba v Uganda CACA No. 156 of 2001** held that;

"As this section indicates, the law does not require the judge to write out a detailed essay of her summing up. It only requires brief notes, as the assessors would have heard all the evidence already. They however need the law explained…That is all the ingredients of the offence and the burden of proof…it must be pointed out that there is no set formula of words to use-they must however be directed that the onus is on the prosecution throughout and secondly that before they convict, they must feel sure of the accused's guilt."

In **Simbwa Paul v Uganda CACA 23 of 2012** this court also noted that;

"It is a good and desirable practice that the substance of the summing up notes to the assessors appears in the record of proceedings. It is the only way an appeal court can tell whether the summing up was properly done. We are however satisfied that this essential step was undertaken by the trial judge and that failure to file the notes on record was not fatal to the conviction."

In Mawanda Patrick v Uganda CACA No. 210 of 2010, it was held that;

*"The Judge therefore erred when she failed to comply with the above provision of the law which is set out in mandatory terms. **(S. 81(2) of the T.I.A).** We however, find that no substantial miscarriage of justice was occasioned to the appellant as the assessor's opinion to convict him of a lesser offence of manslaughter, was rejected by the trial Judge who went on to convict him of a more serious offence*

of murder. Section 34(1) of Criminal Procedure Code Act permits this court to ignore procedural errors and omission if no substantial miscarriage of justice has been caused."

In the instant case, from the court record, the trial judge noted, *"assessors briefed. Opinion to be given on 18/08/2017."*

S. 34 (1) of the Criminal Procedure Code Act, Cap 116 and **S. 139 of the Trial on Indictments Act** mandate this court to set aside a conviction on account of the error of law or fact complained about only where the appellants have shown that the said error occasioned a miscarriage of justice. In the present case, we find that the summing up was done but the only fault was not to include the notes on record, which in our view was not fatal to the appellants' case hence no miscarriage of justice was occasioned. Ground No. 1 thus fails.

Considering Grounds No. 2 and No. 3, the Appellants faulted the Trial Judge for convicting them on the basis of weak and unsatisfactory circumstantial evidence and failing to properly evaluate the evidence on record.

The Supreme Court while commenting on circumstantial evidence in **Katende Semakula v. Uganda SCCA No. 11 of 1994** held as follows:-

"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference..."

Similarly, **in Bogere Charles v. Uganda, SCCA No. 10 of 1996,** Court held that; *before drawing an inference of the accused's guilt from circumstantial evidence, the Court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt."*

Also in the case of **Byaruhanga Fodori v Uganda SCCA No. 18 of 2002,** the Supreme Court pronounced itself on circumstantial evidence as follows: *'It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.'* In the instant case, the circumstantial evidence relied on by the Trial court to connect the appellants with the offence were threats allegedly uttered by the appellants to the deceased prior to his death. Evidence of prior threats was discussed in **Waihi & Anor v Uganda (1968) E.A.278** where the East African Court of Appeal held that *'regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or of impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material…'*

In the present case, there was no direct evidence linking the appellants to the death of the deceased. However, the Trial Judge relied on circumstantial evidence of prior threats allegedly uttered by the appellants to the deceased. The Judge relied on evidence of PW3, PW4 and PW7 who testified about the threats uttered by the appellants. According to PW3 the appellants threatened that they will kill him and litigate with a dead body. PW4's testimony was that she heard

the appellants claim that the deceased was not their father. PW7 testified that she heard A2 say that the deceased would be killed that night, and also heard A2 brag that they had killed the deceased. The Trial Judge further found that; *'a careful analysis of the words said to have been heard by each of the witnesses shows animosity and dislike for the person who was found dead the following day.'* While rejecting the alibi put up by A4; now Appellant No. 2, the trial Judge found, and correctly so in our view, that the disappearance of Appellant No. 2 from the village was unusual. The trial Judge correctly found that Appellant No.2's complicity in causing the death of his father was the reason he was on the run.

In **Obwalatum v Uganda SCCA No. 29 of 2015,** the evidence of prior threats was found to be relevant and admissible. However, it was held that evidence of prior threat cannot stand on its own. It can only be used for corroboration of other evidence which in this case is that the appellant was not only seen at the scene but was also seen fleeing from the scene on his motor cycle. In this case, there was evidence of animosity, rancor and bitterness towards the deceased manifested in a land dispute between the deceased and the appellants and that is why they issued several threats to the deceased. Prior threats were issued on 2nd June 2013 and the deceased in his bed died on 3rd June 2013. Bruises were found on his neck and the nature of the assault was so vicious that his eye popped out. The appellants lived with their deceased father at the time he died. Appellant No.2's conduct of leaving the village and not attending the vigil of his father was not conduct of an innocent person. We would however, find that in the above discourse the witnesses did not directly implicate Appellant No.3 as clearly as they did Appellants No.1 and No.2. The evidence against her is mainly

by PW3 and arises from the fact that she sleeps in the same house with the deceased and only reported the death of the deceased a day later when she came from digging her garden. Much as they had been on bad terms with her deceased who had got a second wife they continued to stay in the same house and wife no.2 stayed in another house. Her explanation is that she came home and slept without talking to her now deceased husband and that she did not call on him the following morning before she went to dig. Her evidence was done when she returned home after the gardening, she proceeded to his room and found him dead. She reported to the authorities. Although the trial Judge accepted as fact the statements of PW3 when he stated that A3 had removed her property from the house, PW3 does not mention what property was removed. We found this statement rather too general for anything to be made of it much less an inference that A3 participated in the murder of the deceased. Not a single item of property she allegedly took was mentioned. Had the trial Judge critically reviewed the evidence of PW3 he would have found that it did not prove beyond reasonable doubt that Appellant No. 3 was involved in the murder of the deceased. We therefore find the conviction against Appellant No. 3 unsafe.

In the result, the circumstantial evidence of prior threats pointed to the guilt of appellants No. 2 and No. 1 thus we find that the trial Judge properly evaluated the evidence on record and came to a right conclusion as regards the first two appellants. Grounds No. 2 and No. 3 also fail in respect of Appellants No. 1 and No. 2 but succeeds. Appellant No.3's appeal succeeds in Grounds No.1 and No. 2. Her conviction is quashed.

Regarding Ground No. 4, the appellants no. 1 and no. 2 faulted the Trial Judge for sentencing them to 26 years' imprisonment, which was a manifestly harsh and excessive sentence.

We are mindful that this court as a 1st appellate court should not interfere with a sentence imposed by the trial court where the trial court has exercised its discretion on sentence, unless the exercise of that 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 the trial court ignored to consider an important matter which ought to have been considered while passing sentence or where the sentence imposed is wrong in principle (**See Kiwalabye Bernard v Uganda SCCA No. 143 of 2001).**

, 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.

Kizito Senkula v Uganda SCCA No 24 of 2001, stands for the proposition that 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 the instant case, the appellants were each sentenced to 26 years imprisonment.

The Supreme Court in **Aharikundira v Uganda SCCA No. 27 of 2015** underscored 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 have now considered the issue of consistency in sentencing for example; **In Turyahika Joseph v Uganda CACA No. 327 of 2014**, court emphasized 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 **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.

Relatedly, 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 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.

Further in **Atiku Lino v Uganda CACA No. 41 of 2009**, the Appellant was sentenced to life imprisonment and on appeal; the sentence was reduced to 20 years' imprisonment.

As noted earlier the appeal in regard to Appellant No. 3 was allowed. Her conviction was quashed and she stands acquitted. However, as concerns Appellants No. 1 and No.2, we are alive to the fact that courts are enjoined to maintain consistency in sentencing as noted in the above authorities. In the circumstances of this case, we find that the sentence of 26 years was harsh and excessive. We accordingly allow the appeal against the sentence against Appellant No. 1 and No.2 and set aside the sentence of 26 years imposed by the Trial Court.

We now exercise the jurisdiction of this court under **S. 11 of the Judicature Act**. Each of the appellants is hereby sentenced to 20 years' imprisonment. In line with **Article 23 (8) of the Constitution,** we set off the 4 years and 2 months the appellants had spent on remand.

As noted earlier, the conviction against Appellant No. 3 was quashed and she is accordingly acquitted and immediately set at liberty unless held on other lawful charges.

Finally, each of the two Appellants No.1 and No.1 shall serve a sentence of 15 years and 10 months' imprisonment W.E.F 18th September 2017 being the date of sentence.

Dated and Signed this ....24th.....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