THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE
CRIMINAL APPEAL NO.168 OF 2013
(CORAM: Obura, Bamugemereire & Madrama, JJA)

FLORENCE ABBO::APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the Decision of Lawrence Gidudu J, dated 2nd February, 2013 in High Court Criminal Session No.83 of 2012 Holden at Mbale)

JUDGMENT OF THE COURT

The appellant, Florence Abbo was indicted for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act. It was alleged that the Appellant on the 12th day of August 2011 at Pajwenda Trading Centre in Tororo District with malice aforethought murdered John Peter Etyang alias Junior.

Background

The background to this appeal as ascertained from the lower court record is that at all material times, the appellant and Otundi the father of John Peter Entyang alias Junior, cohabited as man and wife in Pajwenda Trading Centre in Tororo District. However, Florence Abbo, the appellant found Otundi with children from a previous relationship. These children included John Peter Etyang alias Junior, now deceased. It is alleged that on the 12th of August 2011 at 6.00am in the morning Otundi, the man, went to the garden leaving behind the appellant and his children still sleeping at home. He bore some angst about her tardiness to go and till the garden that morning but the appellant quelled his fears when she soon joined him. According to Tolophisa Nyafwono, a sister of the deceased, on that fateful morning, the appellant instructed her to go to the village well and fetch water for home use. She stated that while she was preparing to go, the deceased came out of the house early and with an unusual bad smell oozing out of his mouth.

Nyafwono asked the deceased what foul drink he had imbibed. The infant replied that their mother (meaning the appellant) had given him "a coke soda" to drink. He then led Nyafwono to an empty mineral water bottle from which he drank the "soda". It contained a smelly substance. At that point the appellant immediately rushed out of the house and went to join her husband in the garden. Immediately after, the deceased started crying in anguish and straightway began vomiting foul smelling substances and was quickly losing his life. No amount of first aid could reverse the situation. The infant was carried to the nearby clinic where he was put on drip but passed on 30 minutes later.

The appellant was charged with the murder of John Peter Etyang alias Junior. She was convicted and sentenced to 40 years' imprisonment. Dissatisfied, the appellant lodged this appeal with two grounds contained in her memorandum of appeal below:

Grounds of appeal

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 meted out a manifestly harsh and excessive sentence of 40 years against the appellant.

Representation

At the hearing of the appeal the appellant was represented by Ms Faith Luchivya on State Brief while Ms Immaculate Angutoko, a Chief State Attorney from the office of the ODPP represented the Respondent.

Counsel Faith Luchivya prayed that leave be granted to file the Notice of appeal and Memorandum of appeal out of time and to validate the Memorandum of appeal under r 2 (2), 5, 43 (3) (a) of the Court of Appeal

Rules. Counsel for the respondent had no objection to the prayers thus Court allowed the application and validated the Memorandum of appeal. Both counsel for the respective parties filed written submissions, which have been adopted, by this court.

Ground No. 1: 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.

Counsel for the appellant submitted that there was nothing on record to prove that the trial judge summed up the law and the evidence in the case to the assessors or that he took a note of his summing up to the assessors. Counsel invited this court to consider the record of appeal, which allegedly shows that on 15th November 2013, there was summing up. She submitted that there is an opinion of Caroline Were, one of the assessors but there is no record leading to her opinion. It was counsel's submission that this was contrary to the mandatory provisions of the law under s. 82 (1) of the Trial on Indictments Act.

Counsel referred us to Adiga v Uganda CACA No. 157 of 2010 where this court noted that;

"... We note from the court record that after the closing submissions of both the State and the defence, the assessors gave their opinion at pages 46-48. There is no record of the summing up notes by the learned trial Judge to the assessors... We agree with both counsel that this provision is couched in mandatory terms and that the failure of the learned trial Judge to adhere to it rendered the trial a nullity and thus occasioned a miscarriage of justice..."

It was counsel's submission that the finding of the Trial Judge ought to be quashed and the sentence set aside on the basis of these irregularities.

Counsel averred that since the appellant has already been on remand since 2013, the conviction ought to be quashed and sentence set-aside on that basis.

In reply to Ground No. 1, counsel for the respondent submitted that he conducted due diligence by requesting for the handwritten version (original) record of proceedings before the trial court and upon perusal confirmed that the learned trial Judge in fact summed up to the assessors and he handwritten record of proceedings was evidence that summing up indeed did happen. Counsel added that both assessors subsequently advised the Trial Judge to convict the appellant and that this information was brought to the attention of counsel for the appellant. It was counsel's contention that this ground is moot and should be struck out.

Ground No. 2: That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence of 40 years against the appellant.

Counsel for the appellant submitted that in sentencing there must be consistency. She referred to Aharikundira v Uganda [2018] UGSC 49 where court noted:

"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"

While sentencing, an appellate court must bear in mind that it is setting guidelines upon which lower courts shall follow. According to the doctrine of *stare decisis*, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained act as sentencing guidelines to

the lower courts in cases involving similar facts or offences since they provide an indication on the appropriate sentence to be imposed."

Counsel further cited Tumwesigye v Uganda CACA No. 46 of 2012, where the appellant was convicted of the offence of murder and sentenced to 32 years' imprisonment. On appeal, court set aside the sentence of 32 years' imprisonment and substituted it with 20 years' imprisonment.

Counsel further referred to Mulolo v Uganda CACA No. 504 of 2017; where a sentence of 15 years' imprisonment for murder was meted out on the appellant by court. It was counsel's prayer that the harsh sentence of 40 years is reduced so that the principle of consistency in sentencing is maintained.

In response to Ground No. 2, counsel for the respondent submitted that sentencing is a discretion of a Trial Judge and an appellate court will only interfere with a sentence imposed if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances as held in Bernard Kiwalabye v Uganda SCCA No. 143 of 2001.

Counsel referred to Kyalimpa Edward v Uganda CACA No. 10 of 1995 where it was held that; an appropriate sentence is a matter of discretion for the sentencing Judge. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence by the trial judge was manifestly so excessive as to amount to injustice.

It was counsel's argument that the trial judge considered the mitigating and aggravating factors and gave reasons for his sentence. Counsel contended that the sentence is legal and consistent with sentences dispensed by this honorable court and the Supreme Court.

Counsel referenced Bakubuye Muzamiru & anor v Uganda SCCA No. 56 of 2015, where the appellants were convicted of murder and aggravated robbery and sentenced to 40 years' imprisonment on a count of murder and this honorable court deemed the sentence neither harsh nor excessive and on further appeal to the Supreme court, the sentence was confirmed. Further that in Sekawoya Blasio v Uganda SCCA No. 24 of 2014; the appellant was convicted of 3 counts of murder of his biological children and sentenced to life imprisonment on each count. This honorable court dismissed the appeal against conviction and sentence. The Supreme Court confirmed the decision that the appellant was sentenced to spend the rest of his natural life in prison. In Sunday Gordon v Uganda CACA No. 103 of 2006, this honorable court saw no reason for interfering with the discretion of the trial Judge who imposed a life sentence against the appellant for murder. In Budebo Kasto v Uganda CACA No. 0094 of 2009 where this court upheld a conviction and sentence of life imprisonment on a count of murder and aggravated robbery respectively.

It was counsel's averment that a sentence of 40 years' imprisonment in the circumstances was appropriate thus she invited this court to uphold the sentence and dismiss the appeal.

Consideration of the Court

We have cautiously considered the submissions of Counsel, the record and authorities availed to us. We are alive to the duty of this court as a first appellate court to reappraise all the evidence at trial and come up with our own inferences of law and fact. (See Kifamunte Henry v Uganda SCCA No. 10 of 1997).

Regarding Ground No. 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.

We had the opportunity to review the lower court record and established in the original hand written record of proceedings dated 15th November 2013, the trial Judge indicated that; '*Summing up notes explained to assessors.*'

We found the summing up notes of the trial Judge fully and clearly explained and noted down for the assessors.

On the same date, Caroline Were one of the assessors read her verdict, she stated that; '*...the running away for about 4kms and hiding in a bush was not innocent. She is guilty and we advise Court to find her so.*"

We must state from the onset that in a trial on indictment the presence of assessors is obligatory and their admission, oath, contestation, if any and summing up must at all times be effectively placed on record.

The tail end of a trial involving assessors involves the trial judge laying out instructions or directions commonly known as summing up. This ought to be a clear and concise rendering of the law and fact as regards a particular case. This is aimed at assisting the laymen assessors to arrive at a reasoned advisory opinion which they then render to the trial Judge. I hereby hasten to add that summing up in our circumstances cannot be compared to jury direction in jurisdictions where a jury of a man's peers will pass a verdict against him. A jury instruction or direction is a guideline given by the judge to the jury about the law they will have to apply to the facts they have found to be true. The purpose of the instructions is to help the jury arrive at a verdict that is well-grounded in the law. Where a jury of twelve men and women are chosen they persons whose social standing is equivalent to the appellant's peers and they become are final decision makers. In this case it is not a judge-led sitting like we have here. It is jury led. The judge is simply like a football umpire. It is imperative on the part of a Judge presiding over

a jury-led trial to give clear jury directives in order for this group of lay men to deliberate with knowledge and understanding before passing a verdict or guilty or not guilty.

The circumstances obtaining in a jury-led trial are not what obtains here in Uganda. In Uganda where we have a Judge-led trial and the assessors who cannot really be equated to jurors simply offer a layman opinion which the trial Judge may either accept or decline.

When handling the summing up to assessors the High Court regulated by s. 82 of the Trial on Indictments Act in matters of procedure while trying capital offendors. Here is what it stipulates.

82. Verdict and sentence.

(1) 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.

(2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.

(3) Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment.

(4) The assessors may retire to consider their opinions if they so wish and during any such retirement or, at any time during the trial, may consult with one another.

(5) If the accused person is convicted, the judge shall pass sentence on him or her according to law.

On many occasions this court has discussed the requirement of complying with section 82 and other related sections, in the light of Article 126(2) e of the Constitution of Uganda. The article 126(2)e enjoins courts to administer substantive justice without undue regard to technicalities. A similar situation was discussed in Byaruhanga Fodori v Uganda CACA 24 of 1999 and the justices opined to the effect that the above sections should be read as rules of procedure. Substantive justice in this case would be not so much

that assessor summing up is on record but rather that the full trial took place and the assessors were present. The details of how the assessors were summed up to should not form part of substantive justice unless it was shown that it in some way impinged on the appellant's right to be heard. While they differ slightly, Komakech v Uganda SCCA No. 10 of 1990 and Okwonga Anthony v Uganda SCCA No. 8 of 2002 both of which were sighted with approval in Geoffrey Kazinda v Uganda CACA 179 of 2020 and 208 of 2020 underscore the case that whereas s. 82 is couched in mandatory terms, it is in effect directory. Simply put, the sections as regards the rules of procedure in dealing with assessors ought to be treated as hand maidens of justice and not as substantive justice. This is a slight departure from our sister jurisdiction Kenya in Angela v Republic [2001] EA 125. Failure to comply with the rules of procedure to the letter should not be reason to upset a full trial.

We therefore find that the trial Judge clearly summed up his notes to the assessors as required by law and had counsel for the appellant been vigilant enough to analyze the entire record, she would have found the same.

The above notwithstanding, and for purposes of future reference, even if the summing up notes had not been recovered, there is good authority to suggest that indeed the notes do not have to exist for this court to make a finding that the trial Judge summed up to the assessors where a full trial has been held and concluded.

In view of the forgoing discussion we are of the view that this ground lacks merit and is hereby dismissed.

In regard to Ground No. 2, it is settled law that sentencing is a discretion of a trial Judge and an appellate court will only interfere with a sentence of a lower court where in exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a

miscarriage of justice or where court ignores to consider an important matter which ought to be considered or where the sentence is illegal. Counsel referred to Kiwalabye Benard v Uganda CACA No. 143 of 2001 cited with approval in Kawooya Joseph v Uganda CACA No. 0512 of 2014.

We are also cognisant of the fact that we cannot interfere with the sentence imposed by the trial court which exercised its discretion unless 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. (See Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000 and Livingstone Kakooza v Uganda SCCA No. 17 of 1993).

In the instant appeal, counsel for the appellant contended that the sentence 40 years against the appellant was harsh and excessive.

We have had the opportunity to reappraise the sentence passed by the learned Trial Judge in his judgment when he stated that;

> *"No previous convictions ore known in this case. She has been on remand for 2 years 2 months and she is a young woman of 37 years. The convict is said to have one daughter and other dependents and she is sickly on treatment for HIV. However, the offence of Murder is a grave one. The convict poisoned a child of her husband by deceiving him that the substance was soda. The facts of this case show that the convict as a step mother was jealous of the step children she found in marriage. Ln stead of opting to leave the marriage she chose to commit on offence of murder of one of the children using a very cruel method of poisoning a 6-year-old boy to death. The sentencing guidelines provide for the starting point of 35 years and down words to 30 years or upwards to death. Considering all the circumstances of this case the submission by both counsel and after reducing two*

years she has been on remand I sentence the convict to 40 years imprisonment."

We note that in Robert Nkonge v Uganda CACA No. 148 of 2009 court upheld a sentence of death against the appellant who had murdered his wife. Similarly, in Bukenya Muhammad & 2 Ors v Uganda CACA No. 903 of 2014, this court upheld a life sentence imposed on the 1st appellant for his participation in the brutal murder of his brother.

We have taken into consideration the factors such as the antecedents and age of the appellant at the time the trial judge passed a sentence against her. The appellant was 37 years at the time she committed the offence and had no history of offending. We have however looked at the circumstances under which the crime was committed especially the fact that she poisoned and murdered the victim who was her stepson over whom she had custody and a duty of care.

We are mindful of the above principles of law considering earlier decisions of this Court and the Supreme Court on sentencing as discussed above.

We note that there can hardly be consistency in the sentences of this court where each case presents its own unique facts that are distinguishable. However, the nature of this offence and the manner in which it was committed clearly were unique and rare. We agree with the learned Chief State Attorney, for the respondent when she relied on Bakubuye Muzamiru & anor v Uganda SCCA No. 56 of 2015, where the appellants were convicted of murder and aggravated robbery and sentenced to 40 years' imprisonment on a count of murder and this honorable court deemed the sentence neither harsh nor excessive and on further appeal to the Supreme court, the sentence was confirmed. Indeed, this is one of those cases where this court has no reason to interfere with the discretion of the trial Judge.

As a result, and given the totality of circumstances of this case, we are of the view that the prison sentence of 40 years, as earlier passed, was appropriate.

Nota Bene

Our brother the Hon. Justice Christopher Madrama JA does not agree with the sentence and therefore has not endorsed this judgment.

Dated at Kampala this 18th Day of ~~December~~ January ~~2022~~ 2023.

Hon. Lady Justice Hellen Obura
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal