THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0297 OF 2015
(Arising from Criminal Session Case No. 081 of 2013)

KEEYA ZAVERIO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Arising from the decision of the High Court of Uganda sitting at Entebbe, (E. J. Alividza, J, dated 23rd July 2015)

CORAM: **Hon. Mr. Justice Richard Buteera, DCJ**
Hon. Lady Justice Elizabeth Musoke, JA
Hon. Mr. Justice Cheborion Barishaki, JA

JUDGMENT OF COURT

Introduction

The appellant was convicted of the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 120, and sentenced to 26 years' imprisonment.

Brief facts

The facts as found by the trial judge are that the deceased Kintu Charles was a son to the accused (now appellant). The deceased used to misbehave and torture his father. The two were staying in the same house. In 2009, he disappeared from his father's house. The appellant informed the relatives that the deceased had gone to Bugerere to visit his mother's people. Relatives tried to trace the deceased there but they were informed that the deceased was not in Bugerere. In 2011, one of the relatives began to be haunted by the deceased spirit that 'he was buried in a bad place'. The relatives then applied pressure on the accused. One day, in the presence of the LC Chairman and other relatives, the accused admitted killing the deceased and burying his body. He took them to where he had buried the body. The appellant led the Police to where he had buried the deceased and Police recovered a dead body in the said place and it was given a decent burial by the relatives. The

appellant was arrested and prosecuted. In his defence, he denied killing the son and stated that this was a grudge his relatives had with him due to succession conflicts. He was tried, convicted and sentenced accordingly.

The appellant now appeals against the sentence on the following ground:

> **The learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh, manifestly excessive and not in line with previous judicial precedents.**

The appellant prayed that the Appeal be allowed and the sentence reduced.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Mutange Ian, on state brief, while the respondent was represented by Mr. Sam Oola, Senior Assistant DPP.

Both counsel applied to rely on their written submissions and the Application was granted. This Court shall, therefore, consider the written submissions in determining this Appeal.

Case for the appellant

Counsel for the appellant moved under Section 132 (1) of the Trial on Indictments to seek leave to appeal against sentence only. There being no objection from the respondent, leave was granted by Court.

Citing ***Kifamunte Henry v. Uganda; SCCA No. 10 of 1997***, counsel for the appellant submitted that it is trite law that the duty of the first appellate court is to re- appraise all the evidence adduced at the trial and come up with its own inferences. He sought to examine a number of precedents and juxtapose these with the instant Appeal. He cited ***Abaasa John & Muhwezi Siriri v. Uganda; Court of Appeal Criminal Appeal No. 33 of 2010***, in which the appellants had been charged and convicted of murder and aggravated

robbery. In enunciating the principles governing the setting aside of the sentence imposed by a trial court, stated thus:

> **"It is now a well- settled position in law, that this Court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstance."**

He stated that the Court of Appeal in ***Abaasa*** (supra) cited with approval the Supreme Court case of ***Livingstone Kakooza v. Uganda; Supreme Court Criminal Appeal No. 17 of 1993***, and stated that:

> **"an appellate Court will also interfere with sentence where the trial Court has 'overlooked some material factor'. It also advised that 'sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration."**

Counsel thus contended that in imposing a sentence in respect of an offence committed by an offender, the trial Court ought to consider previous cases and precedents to ensure consistency in imposing sentences as was re-echoed in the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013. Rule 6 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions) provides:

> **"Every Court shall when sentencing an offender take into account- the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."**

Counsel argued that in the instant case, the learned trial Judge made no reference to previous cases in which a similar offence was committed and the accused people sentenced. Counsel stated that time would fail him to provide

a plethora of authorities in which the sentences imposed for a similar offence of murder were much lower than the one imposed by the trial court.

He cited ***Adiga Johnson v Uganda; Court of Appeal Criminal Appeal No. 157 of 2010*** where court cited a number of authorities in which the sentences imposed for a similar offence of murder were in the range of 19- 20 years. He also cited ***Tumwesigye Anthony v Uganda; Court of Appeal Criminal Appeal No. 46 of 2012*** in which the appellant was convicted of murder and sentenced to 32 years' imprisonment. On appeal, this Court set aside that sentence and substituted it with 20 years' imprisonment. He also referred to ***Anywar Patrick & Anor v Uganda; Court of Appeal Criminal Appeal No. 166 of 2009***, where this Court set aside a sentence of life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months' imprisonment. He also cited ***Uwera Jackie Nsenga v Uganda; Court of Appeal Criminal Appeal No. 824 of 2015***, a case in which the appellant run the husband over with a car, this Court upheld a sentence of 20 years' imprisonment for the offence of murder.

Counsel thus implored this Court to find that the sentence of 26 years' imprisonment imposed upon the appellant by the trial court was excessive, harsh and inconsistent with the previous decisions of this Court. He prayed that the sentence is reduced to 20 years' imprisonment subject to the time the appellant had already served.

Case for the respondent

Counsel for the respondent opposed the appellant's appeal against sentence and supported the sentence of 26 years' imprisonment imposed by the trial court.

In response to the appellant's complaint that the learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh, manifestly excessive and not in line with previous judicial precedents, counsel set out the relevant part of the sentencing proceedings and argued

that the Supreme Court had dealt with circumstances in which an appellate court can interfere with a sentence. He cited ***Rwabugande Moses v Uganda; SCCA No. 25 of 2014; Kyalimpa Edward v Uganda; SCCA No. 10 of 1995; Kamya Johnson Wavamunno v Uganda; SCCA No. 16 of 2000*** and ***Kiwalabye Bernard v Uganda; SCCA No. 143 of 2001.***

He submitted that the principles laid out are 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 or her 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. And that the court will also interfere where there has been a failure to take into account a material factor or an error in principle was made.

Regarding the appellant's concern that the trial court did not consider some previous decisions by this court with regard to sentencing, counsel for the respondent cited the case of ***Katureebe Boaz & anor v Uganda; SCCA No. 41 of 2016***, where the Supreme Court held that:

> **"Consistency in sentencing is neither a mitigating nor an aggravating factor in our view to render a sentence passed illegal. After considering the mitigating and aggravating factors, the sentence imposed lies in the discretion of the Court which, in exercise thereof, may consider sentences imposed in other cases of a similar nature."**

Counsel agreed with the above exposition of the law and submitted that the failure by the trial Judge to consider sentences in previous cases by this court or the Supreme Court was not fatal to the sentence imposed since the trial Judge applied the right principles in this case. She pointed out that the appellant murdered his own son in cold blood when he hacked him twice on the head using an axe and buried the body in a shallow grave behind his house

in an attempt to conceal it. It was counsel's opinion that this was pre-mediated murder that was meticulously planned by the appellant.

Counsel pointed out that the appellant was spared the maximum sentence of death and as such, the 26 years' imprisonment was neither harsh nor excessive considering the gravity of the offence and the circumstances in which it was committed.

Counsel further submitted that the learned trial Judge credited to the appellant the period he had spent on remand and deducted it from the 30 years' imprisonment thus deeming the 26 years as an appropriate punishment.

Counsel invited this Court to consider some authorities and the sentences imposed vis-à-vis the facts and the circumstances of the instant case. In ***Latif Buulo v Uganda; SCCA No. 31 of 2017***, the appellant went to the home of the deceased to pick his wife who had eloped with the deceased. The appellant entered the deceased's house, found a panga in the bedroom which he picked and used to cut the deceased to death. He was convicted of murder and a sentence of 25 years' imprisonment against him by the Court of Appeal was upheld by the Supreme Court.

In ***Mboneigaba James v Uganda; SCCA No. 25 of 2017***, the appellant attacked his mother with a panga and killed her. He was convicted of murder. On appeal to the Supreme Court, he was sentenced to 26 years and 6 months' imprisonment.

In ***Muhoozi Denis & anor v Uganda; SCCA No. 29 of 2014***, the appellants attacked the deceased at his home using a panga. The deceased engaged them in a fight, but he was eventually overpowered. They inflicted multiple cut wounds on his head, neck, chest and arms from which he died. The appellants were convicted of murder. The Supreme Court upheld a sentence of 30 years' imprisonment that had been imposed on the appellants by the Court of Appeal.

In ***Kaddu Kavulu Lawrence v Uganda; SCCA No. 72 of 2018***, the appellant and one Scovia Balyama Nansubuga cohabited for about four years before separating. The latter then entered into a relationship with the deceased and started living with him. While armed with a panga, the appellant went to the deceased's home and found him standing at the entrance of his house in the company of Scovia Balyama Nansubuga. The appellant inflicted fatal injuries to the deceased using the panga he had carried. He was convicted of murder and a sentence of life imprisonment by the Court of Appeal was upheld by the Supreme Court.

Counsel stated that there were similarities between the instant case and the cases cited and submitted that the appellant had not made a compelling case to warrant this Court to interfere with the sentence of 26 years' imprisonment that was imposed by the High Court. He prayed that Court finds that the sentence imposed was appropriate, should be left undisturbed and that the Appeal against sentence be dismissed.

Court's consideration

The duty of this court as a first appellate court was laid out in ***Kifamunte Henry v Uganda; S.C. Criminal Appeal No. 10 of 1997***, where the Supreme Court stated that:

> **"The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."**

In ***Rwabugande Moses v Uganda; S.C. Criminal Appeal No. 25 of 2014***, the Supreme Court high-lighted the duty of the first appellate court as follows:

> **"It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial**

court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. [Baguma Fred vs. Uganda SCCA N0.7 of 2004]"

In the instant case, counsel for the appellant challenged the sentence that was imposed by the trial court for not considering previous cases in which a similar offence was committed and the accused given a lesser sentence.

The law that governs sentencing is well settled. Equally settled are the circumstances in which an appellate court will interfere with the sentence imposed by a lower court. In ***Kyalimpa Edward v Uganda; Supreme Court Criminal Appeal No. 10 of 1995***, the Court considered the principles upon which an appellate court should interfere with a sentence. It referred to ***R v 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 (1984) 15 E.A.C.A. 126. (Emphasis ours)"

In ***Kamya Johnson v Uganda; SCCA No. 16 of 2000***, the Supreme Court held:

> **"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis ours)"**

In the instant Appeal, counsel for the appellant contended that the learned trial Judge had not considered some of the previously decided cases on a similar offence and the sentences that were given and that in so doing, she meted a sentence that was harsh, manifestly excessive and not in line with previous judicial precedents. He cited a number of authorities to justify his prayer for the sentence herein to be reduced from 26 years' to 20 years' imprisonment.

We maintain a strong view that sentencing is a discretion exercised by a trial court that has had opportunity to hear the evidence from both the prosecution and defence, observe the accused/ appellant's conduct and taking into account all the available information, a decision is made regarding the most appropriate punishment. It is, therefore, with great caution and for justifiable cause, that an appellate court should interfere with that discretion. The appellant herein murdered his own biological son. That alone is a very serious aggravating factor. In her wisdom, the learned trial Judge decided to give him a punishment of 26 years' imprisonment.

In ***Kaddu Kavulu Lawrence v Uganda; SCCA No. 72 of 2018***, where the Supreme Court held that:

> **"Counsel for the appellant presented to court related cases where the appellants were sentenced to lesser prison terms and in his view the Court of Appeal ought to have taken those into consideration and given the appellant a somewhat similar**

sentence. It is our view that an appropriate sentence is a matter for the discretion of the sentencing court. Each case presents its own facts upon which a court exercises its discretion."

Whereas counsel for the appellant has cited authorities where sentence in murder cases was 20 years' imprisonment, there is a wealth of authorities where a higher sentence was given. It is not understandable why counsel will look for authorities that support their case. For instance, in this case, counsel for the appellant cited the authorities that were referred to in ***Adiga Johnson David*** (supra) to support his argument for 20 years' imprisonment. However, he did not bring it to this Court's attention that the same authority also cited the case of ***Mbunya Godfrey v Uganda; SCCA No. 004 of 2011***, where the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years' imprisonment. Yet, it is for this Court to be guided by the principles that provide for circumstances in which an appellate court may exercise the discretion to interfere with a trial court's sentence.

Counsel for the respondent cited a number of authorities where a higher sentence than the one that was imposed upon the appellant here was given. We will point out authorities where the offence of murder has attracted a punishment higher than the 20 years' imprisonment sought for by counsel for the appellant.

In ***Akbar Hussein Godi v Uganda; SCCA No. 03 of 2013***, the Supreme Court upheld the concurrent decision of the trial court and the Court of Appeal and confirmed a sentence of 25 years' imprisonment for the offence of murder.

In the case of ***Rwanyanga Charles v Uganda; Court of Appeal Criminal Appeal No. 352 of 2014*** where Judgment was delivered by this Court on 24th February 2022, the appellant who had been sentenced to death for murder by

multiple shootings had his sentence substituted with imprisonment for 29 years and one month, to run from the date of conviction.

In ***Bayo Sunday v Uganda; Court of Appeal Criminal Appeal No. 414 of 2019***, the appellant appealed against his sentence of 27 years, 2 months and 2 days' imprisonment for murder where he caused death by hacking at the deceased with a panga. This Court considered the sentence appropriate and upheld it. In ***Sambwa Issa v Uganda; Court of Appeal Criminal Appeal No. 145 of 2011*** (delivered in 2022), the appellant who murdered his step brother by hacking him to death was convicted to serve a sentence of 25 years. On appeal to this Court, the sentence was upheld.

The principles that govern interference with sentencing require that the appellant proves that trial court did not consider some material factor when passing the sentencing. In this case, no such factor was raised in the submissions by counsel for the appellant. We have read the lower court record in regard to sentencing by the trial Judge. It was stated thus:

> *"Murder of one's own child is the worst kind of murder and it is an abomination in our culture. The hiding of the body makes it even worse. The convict is elderly by the time of the offence you were 54 but now I think you are 59. I hereby sentence you to 30 years imprisonment, I will reduce four years for the period you have spent on remand and you are to serve 26 years imprisonment."*

As a result, we would find that the learned trial Judge rightly exercised her discretion in sentencing the appellant and for someone that murdered his own son in cold blood, 26 years' imprisonment cannot be said to be harsh or manifestly excessive in view of the authorities we have cited and considered above.

We find no reason to interfere with the trial Judge's discretion. The appellant shall continue to serve his sentence of 26 years' imprisonment from 23rd July 2015, the date of conviction.

Dated at Kampala this 30th Day of February 2023.

Richard Buteera
Deputy Chief Justice

Elizabeth Musoke
Justice of Appeal

Cheborion Barishaki
Justice of Appeal