

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 0614 OF 2015
(ARISING FROM KAB-00-CR-CSC-No. 00177 of 2013)

ASIIMWE KENNETH :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgement of the learned trial Judge Hon. Justice Micheal Elubu of the High Court of Uganda at Kabale delivered on the 30/05/2014)

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. JUSTICE OSCAR KIHKA, JA

JUDGMENT OF COURT

The Appellant was indicted and convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 27 years' imprisonment.

The Appellant was dissatisfied with the sentence of the trial court and filed an appeal to this court on the sole ground that:

1. The Learned trial Judge erred in law and fact when he passed out a manifestly harsh and excessive sentence without due regard to the mitigating factors hence occasioning a miscarriage of Justice.



Background

The brief facts of the case as accepted by the trial Judge are as follows; on the 3rd day of June 2012, at Mukirwa Trading Centre which is located in Bubare Sub County in Kabale district, the deceased, after being paid his monthly salary went to the trading Centre with two friends namely; Friday Nicholas (PW4) and Arinda Anaclet (PW5). When the deceased and his friends reached at Hakima Trading Centre near the path heading up to Kyantobe's place, they found the Appellant and two others standing by the road-side holding walking sticks and stones at about 9.00 pm. The Appellant and the others used the sticks to beat the deceased and his two friends. The deceased and his friends then decided to run away from the Appellant and his accomplices. However, the Appellant also had a stone which he used to hit the deceased on the forehead consequent upon which the deceased collapsed. Upon seeing this, the Appellant and the others ran away from the scene. The deceased was rushed to Kabale hospital where he died the next day.

The Appellant was eventually arrested charged with murder and subsequently convicted. Hence this appeal.

Representation

At the hearing of this appeal, Mr. Geoffrey Masereka on state brief appeared for the Appellant while Mr. Joseph Kyomuhendo, Chief State Attorney, appeared for the Respondent. The Appellant's counsel sought and was granted leave to appeal against sentence only. Both parties filed written submissions which were adopted with leave of court.

Appellant's submissions

Counsel submitted that the learned trial Judge passed a harsh and excessive sentence basing on the fact that the offence of murder was rampant in Kigezi Region and that in that session alone, there were 24 murder cases out of the 40 cases that the court heard. Counsel argued that the trial judge did not consider

other mitigating factors as enumerated by defense counsel and that merely taking note of the mitigating factors is not enough. Counsel relied on the decision in **Aharikundira Yustina versus Uganda, SCCA No. 27 of 2015** in which it was noted that since the trial judge did not weigh the mitigating factors as against the aggravating factors, this automatically placed a duty on the Court of Appeal to weigh the factors raised.

Counsel argued that consistency is a vital principle of a sentencing regime that is deeply rooted in the rule of law, which requires that laws be applied with equality and without unjustifiable differentiation. Counsel based his argument on the decision in **Suzan Kigula versus Uganda, HCT-00-CR-SC-0115** in which the accused cut her husband's throat with a sharp panga to death before their children and was sentenced to 20 years' imprisonment upon mitigation.

Counsel prayed that the sentence of 27 years be set aside and replaced with a lesser sentence.

Respondent's submissions

In reply, counsel submitted that interfering with a sentence imposed on a convict is not a matter of compassion or emotions but rather of reason and law. Counsel relied on the decision in **Kiwalabye Bernard vs Uganda, Supreme Court Criminal APPEAL No. 143 of 2001** for the proposition 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 discretion is such that it results into imposing a sentence that is too harsh or so low as to amount to a miscarriage of justice.

Counsel argued that the trial Judge exercised his discretion judiciously and considered all the important circumstances of the case in arriving at an appropriate sentence of 27 years' imprisonment. That the courts have to consider the nature of the offence in the circumstances in which it was committed and pass a severe sentence where the aggravating factors outweigh the mitigating factors.

RR
CROSS J.P.

Consideration of the Appeal

It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of **Livingstone Kakooza v Uganda, SC Criminal Appeal No. 17 of 1993 [unreported]** that:

*'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See **Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.**'*

The foregoing principles are equally applicable in the instant case. Further, the court may not interfere with the sentence imposed by a trial Court simply because it would have imposed a different sentence had it been the trial Court. We shall bear in mind the above principles while resolving this appeal.

The sentencing order of the trial judge states as follows:

"The Convict shall be treated as a first offence as there is no record of previous conviction. The convict has been on remand since June of 2012 which is 2 years. The Court takes into consideration age of the accused. He is a young man and seeks forgiveness. The Court however cannot condone the actions of the Convict. He cut short the life of another young man with a promising future whose father told Court that the death had greatly affected the family. The offence of Murder is rampant in Kigezi Region. In this Session alone there were 24 Murder cases out of 40. The Court must therefore deter by finding out a message to those of a like mind. For the above reasons the Court considers a sentence of 30 years appropriate but will reduce this by the period spent on remand and sentence the convict to 27 years' imprisonment."

RR *George J.P.*

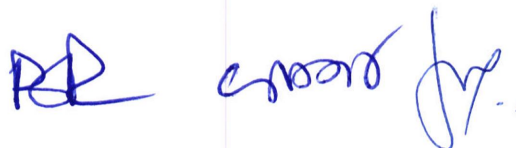
The maximum sentence for the offence of murder is death. We find from the court record and the lower court judgment quoted above that the learned trial Judge considered both the aggravating and mitigating factors of the case and passed a 27-year imprisonment sentence on the Appellant. The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013** provide for the starting point in sentencing for murder as 35 years and the maximum as death. Regarding the principle of uniformity, we are alive to the fact that no two crimes are identical but at the same time, we have to try as much as possible to maintain consistency in sentences.

In **Niwagaba Didas and Turyamubona Francis Vs Uganda Consolidated Criminal Appeals Nos. 0565 and 587 of 2015** (delivered on 13th October 2020), the 1st appellant was sentenced to 27½ years imprisonment and the 2nd appellant sentenced to 37½ years' imprisonment for the offence of Murder. On appeal, the Court of Appeal sentenced both the 1st and the 2nd Appellants to 27 years and 6 months' imprisonment after deducting the period spent on remand.

In **Tugume Moses vs Uganda Criminal Appeal No. 475 of 2016** (delivered on 13th October 2020), the appellant had been convicted and sentenced to 30 years' imprisonment for the offence of Murder. On appeal to the Court of Appeal, the Appellant's sentence was reduced to 27½ years' imprisonment for Murder.

In **Kalyango Musa and Kamya Edward Vs Uganda Criminal Appeal No. 377 of 2019** (delivered on 18th July 2023), the appellants had been convicted of Murder and the 1st Appellant sentenced to 30 years' imprisonment while the 2nd Appellant was sentenced to 25 years' imprisonment. On appeal to the Court of Appeal, the 1st Appellant was sentenced to 27 years, 8 months and 3 days' imprisonment and the 2nd Appellant was acquitted.

Taking into account the principle of uniformity, we therefore find the impugned sentence of 27 years' imprisonment handed out to the Appellant was neither harsh nor excessive; nor do we find that it occasioned a miscarriage of justice to him.





In the premises, we find no grounds upon which we can fault the learned trial Judge and therefore uphold the sentence imposed upon the Appellant.

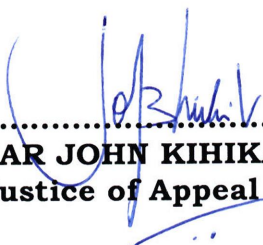
This appeal is devoid of merit and we therefore dismiss it.

We so order

Delivered and dated this^{08th} day of^{September} 2023.

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RICHARD BUTEERA
Deputy Chief Justice

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CHRISTOPHER GASHIRABAKE
Justice of Appeal

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OSCAR JOHN KIHKA
Justice of Appeal