THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT GULU
CRIMINAL APPEAL NO. 038 OF 2011

CORAM:
[Egonda-Ntende; Bamugemereire; Mulyagonja JJA]

OMARA ALAL TONNY ::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(An appeal arising out of the Judgment of Ruby Opio Aweri J, as he then was, in High Court Criminal Session Case No. 11 of 2009, delivered on 18th October 2015 at Lira)

JUDGMENT OF THE COURT

Introduction

The Appellant, Tonny Alal Omara was indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act CAP 120. He pleaded guilty to Manslaughter contrary to section 187 and 190 of the Penal Code Act and was convicted and sentenced to 22 years' imprisonment. He now appeals.

The brief facts as can be garnered from the lower court records are that the appellant, Tonny Amal Omara was the grandchild of Juspentia Can, now deceased. Prior to her death the appellant constantly accused his grandmother of bewitching him. He was later to cause her death. On the eve of the death, the appellant caused havoc and intimidated the deceased and also assaulted her and leaving her severely injured. On that day the appellant run off on seeing her daughter and granddaughters come to her aid.

The following day on the 19th of January 2008 at around 4:00pm while Juspantia was at home with her granddaughters who were assisting her to do house chores, since she was nursing injuries from the previous assault, the appellant emerged from a nearby bush and charged at her with a cutlass. He repeatedly hacked her, causing her deep cut wounds on her skull and elbow which led to massive external haemorrhage. The deceased screamed in fear and terror attracting her sons and their wives. Unfortunately, it was too late to save the old woman. She succumbed to the deep cut wounds and massive bleeding. The result of the post-mortem report was that the deceased sustained a deep cut would on the right facial-parietal skull measuring 6-12 inches long and 5 inches deep which caused severe injury to the brain, the skull, the right eye and the nostril. The appellant run from the scene but not before he was identified by the family of the deceased. He was arrested later that day. The appellant was indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act but later pleaded guilty to Manslaughter contrary to section 187 and 190 of the Penal Code Act. He was sentenced to 22 years of imprisonment. Being dissatisfied with the sentence, the appellant appeals against sentence only.

Grounds of Appeal

There is only one ground of appeal which stipulates that:

> **The learned trial Judge erred in law and in fact when he sentenced the appellant to 22 years which was manifestly harsh in the circumstances.**

Representations

At the hearing, the appellant was represented by Ms Harriet Otto while the respondent was represented by Joseph Kyomuhendo, a Chief State Attorney in the Office of the Director of Public Prosecutions. Counsel for the appellant applied for leave to file the Notice and Memorandum of Appeal out of time and to have them validated. She also sought leave to appeal against sentence only. This court allowed all her prayers. Both counsel proceeded by way of written submissions which this court has relied on to arrive at its Judgment.

Submissions by Both Parties

Counsel for the appellant Ms Harriet Otto submitted that while her client had admitted the offence of manslaughter and was not contesting his conviction, he was much aggrieved by the sentence of 22 years meted out on him by the trial Judge. She submitted that at the time of sentence the appellant was also just 26 years old. He had spent 3 years on pre-trial custody. It was her submission that the appellant regretted his conduct and that while in prison he had turned around and was now a changed man who had become a devout Christian.

Counsel contended that for a person who had pleaded guilty and not wasted court's time, the sentence was not only harsh but was also excessive since it did not compare with the sentence ranges meted out for the same offence. Incidentally counsel relied on **Atuku Margaret**

Opii v Uganda Court of Appeal Criminal Appeal No. 123 of 2008 where this court reduced a sentence of death to 20 years' imprisonment. Counsel invited this court to set the sentence of imprisonment or 22 years aside and to replace it with a more lenient sentence.

In reply, Chief State Attorney Joseph Kyomuhendo opened his submission by highlighting the duty of this court as a first appellate court. Relying on **Pandya v R [1975] EA 335** counsel reasoned that this court cannot differ from the findings and sentence of the learned trial Judge and the assessors because, unlike this court, their findings were based on facts which they had opportunity to hear, first hand.

Regarding the severity of sentence, counsel recited the long-standing rule in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001** which was cited with approval in **Kato Kajubi v Uganda SCCA No. 2 of 2014** to the effect that,

> "an appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores an importance matter or circumstances which ought to be considered while passing the sentence or where the sentence is imposed on a wrong principle."

Counsel invited this court to find that the learned trial Judge correctly exercised his discretion when he imposed a sentence of

22 years imprisonment. Counsel further submitted that the above sentence was justified considering that the appellant attacked his 87-year-old grandmother. His argument was that under normal circumstances this offence ought to have been treated as a murder but that fortunately or unfortunately, the appellant was allowed to plead to the offence of manslaughter, a charge to which he readily pleaded guilty hence tying the hands of court.

In his attempt to persuade this court that sentence of 22 years passed by the learned trial Judge was neither harsh nor excessive counsel for the respondent invited this court to consider the factual background of this case. He submitted that the appellant first assaulted the victim on the 18th of January 2008 and on the very next day he returned, only this time, was armed with a machete. He proceeded to mercilessly cut his grandmother on the head several times killing her instantly.

He drew the attention of this court to the Post-mortem Report which was marked as the first prosecution exhibit, **Exhibit P.1,** which was to the effect that the victim sustained a deep cut would on the right facial-parietal skull measuring 6-12 inches long and 5 inches deep which caused severe injury to the brain, the skull, the right eye and the nostril. It was counsel's submission that the nature of the injury was confirmation that

the appellant used excessive force in his attack on an old, unarmed woman and that he therefore intended the consequences of his actions.

Counsel invited this court to find that the learned trial Judge meticulously considered the all the aggravating and mitigating factors and came to a reasonable sentence. He quoted sections of the sentencing remarks as follows:

> "the accused attacked the deceased a day earlier... The following day, the accused came back holding a panga and assaulted the deceased fatally leading to her instant death. The killing of the deceased was done in a gruesome manner... as far as the mitigating factors are concerned, the accused is a first offender who pleaded guilty thereby saving time...He is a young man of 26 years old he appears to have leaving his own lessons.....He has been staying about 3 years in custody...which I am enjoined by the constitution of this country to consider. Tying all circumstances together, the most appropriate sentence should be 22 years imprisonment."

It was the submission of counsel for the respondent that the learned trial Judge evaluated the aggravating factors against the mitigating factors and correctly concluded that the former outweighed the latter. Furthermore, that the learned trial considered all the circumstances surrounding the commission of the offence and thereby arrived at a just conclusion.

Counsel for the respondent argued that whereas this court is bound to follow the principle of parity and consistency while sentencing, it must bear in mind that the circumstances under which offences are

committed are not necessarily identical. He relied on **Byaruhanga Okot v Uganda Court of Appeal Criminal Appeal No. 78 of 2020.**

Counsel further invited this court to consider **Bacwa Benon v Uganda Court of Appeal Criminal Appeal No. 869 of 2014** in which this court confirmed a sentence of life imprisonment for an appellant who had pleaded guilty to aggravated defilement.

He also relied on **Bonyo Abdul v Uganda SCCA No. 7 of 2011** where a sentence of life imprisonment was confirmed by the Supreme Court where an appellant who committed aggravated defilement was found to be HIV positive.

Counsel for the respondent invited this court to find that in the circumstances, the sentence of 22 years imprisonment passed by the learned trial judge was neither harsh nor excessive.

Analysis of the ground of appeal

This court is alive to its duty as a first appellate court. The duty of a first appellate court was well articulated by Sir Sinclair VP in **Pandya v R** that an appellate court must treat the evidence as a whole to that fresh and exhaustive scrutiny, a position which the appellant is entitled to expect. We warn ourselves of the handicap that we did not see or hear the evidence, firsthand. See **Dinkerrai Ramkrishan Pandya v R 1957 EA 336. Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.113-10, See also Kifamunte Henry v Uganda SCCA No. 10 of 1997.**

The principles on sentencing are that, in general, an appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercises his or her discretion. It is now an established practice that an appellate court will not normally interfere with the discretion of the sentencing judge except for good reason. As alluded to by counsel for the respondent in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001,**

> "an appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion... or so low as to amount to a miscarriage of justice or where a trial court ignores an important matter or circumstances which ought to be considered while passing the sentence or where the sentence is imposed on a wrong principle."

In **Kyalimpa Edward v Uganda SCCA No. 10 of 1995** the court considered the principles upon which an appellate court should interfere with a sentence which borrowed heavily from **R v Haviland (1983)5 Cr. App. R(s) 109** to the effect that;

> "an appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercised his discretion. It is the practice that as an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence

imposed by the trial judge was manifestly so excessive as to amount to an injustice."

This appeal is premised on one ground of appeal in which the appellant appeals against the sentence only. At the risk of repetition but for the avoidance of doubt, I will reiterate part of the memorandum of appeal here.

> **MEMORANDUM OF APPEAL**
> **Appeal from the Sentence of the High Court Holden at Lira before Honorable Justice Rubby Opio Aweri (as he then was *sic*). Dated the 186 day of October 2015 in Criminal case Appeal No. of 2015.**
> **OMARA ALAL TONNY the above named Appellant was convicted on the charge of Manslaughter contrary to section 187/ 190 PCA and sentenced to 22 years of imprisonment hereby appeals to this honorable on the ground below.**
>
> **1. The Learned judge erred in law and fact when he sentenced the Appellant to 22 years which was manifestly harsh in the circumstance.**
>
> **Wherefore the Appellant prays to this honorable court to reduce the sentence to a lesser period of imprisonment.**

Counsel for the appellant was insistent that the sentence of 22 years imprisonment was harsh and excessive. She reasoned that, as a youthful offender who had readily pleaded guilty, the appellant ought to have attracted some leniency on the part of the trial Judge. On the other hand, counsel for the respondent alluded to the circumstances under which this offence was committed and contended that the appellant was lucky to get away with just 22 years of imprisonment.

We have carefully weighed both the arguments for the appellant and the respondents. We find that this matter settled as a plea of guilty for manslaughter although it could have been tried, in a full, blown trial as a murder. The appellant was under the illusion or mistaken belief that the only solution to his fears of bewitchment was to end the life of the person he accused of bewitching him. Having taken that path the appellant set upon his vulnerable and defenseless grandmother, hacking her and severing her brain, skull and facial features including her right eye and nostrils. He almost severed her arm too.

To his advantage, as noted earlier, the appellant was allowed to plead guilty to manslaughter. In as much as the respondent would wish and hope to maintain the status quo, unless the respondent had appealed against sentence, there is little that can be done to atone their bewilderment. Having pleaded guilty the appellant set into motion a series of circumstances which lead us to this point.

This court is abundantly aware that offending is nuanced and is informed by contexts which vary from one case to another. However, as a court we closely follow the principle of parity and consistency in sentencing for reason that similarly placed offenders should not be seen to be disparately treated for similar offences, by the same court. Our jurisprudence is not simply anecdotal. It is

informed, established and well-settled. Appellate courts have through the decades considered what ought to be the range of sentences available as far as the offences of manslaughter and indeed, other offences, are concerned.

However, we must underscore the need for an appellant to appreciate the reason as to why a trial Judge would arrive at a particular conviction and sentence. In this regard we are persuaded by the case of **Ndwandwe v Rex [2012] SZSC 39, where** the Supreme Court of Eswatini, now formerly referred to as, Swaziland considered what was involved in the exercise of the sentencing.

> **"The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The Court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principles and the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the accused other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment."**

Jurisprudence seems to suggest that for more than three decades, the sentencing regime for the offence of manslaughter has

remained firmly and consistently leveled. One might even argue that the law has remained static and unmoved, in spite of the changing times.

With the above background in mind, we now proceed to do a comparative analysis of our decisions on sentencing. In **Simon Amodoi v Uganda Supreme Court Criminal Appeal No. 14 of 1994,** the appellant was convicted by the High Court for the offence of murder, having killed his very own father. He was subsequently convicted by the trial Judge and was sentenced to death.

At the hearing of the appeal, the respondents supported and preferred the offence of manslaughter to that of murder on account of provocation. The court was willing to entertain the concession. The claim by the appellant was that there was a quarrel. A scuffle ensued between the deceased who was the appellant's his father, and his wife, meaning the wife of the deceased. The appellant intervened to separate the two upon which the deceased grabbed the appellant's cutlass and cut him twice on the left arm before the appellant repossessed it and, in turn, cut the deceased once on the neck. The defence of provocation was readily accepted by the prosecution since there were no witnesses. The conviction for murder was quashed and the sentence of death set aside. The Court of Appeal substituted it with a conviction for manslaughter, contrary to section 182 of the Penal Code. The appellant, who had

been on remand for about 3 years, was sentenced to 12 years imprisonment.

Twenty years later in **Magala Ramathan v Uganda Supreme Court Criminal Appeal 1 of 2014** an appellant was convicted of manslaughter on two counts. The appellant was sentenced to a term of 7 years imprisonment on each count to be served consecutively. The Supreme Court affirmed the sentences and maintained that both sentences were to be served consecutively but deducted and accordingly reduced the sentence by the 10 months the appellant spent on remand in light of Article 23 (8) of the Constitution.

In the same way, in **Mumbere Julius v Uganda Supreme Court Criminal Appeal No. 15 of 2014** the appellant was handed a sentence of life imprisonment for the offence of murder. He had allegedly murdered a boda boda rider. On second appeal to the Supreme Court, it was found that the defence of provocation and self-defence was available to him. The sentence of life imprisonment was reduced to 10 years and 2 months.

Now, in **Ismail Kisegerwa & Anor v Uganda Court of Appeal Criminal Appeal No. 6 of 1978** an appeal was heard from a conviction for manslaughter and the sentence of 15 year's imprisonment. The Court of Appeal found that the learned trial Judge gave cogent reasons for imposing the stiff sentence in which court was unable to find error. The Court of the Appeal reasoned that the appellants were lucky to get away with manslaughter. The

court found that there was no justification to interfere with the sentence. The appeal of each appellant was accordingly dismissed.

Similarly, in **Francis Masaba v Uganda Supreme Court Criminal Appeal No. 24 of 1984** the Supreme Court dismissed the Appellant's appeal against conviction for manslaughter (contrary to section 182 of the Penal Code, now repealed), but allowed the Appellant's appeal against sentence and found that the term of imprisonment imposed on the appellant of 15 years was harsh and excessive and was accordingly reduced to 10 years imprisonment. Clearly what is evident is that of recent fewer appellants have ascended to the Supreme Court upon receiving decisions from this court.

More recently, we can revel and find solace in the confidence that there is sufficient jurisprudence to guide this court. In **Ainobushobozi v Uganda Court of Appeal Criminal Appeal No. 242 of 2014** the appellant was convicted of the offence of manslaughter contrary to section 187 and 190 of the Penal Code Act. He was sentenced to 18 years' imprisonment. He later dropped the appeal regarding conviction and proceeded to appeal against sentence only. This court handed him 12 years' imprisonment on grounds that he had spent 3 years on remand prior to his trial and conviction. He was 21years old, a youthful offender and was remorseful. The court observed, nevertheless, that he had committed a heinous offence which was incapable of reparation.

In **Ahimbisibwe Solomon v Uganda Court of Appeal Criminal Appeal No. 132 of 2010** in facts comparatively similar to the matter now before us, the appellant was convicted, on his own plea guilty, for the offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act by the High Court sitting at Bushenyi on 7th July 2010. He was sentenced to 16 years imprisonment. With leave of the Court, he appealed against sentence only. The deceased was the appellant's stepmother. On the 14th of October 2006, at about 8.00pm, the appellant attacked the deceased's home and accusing her of practicing witchcraft. A fight ensued in which the appellant picked a machete and cut off the deceased's head and right arm. She died instantly. He was subsequently charged with murder contrary to sections 188 and 189 of the Penal Code Act. At the trial, the appellant indicated that he was his willing to plead guilty to the lesser offence of manslaughter. The indictment was duly amended. The appellant pleaded guilty to manslaughter contrary to section 187 and 190 of the Penal Code. He was accordingly convicted and sentenced to 16 years imprisonment. He was dissatisfied with the sentence and appealed. The court of appeal reasoned that the appellant was a young man, only 21 years old at the time he committed the offence. He was a first offender who had promptly surrendered to the police as soon as he committed the offence and confessed to the killing. He had been on remand for 3 years and 8 months prior to the conviction. The court reduced his sentence to 13 years' imprisonment.

In **Rwita Tumuhangirwe v Uganda Court of Appeal Criminal Appeal 143 of 2011,** the appellant was indicted for murder contrary to sections 188 and189 of the Penal Code Act. He pleaded guilty to the lesser charge of manslaughter. The appellant was accordingly convicted of the lesser offence of manslaughter and was sentenced to 23 years' imprisonment. He was aggrieved by the sentence and appealed. On appeal he was sentenced to 11 years and 6 months' imprisonment.

Consequently, in view of the plethora of authority regarding the likely sentences for manslaughter, we are unable to follow **Atuku Margaret Opii v Uganda Court of Appeal Criminal Appeal No. 123 of 2008,** as had been advised by counsel for the appellant.

In the same breath we find that the decisions of **Byaruhanga Okot v Uganda Court of Appeal Criminal Appeal No. 78 of 2020, Bacwa Benon v Uganda Court of Appeal Criminal Appeal No. 869 of 2014** and **Bonyo Abdul v Uganda SCCA No. 7 of 2011** distinguishable from the current matter before us. The three decisions relate to sentences which were premised on circumstances of sexual offending of an aggravated nature and in which some appellants were found to be HIV positive. They would not therefore apply to the circumstances where a murder trial was reduced to an offence of manslaughter.

Given the totality of the circumstances of the matter now before us, we agree with counsel for the appellant that indeed, had the learned trial Judge considered the age of the appellant, his readiness to

plead guilty, he would have found that the sentence of 22 years was not only harsh but also excessive. We indeed find that the sentence of 22 years' imprisonment is harsh, excessive and out of range. We hereby set it aside.

Notwithstanding the circumstances under which the offence was committed, having been found guilty of manslaughter and not murder, the sentence passed ought to have reflected that manslaughter was a minor and cognate offence of the offence of murder. We have taken into consideration the fact that the appellant has been on appeal for over 12 years now. This is deplorable. It should not be way appellants are treated in our courts. In the circumstances this court will pass a sentence which ensures that the appellant walks free. We find a sentence of 8 years reasonable. From this we reduce the 3 years the appellant spent in pre-trial custody. This is based on the principle that offenders who admit guilt should benefit from their pleas of guilty by getting up to a third or even half, off their sentence potential sentences.

In the final result, the appellant shall serve a sentence of 5 years' imprisonment with effect from the date of sentence, which in this case is the 18th of November 2010.

This appeal succeeds.

Signed and dated at Gulu this 6th day of June 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal