

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**CRIMINAL APPEAL NO. 04 OF 2017**

**Coram: Mwangusya, Opio Aweri, Mwondha JJSC, Nshimye, Tumwesigye AG.**  
**JJSC**

**SOWEDI ABDUL alias OBONGI LAWRENCE.....APPELLANT**

**VERSUS**

**UGANDA.....RESPONDENT**  
**(Appeal against the Judgment of the Court of Appeal, at Kampala delivered on the 5<sup>th</sup> September 2016 by Kiryabwire, Mugamba and Bamugemereire JJA)**

**JUDGMENT OF THE COURT**

This is a second appeal in which the appellant was dissatisfied with the sentence of 30 years imposed by the Court of Appeal and appealed to this court.

The appellant appealed against sentence only according to the memorandum of appeal as follows:-

**The learned Justices of Appeal erred in law when they failed to evaluate the mitigating factors of the appellant and arrived at an illegal sentence based on wrong legal principles.** fjs

**Background**

The appellant was charged with murder contrary to section 188 and 189 of the Penal Code Act. It was alleged that the appellant and others still at large on 20<sup>th</sup> June 2011 at Lwala village in Kaberamaido District with malice aforethought murdered Wabwire Isma Abdu.

The prosecution's case was that on 20.06.2011, PW1 was driving at night a Fuso Lorry along with the deceased as a passenger. At about 1:00am between Kaberamaido and Kalaki, he came across a road block. According to the witness, a log had blocked the road halfway. He sighted this obstacle with the aid of head lamps of the vehicle. As a result, he slowed down but didn't see anyone, so he increased speed and put on full lights. Shortly thereafter, he saw the appellant and another person emerge from the side of the road and stand in front of the vehicle to stop the witness. According to the witness, he ignored the appellant who then immediately ordered his partner to kill, at which point the witness and deceased were shot at with the bullets hitting the deceased in the heart. The appellant was convicted of murder and sentenced to 37 years imprisonment. Being dissatisfied with the sentence, he appealed to the Court of Appeal. The Court of Appeal set aside the sentence of 37 years imprisonment and substituted it with 30 years imprisonment. The appellant was dissatisfied by the sentence imposed by the Court of Appeal as varied, hence this appeal.

### **Representation**

Mr. Andrew Sebugwawo represented the appellant and Ms. Barbra Masinde Senior State Attorney represented the respondent.

### **Appellant's submissions**

Counsel for the appellant argued that while varying the sentence imposed by the trial court, the Court of Appeal did not exhaustively consider the mitigating factors. Counsel submitted that the mitigating factors that were overlooked in re-evaluation are; the appellant was a first time offender of only 26 years old at the time of committing the offence and he had a wife and two children to look after plus his parents.

Counsel further argued that the trial Judge had only considered the age of the appellant as the only mitigating factor and went ahead to state that the aggravating factors outweigh his youthfulness. Counsel submitted that had the first appellate court considered the other mitigating factors which were overlooked by the trial Judge; it would have arrived at a sentence lesser than 30 years.

He cited the case of **Mbunya Godfrey Vs Uganda, Supreme Court Criminal Appeal No. 04 of 2011** that whereas no two crimes are identical, we should try as much as possible to have consistency in sentencing. Counsel referred Court to the case of **Korobe Joseph Vs Uganda Criminal Appeal No. 243/2013** where this court reduced the sentence of 25 years to 14 years and **Atuku Margret Opii Vs Uganda Court of Appeal Criminal Appeal No. 123/2008** where court reduced the sentence from death to 20 years imprisonment. In both cases, he argued the Court was moved by the mitigating factors in reducing the sentences passed.

Counsel further relied on the case of **Aharikunda Yustina Vs Uganda Supreme Court Criminal Appeal No. 27 of 2015** which held among others that before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, Practice directions together with general principles of sentencing as guided by case law. 

Counsel concluded by inviting this Honourable court to reconsider all the mitigating factors and consider similar offences in similar circumstances and hold that the sentence passed by the Court of Appeal was illegal and set the same aside.

### **Respondent's submissions**

Counsel for the respondent submitted that the trial court complied with the sentencing process by considering both

aggravating and mitigating factors and concluded that the aggravating factors outweighed the mitigating factors. She argued that this same conclusion was arrived at by the Court of Appeal. Counsel cited the case of **Karisa Moses Vs Uganda SCCA No. 23 of 2016** and argued that once this court finds that the sentencing process was complied with, there is no need to interfere with the sentence.

She further referred court to the cases of **Turyahabwe & 12 others Vs Uganda SCCA No. 50 of 2015** and **Karisa Moses Vs Uganda (supra)** and argued that the fact of being a first offender is irrelevant.

In response to the uniformity in sentencing argument, counsel submitted that an appropriate sentence is a matter of discretion of the sentencing court and that each case presents its own facts upon which the court exercises its discretion. She relied on the case of **Kaddu Kavulu Lawrence versus Uganda SCCA No. 72 of 2018** to re-enforce her submissions.

She concluded by inviting this Court to uphold the sentence as varied by the Court of Appeal since the mitigating and aggravating factors were considered by both lower courts.

### **Consideration of the Appeal**

This is a second appeal and the role of this court, sitting as a second appellate court is well settled. In **Kifamunte Henry Vs Uganda Criminal Appeal No. 07 of 1997**, it was held as follows: ✍

**The first appellate court has a duty to review the evidence of the case and to 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...**

**On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to**

**apply such principles: See P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) FI.C.B. 123 (emphasis added)**

Our role is therefore to determine whether the first appellate court, before arriving at its decision subjected the evidence to a fresh scrutiny and evaluation.

In an appeal against sentence, our jurisdiction is limited by section 5(3) of the Judicature Act to only the legality or otherwise of the sentence. In this regard, Section 5(3) of the Judicature Act provides as follows;

**In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law, not including the severity of the sentence.**

The appellant's argument before this court was that both the trial court and the Court of Appeal failed in law when they did not exhaustively consider the mitigating factors as given by the appellant while sentencing.

In his allocutus before the trial court, the appellant through his counsel pleaded that he was twenty six (26) years old, had two children, a wife and parents and prayed for leniency.

While sentencing the appellant, the trial court observed as follows:

**The offence was aggravated by the reckless and deliberate conduct of the accused person in ordering his partner in crime to shoot to kill. More lives could have been lost in this incident as the shooting was random and aimed to kill.**

**That the accused person is a young man of 26 years is a mitigating factor. However, the aggravating factors outweigh**

**consideration of youthfulness. The court had a duty to protect community from the accused person.**

**Appropriate sentence is 40 years. As he has been on remand since August, 2011 he is sentenced to 37 years imprisonment. (emphasis added)**

While varying the sentence from 37 years imprisonment to 30 years imprisonment, the Court of Appeal held as follows:

**We find that the Trial Judge in this case followed the right procedure in passing sentence. Both the mitigating and aggravating circumstances were considered. The Judge specifically took into account the time the offender had already spent on remand.**

**We find that the use of a deadly weapon to wit, a gun in the course of a robbery led to the offence of murder. A sentence of thirty years imprisonment would therefore be appropriate.**

**Consequently, the sentence of 37 years is set aside and a sentence of thirty years is substituted.**

It is clear from the above excerpt of the Court of Appeal Judgment that no reason was given by the learned Justices of the Court of Appeal for reducing the sentence from 37 years to 30 years imprisonment.

The Court of Appeal in **Kiwalabye Bernard Vs Uganda Criminal Appeal No. 143 of 2001** much as it is only persuasive because it was not a Supreme Court decision, we find that it is good law. It stated;

**The law is well settled that where a trial court has exercised its discretion on sentence, an appellate court will not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where the trial Court**

**gives reasons, the appellate court will interfere only if the reasons given are clearly wrong or unattenable. Where no reasons are given for the decision, the appellate court will interfere if it is satisfied that the order is wrong.**

**In *Aharikunda Yustina Vs Uganda Supreme Court Criminal Appeal No. 27 of 2015*, this court observed as follows;**

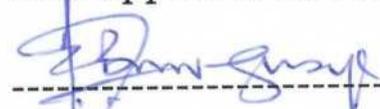
**It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable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

**In the *Third schedule to the Constitution (sentencing Guidelines)*, the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors.**

We do not find any inconsistency about sentencing in the instant appeal. The appellant who committed murder was sentenced to only 30 years imprisonment.

In view of the above, we uphold the sentence as varied by the Court of Appeal. The appellant should continue serving the sentence of thirty years imprisonment as varied by the Court of Appeal and confirmed by this Court. ✍

This appeal is dismissed.

  
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MWANGUSYA

JUSTICE OF THE SUPREME COURT

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OPIO AWERI  
JUSTICE OF THE SUPREME COURT

*Mwondha*  
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MWONDHA  
JUSTICE OF THE SUPREME COURT

*Nshimye*  
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NSHIMYE  
AG. JUSTICE OF THE SUPREME COURT

*Tumwesigye*  
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TUMWESIGYE  
AG. JUSTICE OF THE SUPREME COURT

Nekesa Diana holding brief for  
Andrew Sebupwawo on State brief  
present.

No representative of the respo-  
ndent in Court  
Appellant present.

Court; Judgment read and delivered  
in the presence of the above

*Har. 8/12*

21/11/2019

10:30AM