THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 262 OF 2016

(Coram: Obura, Bamugemereire & Madrama, JJA)

CHEPTOYEK JOB} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale in Criminal Session Case No 123 of 2015 before Kawesa, J delivered on 22nd August 2016)

JUDGMENT OF COURT

The appellant was indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that the appellant and others still at large on 17 November 2014 at Sikutu Village in Kween district with malice aforethought caused the death of the Zelda Yesho.

The facts accepted by the trial judge were that the appellant was found moving on the road from the forest at 8 AM in the morning of the 17th, following the incident of murder which happened in the night of 16th (the night before). The appellant was wearing a blood-stained T-shirt and when he was asked by PW2, he claimed that he had slept with a woman in her menstrual period. He appeared panicky and moved away. Part of the T- Shirt PW2 saw the accused wearing had been torn in the wrist right hand side area. The accused disappeared from the village and did not attend the burial. Two pieces of clothes were recovered. One was from the scene of crime and the other from the house of the accused person. Both were pieces that had been torn off a black striped shirt like clothing which is allegedly the T-shirt which the appellant commonly used to wear and PW2 saw the appellant wearing. The learned trial judge found that from the circumstantial evidence, there was no probable explanation for how the piece of cloth recovered at the scene got into the home of the appellant. Coupled with the disappearance of the appellant from the village, there was strong circumstantial evidence that the appellant was the culprit. The appellant was convicted as charged and

sentenced to 16 years' imprisonment after deducting two years spent on pre-trial detention prior to his conviction.

The appellant had and initially appealed against his conviction and sentence. However, on the date of the hearing and with the leave of court, counsel for the appellant informed the court that he had interacted with the appellant who decided to drop the appeal against his conviction and sought leave to appeal against sentence only. With leave of court, the appellant's counsel abandoned grounds one and two of the appeal submitted only on ground three of the appeal which was that:

> **The learned trial judge erred in law and fact when he imposed a harsh and excessive sentence in the circumstances of the case hence occasioning a serious injustice on the appellant.**

At the hearing of the appeal, the appellant was represented learned Counsel Mooli Alan while the respondent was represented by the learned Assistant DPP Ojok Alex Michael. The appellant was in court. Both counsel of the parties addressed the court in written submissions.

The appellant's counsel submitted that mindful of the gravity of the offence and the maximum penalty and the need to have uniformity in sentences, had the trial judge properly considered the mitigating factors, he would have arrived at a lesser sentence than the sentence 16 years' imprisonment. In the circumstances, he prayed that this court considers the mitigating factors presented by the appellant to arrive at an appropriate sentence in the circumstances.

In reply the learned assistant DPP pointed out that the convict is a first offender, and the maximum sentence of death was not appropriate. Further counsel for the appellant submitted that the appellant was a first-time offender, a young man of 24 years. He had spent two years on remand. He was a student and remorseful. He prayed for leniency. The trial court during the sentencing considered all the mitigating and aggravating factors and sentenced the appellant to 18 years less the period of two years he had spent in pre-trial detention prior to his conviction. He submitted that the appellant's counsel had not advanced any arguments as to why this court should interfere with the discretionary sentencing powers of the learned trial judge. As far as the

law is concerned, the respondents counsel relied on **Nashimolo Paul Kibolo Vs Uganda; Criminal Appeal No. 36 of 2017** for the proposition that an appellate court can only interfere with a sentence imposed by the trial court in very limited circumstances. Further 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 an appellate court, will not normally interfere with the discretionary sentence of a judge unless the sentence is illegal or unless this court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice.

The respondent's counsel prayed that we dismiss the appeal and uphold the sentence.

Resolution of appeal

We have carefully considered the appeal which is against sentence with the leave of court under section 132 of the Trial on Indictment Act. The appellant abandoned grounds 1 and 2 and remained with ground 3 of the appeal that:

> **The learned trial judge erred in law and fact when he imposed a harsh and excessive sentence in the circumstances of the case hence occasioning a miscarriage of justice to the appellant.**

The basis for setting aside a sentence imposed by a trial court were generally set out by the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270** the appeal was against a sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. On the relevant principles to interfere with sentence, the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

A sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser offences in terms of aggravation attracting less severe penalties. Courts have also added another principle of consistency in terms of equality before the law so that offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences and it follows that precedents on sentences of the appellate courts are a relevant guiding factor.

The ground of appeal against sentence is that the sentence was harsh and excessive and that the learned trial judge did not take into account the mitigating circumstances. The trial judge the sentencing notes stated as follows:

> "The accused is a first offender. Accused has prayed for leniency. Maximum (sentence) is death. There is aggravation in the nature of committing the offence (gruesome). Court will give the accused a reformatory sentence and also deterrence be meted out. The deceased (the convict) is a young man. Court will sentence him to a custodial period of 18 years less 2 years spent on remand. He is sentenced to a custodial period of 16 years' imprisonment

We have carefully considered the sentencing notes and we find nothing to fault the learned trial judge. In the proceedings the prosecution prayed for a long custodial sentence. On the other hand, counsel for the accused informed the court that the accused was a young man of only 24 years. He had spent two years on remand and that he had learnt enough. He was a senior-four student and was remorseful. That a custodial sentence would enable him to continue with his studies. The convict further prayed for leniency and for pardon so that he can go back to school.

The age of a convict is a relevant factor and a young offender may be considered for reformation as held in **Kabatera Steven v Uganda; C.A.C.A No. 123 of 2001** (unreported). In the above decision the Court of Appeal held that the age of an accused person is a material factor that may mitigate the sentence imposed where the convict is young.

We have further considered sentences imposed in murder cases considering that the appellant was about 22 years old at the time of commission of the offence.

In **Kasaija Daudi v Uganda; Court of Appeal Criminal Appeal No 128 of 2008, [2014] UGCA 47** the appellant was convicted and sentenced for two counts of murder to life imprisonment by the High Court and on appeal against sentence. The appellant was 29 years old prior to his remand and conviction. This court reduced the sentence to 18 years' imprisonment on each count to be served concurrently.

In **Rwahire Ruteera v Uganda, Court of Appeal Criminal Appeal No 72 of 2011**, the appellant who was 42 at the time of commission of the offence was sentenced to 40 years' imprisonment after conviction on two counts of murder. He was sentenced to 20 years' imprisonment on each count which sentences were to be served consecutively. This court found the sentence imposed to be appropriate but reduced it by the 5 years the appellant had spent on pre-trial remand whereupon he was sentenced to 15 years' imprisonment on each count to be served consecutively from the date of conviction.

In **Tumwesigye Anthony v Uganda; Court of Appeal Criminal Appeal No 46 of 2012 [2014] UGCA 61** the Appellant had been convicted of the offence of murder and sentenced to 32 years' imprisonment. The appellant was a first offender and 19 years old at the time of commission of the offence and this court reduced the sentence to 20 years' imprisonment.

Last but not least in **Atiku Lino v Uganda; Criminal Appeal No 0041 of 2009 [2016] UGCA 20 (6th June 2016)**, the Appellant murdered the deceased when he was 31 years old and his sentence of life imprisonment imposed by the High Court was reduced to 20 years' imprisonment.

In the circumstances the learned trial judge neither erred in law nor in principle in imposing a sentence of 16 years' imprisonment. The precedents show that the sentence was neither harsh nor excessive. The learned trial judge took into account the age of the appellant and the fact that he was a convict without a previous record of conviction.

In the premises, we find no merit in the appeal against sentence and hereby dismiss it.

Dated at Mbale the 15 day of March 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal