THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT GULU

Criminal Appeal No. 337 of 2017

Coram: Kakuru, Tuhaise, & Kasule, JJA

Tako Emmanuel ..... **Appellant**

Versus

Uganda ..... **Respondent**

(An appeal arising from the judgment of Dr. Winifred Nabisinde, J at the High Court of Uganda at Lira in Criminal Session Case No. 259 of 2016 delivered on 28th July 2017)

Judgment of the Court

The appellant, Tako Emmanuel, was convicted of murder contrary to sections 188 and 189 of the Penal Code Act, on his own plea of guilty. He was sentenced to 30 years imprisonment.

The appellant's application to have his Notice of Appeal, which had been filed in this Court out of time, regularised, was granted. Leave was also granted to the appellant to appeal against sentence alone, pursuant to section 132 (1) (b) of the Trial on Indictments Act.

The appellants ground of appeal was that:-

1. The learned trial Judge erred in law and fact when she passed a sentence of 30 years imprisonment which is manifestly harsh and excessive sentence which occasioned a miscarriage of justice.

The appellant prayed that this Court allows the appeal, sets aside the sentence, and substitutes it with an appropriate one.

Background

The particulars of the offence were that Tako Emmanuel (appellant in this appeal) on the 6th day of February 2016 at Acobatek village in Apac district, murdered Ogema Gedihon.

The brief facts of the case as accepted by the learned trial Judge, were that Acio Hellen and the appellant had two children together, that is, the deceased who was aged 2 years, and another aged 4 years. When they separated, the mother of the children remained in custody of the children.

On 6th February 2016, Acio Hellen, the mother of the deceased, became ill and her father, Odongo Joel, decided to take her to Lira Hospital for treatment. He also decided to take the two children to their father the appellant. However, Tom Otim, a paternal uncle to the deceased, returned the deceased child to the mother's home because he had kept on crying. Odongo Joel took the deceased back to the appellant's home before he left with his daughter Acio for Lira. On 18th February 2016, Odongo Joel was informed that his grandchild had gone missing. He looked for the child in vain.

On 23rd February 2016, the appellant was interrogated and he admitted that he had murdered the deceased and thrown the body in the bush near his home. He was arrested and charged with murder. The decomposing body of the deceased was recovered from a bush near the appellant's home and parts of it had been eaten by wild beasts. The remains of the deceased were recovered by Police and sent for post-mortem. The post-mortem report revealed that the remains could be those of the deceased. The cause of death was found to have been strangulation.

At trial the appellant pleaded guilty to the offence of murder, was convicted and accordingly sentenced to 30 years imprisonment.

Representation

Mr. Walter Okidi Ladwar, learned Counsel, appeared for the appellant, on state brief, while Mr. Martin Rukundo, learned Assistant DPP, appeared for the respondent.

The appellant was present in Court for the hearing.

Submissions for the Appellant

Mr. Ladwar submitted that the appellant was convicted on his own of plea of guilty and sentenced to 30 years imprisonment. The victim of the murder was his child. He submitted that the sentence imposed against the appellant by the learned trial Judge was harsh and manifestly excessive. He cited a number of authorities in support of his submissions where murders had been committed under similar circumstances, namely, **Byaruhanga Moses V Uganda, Court of Appeal Criminal Appeal No. 144 of 2010; Odongo Sam V Uganda, Court of Appeal Criminal Appeal No. 88 of 2014; Kasaija Daudi V Uganda, Court of Appeal Criminal Appeal No. 128 of 2008;** and **Batesa Marijani V Uganda, Supreme Court Criminal Appeal No. 69 of 2018**.

Mr. Ladwar submitted that although this kind of murder is not justifiable, there were still factors in mitigation in the case, especially that the appellant pleaded guilty. Counsel also submitted that the appellant is still fairly young and he could still reform if given the opportunity.

Counsel prayed that this Court reviews the sentence and adjusts it in accordance with the current authorities. He submitted that 15 years

imprisonment would be an appropriate punishment in the circumstances of the case.

Submissions for the Respondent

Mr. Rukundo opposed the appeal and submitted that the sentence of 30 years imprisonment which was imposed by the learned trial Judge was appropriate in the circumstances of the case; and that it falls within the sentencing range which this Court has established over time. Counsel maintained that the learned trial Judge had considered 35 years imprisonment to be the appropriate sentence, and she deducted the period the appellant spent on remand. He cited a number of authorities to support his submissions, namely **Atoo Jackline V Uganda Court of Appeal criminal appeal No. 146 of 2004**; **Sekamatte Charles V Uganda, Court of Appeal Criminal Appeal No. 67 of 2013**; **Bwembi Lameck V Uganda, Court of Appeal Criminal Appeal No. 63 of 2018; Semanda Christopher & Another V Uganda, Court of Appeal Criminal Appeal No. 77 of 2010;** and **Batesa Marijani V Uganda, Supreme Court Criminal Appeal No. 69 of 2018.**

Counsel concluded that in view of the sentencing ranges this Court has established over a period of time, the sentence of 35 years imprisonment that was imposed by the learned trial Judge was appropriate in the circumstances. He invited this Court to uphold the sentence and dismiss the appeal.

Submissions in Rejoinder for the Appellant

Mr. Ladwar submitted that the case of **Bwembi Lameck** concerned murder of a wife not a child; and that the case of **Ssemanda Christopher** is just general murder and the circumstances were totally different.

Resolution of the appeal

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. It will however be mindful of the fact that unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. See: **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10 of 1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997.**

This appeal is against sentence only. It is now well settled as to when an appellate court can properly interfere with a sentence passed by a trial Judge. In **Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No. 143 of 2001**, the Supreme Court stated as follows:-

> *"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive, or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

Thus, based on the foregoing principle, we, as a first appellate Court, must consider whether we should interfere with the sentence passed by the learned trial Judge.

The appellant was convicted of murder, which offence carries a maximum penalty of death. The record of appeal shows at page 12

that the mitigating factors in this case were that the appellant pleaded guilty, and he was remorseful. He spent 1 year and 5 months on remand.

The learned trial Judge, while sentencing the appellant, gave reasons at pages 16 and 17 of the record of appeal as to why she arrived at the sentence, that is, that:-

> *"It is my view that as an adult man of his age, he does not deserve any mercy and ought to be severely punished for his actions. He indeed had many options including handing the child to a good Samaritan instead of brutally disposing his life off in such a manner; I therefore find that the aggravating circumstances by far outweigh the mitigating circumstances in this case.*
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> *The State Attorney in her submissions stated that there are no previous known records against the convict; this court will therefore treat him as a first offender. In my view, having taken cognisance of the circumstances under which this offence was committed it is my finding that this was a senseless killing that should have been avoided; the convict had at his disposal other lawful means of granting custody or fostering of this infant to another person instead of resorting to kill him. His action greatly condemned in any civilised society and by this court.*
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> *I have also noted that in such a case, the maximum sentence would have been the death penalty; however, I find that this will not serve the ends of justice in this case and this will be too harsh in this particular case. I have also found that he deserves a long custodial sentence which will enable him to rethink about his*

life; he will also live the rest of his life knowing that he murdered his very own.

While the starting range in terms of years would be at least (35) years imprisonment that being the case, I have also taken into account the age of the deceased and the convict. Taking into account all the circumstances of the case as noted above, and the fact that this convict has been on pre-trial remand for just one year and 5 months, but readily admitted his guilt, I find that he deserves a lenient sentence. I find that a sentence of (35) thirty five years imprisonment would have been appropriate in the circumstances; I have however deducted the remand period and another 3 and half years because of his plea of Guilty. The final sentence he will serve is 30 (thirty) years imprisonment."

We have addressed our minds to the adduced evidence and submissions from both sides. We agree, based on the record, that the convict was a first offender with no previous record. He was aged 36 years when he committed the offence.

The record of appeal shows that the circumstances under which the appellant killed the deceased were cruel, barbaric and merciless. He killed his own child who was defenceless and to whom he owed a duty to protect as his father. The learned trial Judge took all this into account when she was sentencing the appellant. We agree with the learned trial Judge that in this case the aggravating circumstances by far outweighed the mitigating circumstances.

The Constitution (Sentencing Guidelines For Courts Of Judicature) (Practice) Directions, 2013 set a sentencing range for murder to be 35 years to death, with starting point of 30.

In **Byaruhanga Moses V Uganda, Court of Appeal Criminal Appeal No. 144 of 2010,** the appellant who was aged 29 years killed his own child who was 7 months old by drowning him in a swamp. He was convicted on his own plea of guilty and was sentenced to 22 years imprisonment. This Court reduced the sentence to 20 years imprisonment on appeal.

In **Odongo Sam V Uganda, Court of Appeal Criminal Appeal No. 88 of 2014**, this Court upheld a sentence of 19 years imprisonment for murder where the appellant pleaded guilty to the offence.

In **Kasaija Daudi V Uganda, Court of Appeal Criminal Appeal No. 128 of 2008**, the appellant was tried and convicted on 2 counts of murder. He was sentenced to life imprisonment on each count, to run concurrently. This Court, after noting that the appellant was relatively young, aged 29 years, though he committed a serious offence by senselessly killing two people who had already been arrested, quashed the sentence of life imprisonment and sentenced the appellant to 18 years imprisonment after taking into account the period he spent on remand.

The learned trial Judge in this case found a sentence of 35 years imprisonment to be appropriate, after addressing both the aggravating and the mitigating factors. She however deducted the remand period and another three and a half years because the appellant had pleaded guilty, and subsequently sentenced the appellant to serve 30 years imprisonment.

We have addressed both the mitigating factors and the aggravating factors in this case, and the relevant authorities cited. We have also considered the period of 1 year and 5 months which the appellant spent on remand. We find that the sentence of 30 years

imprisonment imposed against the appellant, after taking into account the period the appellant spent on remand, was not manifestly harsh and excessive. In our considered opinion, the sentence was appropriate and fair in the circumstances, and we have no basis to interfere with it.

We thus find no merit in this appeal which is hereby dismissed.

We uphold the 30 years imprisonment sentence imposed by the learned trial Judge against the appellant, running from 28th July 2017, the date of conviction.

It is so ordered.

Dated at Gulu this ....20th day of ....Dec....2019.

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Kenneth Kakuru

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal