THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: B Cheborion, JA, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 0128 OF 2018

(Arising from Criminal Session No. HCT-00-CR-CS-88/2015)

BETWEEN

ALIAT TIMOTHY LOPUTUKA.....APPELLANT

AND

UGANDA..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda Holden at Moroto, by Henrietta Wolayo, J. delivered on 28th July, 2016)

JUDGMENT OF COURT

Introduction

1.] The appellant was charged with one count of murder contrary to sections 188 and 189 of the Penal Code Act.

2.] The facts are that the appellant was a close friend of the deceased. Before the incident, the wife of the deceased had reported to the Local Council authorities of being harassed by the appellant and his friend. The deceased had warned them not to lay his wife. On the fateful day while at their marital home, one of the deceased's sons came running to the mother informing her that her husband had been murdered. The matter was reported to the police and the appellant together with his friend was tried for the offence of murder. At the conclusion of the trial, the friend was acquitted and the appellant was convicted and sentenced to 32 years' imprisonment.

3.] The appellant being aggrieved with the decision of the High Court lodged an appeal in this Court. The appeal is premised on two grounds set out in the Memorandum of Appeal as follows;

1. *The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on the court record and only based her judgment on the evidence of the prosecution in isolation thus coming to a wrong conclusion 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 32 against the appellant without considering the mitigating factors.*

Representation

4.] At the hearing of the appeal, the appellant was represented by Ms. Faith Luchivya. The respondent was represented by M. Samali Wakooli, Assistant Director of Public Prosecution (A DPP.)

Ground one

The learned trial Judge erred in law and act when she failed to properly evaluate the evidence on the court record and only based her judgment on the evidence of the prosecution in isolation thus coming to a wrong conclusion which occasioned a miscarriage of justice.

5.] Before we consider this ground the respondent raised a preliminary objection on grounds that ground one offends Rule 66(2) of the Court of Appeal Rules for not being specific. Counsel submitted that counsel for the appellant did not clearly indicate which particular piece of evidence was wrongly decided. Counsel prayed that this Court applies the principles laid down in **Benjamin**

Oteka Vs. Uganda, Criminal Appeal No. 175 of 2018, and strike out this ground.

6.] Counsel for the appellant did not respond to this objection.

Consideration of Court

1.] According to **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** and **Selle & another v Associated Motor Boat Co. Ltd.& others, (1968) E. A 123,** the Appellate Court is mandated to re-evaluate the evidence that was before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses firsthand. This duty was stated in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**. It was held that a first appellate Court has the duty to review the evidence of the case and reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanor the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor, which may show whether a statement is credible or not which may warrant a court differing from the Judge even on a question of fact turning on the credibility of the witness which the appellate Court has not seen. **See Pandya vs. R. (1957) E.A. 336.**

2.] Considering the burden of proof and standard of proof in Criminal cases and based on the presumption of innocence enunciated in Article 28(3) of the Constitution of the Republic of Uganda 1995, an accused person can only be convicted by a court of law on the strength of the prosecution case and not on the weakness of the defense case.

3.] Rule 66(2) of the Judicature (Court of Appeal Rules) Directives SI 13-10, provides that,

> *The memorandum of appeal shall be set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.*

4.] Ground one is stated in broad terms, that the trial Judge erred when she failed to evaluate the evidence on record and only based her decision on the evidence of the prosecution. The rule is couched in mandatory terms. It requires that a memorandum of appeal sets forth concisely the grounds of objection to the decision appealed against, specifically citing the parts of the law and facts alleged to have been wrongly decided. This was not the case in ground one. The appellant therefore offended Rule 66(2).

5.] Ground 1 is struck off. We shall proceed to consider the second ground.

Ground 2

The learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence of 32 years against the Appellant without considering the mitigating factors.

Now

6.] It was submitted by the appellant that the sentence of 32 years was harsh and excessive. It is argued that the trial Judge did not take into consideration mitigating factors. Counsel relied on **Kwalijuka vs. Uganda, Criminal Appeal No. 532 of 2013,** where it was held that taking into consideration the mitigating factors is far from discretionary. In **Tumwesigye vs. Uganda, Criminal Appeal No. 46 of 2012**, the Court set aside a sentence of 32 years and substituted it with 20 years of imprisonment. Counsel also cited **Mulolo vs. Uganda, Criminal Appeal No 504 of 2017**, where the court maintained a sentence of 15 years for murder which was meted out to the appellant by the lower Court. Counsel prayed that this sentence should be reduced in line with the principle of consistency.

Submissions for the respondent

7.] Counsel for the respondent submitted that the sentence passed down against the appellant was neither harsh nor excessive in the circumstances. It was submitted that a sentence of 32 years was certainly less than the death sentence and could not be said to be excessive. Counsel cited **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, where it was held that an appropriate sentence is a matter of discretion of the sentencing Judge. In that case, the Court went ahead and noted that the discretion would not be interfered with unless the sentence was illegal or unless the Court is satisfied that the sentence imposed was manifestly excessive to amount to an injustice. Counsel relied on the decisions in **Kiwalabye Bernard vs. Uganda, SCCA No. 143 of 2001**, and **Biryomumaisho Alex vs. Uganda, Court of Appeal, CA No. 464 of 2016.**

8.] Additionally, counsel for the respondent submitted that the injuries on the post-mortem report which was admitted as PE.3, the deceased suffered a slit

neck with a sharp object. That this was cruel, inhuman, and degrading to end a life. Counsel cited **Kaddu Kavulu Lawrence vs. Uganda, SCCA No. 72 of 2018,** where the Supreme Court in addressing the same issue of a sentence being harsh, held that a life sentence of imprisonment was legal. Counsel submitted that likewise, a sentence of 32 years was lawful in the circumstances.

Consideration of Court

9.] The Supreme Court has laid down the principles upon which an appellate Court should interfere with the sentencing discretion of the trial Court, in **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995,** the Court relied on **R vs. Haviland (1983) 5 Cr. App. R(s) 109** and held that:

> *"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 discretion. 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 imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126."*

10.] In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001** it was held:

> *"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignored to*

consider an important matter or circumstances which ought to be considered when passing the sentence."

11.] While sentencing the trial Judge held that;

"The slitting of the neck of the deceased was an extreme act of violence that demonstrates the intention to kill. The right to life must be protected by handing down a stiff penalty. The accused is a young man of 37 years, this is a mitigating factor that does not override the aggravating factors. The appropriate sentence is 34 years. The accused has been on remand since June 2014, he is sentenced to 32 years' imprisonment."

12.] We have observed from the record that the appellant did not present before the Court any mitigating factors. However, the trial Judge Considered the age of the appellant as a mitigating factor. It has to be noted that mitigating or aggravating factors are to guide the Court in making the sentencing decision but they are not binding on Court. In our own analysis of the above holding, we find that the trial Judge properly considered the mitigating factor. We cannot therefore fault her.

13.] On whether the sentence of 32 years' imprisonment was harsh, in **Mpagi Godfrey vs. Uganda Supreme Court Criminal Appeal No 63 of 2015**, the Supreme Court confirmed a sentence of 34 years' imprisonment for murder as handed down by the sentencing Judge and confirmed by the Court of Appeal. In **Ndyomugenyi vs. Uganda, Supreme Court Criminal Appeal No.57 of 2016,** the Supreme Court confirmed a sentence of 32 years' imprisonment for murder as passed by the re-sentencing Judge and confirmed by the Court of Appeal.

14.] Guided by the principle of Consistency, it is our finding that the sentence of 32 years' imprisonment in a murder case was neither harsh nor excessive.

15.] This ground fails

16.] Consequently, the appeal fails.

We so Order

Dated at Kampala this 1st **day of** Nov **2023**

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CHEBORION BARISHAKI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL