THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

[Coram: Barishaki, Mugenyi & Gashirabake, JJA]

CRIMINAL APPEAL NO. 407 OF 2016

(Arising from High Court Criminal Case No.037 of 2015)

HABIB SALIM..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda Holden at Arua, before John Eudes Keitirima. J delivered on the 1st November 2016)

JUDGMENT OF THE COURT

Introduction

On 1st November 2014 at Gobiri Nyaria cell in Maracha district, at around 6:30am the deceased who was then 75 years was heard raising alarm near her home. When the alarm was responded to by one of the neighbours' the accused was found moving away from the scene where the deceased was found lying unconscious.

The relatives of the deceased were immediately informed including her niece one Onziru Night who responded and on arrival rushed the deceased to hospital. When she arrived at the hospital she was given a drip and she gained consciousness and even requested to be taken for a long call. This was done by Onziru Night. That at that moment Ms. Night Onziru asked the deceased what happened and she told her that the accused boxed her in the chest and when she fell down the accused continued kicking her in the stomach. The deceased said she made an alarm three times.

That while narrating, the deceased voice started narrowing and she started vomiting blood and eventually collapsed and died. When the post-mortem was done it was found out that the cause of death was respiration failure combined

with closed head injury and abdominal visceral organ contusion all found to be due to some physical violence.

The Appellant Habib Salim was charged with the offence of murder of a one Driciru Hellen Contrary to sections 188 and 189 of the Penal Code Act. Upon trial, he was convicted of the offence of murder and sentenced to 35 years imprisonment. Being dissatisfied with the conviction and sentence, he appealed on grounds that:

1. The learned trial Judge erred in law and fact when he held that the Appellant was responsible for the death of the deceased, Driciru Hellen in the absence of corroborative evidence to that effect.
2. The learned trial Judge erred in law and fact when he sentenced, the Appellant to a long custodial sentence without taking into account the pretrial remand period of two years that he had spent in prison.
3. The learned trial Judge erred in law and fact when he sentenced the Appellant to 35 years in prison which sentence is harsh and excessive in the circumstances

Representation

Ms. Daisy Patience Bandaru was represented the Appellant. Ms. Nakafeero Fatinah and Mr. Bayo William represented the Respondent.

Duty of this Court.

First of all, our duty as a first appellate court is to re-evaluate evidence. Following the cases i.e. **Pandya vs R (1957) EA 336; Kifamunte Henry vs Uganda Criminal Appeal No.10.1997, Bogere Moses and Another v Uganda Criminal Appeal No.1/1997**, the Supreme Court stated the duty of a first appellate court in **Father Narnensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04** at Mengo from **CACA 47/20000 [2004] KALR 236.**

"The court observed that the legal obligation on a first appellate court to re-

appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:- "It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

The Court with approval, quoted the Court of Appeal of England which stated the Common Law position **in Coghlan v Cumberland (1898) 1ch.704** as follows:-

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other; materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen." In Pandya vs R (1957) EA 336, the Court of Appeal for Eastern Africa quoted the passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction."

We shall, therefore, in the course of this judgement re-appraise the evidence on record bearing in mind that we did not observe the demeanor of the witnesses.

Ground 1

Submission by counsel for the Appellant

Counsel for the Appellant submitted that there was no direct evidence identifying the Appellant as the deceased's assailant. **PW2**, said that it was the deceased who said the accused had boxed her yet in the same evidence she said she found the deceased lying unconscious. This amounted to a dying declaration as defined under Section 30 of the Evidence Act which is admissible. This should be taken with caution as the deceased was not there to be cross examined, and although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought. Counsel cited **Tindigwihura Mbahe V Uganda; SC Criminal Appeal No. 9 of 1987**.

Additionally, **PW2** testified that when she had an alarm, she went out and found the deceased lying unconscious and she saw the accused/ Appellant in about 30 metres from the scene walking away. However, there was nothing to show that the deceased was coming from the scene of crime or that he even noticed the deceased. The trial court treated this as circumstantial evidence and relied on this to base its conviction. Court needed to treat such evidence with caution as was in the case of **Byaruhanga Fodori v Uganda, SC criminal Appeal No. 18 of 2002; [2005] 1 ULSR** 12.

Counsel further submitted that the court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. Counsel relied on **Tindigwihura Mbahe Uganda SC crim appeal No. 9 of 1987,** where court stated that circumstantial evidence must be treated with caution and narrowly examined, because evidence of this kind can easily be fabricated. In the instant case, the Appellant was not found at the scene, it is possible that the Appellant was not aware of the fact that deceased had been assaulted and that he did not see the deceased lying at the scene as he was on his way to Nyadri. This may also point to the probable fact that the deceased's assailant upon commission

of the offence escaped unseen. All this show that the circumstantial evidence of **PW2** was capable of other explanation.

Furthermore, PW3, who was the investigating officer did not state the circumstances under which the Appellant was arrested. His evidence is that the Appellant was arrested by Jua kali Group of Maracha Trading Centre, none of whom was called as a witness.

Counsel then submitted that the learned trial judge erred in law and fact when he held that the Appellant was responsible for the death of the deceased. In the absence of corroborative evidence to that effect and the evidence that he used as corroboration was not content enough to pin the Appellant as the person responsible for the death of the deceased.

Submissions by counsel for the Respondent.

Counsel submitted that corroborated evidence is evidence that strengthens or confirms already existing evidence in court. It is used to support testimony of a witness as was in the case of **Ntambola V Uganda, criminal appeal No. 34 of 2015**. In this case, it was stated that evidence of a single identifying witness was not corroborated but was sufficient to convict the Appellant. What is required of court is to satisfy itself that the witness was truthful and reliable. In the instant case the prosecution case was premised on a dying declaration and evidence of a single identifying witness. It was the testimony of **PW1** who had been informed by the deceased that the accused continuously boxed her in the region of the heart and she fell down and even after she had already fallen, the accused did not stop, and that **PW1** should take care of her children as she might not survive, she then shortly passed on. This statement amounted to a dying declaration under **Section 30 of the Evidence Act Cap 6.**

In the case of **Kazarwa Henry V Uganda, Criminal Appeal No. 17 of 2015**, the Supreme court cited and quoted the case of **Tindigwihura Mbahe V Uganda**

(Supra) where it was held that evidence of a dying declaration must be received with caution because the test of the cross examination may be wholly wanting since it is made in absence of the accused.

In **Oyee George V Uganda Court of Appeal Case No. 159, 2012** court emphasized the need for corroboration of a dying declaration before it can be used against the accused, in the instant **PW1** provided the evidence of a dying declaration which was corroborated by evidence of **PW2** whose testimony was that she knew both the accused and deceased and that on the fateful night, she found the deceased lying unconscious unable to talk and also saw the appellant walking away from the scene of crime. The evidence of **PW2** was corroborative of the dying declaration and the identification of the Appellant whose conduct of walking away from the crime scene was inconsistent with his innocence.

Counsel also submitted that the same **PW2** appeared to be the only single identifying witness in court. Counsel further stated that the law on single identifying witness was laid out in the case of **Nzabaikukize Jamada vs Uganda SCCA no. 01/2015 and Abdullah Bin Wendo and Another Vs R (1953)2 EACA 583**. Court considered the evidence on record as a whole to satisfy itself on conditions under which the identification was made to include light during the incident, familiarity of the appellant with the witness, distance between witness and appellant, length of time among others. The testimony of **PW2** was that she knew the Appellant very well. His home is near the scene of crime, it was 7:30am when she saw him about 30 meters walking away from the crime scene and even past his home, hence the conditions were favourable for identification and **PW2** made the correct identification of the Appellant.

Counsel concluded by stating that the evidence connects the Appellant to the crime and indeed he was responsible for the death of the deceased hence the trial Judge correctly convicting him as charged and the ground of appeal should fail.

Consideration of Court.

This was a case for murder and the prosecution has the burden to prove the following ingredients of the offence beyond reasonable doubt

1. Death of a person.
2. The death was unlawfully caused.
3. The death was caused with malice aforethought.
4. The accused persons participated in or caused the death of the deceased.

In this particular case, it is not in dispute that there was a death of a person. The death was unlawfully caused. Death was caused with malice aforethought. What is in dispute in this case is the participation of the Appellant. To support their case, the prosecution brought evidence of three witnesses.

With regard to the ingredient of participation, PW 1 stated that she was called at 7:30am by a neighbour that the deceased had been boxed in the stomach. That she rushed and they took the deceased to hospital at Nyadri. By then the deceased was unable to talk. That they took the deceased to Ovujo hospital. That the nurses they found at the hospital tried to put a drip on her. She averred that as they did this feaces started coming out of her body so the deceased requested to be taken to the wash room. That the deceased told her that the accused had boxed her in the region of her heart and she fell done. The accused boxed and kicked her. The deceased then vomited blood and then passed on shortly.

PW2 on the other hand testified that, on 1st November 2014 at around 7:30 a.m. she was at home, I heard an alarm, then I ran out and found the deceased lying down. She tried to talk to her but she was unable to talk as she was unconscious. many people gathered. The LC's arrived and said she should be taken to hospital. she averred that she never found the accused at the scene but he was in some distance of about 30 metres. the accused was walking away from the scene of the crime.

This is a case of circumstantial evidence and a dying declaration. A dying declaration was defined in The **Black's Law Dictionary, 6th Edition** defines as;

> 'a statement made by a person who believes he is about to die in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them."

Under **Section 30 of The Evidence Act**, a dying declaration is a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them.

Legally, a dying declarations is always received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred in circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for (see ***R. v. Eligu S/o Odel and Epangu S/o Ewunya (1943) 10 EACA 90***; ***Pius Jasunga v. R. (1954) 21 EACA 331***).

We find the corroboration of the dying declaration by PW 1 who stated that he saw the Appellant walk away from the scene of the crime. PW1 responded to the alarm of the deceased. The conduct of the Appellant walking away from an alarm of an elderly woman of 75 years is not one of an innocent person. She was not only elderly but the deceased was also a relative.

The dying declaration was also corroborated by Exh P3 which shows that the deceased had fractured ribs 8 to 9 left side chest crepitations with bleeding into pleural space. The cause of death was found to be Respiration failure due to Pheumo Haemothorax combined with 2 closed head injury and 3 abdominal

visceral organ contusion all due to some physical violence. This aligns with the dying declaration made to PW2 by the deceased that she was boxed and kicked by the Appellant.

Circumstantially, PW2 testified that the Appellant was walking away from the scene of the crime after hearing an alarm, this is a conduct of a person who is not innocent.

Considering that this was early in the morning at around 7:30am, the identity of the Appellant was not mistaken. We therefore find that there is no other logical conclusion other than the fact the Appellant was the one responsible for the death of the deceased.

This ground fails.

Ground 2

Submissions by counsel for the Appellant

Counsel submitted on **Article 23(8)** of the Constitution that:

> "where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

The same position was discussed in the case of **Rwabugande Moses V Uganda; SC Crim Appeal no. 25 of 2014**. It was noted that **Article 23(8)** makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. In the instant case, the evidence on record contained in **page 34** of the record of appeal shows that the Appellant at the time of conviction had been on pretrial remand for a period of 2 years, however there is no evidence to show that the trial judge considered the pretrial remand period save for stating so during sentencing.

As rightly stated by the Supreme Court, in **Rwabugande Moses' case** *(Supra),* just stating that court has taken into account the time spent on remand is not enough because consideration of the remand period should necessarily mean reducing or subtracting that period from the final sentence which was not done in this case, hence making the sentence imposed on the appellant illegal as it contravenes the provisions in **Article 23(8)** of the constitution. Counsel prayed that this ground succeeds.

Submissions by counsel for the Respondent.

Counsel submitted that the trial judge did not error in law and fact when sentencing the Appellant that the 2 years' pre-trial remand was considered.

Counsel referred to the case of **Bulila Christiano and another V Uganda Criminal Appeal NO. 61 of 2015** in which the case of **Nashimolo Paul Kibolo V Uganda Criminal Appeal No. 46 of 2017,** was discussed to the effect that the provision of **Article 23 (8)** does not dictate on court to make a reduction on the sentence already imposed, it further held that at arriving at an appropriate sentence the trial court must calculate the period a convict has spent on remand and subtract it from the proposed sentence. This decision was reached in a judgement delivered on 3rd March 2017. That in accordance with the principle of precedent in court, lower courts must follow the position of the law from that date henceforth.

Subsequently in the case of **Sebunya Robert and another V Uganda SCCA no. 58 of 2016**, it was held that the **Rwabugande decision** *(Supra)* does not have any retrospective effect on the sentences which were passed before it. Counsel submitted that since counsel for the Appellant relied on a judgment delivered on 1st November 2016 which time the precedent was not in place hence having no binding force on the decision taken in the instant case.

Counsel concluded by submitting that the article mentioned was not contravened hence this ground of appeal should fail.

We agree with both counsel for the Appellant and the Respondent that the position of the law is that the sentencing court has to put it consideration the time spent on remand by the accused while sentencing according to **Article 23(8)** of the Constitution.

We however disagree with the submissions made by counsel for the Appellant that the trial judge in this case was bound by the position of the law in **Rwabugande Moses' case** *(Supra),* of arithmetically deducting the years spent on remand by the accused. The position of the law was rectified in the case relied on by counsel for the Respondent in **Nashimolo Paul Kibolo V Uganda Criminal Appeal No. 46 of 2017,** where it was held that the arithmetic calculation of deducting years spent on remand does not act retrospectively but it only applies to **decisions that were delivered after 3rd March 2017, when the Rwabugande Moses***(Supra)* decision was delivered. This instant case was decided on the 1 November 2016 and before the **Rwabugande case** *(Supra)*

This ground fails.

Ground 3

Submissions by Counsel for the Appellant

Counsels' contention was premised on the fact that considering the sentence of 35 years as compared to similar decided murder cases either by this honourable court or the Supreme Court, there is no uniformity, and that the said sentence is harsh and excessive in the circumstances.

Additionally, counsel submitted that there is need for this court as an appellate court to maintain consistency or uniformity in sentencing as was in the case of **Mbunya Godfrey V Uganda; SC Crim Appeal No. 4 of 2011**. Furthermore, in the case of **Rwabugande Moses v Uganda** *(Supra)*; the Appellant who was

convicted of the offence of murder was sentenced by the trial court to imprisonment for a period of 35 years and on appeal against sentence to the Supreme Court, in light of the time spent on remand and other mitigating factors, the sentence was reduced from 35 years to a term of imprisonment of 21 years. Similarly, in the case of **Mbunya Godfrey v Uganda; SC Crim. Appeal No.4 of 2011**, where the Appellant was a first-time offender, the Supreme Court set aside the sentence of death and substituted it with a term of imprisonment of 25 years on the appellant who had murdered his wife.

Counsel also submitted on the case of **Akbar Hussein Godi V Uganda: SC Criminal Appeal No.3 of 2013**, where the Appellant had been sentenced by the trial court to 25 years' imprisonment for the murder of a spouse and was upheld. Similarly, in **Korobe Joseph V Uganda; CA Crim Appeal No. 243 of 2013,** where the Appellant had been sentenced by the trial court to 25 years imprisonment for murder, the court of appeal reduced the sentence to 14 years, because he was of advanced age and had shown remorse.

Counsel concluded basing on the above authorities that the sentence in the instant case is harsh and manifestly excessive in the circumstances and prayed that court interferes with the sentence to bring it to uniformity with sentences made in similar offences as shown. He additionally prayed that court allows the appellants appeal against sentence and substitutes 35 years imprisonment with a period of 20 years from the date of conviction.

Submissions by Counsel for the Respondent.

Counsel cited **Olara John Peter V Uganda Court of Appeal case no. 30 of 2010**, court outlined the law governing interference with the sentence and held that the criteria to be followed is set down in the case of **Kiwalabye Bernard V Uganda Supreme Court CA no. 143 of 2001**, where court stated that the appellate court is not to interfere with the sentence imposed by the trial court which had exercised its discretion on sentence unless the sentence imposed is

manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while the sentence imposed is wrong in principle.

Additionally, the Appellant had been indicted for the offence of murder contrary to Sections 188 and 189 of the Penal Code Act, which offence attracts a maximum penalty of death upon a conviction. Counsel submitted that the trial Judge considered both aggravating and mitigating factors arriving at a lenient sentence of 35 years. Such a sentence was neither illegal, harsh nor excessive and the trial judge rightly directed himself on the law and applied it to the facts on record. Counsel then contended that this court has no basis to interfere with the sentence and prayed that the appeal be dismissed since it lacks merit and the Appellant conviction and sentence be upheld.

Consideration of Court.

It is now an established position of the law that a sentencing court is bound by the principle of consistency. This principle is to the effect that the sentences passed by the trial Court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts. See: **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015.**

Considering whether the sentence is harsh or excessive the court is guided by the principle of consistency. To ensure this consistency the guidelines provide for ranges to guide the sentencing judge. **Guideline 19(1) of the Constitution (Sentencing Guidelines)** provides for sentencing range for capital offences. It provides that:

> "The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence."

When imposing a custodial sentence on a person convicted of the offence of murder, the third schedule of The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, item 3 of part 1** the sentencing range for murder starts from 35 years to death sentence. This can be reduced or increased depending on the mitigating and aggravating factors.

Additionally, the sentencing court is guided by the principle of consistency and uniformity when sentencing. **Guideline 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"

The offence in question in this matter is murder contrary to **Section 188** of the **Penal Code Act**. Under the Penal Code the punishment for murder under **Section 189** is death. Since the case of **Suzan Kigula and other vs. A.G** (*Supra)* the death sentence was overruled. This means this sentence is not hardly considered.

The holding of the trial court as partially laid above demonstrates that the trial court put into consideration the mitigating factors and aggravating factors. The mitigating factors were that the accused was still young and capable of transforming. Having considered the mitigating factors, the trial judge could not be faulted on that principle. In **Aharikundira vs. Uganda [2018] SC Criminal Appeal No.27 of 2015,** court held that;

> "In consideration of the aggravating factors and mitigating factors of the case, and in the interest of consistency we are of the view that the death sentencing this case should not stand. The death sentence is hereby set aside and substituted with a sentence of 30 years to run from the time of conviction in the High Court"

In the above case, the Appellant brutally murdered her husband and cut off his body parts in cold blood.

In **Ndyomugenyi vs. Uganda, Supreme Court Criminal Appeal No.57 of 2016,** the Supreme Court confirmed a sentence of 32 years' imprisonment for a murder as passed by the re-sentencing judge and confirmed by the Court of Appeal.

In **Mpagi Godfrey vs. Uganda Supreme Court Criminal Appeal No 63 of 2015**, the Supreme Court confirmed a sentence of 34 years' imprisonment for murder as handed down by the sentencing judge and confirmed by the Court of Appeal.

In the spirit of consistency, we find that the sentence of 35 years was not harsh considering the fact that this was an elderly woman with few years left for her to rest in peace. The Actions of the Appellant were brutal and the actions deserve the sentence handed down.

We find no merit in this Appeal

1. The appeal is dismissed.
2. Conviction of the lower court upheld.
3. Sentence of the lower court is upheld.

We so order

Dated at Arua this 28th **day of** April **2022**

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CHEBORION BARISHAKI

JUSTICE OF APPEAL

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MONICA MUGENYI

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL