THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE
CRIMINAL APPEAL NO.555 OF 2014 AND 533 of 2016
(CORAM: Obura, Bamugemereire & Madrama, JJA)

EMOT MOSES::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the Decision of Henry Kawesa J, dated 11th June, 2014 in High Court Criminal Session No.160 of 2013 Holden at Tororo)

JUDGMENT OF THE COURT

This is a consolidated appeal in which the appellant, Moses Emot was indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act CAP 120. It was alleged that the Appellant, Okware Siwu, Peter Okware and others still at large on the 11th day of March 2012 at around 4:00 am at Chafu Trading Centre in Tororo District with malice aforethought murdered Rose Akachelan. In one he appealed against both conviction and sentence. In the other he appealed against sentence only.

Background

The background to this appeal as ascertained from the lower court record is that three persons were indicted and tried for the offence of murder. At trial the two were acquitted and only the appellant was convicted. The facts were that on the 10th day of March 2012 at around 4:00pm, the deceased left her home in Kwapa sub-county in the company of her cousin Jane Ajera to visit her other cousin Akware. Along the way, they met Obwana who asked them to accompany him to a disco. The disco dance went all through the night till day break. At about 4:00 am, the deceased informed her friend John Onyapidi that she needed to go back

home in Kacoge. Onyapidi, in turn, tasked his cousin Moses Emor (A1) to ride the deceased and another person back home but Moses declined to carry them both saying he could only accommodate one person on his motorcycle. He therefore carried the deceased alone. Apparently A1 took the deceased to an altogether separate route than the one that would have led to her home. At Chafu Trading Centre, he stopped and forced the deceased off and started to assault her. He did so for quete a while until her alarm attracted the neighbourhood. Apparently A1 was joined by other young men such as Okware Siu (A2) , Peter Okware A3, Junior, Balosi, Emeku and Epat. They together tortured the deceased to unconsciousness. The boys were armed with sticks and machettes. As earlier noted the screams and alarm from the deceased woke up Sam Oketch who went to the scene to inquire what was going on. When the assailants saw Sam Oketch, they ran away but he gave chase and was able to catch Okware s/o Erubire who also later ran away. The deceased was rushed to Kwapa clinic for first aid and later taken to Tororo main hospital where she was pronounced dead at around 3:00pm that day. Moses Emot was arrested on that day while the others remained on the run. On the 31st March 2012 Peter Okware was arrested in Bugiri District where he was in hiding, while Okware Siwu was arrested on 12th of March 2012.

At the trial, A2 and A3 were acquitted while the appellant was convicted and sentenced to Life Imprisonment. Dissatisfied, the Appellant sought leave of this Court to appeal against sentence only which leave was granted. The sole ground of appeal as set out in the Memorandum of Appeal is: 1.**That the Learned Trial Judge erred in law and fact when he**

meted out a manifestly harsh and excessive sentence of life imprisonment against the Appellant.

The appellant prayed for the following orders:

1. That the appeal be allowed
2. The sentence be set aside / varied

Representation

At the hearing of the appeal the appellant was represented by Ms Faith Luchivya on state brief while the Respondent was represented by Ms Immaculate Angutoko Chief State Attorney holding brief for Ms Carolyn Nabaasa Principal Assistant Director of Public Prosecutions, from the Office of the Director of Public Prosecutions.

Counsel Faith Luchivya prayed that leave be granted to file the Memorandum of appeal out of time and to validate the Notice of appeal under r 2 (2), 5, 43 (3) (a) of the Court of Appeal Rules. Both counsel for the respective parties filed written submissions. Court granted the appellant leave to appeal out of time, the Notice of appeal was validated and leave to appeal against sentence only was granted. Both submissions were adopted by court.

Submissions

Counsel for the appellant submitted that the Trial Judge condemned the appellant to a custodial sentence for the rest of his life, which in her view was extremely excessive. Counsel referred to the Trial Judge's remarks during sentencing where he noted that;

"**This is one of the rarest of rare cases (murder and rape), committed by a gang or group. I pray for a sentence of death not deserving of a lighter**

sentence given the circumstances above. He is sentenced to life imprisonment. I so order."

Counsel submitted that in sentencing there must be consistency as was enunciated in **Aharikundira v Uganda [2018] UGSC 49.**

Counsel further referenced **Adiga v Uganda CACA No. 157 of 2010** which cited with approval **Patrick Anywar & Anor v Uganda CACA No. 166 of 2009**, where this court set aside a sentence of life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months imprisonment.

Counsel for the appellant prayed that this honourable court exercises it power under **Section 11 of the Judicature Act** to impose an appropriate sentence so that the principle of consistency is achieved. She further prayed that court allows the appeal and varies the sentence of the High Court and impose one that is reasonable.

Counsel for the respondent raised a preliminary objection. It was his submission that the appeal is bad in law as it offends provisions of s.132 of the Trial on Indictments Act which requires leave of court to appeal against sentence only. We noted that this issue was addressed during the hearing where counsel for the appellant orally sought for leave to appeal against sentence only and it was granted by Court. The preliminary objection is thus overruled.

In reply to the appellant's submissions, counsel for the respondent submitted that 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 it's 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 in Kawooya Joseph v Uganda CACA No. 0512 of 2014.**

Counsel referred to the **Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, No. 8 of 2013** which outlines the general sentencing principles. He specifically cited guideline 6 (a), which provides that every court shall, when sentencing an offender take into account the gravity of the offence, including the degree of culpability of the offender. He added that a sentencing court is also expected to take into consideration the nature of the offence committed by an accused.

It was counsel's submission that the appellant was convicted of murder, which attracts the maximum penalty of death. Counsel contended that the learned trial Judge while sentencing the appellant considered both the mitigating and aggravating factors and gave reason for sentencing the appellant to life imprisonment.

Counsel further argued that the evidence on the record reveals that the deceased met a gruesome death at the hands of the appellant and others. He relied on the testimony of PW3 and PW4 whose evidence was that the deceased had severely been assaulted, which evidence was corroborated by the post-mortem report. In addition, counsel averred that the appellant's crime was premeditated when he calculatingly insisted on transporting one person, a vulnerable young woman, and then deviating from the route to the deceased's aunt's home.

It was counsel's submission that the trial Judge exercised his discretion judiciously and within the precincts of the law. Counsel contended that counsel for the appellant has failed to demonstrate how a sentence of life imprisonment in a gruesome murder such as in the instant case is harsh and excessive when the law prescribes a maximum penalty of death sentence. He added that this court is not bound to interfere with the sentencing Judge's discretion basing on the consistency argument alone.

Counsel invited us to look at the decision in **Sharif Bashasha v Uganda SCCA No. 82 of 2018** wherein the Supreme Court Justices confirmed the sentence of death and observed that; *"it was evident that the Court of Appeal had considered the appellant's mitigating factors but still passed the death sentence."*

Further, counsel cited **Okello Geoffrey v Uganda SCCA No. 34 of 2014** where it was held that:

"In terms of severity of punishment in our penal laws a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws... Courts have power to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law. Article 28(8) of the Constitution provides that "no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum that could have been imposed for that offence at the time when it was committed."

Counsel also referred to **Robert Nkonge v Uganda CACA No. 148 of 2009** where court upheld a sentence of death against the appellant who had murdered his wife. Counsel also cited **Bukenya Muhammad & 2 Ors v**

Uganda CACA No. 903 of 2014 where this court upheld a life sentence imposed on the 1st appellant for his participation in the brutal murder of his brother.

Counsel prayed that this Honorable Court be pleased to find the sentence of life imprisonment against the appellant was the most appropriate and dismiss the appeal.

Consideration of the Court

The appellant in this case is appealing against sentence only. We have carefully 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).**

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 custodial sentence of life imprisonment was extremely excessive.

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

"Accused / convict has been on remand for some time. He is a first offender. There has been shown to exist grave aggravating factors as pointed out by state.

This was gruesome. It is disgusting and incomprehensible how a young girl could have met her death under such brutal and chilling circumstances. Accused acted totally brutally, as beast/wolf taking her sexually, then letting other boys do so, and then taking her life. In spite of pleas for mercy, such a heart deserves no mercy save that of meeting our hand. This case in my view, deserves a tough deterrent punishment... This is one of the rarest of rare case (murder and rape), committed by gang or group. I pray for a sentence of death not deserving of a lighter sentence given the circumstances above. He is sentenced to life imprisonment. I so order."

The Supreme Court in **Aharikundira v Uganda SCCA No. 27 of 2015** underlined the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts.

This court in **Alex Biryomunsi v Uganda CACA No. 464 of 2016** restated the position in **Katureebe Boaz & Anor v Uganda SCCA No. 066 of 2011** the court articulated the necessity for consistency as follows:;

"Consistency in sentencing is neither a mitigating nor an aggravating factor, the sentence imposed lies in the discretion of the court which in exercise thereof may consider sentences imposed in other cases of a similar nature."

We note that there can hardly be consistency in the sentences of this court when each case presents its own unique facts that are distinguishable. However, certain decisions with quite similar facts have embraced the consistency principle.

In **Paul Kibolo Nasimolo v Uganda SCCA No. 46 of 2017** a sentence of death was substituted with a sentence of life imprisonment for murder. Relatedly, in **Kaddu Kavulu Lawrence v Uganda SCCA No. 72 of 2018,** the appellant hacked his former partner to death with a panga and he was sentenced to death. On appeal, this Court substituted his sentence to life imprisonment, which was upheld by the Supreme Court on further appeal.

In **Moses Karisa v Uganda, SCCA No 23 or 2016**, the appellant who was 22 years old was convicted for the murder of his grandfather. The Supreme Court confirmed a sentence of imprisonment of the appellant for the rest of his life.

In the 3rd Schedule to the **Constitution (Sentencing Guidelines);** the sentencing range for murder is from 30 years' imprisonment to death penalty, which is the maximum upon considering the mitigating and aggravating factors.

We have taken into consideration the fact that the appellant was a young man aged 20 years at the time he committed the offence and he was a first offender. We have however looked at the circumstances under which the crime was committed; the victim being a young and vulnerable girl of 15 years who was first subjected to a gruesome acts of extreme violence before she was strangled to death.

We are mindful of the above principles of law and have considered earlier decisions of this Court and the Supreme Court on sentencing as discussed above. We are particularly concerned that in a life sentence might be considered harsh and excessive since it does not accord a 20year old

offender an opportunity for reform. It is our view therefore that a determinate sentence would be serve the purpose. We consider a sentence of 30years imprisonment appropriate in the given circumstances. In line with **Article 23 (8) of the Constitution**, we set off the 2 years, 2 months and 10 days spent on remand.

The appellant will serve a sentence of 27 years, 9 months and 20 days' imprisonment W.E.F 11th June 2014 being the date of sentence.

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 .....February.....~~2022~~ 2023

Hon. Lady Justice Hellen Obura
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal