

5 **THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MASAKA**

(Coram: Richard Buteera DCJ, Catherine Bamugemereire JA,  
& Eva K. Luswata JA)

10 **CRIMINAL APPEAL NO. 0538 OF 2016**

**BETWEEN**

**1. KAPARAGA PAUL**

15 **2. NANKWATSA JULIUS:..... APPELLANTS**

**AND**

**UGANDA:.....RESPONDENT**

20 **[Appeal from the Judgment of the High Court sitting at Masaka in  
Criminal Session No. 0149 of 2016 by Hon. Justice Dr. Flavian  
Zeija delivered on 22<sup>nd</sup> December, 2016]**

**JUDGMENT OF THE COURT**

25 **Introduction**

1] The appellants were indicted with two counts of aggravated robbery contrary to 285 and 286 of the Penal Code Act, and murder contrary to Section 188 and 189 of the Penal Code Act. It was stated in the indictment that Kaparaga Paul, Nankwatsa Julius and Mwanje Alex during the night of 4<sup>th</sup> - 5<sup>th</sup> January 2013 at Kyambogo village in Sembabule District robbed Frank





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5 Tumusiime of his motorcycle Reg. No. UDX 826D Bajaja Boxer  
valued at 3,600,000/= and at or immediately before the said  
robbery caused the death of Frank Tumusiime, and that  
Kaparaga Paul, Nankwatsa Julius and Mwanje Alex during the  
night of 4<sup>th</sup> – 5<sup>th</sup> January 2013 at Kyambogo Village in Sembabule  
10 District murdered Frank Tumusiime.

2] The facts confirmed by the trial Judge in his judgment are that on  
the 4<sup>th</sup> day of January 2013, Frank Tumusiime the deceased rode  
his motorcycle to Kiganda village in Mubende district where he  
15 dropped a one Mwesigye George from Nakatobo village. On his way  
back, his motorcycle developed a mechanical problem at  
Kikumadungu village. He pushed it up to Lutunku Trading  
Centre to trace for a mechanic. At Lutunku Trading Centre, he  
met the 2<sup>nd</sup> appellant, a tribe's mate, who promised him  
20 accommodation at his place since it was getting late. The  
deceased, both appellants and Mwanje were later seen in the bar  
of a one Jumba at around 11:00pm. They all left at midnight on  
the deceased's motorcycle ridden by the first appellant. On the 5<sup>th</sup>  
day of January 2013 at around 6:30 am, the deceased's body was  
25 found dumped near Kyambogo Primary School naked and the  
motorcycle was missing. This was reported to the LC Chairman  
who in turn reported to police. Police investigations revealed that  
the accused had murdered the deceased. A post mortem report  
revealed that the body had bruises around the neck and the cause  
30 of death was confirmed to be strangulation. The appellants who  
were subjected to medical examination, were later charged with

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5 murder. They were convicted after a full hearing and sentenced to  
life in prison

3] The appellants being aggrieved with the decision of the High Court  
lodged an appeal to this Court on one ground.

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***That the learned trial Judge erred in law and fact when he  
sentenced the appellants to imprisonment for life, a sentence  
which is manifestly harsh and excessive.***

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### **Representation**

4] Both appellants were present at the hearing of their appeal where  
they were represented by Mr. Wasswa Joseph. The respondent  
was represented by Ms. Caroline Marion Acio a Chief State  
20 Attorney, being assisted by Judith Nyamwiza a State Attorney. At  
the same hearing, Mr. Wasswa prayed and Court granted him  
leave to appeal against sentence only under Section 132(1) (b) of  
the Trial on Indictment Act, and Rule 43 (3) (a) of the Rules of this  
Court. Both counsel were allowed to adopt their written  
25 submissions as their legal arguments in respect of this appeal.

### **Ground one**

#### **Appellant's submissions**

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5] Mr. Wasswa submitted by first drawing our attention to the duty  
of this Court on appeal as provided under Rule 30 (1)(a) of the  
**Judicature (Court of Appeal Rules) Directions SI. 13-10.** He  
emphasized that our duty to re-appraise the evidence extends to

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5 first appeals against sentence such as the case before us. Mr.  
Wasswa then referred to the sentencing order of the trial Judge.  
He in particular criticized parts of it that he considered irregular  
because the trial Judge did not allude to the principles of  
“consistency,” “parity” or “uniformity” of sentences that the courts  
10 of law are enjoined to consider pursuant to Principle No. 6 (c) of  
the Constitution (Sentencing Guidelines for Courts of Judicature)  
Practice Directions, 2013 (hereinafter the Sentencing Guidelines).

6] Mr. Wasswa in addition submitted that sentencing and its  
15 appropriateness is a matter for the discretion of the sentencing  
court. Citing the decision of **Kasisi Dominic versus Uganda,  
CACA No. 507 of 2014** that followed the decision in **Rwabugande  
Moses versus Uganda, SCCA NO. 25 of 2014**, he argued that this  
Court as a first appellate court, may interfere with the sentence  
20 imposed by the trial court which exercised its discretion only, if is  
shown that the sentence is illegal, or founded upon a wrong  
principle of the law. Likewise, that it can interfere where the trial  
court failed to take into account an important matter or  
circumstance or imposed a sentence which is harsh and  
25 manifestly excessive in the circumstances.

7] Counsel submitted further that the sentence of life imprisonment  
imposed upon the appellants was harsh and excessive. He referred  
to the case of **Ssekawoya Blazio versus Uganda, SCCA No. 24 of  
30 2014** where it was observed that the death penalty though  
constitutional was not mandatory but discretionary. That, that

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5 would make the sentence of life imprisonment the next most  
severe sentence and probably the most effective alternative to  
death sentence.

8] While admitting that no two crimes are identical, Mr. Wasswa  
10 buttressed his submissions on the consistency principle by  
referring to the decision in **Kasisi Dominic Versus Uganda**  
**(supra)** cited with approval in the case of **Mbuga Versus Uganda,**  
**SCCA No.4 of 2011.** In that case, the sentencing Judge was  
15 faulted for failure to consider the principle of consistency when re-  
sentencing the appellants which entitled this Court to interfere  
with the sentence of life imprisonment and substituted it with  
imprisonment of 23 years and 11 months. For that reason,  
counsel invited this Court to consider the sentence of life  
20 imprisonment handed to the appellants as harsh and excessive.  
He invited us to invoke our powers under Section 11 of the  
Judicature Act to set it aside. He suggested a sentence of 25 years  
as appropriate in the circumstances.

9] Mr. Wasswa cited a few cases that have been applied by this Court  
25 and the Supreme Court as a guide to what he considered to be an  
appropriate sentence. He referred, for example, to the case of  
**Kasisi Dominic Versus Uganda, (supra)** where an appellant who  
had received a life sentence for the offence of murder, had his  
sentence reduced by this Court to 23 years and 1 month  
30 imprisonment. Also that of **Onyango Bosco versus Uganda**  
**(2017) UGCA 98,** where a sentence of 45 years' imprisonment for  
murder and aggravated robbery was set aside and substituted for

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5 one of 20 years' imprisonment for the offence of murder and 18  
years' imprisonment for the offence of aggravated robbery, to run  
concurrently. In addition, that of **Turyasingura Joshua and**  
**Natuhwera Naboth, CACA No. 147 of 2013 and No. 27 of 2015.**  
10 In the latter case the sentence of 50 years' imprisonment and life  
imprisonment for murder and aggravated robbery respectively,  
were set aside, and Turyasingura was instead sentenced to 15  
years' imprisonment while his co accused was deemed as wrongly  
convicted and set free.

15 10] In conclusion, counsel invite this Honourable Court to allow this  
appeal, set aside the sentence and impose a lesser sentence to the  
appellants.

### Respondent's Submissions

20 11] Ms. Marion Acio and Ms. Judith Nyamwiza opposed the appeal.  
They relied on several authorities for example that of **Bogere**  
**Moses & Another versus Uganda, SCCA No. of 1977**, cited with  
approval, in **Kifamunte Henry Versus Uganda Criminal Appeal**  
25 **No.1 of 1997**, to agree with what was presented as powers of this  
Court on appeal. Also citing the decision in **Livingstone Kakooza**  
**versus Uganda SCCA No. 17 of 1993**, they agreed to what their  
learned colleague presented as principles to be followed when an  
appellate court decides to alter a sentence. Relying on the  
30 provisions of **Section 34** of the Criminal Procedure Act, they  
added that this Court also has powers to vary a sentence by  
reducing or increasing it.

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12] However, respondent's counsel disagreed with the contention that the sentence imposed was harsh or manifestly excessive. In that regard, they argued that an appropriate sentence is a matter for the discretion of the sentencing court and that each case presents its own facts and the circumstances justify the sentence given. In their view, the offence of murder when committed simultaneously with aggravated robbery should be considered as a serious matter for each offence attracts a maximum penalty of death. Counsel continued that the punishment of life imprisonment is legal and considered lenient in cases where the maximum penalty should have been imposed.

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13] To emphasize the point that the sentence was not excessive, respondent's counsel recounted the prosecution case as admitted by the Court. Following that narration, they concluded that the post-mortem report demonstrated that the deceased was subjected to massive torture before he died. That the deceased could not be decently buried by his family as he was buried along a road. Counsel added that evidence was adduced to show that the appellants were known and feared thieves in the village which is an indication that they were at the material time, a threat to the community. Both counsel argued further that no reasons were advanced for the appellants' actions and that when given a chance to mitigate their sentence, the appellants simply stated that Court should be lenient and consider the period they spent on remand. The trial Judge noted in addition that they were not remorseful.

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5 14] In order to demonstrate that the sentence of life imprisonment was  
appropriate, counsel referred to a few cases where this Court and  
the Supreme court upheld the sentence of life imprisonment for a  
single capital case of murder. For example, that of **Kaddu Kavulu**  
**Lawrence versus Uganda, SCCA No. 72 of 2018**, where an  
10 appellant who inflicted fatal injuries on the deceased using a  
panga received a death sentence. This Court after considering the  
mitigating factors, reduced the sentence to life imprisonment  
which was confirmed by the Supreme Court. Also that of **Opendi**  
**Michael & Another versus Uganda, CACA No. 211 of 2011**,  
15 where the appellants who murdered a deceased during an attack  
on his family on a public road received a sentence of life  
imprisonment, which was upheld by this Court with respect to the  
first appellant.

20 15] In conclusion, respondent's counsel submitted that the  
circumstances of this case are compelling to justify the sentence  
of life imprisonment and that there is no justification to interfere  
with the sentencing discretion of the trial Court. Counsel then  
prayed for this Court to be pleased to dismiss this appeal, uphold  
25 and confirm the sentence of life imprisonment against the  
appellants.

### **Decision of Court**

30 16] The issue for this court's determination is whether the trial Judge  
erred in law and fact when he sentenced the appellants to  
imprisonment for life, a sentence which the appellants consider as

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5 being manifestly harsh and excessive. We have in that regard, carefully studied the court record, considered the submissions for either counsel, and the law and authorities cited therein. We are mindful that this appeal is governed by the provisions of **Rule 30(1) (a) of the** which provides as follows:

10 *(1) On any appeal from the 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;*

15 17] We are accordingly required to carefully and critically review the record of the High Court and re-appraise the evidence in order to make inferences of fact but without disregarding the decision of the High Court. See for example, **Kifamunte Henry versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997**. Alive  
20 to the above-stated duty, we shall proceed to resolve the one ground of appeal as below;

25 18] We are aware that in the exercise of its discretion, the sentencing court is guided by established principles in order to achieve the ends of justice. The agreed legal position as stated by both counsel is that an appellate court should not interfere with a sentence imposed by the trial court which has exercised its discretion, unless it is shown that the sentence is illegal. Also, we may  
30 interfere only if it is evident that in the exercise of its discretion, the trial court ignored to consider an important matter or circumstances which ought to have been considered before

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5 passing sentence or, where the sentence is manifestly excessive or  
too low as to amount to an injustice. **See Livingstone Kakooza  
versus Uganda, SC Criminal Appeal No. 17 of 1993.**

10 19] It is the appellant's case that the learned trial Judge sentenced  
them to a manifestly harsh and excessive sentence of life  
imprisonment. Mr. Wasswa Joseph contended that the trial Judge  
did not consider the consistency principle before sentencing the  
appellants. Counsel went ahead and referred to similarly decided  
15 cases to guide this Court when considering the merit of the appeal.  
Conversely, respondent's counsel Ms. Marion Acio and Ms. Judith  
Nyamwiza contended that the sentence that was meted out is  
consistent with several decided cases, and is appropriate given the  
circumstances of the case.

20 20] Mr. Wasswa in particular objected to parts of the sentencing order  
of the trial Judge which he argued were made contrary to the  
consistency principle. We agree with counsel's observation that  
although crimes are not identical or committed under exactly the  
same circumstances, there is always the need for a sentencing  
25 court to maintain consistency or uniformity when executing its  
sentencing discretion.

30 21] The principle of consistency is well elucidated in **Guideline 6 (c)**  
of the Sentencing Guidelines which provides that:

*"Every court shall when sentencing an offender take into  
account the need for consistence with appropriate*



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5                   *sentencing levels and other means of dealing with  
offenders in respect of similar offences committed in  
similar circumstances.*”

10           It was for the same reason that the Supreme Court in its decision  
of **Aharikundira Yustina versus Uganda, Criminal Appeal No.  
27 of 2015** advised that:

15                   *“it is the 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”.*

20       22] In order to confirm the merit of the appellants’ complaint on that  
point, we shall reproduce the sentencing order. At pages 21 and  
22 of the record the trial Judge stated as follows:

25                   *“The convicts killed a young man. They killed him in an  
aggressive manner by whipping and strangling him.  
Evidence was brought that they were terrorizing the  
village. They are not remorseful. There is need to keep  
them out of that a society. I sentence them to life in  
prison on each of the counts of Robbery and murder. I so  
order. Right of appeal is explained.”*

30                   Signed,  
Hon. Justice Flavian Zeija  
Judge.



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23] It is clear from the ruling that the Judge decided on the sentence without carrying out a cross reference with previously decided cases with respect to the same offence and facts. We appreciate that there is no legal requirement that the Judge must specifically cite previous decisions from which comparison is made, but it is good practice to do so. This Court has previously decided that the sentencing order should on the face of it demonstrate that the sentencing court took cognizance and applied the consistency principle. See for example **Nshaija Abasi alias Rukyeikaire versus Uganda, CACA No. 142 of 2011**. However, we are not persuaded that by failing to do so, the trial Judge decided a sentence that resulted into a miscarriage of justice. The following are our reasons.

24] The appellants were each charged with two counts of aggravated robbery, both serious offences that can attract the maximum sentence of death. **Paragraph 19 of the Sentencing Guidelines** directs us to the sentencing range specified in Part I of the Third schedule. In that schedule, the sentencing range for the charge of murder after considering both the aggravating and mitigating factors is 30 years to death as the maximum sentence. Further according to **Paragraph 18(c)(iv) and (d)** of the same guidelines, a sentencing court may consider imposing the death sentence if the death of a victim was caused by offenders acting as conspirators during a robbery. Previous decisions on the same offences will also be useful.



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25] In **Christopher Byagonza versus Uganda, Supreme Court Criminal Appeal No. 43 of 1999**, the appellant was convicted of murder of his nephew, the attempted murder of another nephew, and aggravated robbery. He was sentenced to death for the convictions of murder and aggravated robbery and seven years for attempted murder. The latter two sentences were suspended. On appeal, the Supreme Court did not set aside the convictions and sentences. In **Bakubye & Another vs Uganda, [2018] UGSC 5**, the appellant was convicted of murder and aggravated robbery and sentenced to 40 years for count 1, and 30 years for count 2 to run consecutively. Both this Court and the Supreme Court decline to agree that the sentences were harsh or excessive and confirmed them. Yet in **Atugonza Tony and 4 Others versus Uganda, SCCA No. 11 of 2011**. The Supreme Court confirmed a sentence of life imprisonment for appellants who had forceful sexual intercourse and later murdered their victim. Relatedly, the authorities cited by respondent's counsel in their submissions indicate that in a previous decision, this Court upheld a sentence of life imprisonment imposed upon offenders that in one transaction committed the double offences of aggravated robbery and murder.

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26] The facts of this case are that the appellants who held out as good people willing to offer the deceased a place of abode, instead hacked a scheme to rob him of his motorcycle and then kill him. There was strong evidence that they murdered him in a gruesome manner. The evidence of the postmortem report is that the

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5           deceased's body had bruises on the chest, neck and strokes on  
the shoulder, and that he died as a result of asphyxiation or  
strangulation. This case was in addition aggravated by the fact  
that the appellants were well known and feared thieves in the  
village, which means that they were a threat to the community. In  
10 addition, the Judge noted that both appellants showed no remorse  
during their trial. Their victim a young man, who was intent on  
earning a decent living was deprived of life in a cruel manner.

27] The above fact must have impacted upon the Judge's decision to  
15 ignore their prayers for leniency. In his discretion, he considered  
it fit to impose a sentence of life imprisonment. We consider that  
he exercised that discretion judiciously. He spared the appellants  
of the death sentence, and we consider his decision well within  
range of the Sentencing Guidelines and previously decided cases  
20 of a similar nature. For those reasons, we find that in the  
circumstances presenting, the sentence of life imprisonment that  
was meted out to the appellants was neither harsh nor manifestly  
excessive. We therefore find no basis for interfering with the  
decision of the trial Court. We accordingly confirm the sentence of  
25 life imprisonment.

28] In conclusion, this appeal has failed and is dismissed.

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*[Signature]*

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5 **Dated** this 16 of 08, 2023.

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**RICHARD BUTEERA, DCJ**  
**JUSTICE OF APPEAL**

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**CATHERINE BAMUGEMEREIRE**  
**JUSTICE OF APPEAL**

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**EVA K. LUSWATA**  
**JUSTICE OF APPEAL**