THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.11 OF 2018

{Coram: Arach-Amoko, Opio-Aweri, Mwondha, Mugamba, Chibita. JJSC.}

1. **ATUGONZA TONNY**
2. **BYARUHANGA DAVID**
3. **BALEKERENDA GEOFREY**
4. **BUSOBOZI MOSES**
5. **BAGUMA SWALEH** ::::::::::::::::::::::::::::::::::::**APPELLANTS**

VERSUS

UGANDA :: **RESPONDENT**

[***Appeal from the judgment of the Court of Appeal at Fort Portal (Kenneth Kakuru, F.M.S Egonda-Ntende and Elizabeth Musoke JJA.) dated 27th March, 2018 in Criminal Appeal No.233 of 2012***]

JUDGMENT OF THE COURT

During the hearing of this appeal on 18th May, 2021, the first appellant **(Atugonza Tonny)** and the third appellant (**Balekerenda Geofrey)** sought to withdraw their respective appeals and opted to continue serving their sentences as passed by the Court of Appeal.

Accordingly, the Court dismissed their appeals pursuant to Rule 66(1) of the Rules of this Court. Consequently, this judgment is in respect of the three remaining appellants, **(Byaruhanga David, Busobozi Moses and Baguma Swaleh).** We proceed to determine the merits of their appeal.

This is the appellants' second appeal against conviction and sentence. The case against the appellants is that on 9th January 2011, at Kijungu Village in Masindi they had sexual intercourse with the deceased **(Bifeeramunda Hamida)** without her consent and killed her thereafter. They were tried and convicted by the High Court sitting at Masindi on counts of murder contrary to Sections 188 and 189 of the Penal Code Act and rape contrary to Sections 123 and 124 of the same Act. They were sentenced to life imprisonment on both offences. The sentences were to run concurrently.

The appellants were not satisfied with the judgment and appealed to the Court of Appeal. The Court of Appeal confirmed the convictions and sentences in respect of murder for all the appellants and it further confirmed conviction and sentence of life imprisonment for rape in the case of the second appellant **(Byaruhanga David)**. However, the Court of Appeal having found no evidence to sustain the offence of rape against them quashed the conviction and sentence of life imprisonment in respect to appellants **Busobozi Moses** and **Baguma Swalleh**. Hence this appeal.

The appellants filed their Memorandum of Appeal in this Court on 10th December, 2020 with the following grounds:

1. **That the Learned appellate Justices erred in law when they upheld the appellants' conviction based on uncorroborated accomplice evidence which was full of falsehoods and grave inconsistencies**

2. **That the Learned appellate Justices erred in law when they upheld the conviction in total disregard of the 1st and the 4th appellants' alibi.**
3. **That the Learned appellate Justices erred in law when they upheld a conviction having relied on unreliable and unsatisfactory circumstantial evidence to convict the appellants thereby arriving at a wrong decision.**
4. **The Learned appellate justices erred in law when they upheld a sentence of life imprisonment which sentence was manifestly harsh and materially excessive and never took into account mitigating factors.**

At the hearing of this appeal, the appellants were represented by Mr. Albert Mooli on a State brief. Ms. Vicky Nabisenke, Assistant Director of Public Prosecution, appeared for the respondent.

On ground 1, counsel for the appellants submitted that the accomplice evidence relied on by the appellate court was false and bore grave inconsistencies. He contended that the Court of Appeal should not have relied on it to convict the appellants.

Counsel submitted that the confession of PW4 was filled with inconsistencies and that it was unreliable. He contended that it did not meet the required standard of proof in criminal matters which he said should be beyond reasonable doubt. Counsel further blamed the Court of Appeal for relying on PW4's confession which he said was an ill-motivated scheme intended to destroy the lives of the

appellants. He cited the case of **Baitwabusa Francis Vs Uganda, Supreme Court Criminal Appeal No. 29 of 2015.**

On ground 2, counsel submitted that the appellants put up the defence of alibi. He contended that the Court of Appeal failed to properly appraise evidence. According to counsel if the Court had evaluated the evidence of alibi given on behalf of the appellants it would have found that PW4's confession was false. He added that PW4 falsely implicated the appellants after having committed his devilish act of murdering Hamida (deceased) in cold blood.

On ground 3, counsel submitted that the Court of Appeal erred in law when they upheld the conviction of the appellants based on unsatisfactory and unreliable circumstantial evidence. He stated that the law cn circumstantial evidence is to the effect that it should consistently point to the accused's guilt without any hypothetical explanation as to his innocence. He cited the case of **Simon Musoke vs R, (1958) E.A 715.**

On ground 4, counsel submitted that the appellants were in their youthful ages between 26-35years of age when they committed the offences. He added that they are all fathers with family responsibilities. Counsel contended that the appellants' mitigating factors were not considered by the trial Judge and the Learned Justices of the Court of Appeal when they convicted and upheld the sentences against the appellants respectively. Counsel prayed for lenient sentences so that the appellants can be released and given opportunity to take care of their children.

Counsel prayed for the convictions of the appellants to be quashed, sentences set aside and all the appellants' release from custody. In the alternative, he prayed that the sentence of life imprisonment be substituted with a custodial sentence of 15 years imprisonment.

On the other hand, counsel for the respondent opposed the appeal. She supported the judgment of the Court of Appeal as far as the convictions and sentences are concerned.

On ground 1, counsel submitted that the evidence of PW4 was corroborated by the evidence of PW3, PW5 and PW6. She added that the evidence of PW3, PW4 and PW 5, PW6, PW7 destroyed the appellants' alibi.

Counsel added that the conduct of DW5 (Baguma Swaleh) when he fled the scene and hid was inconsistent with that of an innocent person. She cited the case of **Onzima Vunusu vs Uganda SCCA No. 34/1995.**

On ground 2, counsel submitted that inconsistencies in evidence were minor. She added that all the appellants were placed at the scene of crime. She submitted that since all the appellants had a common intention which was to kill the deceased it did not matter what role each played.

On ground 3, counsel contended that the mix up of the particular roles played by the appellants apparent in Pw4's evidence was a result of lapse of time. Counsel reiterated that this did not exonerate

any of the appellants because they had a common intention. She cited Section 20 of the Penal Code Act.

Counsel was emphatic that there was circumstantial evidence that was satisfactory, corroborated and reliable to convict the appellants.

On ground 4, counsel submitted that the appellant committed a very serious offence which attracted a death sentence. She added that there was overwhelming evidence on record to prove that the murder was planned, meticulously premeditated and executed. She contended that the appellants deserved a death sentence. She prayed that the life imprisonment sentences handed down to the appellants be maintained by this Court.

Consideration by the court

We have appraised the written submissions tendered before us as well as the authorities available.

The duty of this Court as a second appellate court was stated by this Court in **Criminal Appeal No. 24 of 2015, Kamya Abdullah and 5 Others vs Uganda,** when this Court held as follows: -

"This is a second appeal and the duty of the 2nd appellate Court is to determine whether the 1st appellate court properly re-evaluated the evidence before coming to its own conclusion except in the clearest cases where the first appellate court has not satisfactorily re-evaluated the evidence, the appellate court should not interfere with the decision of the trial Court. See

Criminal Justice Bench Book 1st Edn. 2017 pages 283 and 284. See Also the case of Kifamunte Henry v. Uganda SC Criminal Appeal No. 10 of 1997 where it was held:- ***'On 2nd appeal the Court of Appeal is precluded from questioning the findings of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support finding of fact,.....[R. v Hassan Bin Said (1942) 9 (EACA] 62."***

The extensive judgment of the trial court related to how the deceased was killed. It went on to explain the role played by each of the appellants in killing the deceased. The trial judge evaluated the accomplice evidence. She found that PW4 was an accomplice with the appellants, was a truthful witness and his evidence was admissible since it was well corroborated by the other prosecution witnesses. The trial judge further sifted both the prosecution evidence and appellants' evidence and she found that the alibis set by the appellants were destroyed by prosecution evidence which placed them at the scene of the crime.

The Court of Appeal being the first appellate court stated its role as such and went on to re-evaluate the evidence. The Court of Appeal re-evaluated the evidence of confession statements especially that of PW4. It found him trustworthy. It further addressed the concerns that were raised by the appellants regarding contradictions and

variations in the confession of PW4. The court found those contradictions minor and immaterial, saying they did not go to the root of the case.

The Court of Appeal re-evaluated the evidence that implicated the 2nd appellant (Byaruhanga David), contained in the testimony and confession of PW4. It went further and applied the doctrine of recent possession on account that the 2nd appellant was found with the deceased's scarf and did not offer proper explanation as to how he obtained it.

The Court of Appeal found that the evidence of PW4 implicated the 4th appellant (Baguma Swaleh), and that this was corroborated by the evidence of a wallet recovered from the scene containing the names which included his. On the 5th appellant (Busobozi Moses) the court found that the evidence of PW6 placed him at the scene despite PW4 exonerating him in his oral evidence after having pinned him in his extra-judicial statement. The trial judge explained the circumstances under which PW4 changed his evidence at the trial to exonerate the 5th appellant. She stated that it was a result of intimidation of the witnesses by the relatives of the 5th appellant. She believed the extrajudicial statement where PW4 incriminated the 5th appellant by clearly stating the role he played in killing the deceased. The Court of Appeal confirmed that evidence against the 5th appellant.

We are satisfied that there was ample evidence given by PW4 which gave details of how the appellants went about to kill the deceased. We also find that the Court of Appeal went about its duty as the first

appellate court well by reevaluating the evidence and coming to an appropriate conclusion concerning the first offence of murder.

On the second offence of rape, the Court of Appeal found sufficient evidence against the 2nd appellant, Byaruhanga David. This followed due evaluation of evidence by the trial court on the role he played in the cruel act of rape. We find no compelling reason raised by the 2nd appellant for us to depart from the concurrent findings of the trial court and the Court of Appeal.

In **Sowedi Serinyina Vs Uganda, Criminal Appeal No. 01 of 2017,** this court held as follows:

"Secondly we can only interfere with a concurrent finding of the High Court and Court of Appeal where there was no evidence to support the finding because this is a question of law. Inference legitimately drawn from proved facts by the trial and first appellate court must establish the guilt beyond all reasonable doubt. See Okeno vs Republic [1972] EA 32, Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997."

Concerning sentences, this Court has in several cases shown what should be considered before interfering with the sentence passed by the lower courts in exercise of their discretion.

In **Kyalimpa Edward vs Uganda, SCCA No.10 of 1995** it cited with approval the English case of **R vs Haviland (1983) 5 Cr. App. R 109** and went on to state:

"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 the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice. Ogalo Owuora vs R (1954) 21 E.A.C.A 126 and R vs. Mohamedali Jamal (1948) 15 E.A.C.A 126".

Later on in **Kamya Johnson Wavamunno vs Uganda, SCCA No. 16 of 2000**, court noted:

"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 a discretion or a failure to take into account a material consideration, or taking into account immaterial consideration or an error in principle was made. It is not sufficient that members of court would have exercised this discretion differently"

Recently the above principles were amplified in the case of **Sowedi Serinyina Vs Uganda** (supra), where this Court stated as follows:

"The considerations that can be determined from the above authorities are as follows: -

1. **where court passes an illegal sentence.**
2. **where court passes a manifestly excessive sentence.**

3. **where court passes a manifestly low or inadequate sentence resulting into a miscarriage of justice.**

4. **where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence.**

5. **where the sentence imposed is wrong in principle.**

In this appeal none of the above elements exist to warrant interference by this court on the sentence passed by the sentencing Judge and confirmed by the Court of Appeal."

The fourth ground of appeal is that the Court of Appeal upheld a sentence of life imprisonment, which was manifestly harsh and excessive. They contend that the court did not take into account the mitigating factors

We have perused the sentencing and the reasons therefor by the trial judge on pages 280-286 of the record of appeal. We note that two appellants, Busobozi Moses and Swalleh Baguma, put across their mitigating factors which were taken into account by the trial judge before she sentenced them to life imprisonment. Byaruhanga David withdrew and did not give any mitigating factor, which is his Constitutional right.

The appellants raised this ground at the Court of Appeal. That court re-evaluated and correctly dismissed it for lack of merit. Evidently the trial judge considered both the aggravating factors and mitigating

factors before exercising discretion to sentence the appellants to life imprisonment.

The contention by the appellants that life imprisonment as a sentence was illegal and harsh is misplaced. Life imprisonment is a legal sentence provided for in our law and sentencing guidelines

Consequently, we uphold the three appellants' convictions for murder and in addition Byaruhanga David's conviction for rape. The sentences of life imprisonment passed on the appellants are also confirmed.

Before we take leave of this matter, we need to make clear one aspect in the judgment of the Court of Appeal. The Court of Appeal stated as follows:

"We find that the sentences in respect of both counts were legal. We are cognizant of the fact that under the Prisons Act 2006, Section 86(3), life imprisonment is deemed to be a term of imprisonment for a period of 20 years. We do not find that 20 years imprisonment is harsh and excessive in respect of the offences of murder and rape as both carry a maximum sentence of death..."

We must emphasize that the role of the Court is to pass the legal sentence in accordance with the Constitution. The administration and management of the same is the mandate of the Uganda Prisons Service. This matter was definitely related to by this court in the case

of **Tigo Stephen v Uganda, Criminal Appeal No.8 of 2009.** Court defined the meaning of life imprisonment and stated as follows:

"The provisions of Section 47(6) of the Prisons Act have sometimes been cited as authority for holding that imprisonment for life in Uganda means a sentence of imprisonment for twenty years. However, there is no basis for so holding. The Prisons Act and Rules made there under are meant to assist the Prison authorities in administering prisons and in particular sentences imposed by the Courts.

The Prisons Act does not prescribe sentences to be imposed for defined offences. The sentences are contained in the Penal Code and other Penal Statutes and the sentencing powers of Courts are contained in the Magistrates Courts Act and the Trial on Indictment Act, and other Acts prescribing jurisdiction of Courts.

The most severe sentences known to the penal system include the death penalty, imprisonment for life and imprisonment for a term of years. Imprisonment for life which is the second gravest punishment next only to the death sentence is not defined in the Statutes prescribing it. It seems to us that it is for that reason that the Prisons Act provided that for purposes of calculating remission, imprisonment for life shall be deemed to be twenty years. It is noteworthy that the Act is clear that twenty years is only for the purpose of calculating remission. The question remains whether there are purposes for which life

imprisonment means something more than 20 years, e.g. imprisonment for life....

We find these authorities persuasive because they are based on Statutes similar to our own laws. We hold that life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

We note that in many cases in Uganda, Courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment." Underlining for our emphasis.

The trial court sentenced the appellants to life imprisonment which was confirmed by the Court of Appeal. Nevertheless, in the course of examining whether the sentence was harsh or excessive, the Court of Appeal stated that life imprisonment was deemed to be 20 years imprisonment in accordance with Section 86(3) of the Prisons Act. This, respectfully, is a wrong statement of the law in view of **Tigo Stephen v Uganda** (supra). As regards this and similar cases therefore the sentence of life imprisonment means imprisonment for the natural lives of the appellants.

We find no merit in the appeal. It is accordingly dismissed.

Dated this .....6th.....day of .....October.....2021

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Hon. Lady Justice Stella Arach-Amoko, JSC
Justice of the Supreme Court

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Hon. Justice Rubby Opio-Aweri, JSC

Justice of the Supreme Court

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Hon. Lady Justice Faith Mwondha, JSC
Justice of the Supreme Court

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Hon. Justice Paul Mugamba, JSC
Justice of the Supreme Court

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Hon. Justice Mike Chibita, JSC
Justice of the Supreme Court