THE REPUBLIC OF UGANDA

# THE COURT OF APPEAL OF UGANDA
## AT ~~ARUA~~ Jinja

*(Coram: Kiryabwire; Kibeedi & Mugenyi, JJA)*

**CRIMINAL APPEAL NO. 397 OF 2016**

**ROSE NAKANDI ..... APPELLANT**

**VERSUS**

**UGANDA ..... RESPONDENT**

**(Appeal from the High Court of Uganda holden at Mukono (Mutonyi, J) in Criminal Case No. 125 of 2016)**

## JUDGMENT OF THE COURT

### A. Introduction

1. Ms. Rose Nakandi ('the Appellant') was convicted on her own plea of guilt for the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. The facts of the case as garnered from the record of appeal are that the Appellant and one Hamuza Kauba both lived in Ntenjeru village. Mr. Kauba was a father to two children – Jona Nicholas (5 years, now deceased) and Jessey Kasujja (2 years). Given his busy work schedule, following his separation from the children's mother, Mr. Kauba hired the Appellant to look after the children in his absence. However, the Appellant's neighbours observed her continually beating up Jona Nicholas ('the deceased') when the children started living with her.

2. On 12th September 2015 at around 9.00 pm, the Appellant beat up the deceased, causing him to bleed to death. She thereupon informed her neighbours that the child was ill before, along with her eight-year old daughter, Scovia Nanduga, taking the deceased's body to the home of one Nakiganda (deceased) and throwing it in a pit latrine. She thereafter returned Scovia Nadunga back home and went into hiding. The child, however, informed some neighbours of what her mother had done.

3. The deceased was retrieved from the latrine and taken for post-mortem examination, while shoes attributed to the Appellant were recovered from the scene of crime. The matter was subsequently reported to the police and the accused was arraigned and convicted for the murder of the deceased, and sentenced to thirty years' (30) imprisonment.

4. Dissatisfied with the decision of the trial court, the Appellant lodged the present Appeal in this Court, proffering the following grounds of appeal:

    I. *The Learned trial Judge erred in law and in fact when she failed to follow the proper procedure of recording a plea of guilty.*

    II. *The Learned trial Judge erred in law and fact when she manifestly passed a harsh and excessive sentence to the Appellant.*

5. At the hearing of the Appeal, the Appellant was represented by Mr. Daniel Mudhumbusi while Ms. Samalie Wakooli, Assistant DPP, represented the Respondent.

B. **Parties Legal Arguments**

6. Under *Ground 1* of the Appeal, it is proposed that the Appellant's supposed plea of guilt took the following form: *'I understand the facts. Some are not true.'* Learned Counsel for the Appellant thus contends that insofar as the Appellant disputed the veracity of some of the facts of the case that had been read to her, she did not make an unequivocal admission of guilt and therefore the trial judge ought to have recorded a plea of *not guilty* and proceeded to hear the case as required under section 65 of the Trial on Indictments Act Cap 33 (TIA). Citing **Adan vs Republic (1973) EA 445**, it is argued that for a conviction to be properly based on a plea of *guilty*, the plea must be an unequivocal admission of all the essential elements and facts of the offence, which was not the position in this case.

7. Conversely, while conceding that the plea in this case was improperly recorded, learned State Counsel nonetheless contends that no miscarriage of justice was occasioned by this procedural lapse. She relied on section 139(1) of the TIA to argue that an appellate court can only reverse or alter a finding of the High Court on account of an error, misdirection or irregularity if it can demonstrate that such error has in fact occasioned a failure of justice.

8. Counsel cited of **Kifamunte Henry vs. Uganda (1998) UGSC 20** for the proposition that '**even where a trial Court has erred, the appellate Court will interfere only where the error has occasioned a miscarriage of justice**.' Pointing out that section 139 of the TIA enjoins parties to point out an irregularity at the earliest stage of the proceedings so as to arrest the miscarriage of justice, it is argued that the accused was fully represented at trial and if there was such an anomaly, the advocate ought to have raised it then.

9. Article 126(2)(e) of the Constitution is additionally invoked in support of the view that justice must be administered without undue regard to technicalities. State Counsel sought to illustrate the fallacy of undue reliance on procedural

irregularities with the following observation in **Guster Nsubuga & Another vs Uganda, Criminal Appeal No. 92 of 2018** (Supreme Court):

> There is no denying that fact that we would not be here had the Respondents been asked to take plea after the amendment. It would be neater. It would have removed any excuses. **However, it would be expecting too much to demand that all trials must run like clockwork short of which they would result in nullification of the entire trial. We do not live in a perfect world so we have to evaluate the impact of any particular imperfection on the entire trial**. *(her emphasis)*

10. It is thus argued that not every imperfection should lead to a reversal of a trial court's decision; but, should the Court find that the improper plea taking in this case did occasion a miscarriage of justice, it may remit the matter for retrial or for the plea to be properly recorded before another judicial officer.

11. Under *Ground 2* of the Appeal, the trial judge is faulted for sentencing the Appellant to a 30-year custodial sentence without regard for consistency in sentencing or deducting the 14-month period spent on remand; which sentence in any event is opined to be harsh and excessive. Counsel for the Appellant cites **Abdullah Kamya & Others vs Uganda (2018) UGSC 12** where the Supreme Court adjudged a sentence of 32 years for murder to be inappropriate, harsh and excessive, and reduced it to 18 years yet the Appellant had undergone full trial; as well as **Bosco Lwere vs Uganda (2020) UGCA 2112,** where this Court reduced a 25-year sentence for murder to 18 years.

12. Conversely, State Counsel contests the Appellant's right of appeal on a plea of guilty, save as provided under section 132(3) of the TIA. That notwithstanding, it is argued that the Appellant got away with only a 30-year sentence for the gruesome murder of an innocent child, given her plea of *guilty* and remorse; which sentence cannot be said to be harsh or excessive in light of the maximum death penalty for murder. Citing **Kyalimpa Edward versus Uganda Supreme Court criminal Appeal No.10 of 1995**, it is further argued that sentencing ensues at the discretion of a sentencing judge and can only be interfered with if the sentence is excessive and was premised on a wrong principle. In this case, it is opined, the

trial judge correctly considered the manner in which the crime was committed, moreover in front of other children.

13. Deference is further made to **Bashasha Sharif vs Uganda (2019) UGSC 65** and **Bwembi Lameck vs Uganda (2019) UGSC 22**, where the Supreme Court confirmed sentences of life in prison which is higher than the 30 years imprisonment; as well as **Opolot Justine & Another vs. Uganda (2019) UGSC 4** for the proposition that if the maximum penalty for the offence of murder had not been imposed, it could not be suggested that the sentences were harsh or excessive. Reference is further made to **Turyahabwe Ezra & Others vs. Uganda (2018) UGSC 17**, where the apex court adjudged a sentence of life imprisonment to have been neither illegal nor harsh and excessive given the maximum death penalty for the offence of murder and the wanton manner in which the appellants in that case.

14. With regard to the mathematical deduction of the period spent on remand, it is argued that **Rwabugande Moses vs Uganda (2017) UGSC 8** was decided on 3rd March 2017 well after the decision of this case on 18th November 2016 and therefore does not have retrospective effect on sentences that were passed before it such as the present case. Reference with regard to the non-retroactive application of the **Rwabugande** decision is made to **Sebunya Robert & Another vs. Uganda, Criminal Appeal No. 58 of 2016** (Supreme Court) and **Befeho Iddi vs Uganda (2021) UGSC 42**. On the authority of **Abelle Asuman vs Uganda, (2018) UGSC 10**, as cited with approval in **Bwembi Lameck vs Uganda** (supra), it is argued that the record of appeal indicated that the remand period had been taken into account in this case and therefore the sentence is not illegal.

C. **Determination**

15. Given the vitality of plea taking to a plea of *guilty* and conviction on that basis, we shall address this ground of appeal forthwith. The powers of an appellate court in an appeal from conviction and sentence are stated in Section 132 of the Trial on Indictment Act, Cap. 23 (TIA). Section 132(3) of the TIA makes specific provision for an appeal from a conviction on an accused person's own plea of guilty in relation to '**the legality of the plea or to the extent or legality of the sentence**.'

16. The correct procedure for plea taking was elaborately articulated by the East African Court of Appeal in **Adan vs Republic** (supra) as follows:

> When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. **The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded** and further facts relating to the question of sentence should be given before sentence is passed. The statement of facts and the accused's reply must, of course, be recorded. *(Our emphasis)*

17. In the earlier case of **Tomasi Mufumu v. R [1959] EA 625**, the same court had observed as follows:

> It is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but **should satisfy himself also and record that the accused understands the elements which constitute the offence of murder** ... and understands that the penalty is death. *(Our emphasis)*

18. It is against that background that we carefully considered the record of proceedings in this matter. It reveals that on 18th November 2016 the indictment for murder was read and explained to the Appellant in Luganda:

> *STATEMENT OF OFFENCE*
>
> ***MURDER contrary to section 188 and 189** of the Penal Code Act.*
>
> *PARTICULARS OF OFFENCE*
>
> ***NAKANDI ROSE** on the 12th day of September 2015, at Ntenjeru village, Ntenjeru Sub-county in Mukono District unlawfully caused the death of **JONA NICHOLAS.***

19. The Appellant responded to the indictment in the affirmative as follows: *'I understand the charge. I committed the offence.'* A plea of *guilty* was then recorded, following which the trial court had the full facts of the prosecution case read to the Appellant.

20. Quite clearly, the Indictment as reproduced above and to which the Appellant conceded is silent on the ingredients of the offence of murder. As was proposed in **Adan vs Republic** (supra), the ingredients of the offence are explained to an accused person by the trial judge. In this case, however, the material on record suggests that the *mens rea* for the offence of murder was not explained to the Appellant by the trial judge so as to have her admission thereto secured prior to a plea of *guilty* being entered. Stated differently, it was not explained to her that the offence she had conceded to entailed the ingredient of malice aforethought or intentional killing. This should have been done prior to the prosecutor being asked to read the facts of the case to the Appellant. with the failure to do so, it is quite possible that the Appellant conceded to having killed the deceased without necessarily comprehending or conceding to the ingredient of *mens rea* or malice aforethought that is included in the offence of murder. This would in itself reduce the Appellant's admission to a plea of guilt for the lesser offence of manslaughter rather than murder.

21. Be that as it may, the full facts that comprise the prosecution case were subsequently read to the Appellant. They were recorded as hereunder.

- *The accused person and the father of the deceased was Hamza lived in the same village called Ntenjeru village in Mukono.*
- *Hamza had two children the eldest being the deceased [who] was about 5 years and another aged 2 years.*
- *Hamza and the mother of the children had separated.*
- *He had no time to cater for them since he was working at school.*
- *With the help of LC, they looked after these children. They agreed that the accused would look after the children for 30,000/= per month and weekly pay 16,000= per week for feeding the children.*
- *However, the neighbours of the accused witnessed the accused constantly assaulting the deceased when they started living with her.*

- *On 12/9/2015 at about 9:00pm, the accused used a very big stick and assaulted the deceased until the deceased bled to death. This was witnessed by the accused's daughter about 8 years. The accused carried the body to the compound, and informed the neighbours that the child was sick yet, it was dead. They noticed that the child was dead since the hands were dangling.*
- *The accused carried the child to some unknown place and was followed by her daughter. The accused then with the deceased body dumped it to home of one late Nakiganda, traced the pit latrine and throw the body in the pit latrine. She thereafter went into hiding. The accused's daughter saw all these.*
- *The accused's daughter went back home and informed them that the accused had thrown the child's body into a pit latrine. One of the neighbours reported the matter to police.*
- *The body was retrieved from the pit latrine.*
- *The accused's shoes were recovered from the scene of crime.*
- *Post-mortem was carried out, the deceased's body was found to have multiple linear bruises on the face, back, chest, abdomen, buttocks, forehead, thighs which were in different shapes and sizes. The cause of death was forced trauma.*
- *Fracture on left ribs 6-10.*
- *The accused person was examined on PF 24 and found to be 34 years old with a normal mental status.*
- *The accused was thereafter charged.*

22. With regard to these facts, the Appellant stated – '*I understand the facts. Some are not correct.*' She was thereupon convicted for the offence of murder on her supposed plea of guilt and the matter proceeded to sentencing. The purpose of having the prosecution read the full facts to an accused person that purports to plead guilty to an offence was spelt out in **Adan vs Republic** (supra) as follows:

> The accused (should) be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded.

23. Consequently, in the present Appeal, it is only after the ingredients of murder had been clearly explained, and the facts as read to her by the prosecutor had not been

disputed (in material respects) by the Appellant that a plea of guilty could have been confirmed and recorded as against her. Once the Appellant disputed some of the facts as read to her, the trial judge should have taken trouble to find out which of the facts she disputed so as to make a determination as to whether they were facts that were material to the ingredients of murder, in which case a plea of *not guilty* would be recorded; or whether they were immaterial facts, in which case the plea of *guilty* would be confirmed.

24. Furthermore, as alluded to in both the **Adan** case and **Tomasi Mufumu vs. R** (supra), at that stage it would be advisable too that an accused person that has pleaded guilty to murder is advised of the potential death penalty in respect of that offence. Indeed, in **Kusenta & Another vs. Republic [1975] 1 EA 274**, it was observed that a plea of guilty to murder should only be accepted in the clearest of cases.

25. It does therefore become apparent that the supposed plea of *guilty* was wrongly recorded in this case. On that premise, *Ground 1* of the Appeal is allowed.

26. The question, however, is whether the irregularity in plea taking occasioned a miscarriage of justice and, if so, what remedies are available. Section 34(1) of the Criminal Procedure Code Act, Cap. 116 mandates an appellate court in an appeal against conviction to dismiss the appeal '**notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, .... if it considers that no substantial miscarriage of justice has actually occurred**.' A similar provision is to be found in 139(1) of the TIA to which we were referred by learned State Counsel. For completeness, section 139 is reproduced in its entirety below:

> **(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.**
>
> **(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question**

**whether the objection could and should have been raised at an earlier stage in the proceedings**. *(our emphasis)*

27. Undoubtedly, defence counsel should have brought the irregular recording of a plea of *guilty* to the attention of the trial judge immediately it was recorded as required under section 139(2) of the TIA. However, that omission from the Bar would not negate the pivotal duty upon trial courts to treat the plea taking process with the seriousness that it deserves in order to avert unnecessary retrials with the very real possibility that witness fatigue, compromise or unavailability could set in on retrial. Thus, such an omission from the Bar ought to be weighed against the fundamental consideration as to whether a failure of justice has been occasioned by the improper plea recording.

28. In **Ojera Agona & Others vs. Uganda, Criminal Appeal No. 329 of 2019** (Unreported), where only one of multiple offenders had supposedly pleaded guilty before challenging the plea taking process; this Court reverted to the totality of the evidence on record to deduce his role in the murder so as to deduce whether or not a failure of justice had occurred by the improper recording of a plea of guilty. The Court's finding that the said appellant had been properly identified put to rest any connotations of a miscarriage of justice and had the Court confirm his conviction.

29. In the matter before us presently, however, the Appellant is the sole offender whose prosecution terminated with her purported admission of guilt. Would then a retrial as proposed by learned State Counsel be appropriate remedy in the circumstances of this case?

30. An order for a retrial was in **Rev. Father Santos Wapokra vs. Uganda (2016) UGCA 33** opined to be the result of judicial discretion that should be exercised with the greatest care and on the basis of established judicial principles. Reference in that regard was *inter alia* made to the **Fatehali Manji vs. R. (1966) EA 34**, where it was held that each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it but 'in **general a retrial will be ordered only when the original trial was illegal or defective**.' *See also* ***Ahmed Ali Dharamsi Sumar vs. R. (1964) EA 481***.

31. In **Rev. Father Santos Wapokra vs. Uganda** (supra), this Court additionally proposed the following parameters as a guide to when a court may or may not order a retrial. It was held:

> **The Court must however first investigate whether the irregularity is reason enough to warrant an order of a retrial: *RATILAL SHAHUR [1958] EA 3*.** (Even then) however, before ordering a retrial, the Court handling the case must address itself to the rule of the law that: "*a man shall not be twice vexed for one and the same cause: Nemo bis vexari debet pro eadem causa*". A re-trial must not be used by the prosecution as an opportunity to lead evidence that it had not led at the original trial and to take a stand different from that it took at the original trial. The prosecution must not fill up gaps in its evidence that it originally produced at the first trial: See: **MUYIMBO v R 1969 EA 433.** A retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice, that is where it will deprive the accused/appellant of the chance of an acquittal: See: **M'KANAKE v R [1973] EA 67.** *(our emphasis)*

32. Turning to the Appeal that is before us, it is clear from the wording of the Indictment that was read and explained in a language her comprehension of which is not contested, that the Appellant conceded to having '*unlawfully caused the death of Jona Nicholas*.' That is not one and the same thing as an admission to having ***intentionally*** caused the deceased's death.

33. Under section 187(1) of the Penal Code Act, the offence of manslaughter is defined as follows:

> **Any person who by an unlawful act or omission causes the death of another person commits the felony termed manslaughter.**

34. This is to be distinguished from the definition of murder under section 188 of the same Act as follows:

> **Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder.**

35. Such malice aforethought is in turn defined in section 191 of the Act to include the intention to cause death or knowledge that an act or omission would probably cause death. Consequently it becomes abundantly clear that the Indictment under

which the Appellant was convicted was itself defective. Whereas the *Statement of Offence* made reference to the offence of murder, the *Particulars of Offence* described the offence of manslaughter.

36. *Ayume, Francis J., 'Criminal Procedure and Law in Uganda', LawAfrica Publishing (T) Ltd, 2010 Reprint, pp. 69, 70* addresses the scenario before us where a *Statement of Offence* is defective in citing the law creating an offence but the *Particulars of Offence* clearly state the commission of an offence known in law. Citing the case of **Uganda vs. Jairesi Misango, M.B 310/71** where the *Statement of Offence* made reference to the offence of indecent assault but the particulars thereof described the offence of *'insulting the modesty of a woman'*; the distinguished author approbates the High Court judge's handling of the matter in the following terms:

> The only defect in the charge, he said, was that the statement of offence was not correctly described, an omission which did not occasion a miscarriage of justice since the particulars as set out left the accused in no doubt as to the offence to which he had been asked to plead.

37. Perhaps more importantly for present purposes, the above exposition on defective charges or indictments clarifies that a defective *Statement of Offence* is not fatal provided that the *Particulars of Offence* clearly describe an offence that is known in law and in respect of which an accused person is required to take plea. Consequently, such an irregularity is not reason enough to order a retrial. We are alive to the observation in **Guster Nsubuga & Another vs Uganda** (supra) that '**it would be expecting too much to demand that all trials must run like clockwork short of which they would result in nullification of the entire trial. We do not live in a perfect world so we have to evaluate the impact of any particular imperfection on the entire trial**.'

38. Meanwhile, in **Rev. Father Santos Wapokra vs. Uganda** (supra), another important consideration highlighted by this Court before a retrial can be ordered is '**the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial**.' Given that it is eight (8) years since the homicide in issue presently occurred, we do not think it

can be realistically expected that the evidence available then would still be available. On the other hand, we find that the Appellant pleaded guilty to the offence of manslaughter in accordance with the clear terms of the *Particulars of Offence* in her Indictment. She clearly understood that a plea of *guilty* to manslaughter meant that she had caused the unlawful death of the deceased and '*accepted*' that charge.

39. Considering the totality of those circumstances, not least being the unnecessary cost to all parties of a retrial, we are satisfied that a retrial would not be in the interests of justice in this case. We would hereby quash the Appellant's conviction for the offence of murder and substitute it with conviction on her own plea of guilty for the lesser offence of manslaughter contrary to section 187 of the Penal Code Act.

40. Having so held, we would allow *Ground 2* of the Appeal insofar as the contested sentence related to a conviction for the offence of murder. We are mindful of the fact that the Appellant fatally assaulted a young, defenceless 5-year-old toddler who had been left in her care and, rather than immediately own up to her brutal actions, sought to cover them up by throwing the deceased child into a pit latrine. A post-mortem report states that the deceased's body was found to have multiple linear bruises on the face, back, chest, abdomen, buttocks, forehead, thighs which were in different shapes and sizes, as well as a fracture to 6 – 10 left ribs. The cause of death was forced trauma. This sort of infant abuse is completely unacceptable in a civilized society. Nonetheless, our judicial practice is such that having immediately pleaded guilty to the offence once apprehended, she would attract some degree of leniency at sentencing. Furthermore, we find no antecedents of past conduct of the same nature, although we recognize the fact that such antecedents are not readily forthcoming in our criminal justice system.

41. Consequently, we would sentence the Appellant to a 20-year term sentence for the offence of manslaughter from which we deduct the 14-month period spent on remand to yield a sentence of imprisonment for eighteen (18) years and ten (10) months. This sentence shall run from the date of conviction and sentencing on 18th November, 2016.

D. **Disposition**

42. In the result, this Appeal is substantially allowed with the following orders:

I. **We do hereby quash the conviction of Rose Nakandi for the offence of murder contrary to sections 188 and 189 of the Penal Code Act, and substitute it with a conviction for the lesser offence of manslaughter contrary to section 187 of the Penal Code Act.**

II. **We hereby substitute the 30-year sentence handed to the said Rose Nakandi with an 18-year sentence to run from the date she was sentenced, upon deducting the 14 months that she had spent on remand as at that date**.

It is so ordered.

**Dated and delivered at Kampala this** 26th **day of** December **, 2023.**

**Geoffrey Kiryabwire**

**Justice of Appeal**

**Muzamiru M. Kibeedi**

**Justice of Appeal**

**Monica K. Mugenyi**

**Justice of Appeal**