THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KABALE

(Coram: Muzamiru Mutangula Kibeedi, Christopher Gashirabake & Oscar John Kihika, JJA)

CRIMINAL APPEAL NO: 383 OF 2017

SABIITI NELSON :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[An appeal against sentence only passed on the 12th day of September 2017 by Hon. Justice Moses Kazibwe Kawumi in Criminal Session Case No. HCT-011-CR-CSC-148-2016 of the High Court of Uganda sitting at Mbarara]

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court (Moses Kazibwe Kawumi, J.) by which the appellant was, convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced to serve a 27 years' imprisonment term after deducting the five years he spent on remand.

Background

The appellant, Sabiiti Nelson, and Semana Robert who is not a party to this appeal, were indicted with the offence of murder. The particulars of the offence were that the appellant, Sabiti Nelson, Semana Robert and others still at large on the 28th day of August 2012 at Kabagara village in Kisoro District unlawfully and intentionally caused the death of Ntirengaya Wilberforce (deceased).

The prosecution's case before the trial was that in the evening of 28/08/2012, the deceased and the two other persons were drinking at Ruhandanzovu trading centre. The appellant picked a quarrel with the deceased and fought with him. Shortly after, a one Majambere Enos sided with

the appellant and also beat the deceased. After a short while, the appellant left the trading centre in the company of Majambere Enos and Semana Robert. The deceased went following the appellant and the two other persons and on the way another fight ensued.

When the deceased reached his home, he was very weak but he reported to his mother that he had been assaulted by the appellant and Majambere Enos. The next morning the deceased was taken to the hospital when he was not talking. He was examined on Police Form 3, which showed a cut wound on the temporal region and a depressed scalp. After 4 days in hospital the deceased died on the 3/09/2012.

The post mortem on the body of the deceased revealed that he died due to a brain injury resulting from internal bleeding. The appellant and Robert Semana were accordingly charged with the murder of the deceased.

The appellant admitted assaulting the deceased which resulted into his death. He voluntarily gave an extra judicial statement to that effect. His co-accused denied the offence in totality. The appellant was tried and convicted on the charge of murder. He was subsequently sentenced to serve an imprisonment term of 27 years after subtracting the five years he spent on remand.

The appellant was dissatisfied with the sentence imposed by the trial Court and, with leave of this Court, now appeals against sentence only on the sole ground that:

1. *The learned trial Judge erred in law and fact when he convicted (sic!) the appellant to 32 years imprisonment, which punishment was manifestly harsh and excessive.*

The respondent opposed the appeal.

Representation

At the hearing of the appeal, Ms. Alice Namara of Namara Alice & Co. Advocates represented the appellant on State Brief, while Mr. Simon Peter Semalemba, Director of Public Prosecutions (DPP), appeared for the respondent. The appellant was present in court.

The parties, with leave of the Court, relied on their written submissions in support of their respective cases.

Appellant's submissions

Counsel for the appellant submitted that the sentence of 32 years' imprisonment imposed by the trial Judge was harsh and excessive in view of the circumstances of the case and the principles of consistency and uniformity in sentencing as espoused in the case of ***Tumwesigye Anthony Vs. Uganda [2014] UGCA 61.***

Counsel submitted that the trial learned Judge also overlooked most of the mitigating factors in favour of the appellant such as the fact that the appellant was a young man, and appeared remorseful throughout the trial. That instead the trial Judge went ahead to hand to the appellant a sentence of 32 years' imprisonment, a sentence that was harsh and excessive since it was outside the range of sentences of this Court.

Counsel prayed that this Court be pleased to find that the sentence given by the trial learned Judge was manifestly harsh and excessive in the circumstances and thus be set aside and varied, as per Section 11 of the Judicature Act.

Respondent's Reply

Counsel for the Respondent submitted that the sentence of 32 years imposed by the trial Judge was neither harsh nor excessive as the learned trial Judge took into account all the aggravating and mitigating factors and also considered all the circumstances of the case before arriving at the sentence. Counsel prayed that this court does maintain the sentence.

Resolution

We have carefully read the submissions of both counsel and we have also read the record and the authorities cited to us and others not cited to us. The appeal before us is against sentence only. It

is now settled that for an appellate court, to interfere with the sentence imposed by the trial court, it must be shown that:

1) The sentence is illegal.

2) The sentence is harsh or manifestly excessive.

3) There has been failure to exercise discretion.

4) The trial court acted on a wrong principle.

5) There was failure to take into account a material factor.

See: ***Livingstone Kakooza versus Uganda, Supreme Court Criminal Appeal No. 17 of 1993; Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of 2000;*** and ***Kyewalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.***

We shall bear in mind the above principles when resolving this appeal while, at the same time, not losing sight of the general duty of this court, as first appellate court, to re-appraise all evidence that was adduced before the trial court and come to its own conclusions of fact and law while making allowance for the fact that the court neither saw nor heard the witnesses testify. (See: ***Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I No. 13-10; Fredrick Zaabwe vs. Orient Bank Ltd, Supreme Court Civil Appeal No. 4 of 2006;*** and ***Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

The basis of the appellant's complaint that the sentence is harsh and manifestly excessive is that the trial Judge did not take into account the mitigating factors of the appellant's age, being a young man capable of reform, and that he appeared remorseful during allocutus. Further, that the sentence breached the principle of uniformity and consistency in sentencing.

During the allocutus, the appellant's Counsel during the trial Court stated:

*"**Ms. Namara:***

Convict is a first offender. Been on remand for 5 years. He is a young man capable of reform. He's been remorseful. We pray for a lenient sentence to enable him serve and re-join his family of four children and a wife. The youngest is 7 years and the eldest between 18 years. They need his support.."

The sentencing order of the trial Judge stated:

"SENTENCE AND REASONS FOR THE SENTENCE

The convict is a first offender of 22years with a young family that require his support. He is a young man capable of reform and he appeared remorseful during the allocutus. I have considered the submissions of counsel in [aggravation] and mitigation. Also, the pleas of the convict in the allocutus. I have also taken into account the gruesome manner in which this avoidable offence was committed, and the fact that the deceased also left behind an old mother who derived sustenance from him.

The constitution sentencing guidelines provides for death as the maximum penalty. This is however reserved for the rarest of rare cases, it would not be applicable to this case.

I will consider a custodial sentence. The guidelines provide for 35 years as the starting point for discounting on basis of the prosecutors in mitigation. I will reduce 3 years from the 35 years on the basis of the mitigating factors. I will sentence the convict to 32 years, less the 05 years he has spent on remand, he will serve 27years in jail."

From the record of appeal, we note that the trial judge while sentencing made specific reference to the appellant's age of 22 years, family responsibility and the reformative aspect of the court sentences. He likewise made reference to the aggravating factors. However, he did not give sufficient consideration to the circumstances preceding the death of the deceased.

The court record indicates that the appellant, the deceased and Robert Semana while having a drink at Ruhandanzovu Trading Centre developed a quarrel and a fight ensued from the drinking venue. When the appellant left the drinking venue with three other colleagues of his, he was followed by the deceased. Another fight again ensued on their

way back home. By the time the deceased reached his home, he was weak and he informed his mother that he had been assaulted by the appellant and another person. The deceased was taken to hospital the following morning and he died four days after admission in hospital from internal bleeding.

In our view, the death arose under circumstances when the appellant and the deceased were not fully in charge of their mental faculties as a result of drinking and fist fights. In terms of criminality, the appellant's conviction for murder under the circumstances ought not be put on the same class as that involving persons who are sobber and fully appreciated the consequences of their actions.

Further, it is not evident from the court record that the trial court gave due consideration to the principle of consistency in sentencing in accordance with ***Guideline 6 (c) of Judicature (Sentencing Guidelines for courts of Judicature (Practice) Directions 2003*** and the decided cases of this Court and the Supreme Court including ***Mbunya Godfrey Vs Uganda SCCCA No. 4 of 2011*** and ***Aharikundira Vs Uganda [2018] UGSC 49***. The trial court did not cite any decided case which guided the exercise of its sentencing discretion.

The importance of the principle of consistency in sentencing was stated by the Supreme Court of Uganda in the case of ***Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015***, thus:

> *"...It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."*

In ***Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013***, this Court after reviewing numerous decisions of the Supreme Court and the Court of Appeal stated thus:

"Although the circumstances of each case may certainly differ, this court has now established a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to 35 years imprisonment. In exceptional circumstances the sentence may be higher or lower."

In ***Jamada Nzabaikukize Vs Uganda, Supreme Court Criminal Appeal No.01 of 2015*** where the deceased's death for which the appellant was convicted arose from excessive bleeding after being stabbed by the appellant, a sentence of 20 years was found by the Supreme Court to be appropriate.

In ***Akbar Hussein Godi Vs Uganda, Supreme Court Criminal Appeal No. 03 of 2013,*** the appellant shot his wife to death. He had earlier been threatening to kill her. The deceased had informed her relatives and friends that her life was in danger. The convict eventually executed his plan. He was convicted and the sentence of 25 years' imprisonment was upheld by the Supreme Court.

In ***Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014*** the appellant's cattle trespassed on the deceased's land and destroyed his crops. The deceased seized the accused's cattle and took them to his home with the intention of calling the Local Council chairman of the village to come and settle the matter. The appellant came to the deceased's home and demanded for the release of his cows. When the deceased declined to do so, he and his herdsmen beat him to death. The trial court sentenced him to 35 years' imprisonment but on appeal this court reduced the sentence to 21 years' imprisonment. The sentence was upheld by the Supreme Court.

In ***Aharikundira Yustina Vs. Uganda Supreme Court Criminal Appeal No. 027 of 2015*** where the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial Court and substituted it with a sentence of 30 years' imprisonment.

We find that as a result of the failure of the trial Court to adequately consider the degree of criminality of the appellant arising from the drinking, and the decided cases of this Court and the

Supreme Court in similar matters, he imposed a sentence which manifestly excessive in the circumstances of the case. The appellant was a first offender and aged 22 years only but the sentence passed against him was on the higher end of the sentencing regime set out in the murder cases which we have referred to. In ***Ainobushobozi Venancio Vs Uganda, Court of Appeal Criminal Appeal No.242 of 2014*** this court re-echoed the rule of practice that first offenders ordinarily do not receive the maximum sentence for the offence of which they have been convicted.

Accordingly, this appeal succeeds with the consequence that the sentence of the trial court is hereby set aside.

Re-sentencing

We shall now proceed to sentence the appellant afresh pursuant to ***Section 11 of the Judicature Act*** which provides as follows:

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

We adopt the aggravating and mitigating factors as laid out by the learned trial Judge. Considering the circumstances under which the death of the deceased arose and the decided cases we have referred to in this judgment, we are satisfied that a sentence of 20 years' imprisonment from the date of conviction will meet the ends of justice in this case. From this term, the appellant is entitled to a deduction of the five years spent on remand.

DISPOSITION.

1) The appeal against sentence is allowed.

2) The sentence imposed by the High Court against the appellant for the offence of murder is hereby set aside.

3) The appellant shall serve an imprisonment term of 15 (fifteen) years from the 21st day of August 2017, the date of conviction.

205 **We so order.**

Delivered and dated this ..29th.. day of ..November..... 2023.

.....29/11/2023

MUZAMIRU MUTANGULA KIBEEDI

Justice of Appeal

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CHRISTOPHER GASHIRABAKE

Justice of Appeal

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OSCAR JOHN KIHIKA

Justice of Appeal